Cambridge Law Journal, **62(1)**, March 2003, pp. 55–71
Printed in Great Britain

ARTICLES

THE HIGHEST COURT: SELECTING THE JUDGES

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GREAT honour as it is, it is nonetheless daunting to deliver the Sir David Williams Lecture in the presence of Sir David himself, and on a subject close to his own interests. The ideal David Williams Lecture would obviously be a lecture given by David Williams. But as that is not to be—at any rate not this evening—my lecture, by definition then not the ideal lecture, will I hope be received as at least a personal tribute to an inspiring constitutional lawyer.

The highest court of the United Kingdom is not, strictly, a court at all. It is merely a committee of the House of Lords, the Appellate Committee. It sits ordinarily in a committee room in the House. As it is a committee, and not a court, its members do not sit in judicial robes or on a raised judicial bench, but unrobed at a table. The members of the Appellate Committee are full members of the House of Lords who are entitled to participate in the legislative processes of that House. Nonetheless, the core members of the Appellate Committee are full-time salaried professional judges, with the tenure and other rights of English High Court judges. There are twelve of them, known as Lords of Appeal in Ordinary, or, less formally, Lords of Appeal or as the Law Lords[1]. They are appointed by the Queen, on the advice of the Prime Minister, who will have had one or more names recommended to him or her by the Lord Chancellor. The Law Lords constitute the final court of appeal for the whole of the United Kingdom. Appeals come to them from the Court of Appeal in England, the Inner House of the Court of Session in Scotland, and from the Court of Appeal of Northern Ireland.

* Q.C. This article was given as the second Sir David Williams Lecture, Cambridge, 10 May 2002.

[1] "Core" members, because retired Lords of Appeal in Ordinary may continue to sit on the Appellate Committee until the age of seventy-five. More rarely, a peer of the realm who has left "high judicial office" may be invited to sit. Lord Cooke of Thorndon, formerly President of the New Zealand Court of Appeal, is a recent and distinguished example.

Lord Justice Asquith, later himself a Law Lord, once described the qualities of an ideal trial judge. That judge, he said, was expected to be quick, courteous and right. This did not mean, he added, that the Court of Appeal was to be slow, rude and wrong, for that would be to usurp the function of the House of Lords. These days the House of Lords, judicially, is seldom slow and never rude. Appeals are heard and judgments given with reasonable despatch. As to being right or wrong, views on individual decisions obviously differ, but on the whole the practising profession is well-satisfied with the work of the Law Lords. Now and at least for many years past the Appellate Committee has been intellectually impressive, impartial, fair-minded and, I believe, open-minded. It would be too much to expect that every appointment of a Law Lord should receive a 100% endorsement from the legal profession (in which I include judges, practitioners and legal academics), but in my time at the English Bar no appointment has caused major controversy, still less scandal. No plainly, or even arguably, unqualified judge has been promoted to the Lords. Nor, whatever government has been in power, has there during this time been any suggestion of political bias or preference in making the appointments.

Why then has there been in recent years a flow of books, articles, research papers and speeches questioning and indeed radically challenging the present arrangements under which the judges of our highest court are appointed and do their judicial work? Writers and speakers question whether the present qualifications for appointment to the highest court are appropriate. Should candidates, they ask, be sought from a wider pool? Should the appointments remain in the hands of the executive? Should our highest court become solely a constitutional court? All these issues are being debated with different degrees of vehemence. Possibly my favourable assessment of the present performance of the Law Lords is wildly wrong. But if not, what has given rise to the calls for reform?

There is at present a fashion for general criticism of the judiciary, not particularly directed at the House of Lords. It may have something to do with the Millennium. We are told that we must have judges fit for the 21st century. Our judges, it is pointed out, are mostly white middle-class, middle-aged males. They are therefore said to be out of touch with ordinary life, and not representative of our diverse population. They are appointed by a secretive process lacking transparency and democratic legitimacy.

There are three particular issues which have, I believe, fuelled the debate about the Law Lords. The first is the peculiar

constitutional position of the Lord Chancellor. He is a cabinet minister in charge of a department, and a legislator in the House of Lords, where he propounds and defends government policy. At the same time he is a judge, indeed the head of the judiciary. He may, if he chooses, sit on the Appellate Committee in any appeal, and when he does so he presides. But, unlike other judges, he has no security of tenure: he may be at any time removed from office by the Prime Minister. As a cabinet minister he appoints all English judges below the Court of Appeal. Court of Appeal judges and Law Lords are nominated by the Prime Minister for appointment by the monarch. In reality, therefore, the power of appointment is with the Prime Minister and it may be assumed that he generally acts on the advice of the Lord Chancellor. The judicial aspect of the Lord Chancellor's office has been attacked as a departure from the constitutional doctrine of the separation of powers, and as possibly incompatible with the European Convention on Human Rights. The attack has come not only from the less exalted ranks of the profession, but also most recently and most powerfully from one of the sitting Law Lords.[2] The desirability of the Lord Chancellor's triple role is not my theme this evening. I content myself with saying that the arguments are by no means all on one side. At all events, the controversy has naturally led to an examination of the Lord Chancellor's position as the *de facto* selector of the Law Lords.

The second issue is the call to separate the highest court completely from the House of Lords and to transfer its judicial functions to a newly created Supreme Court of the United Kingdom. The arguments for the change are partly constitutional[3]—the separation of the judicial from the legislative power—and partly practical. The practical aspect is that the Law Lords are physically tucked away in the uncomfortable interstices of the House of Lords. It is said that when, a few years ago, an additional Law Lord was appointed, a lavatory had to be converted into an office for him. A Supreme Court of the United Kingdom would merit a dignified and commodious building of its own, comparable to the Supreme Court buildings in Washington, Ottawa or Canberra. Whether it follows that the highest court should no longer be part of the House of Lords is another question which I shall leave unanswered. This issue too has concentrated attention on the position of the Law Lords.

[2] Lord Steyn in his Neill Lecture, given at All Souls College, Oxford, on 1 March 2002. See also Diana Woodhouse, *The Office of the Lord Chancellor*, (Oxford 2001), *passim*.

[3] See, for example, the written evidence presented to the Royal Commission on the Reform of the House of Lords by JUSTICE, May 1999. The Senior Lord of Appeal, Lord Bingham of Cornhill, has spoken publicly in favour of the establishment of such a court.

The third issue is one which truly warrants a reconsideration of all aspects of the appointments to our highest court. This is the passage of the Human Rights Act of 1998, which made the European Convention on Human Rights an integral part of United Kingdom law, and thus gave us what is in effect if not in name a bill of rights. It has given to British judges a power which they have not previously claimed, and which permits and requires hitherto unknown judicial interventions not only in the sphere of executive action but also in the sphere of legislation. Indeed, it was this prospect which provided the principal argument for those who opposed the incorporation of the European Convention into our law. Thus Lord Mackay of Clashfern, when Lord Chancellor, said in a speech in 1996,[4] that incorporation of the Convention

> would inevitably draw judges into making decisions of a far more political nature. ... The question which would then be asked, ... is whether the introduction of such a political element into the judicial function would require a change in the criteria for appointment of judges, making the political stance of each candidate a matter of importance. ... Following on from that is the question ... whether their appointment should be subjected to political scrutiny of the sort recently seen in the United States.

I do not believe that the Human Rights Act has so far politicised our judiciary. Nor do I think that it is likely to do so in the manner feared by Lord Mackay. One must remember that even before the Human Rights Act judgments of English courts not infrequently had considerable political consequences or at least aroused acute political controversy. To mention only two, the decision of the Divisional Court restraining the government of the day from financing the building of the Pergau dam in Malaysia[5], and the decision of the House of Lords in the case of General Pinochet.[6] But Lord Mackay was not by any means wrong in pointing out that the exercise of judicial power under an incorporated Convention could now have a more directly political element. Before the Human Rights Act courts intervened to set aside an executive decision only when they concluded that the decision was either illegal or so irrational as to be outside the range of reasonable decision-making. Now a reviewing court may be required to decide whether the balance which a decision-maker has struck between individual rights and a conflicting public interest

[4] A speech to the Citizenship Foundation, Saddlers' Hall, London, 8 July 1996.
[5] *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Limited*, [1995] 1 W.L.R. 386.
[6] *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147.

was the correct one—a decision which may have a decided political element. The Human Rights Act does not give the courts the power to strike down acts of Parliament even if they are incompatible with the rights embodied in the Human Rights Act. Parliamentary sovereignty is thus preserved. But in introducing any bill into Parliament the responsible Minister must now state that in his opinion the bill either is, or is not, compatible with the Human Rights Act. The negative option is likely to be rare. Consequently, while the court's power is merely to declare an act of Parliament to be incompatible with the Human Rights Act, such a declaration may have adverse political repercussions for the responsible minister and his government. The devolution of powers to Scotland is also likely to give rise to disputes which, under the relevant legislation, may end up in the Judicial Committee of the Privy Council. As that Committee is largely (although not entirely) made up of Law Lords or former Law Lords there is further scope for judgments which may have a direct political effect.

These considerations have led some legal commentators to ask whether the qualities and qualifications hitherto looked for in a Law Lord are still the right ones. The formal qualifications are simple—*either* two years experience of high judicial office *or* a qualification to appear as an advocate in any of the three high courts of the United Kingdom, held for at least 15 years. Of course in reality rather higher qualifications are needed. All the present Law Lords have been promoted from one or other of the three courts of appeal in the United Kingdom. All of them had been practising barristers before their first appointments as judges. While the minimal statutory qualifications are the only legal fetters on the Prime Minister's choice of new Law Lords, there is a firmly established convention that there should be two Scottish Law Lords. And since 1988 there has always been a Law Lord from Northern Ireland. (The Law Lords at present include three graduates of universities in or near Cape Town, but that has not as yet crystallised into a constitutional convention.)

So much for the qualifications. What are the qualities hitherto looked for in a Lord of Appeal? The only publicly stated criterion is merit. Where a vacancy occurs the Lord Chancellor will recommend to the Prime Minister the person who appears to him the best qualified, regardless of gender, sexual orientation, ethnic origin or religion and, of course, regardless of political affiliation. That tells us what is not relevant. To define merit is more difficult. In this context it must surely include outstanding intellectual ability as a lawyer, a judicial temperament, a sense of fairness and considerable experience of the law in practice. I believe that those

are the qualities that recent Lord Chancellors have looked for and, allowing for human error, have largely found.

It must at once be conceded to the critics that the Appellate Committee which merit in this sense has provided for us can hardly be said to be in any general sense representative. All its members stem from the practising profession, and all had served for many years as judges. They are all white men and, if "middle-class" today means anything, I suppose they are all middle-class. They would, I think, confess to being middle-aged, some more cheerfully than others. For my part I do not understand the call for a court to be representative. We are never told what sort of representation is contemplated or how it is to be achieved. Presumably no-one in this country wants judges to be elected.[7] On the United States Supreme Court, I understand, it is essential to have a spread of Justices from different regions of the country. There is also now said to be a woman's slot on the Court, a Jewish slot, an Afro-American slot and an Italian-American slot. It is said too that President Bush is now looking to appoint an Hispanic-American when next a vacancy occurs. I do not believe that anyone here could seriously advocate that type of representation.[8]

The concept of representativeness may be quickly discarded. A more fruitful concept is diversity. Diversity in a court of final appeal is in my view a good in itself. This does not mean that a woman judge on the panel, or a judge from a different ethnic background will necessarily decide a case differently from a white male judge. But their presence could enrich the court. The case for diversity was put this way in a recent article by Lady Justice Hale (one of only three women who have so far reached the English Court of Appeal)—

> ... a generally more diverse bench, with a wider range of backgrounds, experience and perspectives on life, might well be expected to bring about some collective change in empathy and understanding for the diverse backgrounds, experience and perspectives of those whose cases come before them.[9]

[7] Dame Brenda Hale (Lady Justice Hale) has written that "judges should be no less representative of the people than the politicians and civil servants who govern us," but she nonetheless disavows any suggestion that judges should be elected—"Equality and the Judiciary", [2001] P.L. 489, 503.

[8] I once heard the argument for representativeness pressed to its limits. I was in Washington D.C. when Judge Carswell, a Florida judge, was nominated for appointment to the Supreme Court by President Nixon. The American Bar Association, which assesses all candidates for Federal judicial office, had reported that Carswell was "mediocre". A western senator, riding to his rescue, said to the Committee that there were a great many mediocre people in the United States, and that they too were entitled to their representative on the court. (Carswell was not confirmed.)

[9] [2001] P.L. 489, 501. (Since this lecture was given a fourth woman judge has been appointed to the Court of Appeal.)

I am certain that this is true. I speak from my experience as an acting justice of the South African Constitutional Court. It was a court the like of which had, needless to say, never before been seen in South Africa, and I doubt whether such a court has been seen anywhere else. Of the eleven judges on the court there were six white men, three black men, one black woman and one white woman. Five had been high court judges, some had come directly from the Bar, at least four had at some time been academics, as well as having practised as either advocates or attorneys. One had been a political exile. They were all good lawyers. But what I found overwhelming was the depth and variety of their experiences of law and of life. This diversity illuminated our conferences especially when competing interests, individual, governmental and social, had to be weighed. I have no doubt that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had. Yet no-one, black, white, male or female was representing any constituency. The South African Constitution states only that the need for the judiciary to reflect broadly the racial and gender composition of the country must be considered when judicial officers are appointed.[10] That was achieved.

The South African Constitutional Court was an entirely new court, established under a constitution that was a deliberate break with the past. Bringing an element of diversity into our highest court in the United Kingdom is a different problem. For practical purposes the immediate issue is the absence of women on the court. In the nature of things, the judiciary is chosen from senior practitioners, among whom the proportion of women is still small. There are no more than a dozen women among the approximately 120 judges of the High Court in England and Wales. Three out of 36 members of the Court of Appeal are women. One of those three is the respected President of the Family Division. The other two, while also respected, are comparatively junior on that court. There are three women among the 32 judges of the Court of Session in Scotland, none as yet in the Inner House, which is the appellate court. As far as I know there are no women in the higher courts of Northern Ireland. How long are we to wait for women judges to make their way up to the House of Lords? Can what has been called the trickle-up process be accelerated? Perhaps it can. Affirmative action is a distasteful expedient, if it means appointing a person not really up to the job, on grounds of gender or race. Among other things it is humiliating for the person so appointed. But, if there is a choice to be made between a number of well-

[10] The Constitution of the Republic of South Africa Act, No. 108 of 1996, section 174(2).

qualified candidates, to give deliberate preference to a woman among them is surely justifiable in the public interest, and would be for the long-term benefit of the court. It could theoretically fall foul of the jurisprudence of the European Court of Justice[11]—but choice of the best candidate has in any event an inescapable subjective element, and the selection of a well-qualified Lady of Appeal would, I hope, be applauded.

Given that the major task of a final court of appeal is to decide important questions of law, some writers have suggested that some diversity could be achieved by appointing senior legal academics direct to the highest court.[12] There is precedent for this in the United States. Justice Felix Frankfurter, who was transplanted by President Roosevelt straight from the Harvard Law School to the Supreme Court of the United States, had had no judicial experience. He subsequently gave a public lecture, celebrated or notorious in its time, which was in effect a defence of his own appointment.[13] His theme was that the work of the US Supreme Court was so different from that of other courts that prior judicial experience was an irrelevance.

It is not for me to say that the eminent Justice was wrong, but his words certainly have no application to the House of Lords. The Appellate Committee, unlike the US Supreme Court, has to deal with the whole field of private as well as public law. Nor is its work merely to solve legal conundrums. There are few appeals which do not entail a careful study of the facts and, often, an understanding of the processes and strains of litigation. A Law Lord with neither prior judicial experience nor long years in practice would be at a considerable and possibly incurable disadvantage. Besides, judicial qualities are best assessed through performance on the bench in the lower courts. Of course, there have been notable exceptions. English Law Lords have occasionally been appointed directly from the Bar. The last of these, Lord Radcliffe, was so appointed by Mr. Attlee in 1949—but Lord Radcliffe was a Q.C. of great experience and exceptional brilliance.[14]

I must make it clear that I am certainly not against the appointment of academics to the bench. But I believe that they should come to judicial office by the same route as practising

[11] See *Kalanke* v. *Freie Hansestadt Bremen* [1995] E.C.R. I-3051: [1995] I.R.L.R. 660; *Marschall* v. *Land Nordrhein Westfalen* [1997] E.C.R. I 6363: [1998] I.R.L.R. 39.

[12] See *e.g.* A. Le Sueur and R. Cornes, *The Future of the United Kingdom's Highest Courts* (School of Public Policy. UCL, 2001), p. 115.

[13] *The Supreme Court in the Mirror of Justices*, the first Owen J. Roberts Memorial Lecture, given at the University of Pennsylvania Law School, 1957. Justice Frankfurter said that "the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero".

[14] I shall refer below to the political exceptions.

barristers or solicitors. Some academics have become recorders and in appropriate cases sit as deputy High Court judges. I hope and expect that some of these appointments will lead to a full-time judicial career, with every prospect of promotion on merit to higher courts.

Wherever the Law Lords come from, whatever their gender, the question remains—in the era of the Human Rights Act, should we look for different qualities in our top judges? Sensitivity to social issues, and an appreciation of the importance of individual rights would be desirable qualities—if only there were some way of discerning them. Perhaps the best we can hope for is that a marked absence of those qualities will disqualify. About two years ago a Scottish judge was engaged in an appeal in which the appellants had invoked their rights under the European Convention. Before the conclusion of the appeal the judge published articles in the press roundly attacking the incorporation of the Convention into United Kingdom law. He suggested that the Convention would provide "a field-day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers".[15] I have no reason to think that the learned judge aspired to the House of Lords, but one would hope that such views would be a positive disqualification for highest judicial office. Affirmatively, I would suggest that experience of public law should count more heavily. Broad jurisprudential interests will be more desirable than ever.

Some suggestions have gone further. Sir Thomas Legg Q.C., the former Permanent Secretary in the Lord Chancellor's Department, whose knowledge of the judicial appointment process, and of the judiciary, is unequalled, has written that with the "advent of the new era" (*i.e.* the human rights era) there was a case for "enlarging the courts' political understanding and horizons" by appointing some lawyers, whether academics or practitioners "with experience of public life".[16] Professors Le Sueur and Cornes in their indispensable research paper, *The Future of the United Kingdom's Highest Courts*[17] speak of the desirability of judges at the highest level having political astuteness, and the "requisite political skill", in a "broad, non-partisan sense". They say—

> There is an argument that the process of wringing politics out of the appointments process in the last 20 years or so [I would say in the last 40 years or so] has left the senior judiciary over-insulated from the political world.[18]

[15] See *Hoekstra* v. *H.M. Advocate (No. 3)* [2000] H.R.L.R. 410, in which another Scottish appellate court set aside the decision of the court of which that judge had been a member.
[16] "Judges for the New Century", [2001] P.L. 62, 68.
[17] Note 12 above.
[18] At p. 113.

It is difficult to disagree with those views in the abstract. But the problem is to define political astuteness even, or especially, in the "broad, non-partisan sense", and to identify those who have it. As far as I am aware, none of the present High Court judges has been a Member of Parliament. And it is now rare for leading lawyers to enter the House of Commons. It was not always so. In the 19th century, and well into the 20th century, judicial appointment was a well-recognised reward for party political services. Research carried out by Professor Harold Laski, for his 1932 essay *The Technique of Judicial Appointment*[19] established that between 1832 and 1906, out of the 139 judges appointed in the period, eighty were Members of Parliament at the time of their appointment, and another eleven had stood as candidates for Parliament. Up to the time of the second world war the Attorney-General and Solicitor-General of the day had by convention the reversion of the highest judicial offices, as vacancies came up. In that era the convention was accepted. It led indeed to the appointment of some of our most eminent judges. The formidable 19th century Master of the Rolls, Sir George Jessel, was Solicitor-General when appointed. Lord Macnaghten, elevated to the House of Lords in 1887 from the unpromising springboard of Attorney-General for Ireland, was possibly the most brilliant Law Lord of his time. But these political appointments came to be questioned. When, in 1923, Sir Ernest Pollock, a not particularly impressive Solicitor-General, was appointed Master of the Rolls there were protests in the press and from the legal profession. I must, however, add that after he had sat in his first appeal, counsel who had been in his court was eagerly asked by his colleagues for his impression of the new Master of the Rolls. "Disappointingly good", he reported. No such story palliates the appointment of his contemporary Lord Hewart, the Attorney-General who was made up to Lord Chief Justice in 1922, and held that office until 1940. Mr. R.F.V. Heuston, that most learned and critical historian of the judiciary, expressed the considered opinion that Hewart was the worst Chief Justice England had had since the end of the 17th century.[20]

In the 1940's and 1950's a few politicians were appointed to the Bench and ultimately reached the House of Lords. Their ability and impartiality could not be questioned.[21] In Scotland for reasons relating to the nature of the Scottish legal profession, Lord Advocates (in effect the Scottish equivalents of the Attorney-

[19] Published in *Studies in Law and Politics*, (London 1932).
[20] R.F.V. Heuston, *Lives of the Lord Chancellors, 1885–1940* (Oxford 1964), p. 603.
[21] I have in mind Lord Somervell of Harrow, Lord Donovan and Lord Simon of Glaisdale. There may have been others whom I have overlooked.

General) have continued to be directly appointed to the higher judiciary, including the House of Lords. One of them was Lord Reid, one of the truly great judges of his time. But I have no doubt that the time has passed for transfers from politics to the bench. Something may indeed have been lost, but more has been gained. To try to re-introduce undefined political experience as a qualification would be a step backwards on a slippery slope. Lord Salisbury, Conservative Prime Minister at the turn of the 19th and 20th centuries (as reported by his daughter) said that within certain limits of intelligence, honesty and knowledge of law one man would make as good a judge as another, and a Tory mentality was *ipso facto* more trustworthy than a Liberal one.[22] Ours is a more fastidious age. We do not want to slide back in that direction.

A related question which has been raised by the Human Rights Act is whether our highest court ought to become solely a constitutional court, like the constitutional courts of Germany and some other European countries and, more recently, South Africa. For my part I see no need for such a court in the United Kingdom. There were reasons of history, in both Germany and South Africa, not entirely dissimilar, for a separate constitutional court under a new constitution which was intended to be a complete break with an oppressive past. Significant as the Human Rights Act is, it does not constitute the same sort of revolution. On a practical level, cases on human rights in the United Kingdom can seldom be categorised as purely constitutional cases. They usually entail consideration of the common law, both civil and criminal.[23]

The Law Lords, in my respectful opinion, have shown themselves fully capable of handling the jurisprudence which has developed from the European Convention on Human Rights, and have already demonstrated that human rights cases in this country do not call for a separate panel of human rights specialists. I should like to emphasise what is sometimes forgotten when we speak of the need for judicial sensitivity to human rights issues. A culture of rights does not mean that the individual must always win against the state, or that every individual right must be extended to its furthest limit. Human rights adjudication requires above all a sense of proportion and balance.

What remains to be considered is the manner in which the judges of the highest court are selected. It is in this context that we

[22] Quoted in Heuston, *op. cit.*, p. 37.

[23] As David Steel J. remarked in a recent (unreported) case, "The tentacles of the Human Rights Act reach into some unexpected places. The Commercial Court, even when exercising its supervisory role as regards arbitration, is not immune."

hear the words, ''transparency'' and ''democratic legitimacy''. As I have said, there are no formal constraints on either the Prime Minister or the Lord Chancellor in selecting the Law Lords. Needless to say, in recent times the Lord Chancellor has consulted very widely before making any recommendation. This is and has been his practice before making any judicial appointment. Again, Sir Thomas Legg is the invaluable source. For appointments at High Court level and above, the Lord Chancellor consults a small group of what Sir Thomas calls ''top judges''.[24] There is also informal consultation, in some cases, with other branches of the legal profession. A report by Sir Lionel Peach, the former Public Appointments Commissioner, has concluded that the Lord Chancellor's system was as good as any he had seen in the public sector—which I assume was intended as a compliment. I would agree with Sir Thomas' conclusion:[25]

> Like any system, this one should be judged by its results. Many, including most of its critics, accept that it has produced a judiciary of high overall quality. There is no serious suggestion that the power of appointment has been abused for political or other improper purposes.

As long as this system remains, its democratic legitimacy comes from the democratic accountability of the Prime Minister and the Lord Chancellor. As to transparency, the system itself is well known. And the appointments themselves are open to the judgment of the public. I can see only disadvantages in disclosing the reasons why the Lord Chancellor and the Prime Minister have preferred Lord Justice A to Lord Justice B for a vacancy in the House of Lords. Mr. Marcel Berlins of *The Guardian* has extracted from the Public Records Office an entertaining account of the appointment of two new Law Lords by Mr. Attlee in 1949. One name put up for consideration was Lord Merriman, then the President of the Probate, Divorce and Admiralty Division of the High Court. ''Soundings'' were taken by the Lord Chancellor and his permanent secretary and their report was that

> Lord Merriman would be most unsuitable for promotion; that he has not the requisite capacity; and furthermore, that if he were appointed he would soon put up the backs of his colleagues and they would all be at sixes and sevens. So strongly does the Master of the Rolls [Lord Greene] take this view that if Lord Merriman were appointed, he (the Master of the Rolls) would be unwilling to accept a lordship of appeal and would prefer to stay where he is. By contrast both the

[24] [2001] P.L. 62, 64.
[25] At p. 65.

> Lord Chief Justice and the Master of the Rolls agree that Cyril Radcliffe would make an admirable lord of appeal.[26]

So Merriman was not appointed, and Greene and Radcliffe were. What possible good would it have done either for Merriman or the appointment system if, in the name of transparency, the reasons for the Prime Minister's choice had had to be made public?

When I had reached this stage in the preparation of this lecture I began to feel qualms, if not dismay. It seemed that in a lecture given in honour of so creative and original a legal thinker as Sir David Williams, I was doing no more than defend the *status quo*. I fear that that has turned out to be largely true, but not entirely. The present system of selecting the higher judiciary, and especially the Law Lords, has a potential flaw, notwithstanding its successful outcomes in recent years. The flaw is that it depends so heavily on the judgment and integrity of the Lord Chancellor of the day. Lords Hailsham, Elwyn-Jones, Mackay and Irvine, to name the four most recent Lord Chancellors who have made appointments to the Lords, have been impeccable in avoiding any hint of political favouritism or any basis of appointment other than merit. But that is no guarantee for the future, especially as it is not inconceivable that the role of the Lord Chancellor in government will change. If his judicial role were one day to disappear, a future Lord Chancellor might not even be a lawyer.

I firmly believe that the appointment of judges including those of the highest court should remain the responsibility of the executive branch of government. In some European countries, such as Germany, Spain and Italy, the judges of the highest court, the constitutional court, are elected by the legislature according to varying procedures, which usually require a special majority vote. Those countries no doubt have good reasons for choosing that system, and it presumably works to their satisfaction,[27] but I do not think that election of judges by Parliament is a serious runner in this country. It would make judicial appointments the subject of political conflict or, no more creditably, of political deals.

Very much the same objections would apply to any attempt to introduce a parliamentary confirmation process akin to the American system (commanded by their Constitution) of requiring executive appointments of Federal judges, including Justices of the Supreme Court, to be subject to confirmation by the Senate. The

[26] *The Guardian*, 20 March 2002.

[27] I cannot refrain, however, from quoting a news item which I saw last month in an Italian newspaper: "Not enough members of parliament showed up on Thursday afternoon to allow for a binding vote on the appointment of two judges to the Constitutional Court. The vacancies have remained unfilled for almost two years due to political bickering." (Italy Daily, Milan, 12 April 2002.)

bitter public conflicts over the nominations of Judge Robert Bork (who was rejected) and Justice Clarence Thomas (who was confirmed) have diminished whatever attraction that system might otherwise have had for us.[28] The American system must have its advantages—I have been told that the process gives a certain confidence to the judges who have survived it—but again I do not think there is any real belief here that it is an exportable system.

A more promising suggestion is a judicial appointments commission. There are different models for such commissions, to be found in some European countries, in some states of the United States, in the Commonwealth and now in Scotland. In some models it is the commission which actually makes the appointments, taking it out of the hands of the executive. In others, including Scotland, it merely makes recommendations to the executive. Another model is the Judicial Services Commission established by the new South African Constitution.

The political background to the South African Commission is essential to its understanding. At the time of the political changeover there was only one black judge and one woman judge. Moreover, during the 45 years of apartheid government the standing of the South African Supreme Court had been diminished by far too many appointments of judges whose only apparent qualification for the bench was their adherence to the party in power. The object of the Judicial Services Commission under the new Constitution was twofold. One was to prevent unmeritorious candidates being appointed on political or other improper grounds. The second was to encourage the transformation of the judiciary by the appointment of suitable black lawyers and women lawyers. Accordingly, the executive power of appointment has been fettered.[29] Where a vacancy occurs in any of the courts, including the Constitutional Court, judicial aspirants must apply to the Judicial Services Commission (or allow their names to be put forward by others). They must then appear before the Commission to be interviewed. It follows that the applicants are in open competition with one another. The sessions are open to the public and the press but are not televised. At the end of the process the Commission is expected to send up a shortlist of approved candidates for each vacancy. The President of South Africa may appoint any of those on the list or reject them all, but he may not appoint anyone not put up by the Commission.

[28] One may perhaps apply to nominees to the Supreme Court the current dictum on candidates for the US Presidency—"Presumed innocent until nominated."

[29] The statutory provisions governing the functions of the Commission are to be found in the Constitution of the Republic of South Africa Act, No. 108 of 1996, sections 174 and 178. The Commission has established its own procedures.

The first requirement of any workable judicial service commission must be a composition which inspires confidence, and which is itself not solely in the hands of the executive. The South African Constitution makes elaborate provision to this end. The members include the Chief Justice (who presides); a Judge President of one of the provincial divisions of the High Court, designated by the other Judges President; two practising advocates (barristers) nominated by their profession; two practising attorneys (solicitors) similarly nominated; a teacher of law designated by teachers of law at South African Universities; there are 10 parliamentary representatives chosen by the two houses of parliament in a way which ensures that opposition parties have equal representation; and four designated by the President as head of the executive after consulting all leaders of parties in the lower house of Parliament. Thus, while only seven members have to be lawyers or judges, one sees a genuine attempt to avoid government domination of the Commission.

Whether the Commission has fulfilled all expectations is debatable. I can only give my impression. I would say that it has succeeded in eliminating some poorly qualified candidates who might otherwise have hoped for political favour. It has not, in my opinion, been sufficiently rigorous in ensuring that legal knowledge and experience accompany the other qualities needed for the transformation of the judiciary. It is my opinion too that the non-legal members of the Commission have contributed little to the Commission's expertise. Yet, in general I have no doubt at all that the Judicial Services Commission is in South African terms a huge advance on the old system of unfettered executive appointment. Notwithstanding the reservations which I have expressed, the South African experience convinces me that an independent commission would be a valuable addition to the process of selecting the judges of our highest court. I do not, however, think that we need a commission to select or nominate the judges on the South African model. Unlike South Africa, the United Kingdom does not face the problem of changing a system which was riddled with racial inequality and political and other forms of favouritism. Here the objective would be to ensure as far as humanly possible that non-political appointment on merit will continue to be the rule. What I suggest is a relatively small committee, whose sole functions would be to consider any appointment of a Law Lord proposed by the Lord Chancellor. The committee would receive in confidence all the material on which the Lord Chancellor had based his provisional choice, and would, if necessary, question him on why, for example, he prefers candidate A to candidate B. The committee should have

the right to be consulted and to give advice and should have the power for good reason to veto a proposed appointment. I would suggest that the majority of members be drawn from the active profession, by which I mean judges, barristers, solicitors and legal academics, together perhaps with a recently retired Law Lord. There should be room for a senior civil servant, not in the Lord Chancellor's department, or another layman with experience of appointment processes in other contexts.[30]

I would avoid public hearings of any kind. The South African experience shows that public hearings, however courteously conducted, may be humiliating for rejected candidates, especially those who are already judges, and have aspired to promotion. Competitive candidacy between judges is in itself distasteful and diminishes respect for the judiciary. In the light of calls for a public process, in the name of "transparency", it is perhaps worth looking at some of the questions which have been put to candidates appearing before the South African Commission. There are sometimes searching questions about the candidate's activities and attitudes in both the old South Africa, and the new. In one case a judge of very long experience who sought promotion was closely questioned about his previous membership of a secret society devoted to promoting Afrikaner nationalism and its ideology. In another case, an application by a candidate who had been an industrial arbitrator was opposed by a party which had appeared before him in that capacity. The objection to his appointment was based on the allegation that his conduct of the arbitration had shown a disparaging attitude to women employees. He was interrogated in detail about his questions to witnesses and his findings. One may also recall the questioning of Robert Bork in the United States Senate Judicial Committee. He was called on to defend a decision that he had given as a Federal Circuit judge holding that a chemical company was entitled to require women employees to undergo sterilisation if they wished to continue in certain jobs. He was also asked whether he would, if appointed, vote to overrule the Supreme Court's decisions on abortion and contraception. He was questioned about his part in dismissing the Watergate special prosecutor, Archibald Cox, 14 years earlier.

It is not for me to say that in the contexts of South Africa and the United States such questioning was improper or unnecessary. What these examples do show, I suggest, is how inappropriate, if

[30] The possibility of a commission to scrutinise all judicial appointments (which would be an enormous task) raises issues beyond the scope of this lecture. There is already an independent Judicial Appointments Commissioner who has no role in making actual appointments, but has power to scrutinise the processes of the Lord Chancellor's department.

not pointless, interrogation by a commission even in private, would be in our judicial context. I would ask those who advocate the interrogation of candidates for high judicial office, what sort of questions could usefully and properly be put to them. I cannot think of any. Although some judges including Law Lords may be popularly regarded as liberal and others as conservative, their views are not derived from party allegiance, if indeed they have any, nor from extreme ideologies, nor even from what Lord Mackay called a political stance. In this country issues like abortion or the penalties for murder, are not electoral issues and do not arouse the ferocious political debate that they do in the United States. When a new Law Lord is appointed there is no speculation on what his views will be on any issue likely to come before him. In England, unlike the United States, the judges of the highest court are not selected in order to satisfy particular political constituencies. Nor is there any equivalent here to the understandable South African sensitivity about a judge's pro-apartheid past. Naturally, a judge's ability as evidenced by his or her judgments would be taken into account in any selection process. But that judges should be called on to defend their judgments, even in committee, is not only distasteful but is, surely, incompatible with the independence of the judiciary. It cannot be justified by words like "transparency" or "accountability".

This is a long path by which to have reached so modest a conclusion—Lords of Appeal to be appointed much as they are now, subject only to scrutiny and possible veto in extreme cases by an independent commission. This is not to disparage the research and thought of the observers of the House of Lords who have advocated more radical change. It is right that the court which is the ultimate protector of our liberties should be critically observed and appraised. But we should also keep in mind the limitations of institutional safeguards, whether simple or elaborate. In the end we shall still have to rely on the wisdom, integrity and good sense of the judges who sit in our highest court.