

Judicial Diversity

Professor Penny Darbyshire, Seminar, University of Worcester, Wednesday 28 October 2020 at 10.15. p.darbyshire@kingston.ac.uk pennydarbyshire.com

Reading

Darbyshire on the English Legal System (Sweet & Maxwell 2020), chapters 14, “Judges” and 15 “Magistrates” and 13, “Lawyers”. *Diversity of the judiciary: Legal professions, new appointments and current post-holders 2020 statistics* (Ministry of Justice, September 2020, accessible via the Judiciary website). *Sitting in Judgment – the working lives of judges* (Hart 2011).

Image

White, male, Tory toffs, old boys’ network. Out of touch. Magistrates and lay tribunal members ignored. See *Sitting in Judgment*.

Judicial Independence

Act of Settlement 1701. The Constitutional Reform Act 2005 separated powers; re-emphasised JI.

Magistrates (JPs)

- **Importance:** they determine the bulk of criminal cases (84.66% in 2019), almost all youth criminal cases, “out of sight, out of mind” and many family cases.
- Very **powerful:** like judge and jury in criminal cases. In the Family Court, they can do everything except wardship and divorce. More powerful than most district judges, e.g. care.
- **Who?** 13,177 unpaid volunteers. Used to be over 30,000. Mostly non-lawyers. Anyone, 18-65 can apply. Need not be a citizen (Act of Settlement) but UK resident for 5 years.
- **Recruited** not by JAC but locally by 23 advisory committees (volunteers and magistrates, chaired by Lord Lieutenant of the County). New recruitment page under construction [here](#).

Women = 56%

BAME = 13%

Age = 82% are over 50

Social diversity = no official stats but too middle class

Critics: me, Auld LJ, Jane Donoghue, Transform Justice, The Policy Exchange, The House of Commons Justice Committee 2016 and 2019.

Problems

Shortage “The current shortfall is as frustrating as it was foreseeable” (Justice Committee 2019).

BAME representation 13% is nearly average in the England and Wales population (14%) BUT defendants in criminal cases are disproportionately non-white. Since the 1980s, Lord Chancellors have made huge efforts to attract non-whites BUT still insufficient in some areas. For example, in 2019, 29% of London magistrates were BAME in a population of 40% BAME. Birmingham 29%/46%.

Social class 2013 research by the Policy Exchange in 3 areas found almost 90% were from “higher managerial, administrative and professional occupations”. A 2019 judiciary/HMCTS survey found that 66% were not in employment. Of those who were, 40% were not given time off to sit.

Solutions? Suggestions

Repeated attempts, e.g. National Recruitment Strategy 2003. Transform Justice and The Policy Exchange suggested 10-year fixed tenure and said that the recruitment window is too narrow. The Parliamentary Justice Committee recommended proactive advertising and continuous recruitment, and a streamlined and swift selection system. Everyone (for decades) has suggested rewarding/persuading employers. In 2019, the Justice Committee stridently criticised government inaction since their 2016 report. Their recommendations should be revisited “as a matter of urgency”. Copy Scottish system: suggested by Transform Justice and me.

Tribunal Judiciary and Non-legal members

3,281 Non-legals = 52% women; 16% BAME; 82% over 50.

Judiciary

Stats

Women account for 32% of court judges; 47% of tribunal judges; 26% of senior judges; 44% of district judges. 2 of 12 in UKSC.

BAME account for 8% of court judges; 12% of tribunal judge. None in UKSC.

Both do not equate to the percentages of experienced lawyers.

Therefore, the CR Act 2005 has not yet succeeded. Why?

- The legal profession is unrepresentative. See 2020 stats and Darbyshire 2020, ch. 13.
- Reluctance to apply. Genn 2008. JAC identified myths. Recent recruitment crisis/shortage.
- Women/BAME applicants are less successful. 25% of applicants are BAME but only 12% of those recommended. Women are 50% of applicants; 45% of recommended.
- Exclusion of solicitors. 148,300 solicitors; under 17,000 barristers. **The judicial pyramid represents the hierarchical legal profession.** That is, barristers think they are the senior profession. Solicitors reluctant to apply. Statute generally requires advocacy rights.
- The emphasis on silk. Senior judges are normally recruited from silks. Only 10% of barristers are silks. Only 17% of silks are women. 9% are BAME.
- My point, statutory restrictions: The CRA 2005 confines appointments to barristers, solicitors and legal executives. Academics and other lawyers are ineligible.

Does Lack of Diversity Matter?

It is an international embarrassment: Council of Europe. No evidence of gender bias in judgments.

Attempts to recruit and widen the judiciary

A litany, since the early 1990s. See my book. LCs/ senior judges/JAC try hard. The statute is their enemy.

Should UKSC candidates be publicly examined?

No. UK judges are not party political or elected. The UKSC does not decide on issues such as abortion because of the sovereignty of Parliament. Public examination does not predict future judgments.

Thank you for inviting me! I welcome queries from students and academics, worldwide.