On the bench

Achieving judicial diversity may require more work than is envisaged, suggests **Geoffrey Bindman QC**

Appointment of Lord Sumption to Supreme Court & subsequent controversy suggests that there is still some work to do to achieve judicial diversity.

The House of Lords' Constitution Committee published its report on judicial appointments on 28 March and concluded that a more diverse judiciary would increase confidence in the justice system. It rejected the notion that those from under-represented groups are less worthy candidates or that a more diverse judiciary would undermine the quality of our judges. It recommended greater commitment by the government and the legal profession to encourage applications from lawyers other than barristers.

The JAC has identified a long list of qualities and abilities required for judicial office. They can be summarised as expertise, intelligence, integrity, awareness of diversity, and understanding of different needs, authority, and efficiency. These labels are too vague to provide real guidance for the selectors. Much more important have been their pre-conceptions of judicial appearance and behaviour. In those pre-conceptions much depends on the characteristics of the selectors themselves. Lord Neuberger, Master of the Rolls, told the committee: "The main problem is the cast of mind. Most of us think of a judge as a white, probably public school man. We have all got that problem."

> **"As a wealthy white male educated at Eton & Oxford, he falls short on the diversity test"**

This was hardly novel. The Constitutional Reform Act 2005 (CRA 2005) already obliges the Judicial Appointments Commission (JAC) to appoint solely on merit, while at the same time appointing only those of "good character", and having regard to the need to encourage diversity. The Lords' committee says: "We support the current appointments model and believe that no fundamental changes should be made." Yet the proportion of women and ethnic minorities in the judiciary falls far short of their proportion in the population as a whole. Only five of the 54 most senior judges are women and in the Supreme Court only one out of 12. None of the 54 is black. And the majority are privately and Oxbridge educated.

The committee asserts that "merit must continue to be the sole criterion for appointment". But, as Lord Goldsmith told the committee: "The problem with this whole debate is the assumption that we know what merit is." A succession of distinguished witnesses failed to provide a definition. Lord Falconer said "merit is regarded as co-terminous with having been a junior and a QC at the Bar for 30 years". Lord McNally said of merit "it is often deployed by people who, when you scratch the surface, are really talking about 'chaps like us'".

The JAC is dominated by the profession. Of its 15 members, seven must be judges or other lawyers. Inevitably, the views of the lawyers will prevail. They, after all, are already doing the job or in daily contact with those who do. Lord McNally is right. They favour people like them. However, proposals by the Ministry of Justice (MoJ) in its report on its consultation "A judiciary for the 21st century" will be included in a forthcoming Crime and Courts Bill announced in the Queen's speech. These include the power authorised by the Equality Act 2010 to resolve a "tie-break" between candidates of equal merit in favour of diversity, and greater lay involvement in the selection process.

Supreme Court different

Appointment to the Supreme Court, newly established by CRA 2005, is not conducted by the JAC, but by ad-hoc commissions appointed by the Lord Chancellor, which must include the president and deputy president or other senior judges and a nominee of the JAC. The commissions must consult a long list of senior judges and others before recommending a candidate for appointment. Here too, CRA 2005 requires selection to be "on merit". Even more than for appointments at lower levels, lawyers are dominant in the selection process. The initial members of the Supreme Court were the former Lords of Appeal and thereafter eligibility is restricted to those who have already held high judicial office or have been a barrister or solicitor for at least 15 years.

Appointments to the Supreme Court need to be managed differently because it is the pinnacle of the legal systems of the UK. The JAC has responsibility only in England and Wales. Decisions of the Supreme Court will, over time, determine the shape of the common law and the approach to statutory interpretation. Most crucially, the Supreme Court has the ultimate constitutional responsibility for upholding the rule of law and ensuring that the government acts lawfully.

This responsibility enhances the importance not only of diversity in experience and background among its members but of a broad understanding and acknowledgement of the court's constitutional function.

Sumption controversy

The first new appointment, that of Jonathan Sumption QC, is controversial. Unusually, he comes direct from the Bar. He thus has limited judicial experience, though he has the advantage of having been a member of the JAC. As a wealthy white male educated at Eton and Oxford, he falls somewhat short on the diversity test. He is widely regarded as a man of outstanding intellectual ability and at the Bar was a pre-eminent advocate. He is also a distinguished mediaeval historian, whose multi-volume work—still incomplete—on the Hundred Years War has been placed on the same scholarly pedestal as Steven Runciman's celebrated *History of the Crusades*.

Beyond his professional and academic achievements, he has attracted media interest for two reasons which have fuelled the controversy over his appointment. The first is the high fees demanded for his services. In 2001 he admitted in a letter to *The Guardian* to earning £1.6m in a single

year—as much, it was said at the time, as six High Court judges and 69 refuse workers put together. His justification was "that is what my services are worth to the people who pay for them, all of whom are hard-nosed professionals spending their own money". This is unconvincing: his corporate and governmental clients were spending the money of their shareholders or the taxpayer. He put himself on a level with media stars such as Charlotte Church and Sean Connery and referred to his "puny £1.6m", compared with the earnings of Bernie Ecclestone. Charging whatever clients are prepared to pay may be the norm in commerce, but in a privileged profession restraint is called for. Excessive fees restrict access to justice.

Unusually, Lord Sumption failed to take up his seat on the Supreme Court until several months after his appointment. He had been briefed to appear for the Russian oligarch Roman Abramovitch in a High Court action not due to be heard until November 2011. The press variously reported his fee to be between £3m and £10m. During my years in practice I had, from time to time, to find new senior counsel because the one I had briefed had been elevated to the Bench. Before Lord Sumption it was taken for granted that a judicial promotion meant promptly handing over outstanding work to others, of whom there is no shortage.

High fees and affluence among senior barristers are par for the course. It would be hard to require diversity in wealth among judicial appointees, even though the combination of wealth and a private education within the tradition of the English upper class has given our judicial system a culture and style remote from the lives of most of its clients or customers. Nevertheless, the detachment from the concerns of ordinary life which these factors can create should be a factor in the selection process.

The second source of concern in the appointment of Lord Sumption is, however, more substantial. It is his view of the role of the Supreme Court which he expounded in his FA Mann lecture "Judicial and Political Decision-Making: the Uncertain Boundary" delivered last November, several months after his appointment but before he had occupied his seat on the court. In his lecture he considers "How far can judicial review go before it trespasses on the proper function of government and the legislature in a democracy?" It is an elegantly written and nuanced presentation, but the essence of his argument is that judges have overstepped the boundary between the determination of legal questions and intrusion into the determination of policy issues, which are the preserve of a democratically-elected government.

His views carry disturbing echoes of the conflict which has dogged the Supreme Court of the US between the "conservative" judges generally appointed by Republican presidents and "liberal" judges appointed by Democrats. The divide is ostensibly between judicial activism and restraint. Lord Sumption places himself firmly in the latter camp. His lecture was a scarcely-veiled attack on his soon-to-be judicial colleagues for interfering in politics.

> "Sumption's approach would allow such injustices to remain without remedy"

It brought forth a prompt and trenchant rebuttal by the very experienced former judge Sir Stephen Sedley, who retired last year after 14 years of distinguished service on the High Court bench and in the Court of Appeal (*London Review of Books*, 23 February 2012, p 15). Lord Sumption had given a number of examples of cases where he claimed the courts had trespassed on matters of policy. Sir Stephen pointed out that Lord Sumption had made a fundamental error by conflating government and legislature. Whereas courts must be scrupulous to comply with the requirements of legislation, they have an equal duty to oversee and apply public law controls to the actions or failures of the executive. In two of the cases cited by Lord Sumption in support of his claim of judicial meddling in policy matters, I happened to be the claimant's solicitor. In the Pergau Dam case, the World Development Movement successfully challenged the use of development funds to finance a Malaysian project which did not satisfy the requirements of the statute under which the funds were to be expended. The project was supported—improperly in the view of the court—not as a genuine development scheme but as a quid pro quo for a weapons contract. The court was not subverting a valid policy decision, but striking down ultra vires action by the executive. By doing so it sought to restore to the development budget funds wrongly diverted from it.

In *ex parte Witham*, the court held that a regulation which denied the waiver of court fees to a litigant in person who could not afford to pay them exceeded the authority of the statute under which the regulation was made. The court removed the barrier to his access to justice.

Forgetting the dying bird

Lord Sumption's approach would allow such injustices to remain without remedy, in order to satisfy an abstract notion of democratic responsibility. One is reminded of Thomas Paine's comment, when pointing out that Edmund Burke's critique of the French Revolution contained no hint of concern for the wretched victims of the former regime: "He pities the plumage and forgets the dying bird." The courts surely have an overriding duty to do justice in the case before them, unless legislation clearly prevents them?

Sir Stephen notes that someone in the audience at Lord Sumption's lecture remarked afterwards: "At last we have our own Scalia." Judge Antonin Scalia of the US Supreme Court is the high priest of judicial restraint. The US Supreme Court has, of course, a more directly political role than our Supreme Court because it can strike down legislation which it deems unconstitutional. Scalia and his conservative colleagues recently applied their abstentionist doctrine to defeat legislation controlling election expenses. They boosted the political power of the rich over the poor by allowing them to provide their favoured candidates with unlimited campaign funding.

Lord Sumption makes clear in his lecture that his concern about what he calls "a natural tension between democracy and some aspects of judicial review" only arises in a minority of public law cases. Yet the controversy suggests that achieving diversity may require more work than is envisaged by the Lords' Constitution Committee or the MoJ. In many countries there is much greater transparency and public involvement in the selection of the most senior judges. In the US and South Africa the candidates are rigorously interrogated in public hearings. The Lords' committee rightly rejected the idea of parliamentary confirmation hearings. Change cannot come quickly, but public hearings conducted by a selection panel with adequate lay membership, rather than by politicians, would reveal the attitude of candidates and reassure us that the diversity agenda was being fully implemented. NLJ

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