

# Do We Need Judges?

Professor Leslie Thomas KC



# Arguments for Judges

- Essential to the rule of law
- A check on the power of the executive



Lady Justice at Stadhuis Haarlem.jpg  
Justice\_at\_Stadhuis\_Haarlem



# Arguments against judges

- Unrepresentative of society
- Disproportionately drawn from privileged groups
- Not democratically accountable
- Trained in law, and not necessarily well-equipped for their role



Heads of the Law. Source: Vanity Fair 27<sup>th</sup> November 1902.

# Judges as finders of facts

- May make false assumptions about credibility of witnesses, e.g. that inconsistent accounts are more likely to be fabricated
- May misunderstand statistics, e.g. “the prosecutor’s fallacy”



Ben Goldacre in 2009. Source: TAM London 2009



# Judges and morality

- Criminal sentencing mainly based on culpability/moral desert
- Judges use moralising language from the bench
- Judges are mainly drawn from privileged backgrounds, unlike defendants
- Do judges have the moral authority to sit in judgment on the conduct of others?



# Judges and politics

- Judges often have to make politically controversial decisions
- Decision-making under the Human Rights Act 1998 has often put judges in the political firing line
- The debate over “judicial activism” changes according to the political context - sometimes it’s the political right decrying judicial activism, sometimes it’s the left
- Sometimes judges protect the rights of marginalised minorities, other times they throw them under the bus





Mykola Gnatovskyy at the ECHR. Source: Wikimedia Commons



# How are judges appointed?

- Before 2005 the Lord Chancellor played the main role in judicial appointments, in consultation with the senior judiciary
- No open and transparent recruitment process - "tap on the shoulder"
- Constitutional Reform Act 2005 created the Judicial Appointments Commission and introduced open competition for judicial posts
- The Lord Chancellor now plays a very limited role
- Whether politicians should play a role in judicial appointments is hotly debated







Lord Hewart. Source: National Portrait Gallery



# How are judges held accountable?

- High Court judges and above have virtually absolute security of tenure - they can only be removed by a joint address of both Houses of Parliament, which has never happened
- But they may be forced to resign, e.g. Mr Justice Jeremiah Harman
- Lower court and tribunal judges have less security and can be removed by Lord Chancellor with concurrence of Lord Chief Justice
- Judicial Conduct Investigation Office (JCIO) investigates complaints against judges
- JCIO sometimes accused of overreach, e.g. Judge Peter Herbert





Jonah Barrington, Source: British Library



Lutfur Rahman. Source: Wikimedia Commons



# Is the judiciary representative of society?

- Ethnic minority people constituted 10% of all judges in 2022
- They constituted 5% of High Court judges and above, 12% of tribunal judges, 16% of barristers and 18% of solicitors
- Women made up 35% of all court judges and 52% of all tribunal judges
- No clear data on socio-economic background of judges
- No data on professional career of judges - e.g. overrepresentation of commercial lawyers and Treasury Counsel as opposed to legal aid lawyers



# Do we need judges?

- Yes!
- But we need a more diverse judiciary - not just more women and ethnic minorities, but fewer judges from wealthy backgrounds and fee-paying schools, and more from non-traditional backgrounds
- We need more judges from underrepresented groups e.g. refugees and migrants, transgender people
- We need judges from a more diverse range of professional backgrounds
- We need affirmative action in judicial appointments
- We need to diversify legal training e.g. introduce training on mental health and scientific literacy





©Israeli Justices being sworn in. Source: Wikimedia Commons.



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Law Arrangement or Who shall be chief (BM J,4.116).jpg



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# Questions?





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