

THE STUDY OF PARLIAMENT GROUP

Paper No. 3

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Is there a case for greater legislative involvement in the judicial appointments process?



LONDON: STUDY OF PARLIAMENT GROUP, 2014

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Acknowledgments

This paper was originally drafted as an MPhil thesis at Queen Mary, University of London. The author would like to thank the House of Commons for part-funding the research undertaken in support of this paper; Collette Rawnsley, Simon Patrick and Hélène Tyrrell, who kindly agreed to comment on drafts; and his supervisors, Professor Kate Malleson at the Queen Mary (University of London) and Professor Andrew Le Sueur (now at the University of Essex) for their encouragement and assistance throughout this project. He would also like to thank his examiners, Professor Roger Masterman and Colm O'Cinneide, who provided helpful suggestions and feedback; and a number of individuals who generously agreed to be interviewed as part of the project (some of whom are identified in Chapter 1). Any remaining shortcomings or infelicities are entirely his own; as are the views expressed, which should not be taken to reflect the views of any other person or organisation.

Is there a case for greater legislative involvement in the judicial appointments process?

Abstract

The dramatic increase in public law and human rights cases coming before the UK Supreme Court (and the Appellate Committee before it) means that the UK's top court is more frequently determining essentially socio-political questions. In the light of this expanding judicial role, this paper asks whether new mechanisms for increasing political accountability, such as a parliamentary confirmation procedure, are needed for appointment to the most senior judicial offices (including, but not limited to, the UK Supreme Court).

The research addresses the conceptual arguments for greater political accountability in the appointment process. It also considers the expanding ambit of judicial independence. Focusing on whether parliamentarians should have a role in the judicial appointments process, it asks what is meant by political accountability in the context of judicial appointments and considers what evidence there is that greater accountability is necessary. The research examines whether new methods of accountability could be introduced in the UK without impacting on judicial independence. It seeks to shed light on these questions by examining the recent move by the UK Parliament to introduce pre-appointment hearings for other senior posts and evaluates whether such processes are readily transferable and, if so, whether UK parliamentary committees are well placed to undertake this task.

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Table of Contents

	<i>Page</i>
Note on the author	ii
Acknowledgments	ii
Abstract	iii
Chapter 1: Introduction	1
Chapter 2: What Do We Mean by 'Judicial Accountability'?	5
Chapter 3: Increasing Judicial Power	14
Politics in Law: Campaigning and Politicisation	17
The Judiciary and the Law Making Process	19
A New Approach to Cases Involving National Security	21
Who Should have the Final Word on the Law?	23
The Rule of Law and Parliamentary Sovereignty	28
Chapter 4: The Separation of Powers	33
Structural Separation of Powers and the Role of the Lord Chancellor	35
Institutional Independence and the Need for Judicial Accountability	43
Chapter 5: The Government Responds	53
A Considered Response?	58
Chapter 6: Do Parliamentary Select Committees have the Capacity to Conduct Judicial Confirmation Hearings?	61
Are there any Lessons to be Drawn?	66
What Difference Would it Make?	69
Chapter 7: Conclusion	71
Bibliography	76

Chapter 1: Introduction

It is indisputable that the constitutional position of the judiciary has changed significantly in the past 40 years. Many of the changes reflect the new constitutional settlement and the transition in the relationship between the citizen and the state. Lord Phillips of Worth Matravers, the former President of the UK Supreme Court, has observed that:

The citizen must be able to challenge the legitimacy of executive action before an independent judiciary. Because it is the executive that exercises the power of the State and because it is the executive, in one form or another, that is the most frequent litigator in the courts, it is from executive pressure or influence that judges require particularly to be protected.¹

This quotation is a useful scene-setter, since it reflects both a traditional view of judicial independence and the need for the judiciary to be protected against an overweening executive. In addition, it demonstrates some of the dangers facing the modern judiciary – in seeking to protect individuals from the increasing influence of the state, the judiciary finds itself inevitably drawn into the political arena. Moreover, it might also be argued that it illustrates how Parliament has been somewhat marginalised as commentators question its ability to hold the executive to account.²

Against this backdrop, this paper assesses the increasing tensions between the judiciary and other branches of Government; and it questions whether the current system might be improved by the introduction of some form of additional political accountability in the judicial appointments process. This research follows on from an earlier paper produced by the author for the Study of Parliament Group (SPG) in 2010 entitled *The Changing Constitution: A Case for Judicial Confirmation Hearings?*³ That paper considered accusations that the UK judiciary had become more activist and increasingly inclined to thwart the will of the elected element. It concluded that this impression may be, in part, because judges are now frequently finding themselves adjudicating on issues that many would regard as being essentially ‘socio-political’ in context and also because the courts have expanded their remit, considering issues that historically would not have been considered justiciable. Scholars, such as Vernon Bogdanor and Conor Gearty, recognised the new tensions and cast around for potential solutions.⁴

¹ Lord Phillips of Worth Matravers, *Judicial independence and accountability: a view from the Supreme Court*, 8 February 2011, pp 6–7

² This is not the place for a significant discussion on the merits and issues around legal and political constitutionalism. For that, see for example: Griffith, J.A.G. *The Political Constitution* (1979) 42 *Modern Law Review* 1, and *The Common Law and the Political Constitution* (2001) 117 *Law Quarterly Review* 42; Tomkins, A. *Our Republican Constitution* (Oxford: Hart Publishing, 2005); Waldron, J. *The Core of the case against judicial review* (2006) 115 *Yale Law Journal* 1346; Gee, G. and Webber, G.C.N. *What is a Political Constitution?* (2010) 30 *Oxford Journal of Legal Studies* 273 and Horne, A. and Walker, C. *Lessons Learned for Political Constitutionalism?: Comparing the enactment of Control Orders and Terrorism Prevention and Investigation Measures by the UK Parliament* [2014] *Public Law* 268

³ Horne, A. [*The Changing Constitution: A Case for Judicial Confirmation Hearings?*](#) (Study of Parliament Group Paper No. 1, London, January 2010)

⁴ See for example: Bogdanor, V. *Human Rights and the New British Constitution*, Tom Sargent Memorial Lecture, 2009; Gearty, C. *Are Judges Now Out of their Depth?*, Tom Sargent Memorial Lecture 2008

While it did not reach any settled view on the merits of the ‘activist’ argument, the earlier SPG paper concluded that the *perception* of increased judicial activism, particularly amongst Ministers and the media, was leading to increased conflict between the judiciary and parliamentarians. It also (cautiously) suggested that the introduction of a form of confirmation hearing might go some way to redress the balance, without treading too heavily on the essential principle of judicial independence.

While the judicial appointment system was comprehensively ‘modernised’ in 2005, none of the abovementioned issues were high on the agenda of reformers. Although some raised the issue of political or ‘democratic’ accountability (for example Sir Thomas Legg QC, Robert Hazell and Keith Ewing⁵), the focus of both the Government and the judges was on securing judicial independence. This became even more important following the botched prime ministerial attempt to abolish the historic office of the Lord Chancellor (sometimes viewed as the judges’ ‘protector’ in cabinet) without consultation.

Accordingly, parliamentary involvement in the process was swiftly discounted, and executive interest was narrowed with a clear intention to establish an independent judicial appointments commission, as free as possible from political influence. While the Government worked hard to ensure that the new process was not completely dominated by the judiciary, by ensuring lay representation, it appeared to overlook the increasing tensions between the judiciary and parliamentarians (both within and outside Government). At that time, the Government had principled concerns that any political involvement in appointments could impact on the quality of appointees. In particular, the Lord Chancellor was keen to avoid any role for Parliament,⁶ perhaps influenced by the often-disparaged US confirmation hearings process. Those who argued that it was a “delusion” that politics could be taken out of important decisions by entrusting them to quangos were broadly ignored.⁷

Now that the new appointments system has had time to bed in, it appeared a suitable time to revisit some of these issues. This new paper follows up on the work of the earlier SPG paper, but will not rehearse the discussions contained in it in any detail. It will start by introducing some of the arguments around the issue of judicial accountability and how it should be defined (Chapter Two). It will go on to consider how the abovementioned constitutional changes might justify a re-examination of the traditional hostility towards methods of political accountability and whether new methods of accountability are indeed necessary. The paper will also question whether the newfound respect for the doctrine of the separation

⁵ See: e.g. Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (court of final appeal)*, Session 2003–04, HC 48-II, where Sir Thomas Legg said: “I have expressed my preference for nominees for the new Supreme Court being confirmed by Parliament before the Prime Minister submits their names to the Queen for appointment. Whatever form the Parliamentary deliberations took, they would – and I think should – be public.” Robert Hazell argued: “[V]ery senior judicial appointees (Justices of the Supreme Court, and the four heads of division) should be invited by Parliament to present themselves for a scrutiny hearing. The committee would have no power of veto over the appointment. The main purpose of the hearing would be to introduce the new appointee to Parliament, and to give the committee the opportunity to develop a dialogue with the most senior judges on constitutional, legal and judicial policy”. See also: Ewing, K.D. *A Theory of Democratic Adjudication: Towards a Representative Accountable and Independent Judiciary* (2000) 38 Alberta LR 708

⁶ Interview with Lord Falconer QC, September 2010

⁷ Cranston, R. Foreword to Horne, A. *The Changing Constitution: A Case for Judicial Confirmation Hearings?* (Study of Parliament Group Paper No. 1, London, January 2010)

of powers should preclude Parliamentary involvement in judicial appointments (Chapters Three and Four). It will assess the Government's most recent reforms to the appointment system (particularly those taken forward in the Crime and Courts Act 2013 (Chapter Five). The paper will examine whether the introduction of any form of political accountability in the context of judicial appointments would unduly interfere with judicial independence (both in the general context and specifically in the context of the judicial appointments process).

The second stage of the research will look at capabilities. At the same time the Labour Government was promulgating proposals for a new Bill of Rights and other constitutional reform under its *Governance of Britain* programme, it was also seeking to "strengthen the powers of Parliament". It therefore introduced a new pre-appointment hearing system for appointments to quangos and other bodies. These new hearings were initially introduced during Gordon Brown's premiership. As Kate Malleson and Robert Hazell have noted, since 2008, parliamentary select committees have been scrutinising appointments to pre-eminent public bodies.⁸ These exercises consisted of pre-appointment scrutiny hearings for the top 60 public appointments and were the subject of much debate.

This system did not apply to the judiciary, but nonetheless looked very much like the judicial hearings model that had been introduced in Canada in 2006.⁹ Thus, while the UK Government conspicuously refused to accept any move towards pre-appointment hearings for the judiciary, there is at least a series of domestic examples as to how the UK Parliament might conduct any future hearings (and an important assessment as to whether it has the institutional capacity to undertake such work).

The House of Commons Liaison Committee, the Constitution Unit at University College London and the Institute of Government have recently considered these scrutiny hearings, which are designed to focus on the candidates' professional competence and independence.¹⁰ Concerns were raised that they would undermine the integrity of the public appointments process; or that Select Committees would seize upon the opportunity and engage in inappropriate lines of questioning. However, the research conducted by the Constitution Unit and the Institute for Government appears to demonstrate that such concerns were baseless. The perceived benefits of this new procedure (and whether it could be used as a useful method of judicial accountability) will be explored at Chapter Six. The second strand of the research will look at the implementation of these hearings and consider whether there are any objections (either in practice or principle) for importing them into our judicial appointments system.

⁸ Malleson, K and Hazell, R. *Increasing democratic accountability in the appointment of senior judges*, UK Constitutional Law Group Blog, 15 July 2011

⁹ See for example Hogg, P. *Appointment of Justice Marshall Rothstein to the Supreme Court of Canada*, Osgoode Hall Law Journal, Vol. 44, No. 3, 2006, (527–538); Gee, G. *The Politics of Judicial Appointments in Canada in Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (A collection of essays prepared under the auspices of the Judicial Appointments Commission), pp 99–114 (London, 2010) and Paterson, A. and Paterson, C. *Guarding the Guardians?* Centre Forum, March 2012, Chapter 5 (available at: <http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf>, last accessed 27 August 2013)

¹⁰ Constitution Unit, *An Evaluation of Pre-Appointment Scrutiny Hearings*, 9 February 2010, and Institute for Government, *Balancing Act: The Right Role for Parliament in Public Appointments*, March 2011

In addition to a consideration of the scholarly material already available on the issue of pre-appointment hearings, the author also interviewed some of those involved in the process at the time of the original reforms and thereafter, in order to gain an understanding of the process that was adopted and the perceived limitations of Parliamentary involvement. The purpose of these interviews was essentially to enhance the author's analysis and ensure that he had the opportunity to subject his thesis to external challenge by those involved in the decision making process. It also allowed for the assessment of some new (albeit limited) primary material on the UK judicial appointment system. The author would like to express his gratitude to Lord Falconer of Thoroton QC, Sir Thomas Legg QC, Sir Alan Beith MP, as well as two senior judges and several Parliamentary officials who prefer to remain anonymous.

This research is also informed, even if only subconsciously, by the decade that the author has spent working in Parliament, first as the legal specialist on the Constitutional Affairs Select Committee (during the passage of the Constitutional Reform Act 2005); as the Senior Researcher on public law, human rights and counter-terrorism in the House of Commons Research Service in the House of Commons Library (2006–13); and, most recently, as Legal and Senior Policy Advisor at the House of Commons Scrutiny Unit.

Although democratic accountability could have a number of different meanings (and encompasses the election of judges in some jurisdictions) given the United Kingdom's general preference for representative democracy, this paper will focus on the role of parliamentarians – and in particular, their role in the in the appointments process. Hence, references to 'democratic accountability' should be taken to mean accountability to elected parliamentarians. In the main, the emphasis will be on means of establishing accountability via the legislature; but where it is relevant, the paper will also examine the role of the executive in the judicial appointments process.

Finally, it is worth noting that when considering the concept of judicial accountability, the author is really concerned with the most senior appointments and that this work does not touch upon the process for appointing judges below the level of the High Court, nor does it consider the appointment of tribunal judges or magistrates. The main focus will be on appointments to the Supreme Court (because of the importance of its decisions and its "policy making function")¹¹ and of appointments to managerial roles, such as the Lord Chief Justice and Heads of Division.

¹¹ Lord Justice Etherton, Uncorrected Oral Evidence to the House of Lords Select Committee on the Constitution Inquiry into the Judicial Appointments Process, 13 July 2011, Q47. The "policy making function" of the Supreme Court will be considered in more detail in Chapter 3

Chapter 2: What Do We Mean by 'Judicial Accountability'?

Accountable: Adjective

(1) *Required or expected to justify actions or decisions; responsible: Ministers are accountable to Parliament ... (Oxford English Dictionary)*

It seems strange to have to pose such a question. However, while there has been extensive academic commentary on the benefits of judicial control and judicial review on what is often described as an otherwise “unaccountable executive”,¹² there appears to be far less thought given to the mechanisms that are in place to hold judges to account. Instead, far more consideration has been given to the issue of judicial independence – a subject which will be considered later in this paper. This is unfortunate, since it is worth recognising that the peripheral research which does exist appears to suggest that accountability may well have some effect on judicial decision making.¹³ Dawn Oliver and Gavin Drewry have stated that, amongst other things, generally “accountability involves the idea that a person or body should give an account, or an explanation and justification for its acts.”¹⁴ They distinguish this from the concept of ‘responsibility’ – which they define essentially as taking the blame if something goes wrong.¹⁵ It might well be the case that the lack of wide ranging research into judicial accountability stems from a broad acceptance of the proposition that accountability is “a euphemism for control” and (in the context of this research) that an independent appointments commission is the preferred method of selecting judges because “it protects the judges from the excesses of democratic or popular selection.”¹⁶ Taken to its furthest extreme, the concept of democratic accountability seems to raise fears (at least amongst members of the judiciary) of electing judges, or at the very least, politically partisan confirmation proceedings.¹⁷ A typical response against the introduction of new methods of accountability might be that since judicial independence is a core value, allowing politicians

¹² To the extent that in some publications the term ‘judicial accountability’ sometimes appears to refer to judges holding the executive to account – see for example, Flinders, M. *The Politics of Accountability in the Modern State*, (Ashgate, 2001) p131 and Flinders, M. *Mechanisms of Judicial Accountability in British Central Government*, Parliamentary Affairs, (2001), 54

¹³ Besley, T. and Payne, A. *Judicial Accountability and Economic Policy Outcomes: Evidence from Employment Discrimination Charges*, Institute for Fiscal Studies, WP03/11, June 2003. However this research looks at the effect of the public election of judicial office holders rather than political involvement in appointments

¹⁴ Oliver, D. and Drewry G. *The Law and Parliament* in Oliver, D. and Drewry, G. (eds), *The Law and Parliament* (London, Butterworths, 1998) p10

¹⁵ *Ibid*

¹⁶ Beloff, M. *Neither Cloistered Nor Virtuous? Judges and their Independence in the New Millennium*, [2000] Denning Law Journal 153–172 at 171

¹⁷ For a proponent of more radical change, see for example: Carswell, D. *Time to democratise the judges?* Douglas Carswell’s Blog 8 March 2011, where he notes the move towards elected police commissioners and argues a need for “democratic appointment hearings.” The need for greater “democratic accountability” (although not in relation to the judiciary) was a theme picked up by David Cameron prior to the General Election. See for example: Cameron, D. “A new politics: Democratic accountability”, *The Guardian* 25 May 2009. He outlined progress in this area in a subsequent speech, *We will make government accountable to the people*, delivered on 8 July 2010

a greater say in the selection of judges could threaten that independence. This should not be an end to the debate.¹⁸

When considering the issue of judicial accountability, it is first necessary to distinguish between judicial accountability on the one hand and accountability for the judicial appointments process on the other. While the latter may well form part of judicial accountability in the broader sense, it is also worth questioning whether it can be considered separately.

It is also necessary to consider who is accountable for selection decisions and to whom. Both the executive and Parliament have some responsibility for judicial accountability under the current system (introduced by the Constitutional Reform Act 2005) albeit that the role of the Lord Chancellor is now far less significant than it was previously. Although contested, the retention of a role for the Lord Chancellor in the appointments process (discussed further below) can clearly be justified. This is not only to secure accountability to Parliament through the usual convention of individual ministerial responsibility, but also to retain some political accountability (at least in relation to the appointment of senior judges). As for Parliament, it has the responsibility “to establish the statutory framework for the judicial appointments process.” Parliament “also has an accountability role to play in overseeing the process and reviewing the success or failure of its operation” and (therefore in holding the Lord Chancellor and Judicial Appointments Commission (JAC) to account).¹⁹ While the role of Parliament may seem quite limited, Parliament has retained the ultimate sanction – the power to dismiss senior judges.

American academic, Mary Clark, has identified a number of forms of accountability in the new UK judicial appointments system. These include: the fact that the members of the judicial appointment commissions are known, not secret; the judicial appointment commissions publicly advertise judicial vacancies (and post some limited information on their candidate selections on a public website); and, the Lord Chancellor is constrained in his discretion to review the recommendations of the judicial appointment commissions.²⁰

Both the executive and Parliament clearly feel that they can expect to hold the Judicial Appointments Commission for England and Wales to account for its performance. The JAC publishes detailed annual reports.²¹ Members of the JAC have also regularly appeared before the House of Commons Justice Committee (and previously the Constitutional Affairs

¹⁸ For a counter-argument to this traditional view, see for example: Paterson, A. and Paterson, C. *Guarding the Guardians?* Centre Forum, March 2012

¹⁹ House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, para 38

²⁰ Clark, M. L. *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, Louisiana Law Review, 71, no. 2 (2011): 451–502 at 483

²¹ The Judicial Appointments Commission, a non-departmental public body sponsored by the Ministry of Justice, was established formally on 3 April 2006. Separate appointments for Scotland and Wales are made by respective national appointment commissions and appointments to the Supreme Court are made by a separate, *ad hoc*, commission, which is discussed in further detail below

Committee) to discuss the appointments process.²² Such appearances have not only focused on the efficiency of the process, but also on inputs (mainly the diversity of candidates and what can be done to encourage solicitors, minority candidates and women to apply for appointments). It is also worth noting that the preferred candidate to Chair the JAC is already subject to interview by the House of Commons Justice Committee. That Committee interviewed the current Chair of the JAC, Christopher Stevens, and endorsed his candidature in January 2011.²³

Parliamentarians also wish to have a continuing input into the selection criteria used by the JAC (for example, by modifying eligibility through statute, or by demanding that the JAC come up with policies to increase judicial diversity). Both of these activities impact upon the JAC's decision making in respect of candidate selection, but neither appears to have been seen as a genuine threat to judicial independence. This is despite that fact that some would contend that an increase in diversity would necessarily impact on decision making by the highest courts and that it is a "small p" political interference with appointments.²⁴

Erika Rackley has considered this issue having regard to the appointment of women judges, noting the well-known comments of US Supreme Court Justice, Sonia Sotomayor, that "a wise Latina woman *with the richness of her experiences* would more often than not reach a better conclusion than a white male who hasn't lived that life." Rackley also noted that other women US Supreme Court judges made similar points – for example Ruth Bader Ginsberg has argued that being a woman helps a judge have a better understanding of the issues at stake in the case of sex and pregnancy discrimination.²⁵ Although she recognises that empirical evidence supporting differences between male and female judges is, at best, "equivocal", she nonetheless maintains that "once we accept that who the judge is matters, then it matters who our judges are."²⁶

In the foreword to the book, *Feminist Judgments: From Theory to Practice*, Baroness Hale considered the scholarly reworking of a selection of well-known cases from a feminist perspective. She posed the question: "What difference would it make if there were more feminist judges?" and concluded that while judges could not have an 'agenda' to shape the law, that they could "certainly bring their own experience and understanding of life to the interpretation or development of the law or to its application in individual cases."²⁷ She observed that a feminist judge might set the story in a different context, or take different facts from the mess of detail, to tell the story in a different way. All of this suggests that

²² See, e.g. Constitutional Affairs Select Committee, *Judicial Appointments Commission*, Oral Evidence 20 March and 20 June 2007, HC 416 and Justice Select Committee, *The Work of the Judicial Appointments Commission*, 7 September 2010, HC 449-I

²³ Justice Committee, *Appointment of the Chair of the Judicial Appointments Commission*, Second Report Session 2010–11, HC 770

²⁴ See, for example, Hunter, R. McGlynn, C. and Rackley, E. *Feminist Judgments: From Theory to Practice* (Hart, Oxford, 2010)

²⁵ Rackley, E. *Women, Judging and the Judiciary*, (Oxford, Routledge, 2013) p167

²⁶ *Ibid*, p142 and 164. For a more sceptical view on these issues, see: Lord Sumption, *Home Truths about Judicial Diversity*, Bar Council Law Reform Lecture, 15 November 2012

²⁷ Hunter, R, McGlynn, C. and Rackley, E. *Feminist Judgments: From Theory to Practice*, (Oxford, Hart, 2010) Foreword

proponents of judicial diversity might well be hoping for different outcomes in cases, which is surely a 'political' aim of sorts.²⁸

While the JAC is clearly supervised by both the executive and Parliament, there is, however, little obvious or significant democratic accountability in the appointment process itself – as Clark observes, there is no requirement that either the judicial appointment commissioners or Lord Chancellor actually be elected officials, although both may be held to account by number of parliamentary committees.²⁹

The traditional approach to judicial accountability more generally has been set out in some detail by Andrew Le Sueur, who has noted a series of formal and informal methods including: publication of an annual report by the court; rights of appeal to higher courts; academic commentary on particular judgments and the conduct of courts; scrutiny of the judicial appointments process; robust and accurate reporting on judgments in the news media; and, education by the Bar and other legal professional organisations.³⁰ Le Sueur subdivided accountability into four different groups: 'probity accountability' (e.g. basic audit requirements; mechanisms to guard against the corruption of individual judges, or conflicts of interest); 'performance accountability' (e.g. focus on 'delivery' and 'outcomes' including management targets (which can be judged by way of annual reports); 'process accountability' (where public authorities are called upon "to explain and justify the decision making processes they adopt in carrying out their task". In the judicial context, this could include explaining the methods used to select which cases to hear in full and the arrangements for the composition of benches in the appellate courts); and 'content accountability' (e.g. what the law is and what constitutional values a court ought to promote in its judgments). It is this last version of accountability which is the most challenging since, as Le Sueur observes, it is "here that the highest degree of 'independence' is expected."³¹

In relation to rights of appeal, it might be said that the existence of the Court of Appeal and Supreme Court serve as "an instrument of professional accountability – peer review, in a literal sense – for the judges below."³² Thus the higher courts can act both as a form of "quality control in the administration of justice" and to provide a "mechanism of accountability in respect of those exercising judicial functions in the lower courts."³³ This type

²⁸ Another reason cited for appointing senior women judges is that of demonstrating leadership and a commitment to diversity – another small 'p' political criterion. See *The Times*, "If not now for a woman Lord Chief Justice, when?" 18 July 2013 and *The Guardian*, "Choice of Sir John Thomas as Lord Chief Justice sees tradition prevail", 15 July 2013

²⁹ Particularly, the Justice Committee and the House of Lords Constitution Committee

³⁰ Le Sueur, A. *Developing mechanisms for judicial accountability in the UK* in Morgan, D. (Ed) *Constitutional Innovation – The Creation of a Supreme Court for the United Kingdom; domestic, comparative and international reflections*, (A special issue of Legal Studies, Butterworths, 2004), p 80. See also: Le Sueur, A. *Parliamentary accountability and the judicial system* in Bamforth, N and Leyland, P (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013)

³¹ Le Sueur, A. *Developing mechanisms for judicial accountability in the UK*, in Morgan, D. *Constitutional Innovation: The creation of a Supreme Court for the United Kingdom; domestic, comparative and international reflections*, (London, LexisNexis, 2004, pp81–88

³² Blom-Cooper, L. and Drewry, G. *The House of Lords and the English Court of Appeal*, in *The Judicial House of Lords 1876–2009* Blom-Cooper, L, Dickson, B and Drewry, G. (eds), (Oxford University Press, 2009), p49

³³ *Ibid*, p51

of self-regulation may give some candidates cause for concern when senior judges are also heavily involved in deciding on promotions to the Court of Appeal and Supreme Court. The House of Lords Constitution Committee has recently considered the issue of judicial appraisal, suggesting that “a formal appraisal system should be introduced” but that it should be judge-led as “appraisal by an outside body could interfere with the independence of the judiciary.”³⁴ It was not clear, from the evidence before the Committee, whether it would be beneficial to make use of such appraisals when judges applied for more senior appointments.³⁵

Other recent developments include appearances in television documentaries on the work of the Supreme Court and the televising of Supreme Court hearings (with the prospect of televised hearings or judgments in the lower courts to come).³⁶ This has been combined with other communication strategies to enhance transparency (including a website, Twitter feed and an e-mail alerter about forthcoming judgments, as well as useful press releases to supplement the text of judgments, for those who only want the gist of a decision). Richard Cornes has contrasted this with the position that existed prior to the creation of the Supreme Court, noting that the Appellate Committee “had no dedicated communications operation. It released its judgments – collections of speeches – in accordance with parliamentary protocols, which to a non-lawyer onlooker when a Committee reported back to the House effectively disguised both its function in general, and the outcome of the decision in the case being decided.”³⁷ Cornes recalls that the Appellate Committee “had no annual reports, and no articulated strategic objectives, relevant to communications or otherwise. It had no separate institutional identity; it was a ‘court’ yes, but a court which sat as a committee of Parliament.”³⁸

Judges may also use speeches or lectures to try to give an overarching constitutional theory to some of their decisions (the potential dangers of judicial speech-making are discussed further in Chapter 4). These methods of accountability have been described as ‘soft’ or narrative accountability and it has been said that such soft accountability “has fashioned a more transparent court that is much more energetic in giving an account of its judicial business and day-to-day operations.”³⁹

In spite of such increased transparency (and for obvious reasons), this remains a long way from the sort of ‘hard accountability’ that can be faced by politicians (and even civil servants) having to answer for decisions in front of opponents, or parliamentary committees. Vernon Bogdanor has sought to distinguish between these two different readings of accountability. He has contended that while it would be impossible for the judges to be subject to anything resembling ministerial accountability (which he defines as “sacrificial accountability”

³⁴ House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, paras 183–186

³⁵ *Ibid*, para 185. See also, *The Guardian*, “Do judges really need more oversight?”, 11 September 2013

³⁶ See: e.g. Ministry of Justice, *Proposals to allow the broadcasting, filming and recording of selected court proceedings*, May 2012

³⁷ See: e.g. Cornes, R. *A constitutional disaster in the making? The communications challenge facing the United Kingdom’s Supreme Court* [2013] Public Law 266

³⁸ *Ibid*

³⁹ Hazell, R. and Gee, G. *The Guardian*, “When the supreme court won’t hear”, 2 November 2011

whereby ministers take the credit for what goes right in their department, and the blame for what goes wrong, to the extent that they are required to resign if something goes seriously wrong), this would not stop them being accountable in an “explanatory sense”. He defines this as accountability whereby the judges would be required to give “an account of their stewardship to Parliament”, by appearing before parliamentary committees after appointment and being questioned on their judicial approach.⁴⁰

Almost all would accept, in the words of Professor Anthony Bradley, that: “judicial independence requires that judges are not directly accountable either to the executive or to Parliament for their decisions.”⁴¹ Yet, it is also precisely the sort of soft accountability, described above, that brings the judiciary further into the public domain. After all, if the judiciary wishes the public to have a greater understanding of its work, it is unsurprising if the public also wants to have greater knowledge of who these judges actually are and how they were appointed. Cornes has noted that the greater transparency will also no doubt fuel press interest since the mainstream press “like stories about the justices which can be presented as accounts of ‘who’s up, who’s down’, ‘who’s tipped to join the Court’, or ‘who might be the next President or Deputy.’”⁴²

A further move towards judicial accountability has seen judges appearing before select committees to discuss the legal impact of policy decision and the administration of justice more generally.⁴³ However, Bogdanor’s views on accountability have been resisted by the judiciary. In recent years a number of members of the senior judiciary have expressed concerns about their need to be accountable to Parliament through the medium of select committees. When the House of Lords Constitution Committee concluded that select committees could play an important role in holding the judiciary to account by questioning judges in public, Lord Phillips observed that he did not find the phrase “attractive” since it suggested “subservience and a command and control relationship between the judiciary and Parliament”. He expanded on this by commenting that he did not “believe that it would be desirable for judges to appear to be at the beck and call of Parliament.”⁴⁴

Lest one think that this was simply a fit of pique, Sir Jack Beatson argued in a subsequent speech that: “the constitutional orthodoxy in the past, when there was less separation of powers than there is now, has been that Parliament, as the High Court of Parliament, has the *power to summon judges*”. While he did not seek to challenge the legal position directly, he stated that the “judiciary and the Lord Chief Justice” had concerns about the “frequency of

⁴⁰ Bogdanor, V. *The New British Constitution*, (Hart, 2009), p85

⁴¹ House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151, para 121

⁴² Cornes, R. *A constitutional disaster in the making? The communications challenge facing the United Kingdom’s Supreme Court* [2013] Public Law 266 at 289

⁴³ See for example, Horne, A. *Parliamentary Scrutiny: an assessment of the work of the Constitutional Affairs Committee*, Justice Journal, Vol 3, No. 2, December 2006. For more recent assessment see: Kennon, A. *Legal Advice to Parliament* and Drewry, G. *Parliamentary Accountability for the Administration of Justice*, both in Horne, A. Drewry, G. and Oliver, D. (eds) *Parliament and the Law* (Oxford, Hart Publishing, 2013) and Le Sueur, A. *Parliamentary accountability and the judicial system* in Bamforth, N and Leyland, P (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013)

⁴⁴ Lord Phillips of Worth Matravers, *Judicial Independence*, Commonwealth Law Conference 2007, Kenya, 12 September 2007

these invitations” – in particular due to questions about partiality. He also claimed that appearances by judges before parliamentary committees in other Commonwealth common law jurisdictions were much less frequent. He went on to suggest that the increase in separation of powers and the “partisan nature of debates about the administration of justice” tended to suggest that it might not be appropriate for judges to comment on certain matter upon which they have done so in the past.⁴⁵

These concerns were later echoed by the (then) Master of the Rolls, Lord Neuberger, who noted, in a lecture in 2012, the “increasing, and perhaps not entirely beneficial, tendency for members of the judiciary to be asked to give evidence to Parliamentary committees” and the fact that the judges “cannot offer such committees legal advice, just as they cannot provide the executive with legal advice.”⁴⁶ Given that Members of the House of Lords cannot be compelled to attend at select committees, one might spot a certain irony in the fact that by ensuring their removal from the legislature, the most senior judges suddenly became, at least theoretically, compellable by Parliament. A further argument against the practice was raised by Lord Justice Toulson, who wrote a note to Justice Minister, Lord McNally stating that: “Judges who are called before such committees may have views of their own which do not necessarily represent the views of the judiciary” arguing that “they may not be particularly well informed and it can be an easy temptation for them to become drawn into political areas.”⁴⁷ Quite what methods the judiciary has, as an institution, to divine the “views of the judiciary” as a whole remains unclear, but the question becomes more relevant in circumstances where the senior judges take a more centralised approach.⁴⁸

In October 2012, the Judicial Executive Board published *Guidance to Judges on Appearances before Select Committees*. It conveyed much of the sense of unease suggested by the earlier judicial comment, although it did not go so far as challenging the ability of Parliament to summon judges. The guidance stated that appearances before Committees should be considered “exceptional”, noting that “until the last quarter of the twentieth century there were virtually no appearances by judges before parliamentary committees.” The guidance provided for a very centralised procedure that envisaged requests for attendance going directly to the Private Office of the Lord Chief Justice “for administrative convenience.” This is a change from past practice when Committees might approach a Head of Division or other senior judge (or a judge who acted in a representative capacity, such as the Secretary to the Association of District Judges) directly. The current guidance indicates that:

25. In the unlikely event that agreement as to judicial attendance cannot be reached through informal channels and the select committee indicates it is unhappy with a

⁴⁵ Sir Jack Beatson, *Judicial Independence and Accountability: Pressures and Opportunities*, Nottingham Trent University, 16 April 2008

⁴⁶ Lord Neuberger, *Where Angels Fear to Tread*, Holdsworth Club Presidential Address, 2 March 2012

⁴⁷ House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, para 55

⁴⁸ For an example of this, see, Judiciary of England and Wales, *Response of the Senior Judiciary to Law Commission consultation on contempt of court*, March 2013, which noted that the report reflected “the views of the President of the Queen’s Bench Division, the Senior Presiding Judge, Lord Justice Leveson, Lord Justice Goldring, and other senior judges. It has not been possible, however, to consult all relevant judges.”

proposed non-attendance or with a judge declining to answer particular questions, the Lord Chief Justice will be consulted.

26. It is extremely unusual and very unlikely to be the case that a parliamentary committee will order a judge to attend.⁴⁹

It is evident that tensions can arise – a recent example relates to the request that Lord Justice Leveson attend the Culture, Media and Sport Committee following the publication of his report on media standards.⁵⁰ It is worth noting, however, that this is a very unusual case, since it relates to the conduct and conclusions of a public inquiry, rather than a strictly judicial matter. John Whittingdale, the Chair of the Committee, was quoted in the *Daily Telegraph* as having said: “He chaired an inquiry which made recommendations to Parliament, it doesn’t seem unreasonable that Parliament asks him some questions about that.”⁵¹

Clearly, if the judges have concerns about being summoned before parliamentary committees, they are also likely to feel that increasing accountability through an appointments process will impinge on their independence. Nonetheless, as was set out in *The Changing Constitution: A Case for Judicial Confirmation Hearings*, a number of commentators have begun to express concern about the balance that has been struck.⁵² In a recent submission to the Lords Constitution Committee, Alan Paterson has expanded on this argument, pointing out the need for an appropriate balance between judicial independence and accountability:

If, as in this jurisdiction, we have, over the last 30 years, conferred more and more powers and responsibilities on the judiciary – and they have played a role in that – and if we pushed for a separation of powers in place of the older balance of powers, then we have created a more powerful judiciary. Therefore you have an accountability problem that goes with that in a democracy, which of course has to balance the paramount need for judicial independence. So you have to hold these in tension. The best way of getting accountability involved in that tension is at the judicial appointments stage. So you need a balance between accountability and independence; it has to be a fair, open and transparent procedure and it has to be equal-opportunities appropriate.⁵³

Erika Rackley has stated that effective political oversight of the judicial appointments process, through an increased role for parliament, serves at least three purposes:

First, the ‘overt political accountability’ it offers, particularly in the appointment and selection of the senior judiciary, enhances the democratic legitimacy of the appointments

⁴⁹ Judicial Executive Board, [Guidance to Judges on Appearances before Select Committees](#), October 2012 (last accessed 15 March 2013). It is unclear how this Guidance relates to Supreme Court Justices

⁵⁰ *The Independent*, “Lord Leveson refuses to be drawn into row on press regulation”, 10 October 2013

⁵¹ *Daily Telegraph*, “Lord Justice Leveson could appear in front of MPs within weeks”, 25 June 2013. See also, *The Times*, “Leveson invited to give evidence before MPs”, 26 June 2013

⁵² Horne A, *The Changing Constitution: A Case for Judicial Confirmation Hearings?* Study of Parliament Group Paper No. 1, 2010, p30

⁵³ Alan Paterson, Uncorrected Oral Evidence to the House of Lords Select Committee on the Constitution Inquiry on the Judicial Appointments Process, 6 July 2011, Q2

process. Second, to the extent that it leads to greater transparency, not only of the process itself but also of those appointed to the Bench – their motivations, values, competencies and so on – it increases public trust and confidence in the judiciary as a whole. Finally, insofar as greater political input in the appointment process reinforces public confidence in the legitimacy of the judiciary, this in turn strengthens the individual judge's decision-making. It is suggested that while the US Supreme Court judges might not enjoy the confirmation hearing experience, their judicial position is reinforced by it.⁵⁴

Different levels of political accountability may be more appropriate depending upon the precise role of the judiciary and different branches of government can have a role. In a jurisdiction where the judges are the guardians of a written constitution, such as the United States, or Germany, one can see very direct political involvement in judicial appointments. A similar approach can be seen at the European Court of Human Rights in Strasbourg, where judges are elected, without undermining the rule of law.⁵⁵

Whether such methods are appropriate for a court without direct strike down powers⁵⁶ is open to question and will be explored in more detail in later Chapters. The Canadian approach to judicial hearings, which appears very similar to our own parliamentary hearings for quango appointments, will also be mentioned briefly.

⁵⁴ Rackley, E. *Women, Judging and the Judiciary*, (Oxford, Routledge, 2013), p89

⁵⁵ Drzemczewski, A. *Election of judges to the Strasbourg Court: an overview*, European Human Rights Law Review (2010), pp377–383

⁵⁶ For an interesting recent discussion on the precise role of the UK Supreme Court as an apex court, see: Masterman, R. and Murkens, J. *What kind of a Court is the UK Supreme Court*, UK Constitutional Law Group Blog, 11 October 2011

Chapter 3: Increasing Judicial Power

*The ultimate authority in the English Constitution is a newly-elected House of Commons (Bagehot)*⁵⁷

*If changing judges changes law, it is not even clear what law is (Richard Posner)*⁵⁸

With a proper concept of what is meant by judicial accountability established, it is possible to consider why there is any case for change. Mechanisms for accountability are of obvious importance in all areas of good governance and, where there are shifts of power or responsibility, mechanisms for their control may require alteration.⁵⁹ The changing role of the judiciary and the resulting effects provide a clear prompt for a review of judicial accountability. Be it disputes over asylum and immigration; terrorism legislation; or the need for a privacy law, the period since entry into force of the Human Rights Act 1998 has arguably seen more conflict between parliamentarians and the senior judiciary than any in recent memory.⁶⁰ Many of these issues arise from the challenge of giving due regard to the ‘rule of law’ – a concept now accepted by most politicians (if resolutely undefined) – whilst seeking to maintain any concept of the Diceyan reading of Parliamentary sovereignty. It has been argued by some commentators that the United Kingdom is currently in a “transitional phase from parliamentary to constitutional democracy.”⁶¹ One consequence of this is that the constitution is becoming “increasingly juridified”.⁶² This can be seen to result in a gradual (but ratcheting) narrowing of the freedom of action of politicians and bureaucrats (whilst potentially increasing public accountability).⁶³ Whilst this might once have seen a preoccupation of the tabloid press, today one can even find a *Guardian* editorial conceding that liberals may “brush off the concern about unelected hands grabbing too much political power at their peril.”⁶⁴

The various challenges to Dicey’s doctrine of the supremacy of Parliament were set out in some detail in *A Case for Judicial Confirmation Hearings* and, hence, these arguments will not be rehearsed extensively here. Nonetheless, it is worth noting that it is broadly recognised that the passage of the European Communities Act 1972 and of the Human Rights Act 1998 have impacted heavily on Dicey’s once sacrosanct proposition. In addition to these obvious legislative restrictions on the supremacy of Parliament, members of the executive have also

⁵⁷ Bagehot, W, *The English Constitution* (1867), (Oxford World’s Classics, 2009 reissue) p160

⁵⁸ Posner, R. *How Judges Think* (London, Harvard University Press, 2008), p1

⁵⁹ Paterson, A. *Final Judgment* (Oxford, Hart, 2013), p306

⁶⁰ For a summary of the author’s views on these issues, see: Horne, A and Maer, L. *From the Human Rights Act to a Bill of Rights?* in Horne, A. Drewry, G. and Oliver, D. (eds) *Parliament and the Law* (Oxford, Hart Publishing, 2013)

⁶¹ Malleson, K. *The New Judicial Appointment Commission in England and Wales*, in Malleson, K and Russell, P. *Appointing Judges in an Age of Judicial Power* (University of Toronto Press, 2006), p41

⁶² Jowell, J. and Oliver, D. *The Changing Constitution* (Oxford University Press, 2004) p xv. Juridification has been defined as “the increasing role of the courts in the process of collective decision making”. See: Bevir, M, *The Westminster Model, Governance and Reform*, *Parliamentary Affairs*, 61(4) (2008), pp559–577 at 559

⁶³ *Ibid.* See also, Flinders, M. *Mechanisms of Judicial Accountability in British Central Government*, *Parliamentary Affairs* 54(1) (2001) pp54–71 at 55

⁶⁴ *The Guardian*, “Anti-cuts litigation: court politics”, 3 November 2011

complained that their freedom of action is increasingly circumscribed by the decisions of the courts, due to the increase in scope and frequency of administrative law challenges.⁶⁵

Notwithstanding these substantive adjustments, there has also been, as Bogdanor has put it, a broader change, a “transformation of political questions into legal questions” and “historical questions of political philosophy into jurisprudential questions.”⁶⁶

This has no doubt been accelerated by the introduction of the Human Rights Act and discussions around whether it is a ‘constitutional statute’. These changes can also be traced back to the growth of judicial review in the 1960s and the passage of the Supreme Court Act 1981, which made judicial review more accessible. Indeed, it appears that the enlargement of the state and the desire of the state to use “law to realise notions of distributive justice” made it inevitable that the judiciary would be drawn into matters of political controversy.⁶⁷ Flinders suggests that while previously friction had been avoided through a process of “non-provocation”, following the expansion of judicial review (and by the mid-1990s), “the judiciary had significantly extended the sphere of executive action that it was willing to rule on; and the relationship between the judiciary and the executive had deteriorated markedly (and often publicly).”⁶⁸

In a compelling narrative that builds on arguments relating to judicial preference (perhaps first raised by John Griffith), Conor Gearty has argued that the expansion of judicial review, combined with the more recent constitutional changes, has resulted in a *potential* problem, namely that a new “hoop” – “does it please the judges” – is “hovering dangerously in the background, camouflaged by grandiose talk of the rule of law, principles of constitutionalism and disturbance to the constitutional order.”⁶⁹

The judiciary itself would not necessarily recognise this problem. In a speech given on the eve of his retirement in July 2013, the (then) Lord Chief Justice, Lord Judge, gave the typical response to this accusation:

Judges themselves are governed by the rule of law which they are responsible for upholding without fear or favour. They cannot give judgments according to their personal whims or prejudices or preferences. They sometimes must give judgments contrary to their personal preferences, because that is what the law requires. The difficulties they have to face are not always appreciated. They are easily criticised, and cannot answer back.⁷⁰

⁶⁵ Horne A, *The Changing Constitution: A Case for Judicial Confirmation Hearings?* Study of Parliament Group Paper No. 1, 2010, pp4–6

⁶⁶ Bogdanor, V. *Human Rights and the New British Constitution*, JUSTICE Tom Sargent Memorial Lecture 2009, 14 October 2009

⁶⁷ Loughlin, M. *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford, Hart, 2000), p108. See also Horne A. *The Changing Constitution: A Case for Judicial Confirmation Hearings?* Study of Parliament Group Paper No. 1, 2010, pp3–6

⁶⁸ Flinders, M. *The Politics of Accountability in the Modern State*, (Ashgate, 2001), pp138–9

⁶⁹ Gearty, C. *Are Judges Now Out of their Depth?*, Tom Sargent Memorial Lecture, October 2007

⁷⁰ Lord Judge, Speech at The Lord Mayor’s Banquet to Her Majesty’s Judges, 3 July 2013

Nonetheless, the issue has been recognised by some judges, albeit rather indirectly. Lord Justice Etherton, for example, has recently considered the way that a judge's personal and moral philosophy can impact on judicial decision making, noting that what has changed with the Human Rights Act "are the size and importance of the gaps, left unfilled by common law precedent, where the personal outlook of judges and their political role feature much more prominently."⁷¹ Cardozo explained this particularly eloquently with his reflection that:

Every day there is borne in on me a new conviction of the inescapable relation between the truth without and the truth within. The spirit of the age, as it is revealed to us, is too often only the spirit of the group in which accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.⁷²

Sir Stephen Sedley has recognised the argument that "the courts are one of many locations in which politics are conducted" and has previously warned that there is every reason to suspect that the introduction of a Bill of Rights would "shift a further tranche of political power to the judiciary", arguing that under such a model (and, indeed, under the European Convention on Human Rights and the Canadian Charter of Rights) "the criterion of what is 'justifiable in a democratic society' illogically transfers to an unelected judiciary the final say as to whether what an elected legislature has done is consistent with democracy."⁷³

In his book, *The Judge in a Democracy*, the former President of the Supreme Court of Israel, Aharon Barak, acknowledged that "judicial philosophy is closely intertwined with the personal experience of the judge." He went on to write that:

It is influenced by his education and personality. Some judges are more cautious and others less cautious. There are judges that are more readily influenced by a certain kind of claim than are other judges [...]. Every judge has a complex life experience that influences his approach to life, and therefore his approach to law. There are judges for whom considerations of national security or individual freedom are weightier than for other judges. There are judges whose personal makeup obligates order, and as a result, they require an organic development and evolution of the law. There are judges whose personalities place great importance on the proper solution, even if they reach that solution in a non-evolutionary way. There are judges whose starting point is judicial activism; there are judges whose starting point is self restraint. There are judges who give special weight to considerations of justice in the general sphere, even if it creates injustice in the individual case. Other judges emphasize justice in the individual case even if it does not fit with the general justice at the basis of the norm.

One must always remember that this judicial philosophy – the fruit of the judge's personal experience – is relevant in the realm in which the judge has discretion. It functions only within a range of reasonableness. It works only in cases where the legal problem has more than one legal solution.⁷⁴

⁷¹ Lord Justice Etherton, *Liberty, the archetype and diversity: a philosophy of judging* [2010] Public Law 727 at 740

⁷² Cardozo, B. *The Nature of the Judicial Process* (Cosimo Inc, 2009) pp 174–5

⁷³ Sedley, S. *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011), p288

⁷⁴ Barak, A. *The Judge in a Democracy*, (Oxford, Princeton University Press, 2006), p119

American Circuit Judge and academic, Richard Posner, has underscored the dangers of politicisation when considering the replacement of a judge on the US Supreme Court with another who had more trenchant and defined views (and the effect this had on outcomes). Posner observed that the change demonstrated the “personal and political elements in judging” and noted, worryingly, that “if changing judges changes law, then it is not even clear what law is.”⁷⁵

Politics in Law: Campaigning and Politicisation

As well as the vagaries of judicial philosophy, it is also clear that many Non-Governmental Organisations (NGOs) and other pressure groups try to use court processes, such as judicial review, as an extension of their campaigning work.⁷⁶ This may be a perfectly legitimate way of highlighting poor administrative decision making; however, the Government expressed concerns about this in 2012, launching a consultation which aimed to restrict what it described as “weak” and “hopeless” cases.⁷⁷ The Ministry of Justice consultation paper said that the government was concerned that “the Judicial Review process may in some cases be subject to abuses, for example, used as a delaying tactic, given the significant growth in its use but the small proportion of cases that stand any reasonable prospect of success.”⁷⁸

The consultation paper also noted the growth in claims for judicial review: “In 1974, there were 160 applications for Judicial Review, but by 2000 this had risen to nearly 4,250, and by 2011 had reached over 11,000” (although it recognised that over three quarters of these claims related to asylum and immigration).⁷⁹ The consultation was heavily criticised⁸⁰ (a typical response complained that it was “riddled with unsubstantiated allegations sitting

⁷⁵ Posner, R. *How Judges Think*, (London, Harvard University Press, 2008), p1

⁷⁶ See for example: Lewis, J. *Winning the Campaign or Winning the Case?* [2007] *Judicial Review* 107; De Smith Woolf and Jowell, *Judicial Review of Administrative Action* (Sweet and Maxwell 1995), p23 and Harlow, C. and Rawlings, R. *Pressure through Law* (Routledge, 1992)

⁷⁷ Ministry of Justice, *Judicial Review: Proposals for Reform* (CP25/2012), 13 December 2012. Not that this idea of increasing importance of judicial review (and activism) is a new one – in 1992 Ferdinand Mount said that “more conclusive evidence of the revival of judicial activism is the huge and benign expansion of judicial review of administrative action. He noted that the “fivefold increase [in applications] within a decade is little short of a judicial revolution.” It is not clear that the Government still views the continued increase in applications as benign any more. Mount, F. *The British Constitution Now*, (London, William Heinemann, 1992), p261

⁷⁸ Ministry of Justice, *Judicial Review: Proposals for Reform* (CP25/2012), 13 December 2012, para 2. In a rather blunter article in the *Daily Mail*, the Secretary of State for Justice, Chris Grayling, argued that “the professional campaigners of Britain are growing in number, taking over charities, dominating BBC programmes and swarming around Westminster ... one essential part of the campaigner’s armoury is the judicial review, through which it is possible for them to challenge decisions of government and public bodies in the courts. As a result, they hire teams of lawyers who have turned such challenges into a lucrative industry.” *Daily Mail*, “The judicial review system is not a promotional tool for countless left-wing campaigns, says Chris Grayling”, 6 September 2013. It is unclear why the Justice Secretary took the view that NGOs would wish to waste their limited resources on “weak” or “hopeless” cases

⁷⁹ *Ibid*, para 28. See also, Thomas, R. *Immigration Judicial Reviews*, UK Constitutional Law Blog, 12 September 2013

⁸⁰ See for example, Bondy, V. and Sunkin, M. *Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse*, UK Const. L. Blog (10 January 2013) (available at <http://ukconstitutionallaw.org>) and Elliott, M. *Judicial review – why the Ministry of Justice doesn’t get it*, UK Const. L. Blog (16 December 2012) (available at <http://ukconstitutionallaw.org>)

awkwardly alongside admissions about the lack of supporting evidence at the Government's disposal").⁸¹

In spite of this, in April 2013, the Government published a response announcing that a number of the restrictions suggested in the original consultation would be taken forward.⁸² There was further alarm following the publication of a separate Ministry of Justice consultation, entitled *Transforming Legal Aid, Delivering a more credible and efficient system* (CP14/2013). The Ministry of Justice argued that the legal aid reforms proposed would "not prevent legal aid being granted for future judicial reviews" but said that it was "concerned that currently legal aid is being used to fund weak JRs which do not receive a court's permission to proceed, and so have little effect other than to incur unnecessary costs to the taxpayer."⁸³

The Judicial Executive Board sent a collective response to the second consultation which could be seen to be critical of many of the Government's proposals and their potential effect on the legal profession.⁸⁴

Recently, concerns have also been raised by some commentators about the use of s 149 of the Equality Act 2010 (the public sector equality duty). In particular, it has been suggested that activists allow the impression that the courts can be used for "nakedly political ends", even where the courts themselves have been reticent.⁸⁵ Lord Justice Laws recognised this concern in the case of *R (on the application of MA and others) v Secretary of State for Work and Pensions and another*,⁸⁶ a challenge against what critics referred to as the "bedroom tax".

He observed that:

The cause of constitutional rights is not best served by an ambitious expansion of judiciary territory, for the courts are not the proper arbiters of political controversy. It is in this sense that judicial restraint is an ally of the s 149 duty, for it keeps it in its proper place, which is the process and not the outcome of public decisions. I would with respect underline what was said by Elias LJ at para 78 in *Hurley*, rejecting a submission for the claimants that it was for the court to determine whether appropriate weight has been given to the duty: "it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

Mark Bevir has contended that when the application of a rule is given over to courts, citizens "have an incentive to try to get their way on that issue by employing a lawyer, rather than by

⁸¹ Liberty, *Liberty's Response to the Ministry of Justice Consultation, Judicial Review: Proposals for Reform*, January 2013

⁸² Ministry of Justice, *Reform of Judicial Review: the Government response* (Cm 8611), April 2013

⁸³ *Law Society Gazette*, "Treasury counsel condemn reforms to judicial review", 7 June 2013

⁸⁴ Judiciary of England and Wales, *Response of the Judicial Executive Board to the Government's Consultation Paper CP 14/2013, Transforming Legal Aid: Delivering a more credible and efficient system*, 4 June 2013. For a vigorous critique of the Government's proposals, see: Sedley, S. *London Review of Books*, *Beware Kite Flyers*, 12 September 2013. See also, Wagner, A. *Judicial Review is not part of a vast left wing conspiracy*, UK Human Rights Blog, 9 September 2013

⁸⁵ See: e.g. Callus, G. *We Must revisit the Equality Act to stop vexatious court cases*, Spectator Coffee House, 8 August 2013

⁸⁶ [2013] EWHC 2213

in engaging in democratic politics.”⁸⁷ Phillip Sales has suggested that when one is disenchanted with political life, which can be subject to moral panics, disproportionate and other over hasty decisions and potentially dangerous populism, “the relative insulation of the courts from popular political pressure seems attractive.”⁸⁸ The result of all of this is that, when the will of politicians is thwarted by the courts, questions about judicial accountability are frequently posed by Ministers and backbenchers alike.⁸⁹

Nonetheless, it is worth recognising that political responses to these questions have been somewhat muddled. Politicians, whether members of the executive or backbench Members of Parliament, often appear to have little time for checks and balances on their power.⁹⁰ Criticism of judges, whether domestic, from Strasbourg, or the courts of the European Union, is often fierce and no longer seems to be moderated by the conventions of old. Reporting of these conflicts in the press is often inaccurate or inflammatory. Moreover, recent responses, such as efforts to make rights “more British”; balance them with responsibilities; or, “bring rights back home”,⁹¹ do not necessarily address the crux of the difficulties which often come back to the question of who has the final word on the law – elected politicians or judges.

Finally, it is worth noting that these are not concerns that have only been voiced by those on the right of the political spectrum. Former Justice Secretary and Lord Chancellor, Jack Straw, has recorded in his memoirs that an obstacle to the incorporation of the European Convention on Human Rights was the fear that it would give courts the power to override the sovereignty of Parliament. He noted that “the tribal sentiment inside the Labour party at the time inclined us to distrust the judiciary, who were, in this not wholly accurate view, regarded as reactionary elements of the British Establishment.”⁹²

The Judiciary and the Law Making Process

The abovementioned concerns are all worthy of some consideration; and many of them stem, at least in part, from the age-old question about the extent to which the judiciary is involved in the law making process. It has been suggested that one reason that Parliament did not press for any role in the judicial appointments process during the passage of the Constitutional Reform Act 2005 is due to the doctrine of parliamentary supremacy. That is to say that there was no perceived need for Parliament to shape the courts through participation in judicial appointments – “as final arbiter of the law, Parliament could

⁸⁷ Bevir, M, *The Westminster Model, Governance and Reform*, Parliamentary Affairs, 61(4) (2008), pp559–577 at 565

⁸⁸ Sales, P. *Judges and the Legislature: Values in Law*, Cambridge Law Journal, 71(2) July 2012, pp287–296 at 288

⁸⁹ See for example: *The Times*, “Judges Dismayed Tory Ministers – Asylum Ruling” 8 September 2001; *The Evening Standard*, “Blunkett – I won’t give in to the judges”, 12 May 2003; *The Times*, “Victory for Afghan Hijackers fighting to remain in Britain”, 5 August 2006; *The Guardian*, “Leave human rights law to the judges”, 11 October 2011

⁹⁰ See, for example: O’Cinneide, C. *Human Rights law in the UK – is there a need for fundamental reform?* [2012] European Human Rights Law Review 595

⁹¹ Pinto-Duschinsky, M. *Bringing Rights Back Home*, (Policy Exchange, 2011)

⁹² Jack Straw, *Last Man Standing: Memoirs of a Political Survivor*, (London, Macmillan, 2012), p272. See also, Paterson, A. *Lawyers and the Public Good: The Hamlyn Lecture 2011*, (Cambridge University Press, 2012) pp135–137

override any decision of the Appellate Committee of the House of Lords.”⁹³ This Diceyan view that the practice of the common law does not really contradict the supremacy of Parliament (as judicial legislation is subordinate) is now open to increasing doubt.⁹⁴

In response to recent complaints (and particularly where cases raise Convention rights, or relate to equality duties), the judges often state that they are simply fulfilling duties imposed on them by Parliament. One clear example is the transformation of Article 8 of the European Convention on Human Rights (ECHR) into a privacy law, to be deployed (usually) against the tabloid press. In response to any criticism, the judges will often put forward the excuse that “we apply the human rights act because that is what Parliament has instructed us to do.”⁹⁵ In terms of the development of a privacy law, this rather ignores the fact that the main Strasbourg cases developing the law of privacy occurred well after the enactment of the Human Rights Act, and arguably fell rather more into the “living instrument” school of thought, which has not necessarily received political endorsement.⁹⁶

This doctrine, which dates back to the case of *Tyrer v United Kingdom*,⁹⁷ essentially means that the courts will interpret the Convention according to present-day conditions, despite the fact that interpretation they reach might not have accorded with the views of the original drafters. Even direct proponents of the living instrument, or “living tree” doctrine, such as Baroness Hale, have concluded that there are “some natural limits” to its growth and development. Otherwise there is a fear that the judgments of the domestic and Strasbourg courts “will increasingly be defied by our governments and Parliaments.”⁹⁸ However, whilst Baroness Hale acknowledged a need to leave some matters to Parliament, she took the view that this was not down to the fact that Parliament was more democratic than the courts (since “the courts are just as essential to a democracy based on the rule of law as is Parliament”), but rather down to the more pragmatic issue of “institutional competence” (discussed further below).

In the case of the privacy debate, not only has the judiciary seemed to give little weight in their judgments to Parliament’s views (expressed in section 12(4) of the Human Rights Act) that “the court must, *inter alia*, have *particular* regard to the importance of the Convention

⁹³ Clark, M L. *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, Louisiana Law Review, 71, no. 2 (2011): 451–502 at 487. Although it could not be said that Parliament carefully deliberated or debated this issue

⁹⁴ Bevir, M, *The Westminster Model, Governance and Reform*, Parliamentary Affairs, 61(4) (2008), pp559–577

⁹⁵ Lord Phillips of Worth Matravers, interview with the BBC, 11 October 2011 (<http://www.bbc.co.uk/news/uk-15253829>)

⁹⁶ See for example: *Campbell v MGN Ltd* [2004] 2 AC 457; *Re S (A Child)* [2005] 1 AC 593 and in the Strasbourg context, *Von Hannover v Germany* (2005) 40 EHRR 1. For a political critique of the “living instrument” doctrine, or “rights inflation”, as some refer to it, see: Dominic Raab MP *The Daily Telegraph*, “What happens if we defy Europe – Nothing”, 2 February 2011

⁹⁷ (1979–80) 2 EHRR 1

⁹⁸ Baroness Hale, *Beanstalk or Living Instrument – How Tall can the ECHR Grow*, Barnard’s Inn Reading, June 2011. Of course, proponents of the doctrine might also note that it should not have been a particular surprise to those who drafted the HRA 1998, since, by that stage, it had been in operation for nearly 20 years

right to freedom of expression” (my emphasis),⁹⁹ but once the courts have expressed their views on the appropriateness of these types of privacy laws as a *fundamental* human right under the Convention, it becomes rather difficult (at the very least politically, but also practically) for the Government to pass legislation to the contrary.¹⁰⁰

A New Approach to Cases Involving National Security

A good example of an area which has caused conflict between the judiciary and the executive is the courts’ approach to national security cases. A long series of cases (until 2001) had demonstrated the reluctance of the courts to interfere where the Government had argued that national security was in play.¹⁰¹

In the case of *Hosenball*, Lord Denning said “our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a setback. Time after time Parliament has so enacted and the courts have loyally followed.” More recently, in the case of *Rehman*, Lord Hoffmann observed that:

What is meant by “national security” is a question of construction and therefore a question of law [...]. On the other hand, the question of whether something is “in the interests” of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial discretion. They are entrusted to the executive.¹⁰²

Since then, there has been what can only be described as a sea change in approach, following the case of *A v Secretary of State for the Home Department*.¹⁰³ Lord Bingham, who gave the leading judgment, considered a statement by the Attorney General that:

⁹⁹ Lord Justice Sedley did seek to address this point in the case of *Douglas and others v Hello! Ltd* [2001] 2 All ER 289. He concluded, amongst other things, that: “it is ‘the Convention right’ to freedom of expression which both triggers the section (see s 12(1)) and to which particular regard is to be had. That convention right, when one turns to it, is qualified in favour of the reputation and rights of others and the protection of information received in confidence. In other words, you cannot have particular regard to art 10 without having equally particular regard at the very least to art 8.” See paras 131–137. See also: *BBC Online*, “Human Rights Act ‘may need amending’ in privacy row” 24 May 2011. The courts have had even less regard to the ‘interpretation clause’ as s 13(1) of the 1998 Act, which relates to freedom of thought, conscience and religion. See for example the comments of Lord Justice Buxton in *R (Williamson) v Secretary of State for the Home Department* [2002] EWCA Civ 1926, [2003] QB 1300 at [49] and Mr Justice Richards, who in the case of *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), [2004] IRLR at [41] where he observed that “while there is a need to have specific regard to the rights protected by article 9, section 13 of the 1998 Act does not give greater weight to those rights than they would otherwise enjoy under the Convention.”

¹⁰⁰ Particularly given the insistence by the courts that if Parliament wishes to breach Convention rights, it cannot do so by implication, but must do so in clear terms (for more on this, see, for example: Kavanagh, A. *Constitutional Review Under the UK Human Rights Act*, (Cambridge University Press, 2009), p317

¹⁰¹ See: e.g. *Liversidge v Anderson* [1942] AC 206, *R v Home Secretary, ex p Hosenball* [1977] 3 All ER 452; *R v Home Secretary, ex p Cheblak* [1991] 2 All ER 319 and *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153. For further analysis, see: Horne, A. *The Courts and Counter-Terrorism: Asserting the Rule of Law?* in McDougall, I. *Cases that changed our lives* (London, Lexis Nexis, 2010) p195 *et seq*

¹⁰² [2001] UKHL 47, at para 50

¹⁰³ [2004] UKHL 56, [2005] AC 68 HL

37. [...] It was for Parliament and the executive to assess the threat facing the nation, so it for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment.

He rejected this argument, concluding that:

42. [...] The function of independent judges, charged to interpret and apply the law is universally recognised as a cardinal function of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision making as in some way undemocratic [...] The 1998 [Human Rights] Act gives the courts a very specific, wholly democratic mandate. As Professor Jowell has put it “The courts are charged by Parliament with delineating the boundaries of a rights based democracy”.

This judgment, in what is commonly referred to as the Belmarsh case (since it related to the detention, without trial, of non-national terror suspects who could not be deported – mainly at Belmarsh high security prison), might have been seen by some as a judicial response to some of the perceived excesses which had come about at the height of the so called “War on Terror”. Jack Straw appeared to see it that way, describing the judgment as a judicial “backlash”.¹⁰⁴ Certainly, the Belmarsh case has been seen as a key development in the courts asserting the rule of law and being less deferential to the views of the executive on this subject.¹⁰⁵

After the judgment in the Belmarsh case, it might be thought that the domestic courts seemed more reticent to interfere in subsequent national security cases, finding for the Government in a series of cases, perhaps feeling that their point had been made.¹⁰⁶ Yet, the genie was out of the bottle, and in spite of the more conservative views of the UK courts, the European Court of Human Rights proceeded to find against the Government in a series of cases relating to: the use of secret evidence; stop and search powers; and, the deportation of a notorious terror suspect (Abu Qatada) where there was a risk that torture evidence might be deployed against him.¹⁰⁷ Some of these Strasbourg judgments were later considered and upheld (not always enthusiastically) by the domestic courts – much to the consternation of the Government.¹⁰⁸

¹⁰⁴ Straw, J. *Last Man Standing: Memoir of a Political Survivor*, (London, Macmillan, 2012), p283

¹⁰⁵ See: e.g. *Cases: A v Secretary of State for the Home Department* (2005) 68 (4) *Modern Law Review* 654–80. In particular, Tom Hickman, who described the judgment as an “elucidation of the separation of powers” and “an important statement of constitutional principle that properly affirms a commitment to the rule of law as understood in modern liberal democracies” (at 664–5)

¹⁰⁶ See: e.g. Ewing, K.D., *Bonfire of the Liberties*, (Oxford University Press, 2010)

¹⁰⁷ *A and Others v United Kingdom* [2009] ECHR 301; *Gillan and Quinton v United Kingdom* [2010] Crim LR 415, [2010] ECHR 28; *Othman (Abu Qatada) v United Kingdom* [2012] ECHR 56

¹⁰⁸ *Secretary of State for the Home Department v AF No. 3* [2009] UKHL 28 in which Lord Rodger observed “In reality we have no choice: Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed.” (at para 98)

It is interesting to ponder what the effect of such judgments might have been had they been applied in the past (and whether the lawyers and judges who these days may have little first-hand experience of such issues, always know best).

Who Should have the Final Word on the Law?

The issue as to who has the final word is particularly concerning in circumstances where society at large believes that the courts have struck the wrong balance. In the UK, while Parliament legally retains the final say under the 1998 Act, the politics of the situation can be very difficult. While Parliament can theoretically intervene to correct the law, practical difficulties may arise if such an intervention would be deemed by the courts to infringe a Convention right. Commenting on a similar picture in Canada, Lorne Neudorf has argued that the “dialogue” that is meant to exist “is sometimes more like a judicial monologue given political reluctance to challenge judicial decisions that hold rhetorical advantages, particularly in human rights cases.”¹⁰⁹

This criticism has been echoed by political scientist, Michael Pinto-Duschinsky, who has said that while the Human Rights Act protected the formality of parliamentary sovereignty, “Parliament has the last say, but only if it submits to the views of the judges.” Pinto-Duschinsky argues that in circumstances where a court issues a declaration of incompatibility under section 4 of the 1998 Act, “if Parliament refuses to introduce legislation to remove the incompatibility, any person can then bring a case against the UK before the Strasbourg court in the almost sure knowledge that Strasbourg will decide against the UK.”¹¹⁰ Anthony Bradley has contended that: “A declaration of incompatibility leaves a United Kingdom statute mortally wounded, and a government that proceeds as if it were not does so at its peril.”¹¹¹ And, in a more philosophical vein, as Bogdanor has suggested, rights “purport to provide final answers” and “when someone says ‘I have a right’ that really ends the argument. It takes the argument out of politics.”¹¹²

As noted above, commentators often focus on the issue of whether Parliament can ignore a declaration of incompatibility. What could prove just as contentious as mere inaction would be if Parliament sought to introduce (or amend) legislation where the courts had already clearly indicated this would infringe Convention rights (for example: explicitly worded legislation to overrule the impact of *Chahal v UK* and subsequent judgments, to allow the Home Office to deport terror suspects to countries where there was a real risk that they

¹⁰⁹ Neudorf, L. *The Supreme Court and new judicial independence*, Cambridge Journal of International and Comparative Law (2012) 1(2), 25–43 at 41

¹¹⁰ Pinto-Duschinsky, M. *The Hijacking of the Human Rights Debate*, Standpoint Magazine, May 2012

¹¹¹ Bradley, A. *Publication Review: Parliamentary Sovereignty and the Human Rights Act* [2011] Public Law 203 at 206. For an up to date list of how the Government has responded to the 28 declarations of incompatibility (of which only 20 were upheld on appeal) see: London School of Economics, *Human Rights Futures Project: Declarations of Incompatibility under the Human Rights Act 1998*, April 2013 (available at: <http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2013/incompatibilityHRA.pdf>, last accessed 3 May 2013)

¹¹² Bogdanor, V. *Human Rights and the New British Constitution*, JUSTICE Tom Sargant Memorial Lecture 2009, 14 October 2009

would suffer torture).¹¹³ In those circumstances, Roger Smith, the former director of the NGO JUSTICE, has observed that the likely legal consequence would be that an application would be made to the European Court of Human Rights “whose decision the government was bound by treaty to implement.”¹¹⁴

There would also be a strong political cost, as Lord Hoffmann recognised in *R v Home Secretary, ex p Simms*, when he said:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is a great risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.¹¹⁵

It is evident that we have moved on from a situation in which judges were simply holding ministers to account “for the lawful exercise of the powers conferred upon them by Parliament” since they are now also “holding them accountable against judicial interpretations of very abstract rights” which have become a new form of judge made law.¹¹⁶ Hence, whilst one interpretation may be that the judges have done no more than give an interpretation of a law that Parliament has passed, others may form the view that the judiciary is clearly not only engaged in both policy and lawmaking, but also that it can sometimes have the final say on issues.¹¹⁷ This conclusion is bolstered by recent comments from the (then) Lord Chancellor, Kenneth Clarke, who has said that “if Parliament disagrees with a judgment, it is open to Parliament to consider reforming the law, but as long as we remain bound by the Convention on Human Rights, we cannot reform the law in a way that does not conform with our obligations under the Convention.”¹¹⁸

¹¹³ This, of course, has to be contrasted with situations where the courts have essentially ruled against the Government’s interpretation of the law on human rights grounds but invited Parliament to legislate if it preferred a contrary view, e.g. *R v Davis* [2008] UKHL 36; [2008] AC 1128 (anonymous witness evidence) and *Al Rawi and others v The Security Service and others* [2011] UKSC 34 (closed material procedures)

¹¹⁴ Smith, R. *Human Rights and the UK Constitution: can Parliament legislate “irrespective of the Human Rights Act”?* Legal Information Management, 6 (2006), pp274–281. The role of the Strasbourg Court falls outside the ambit of this work, but clearly has a high degree of relevance as to who has the final word in disputes between the legislature and the judiciary – see for example the conclusions of the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Report, Session 2013–14, HL Paper 103

¹¹⁵ [2001] 2 AC 115 at 131. See also the comments of Lord Justice Laws on ‘constitutional statutes’ in *Thoburn v Sunderland City Council* [2003] QB 151

¹¹⁶ Flinders, M. *The Politics of Accountability in the Modern State*, (Ashgate, 2001), pp140–1

¹¹⁷ An example of this is the Government’s failure to change the law in relation to the deportation of terror suspects where there is a risk of torture. Certainly, as its intervention in *Saadi v Italy* demonstrated, the Government never accepted the ruling in *Chahal v UK* (which introduced an absolute bar, irrespective of the conduct of the individual concerned), but it never felt confident enough to ignore its effects, even at the height of the “war on terror”, when it instead introduced many other contentious measures, such as indefinite detention of foreign terror suspects

¹¹⁸ Joint Committee on Human Rights, *The Government’s Human Rights Policy and Human Rights Judgments*, 20 December 2011, HC 1726-i, Q11

Lord Justice Etherton has controversially suggested that there is a fundamental difference between the top two courts (the Court of Appeal and Supreme Court) and the lower courts in this context because, as he put it:

The top two courts, the Supreme Court in particular, is now primarily a policy-making body over a much wider area than it ever was. Professor Bogdanor has referred quite rightly to the “New British Constitution” [...] This has totally changed the relationship between the policy-making judiciary in the highest two courts and Parliament. The judges are not accountable in relation to that policy-making element. This is what is critical.¹¹⁹

In part, the defensive comments from judges sound like a retreat to the past, since they echo an earlier age. As Pannick recognised in his 1987 text, *Judges*, until the 1960s, the judiciary was prone to deceive itself by suggesting that it merely applied the law made by Parliament and that the job of the judges was only to interpret the law.¹²⁰ In a speech in 1953, Lord Denning noted that it was “almost heresy” to admit that judges make law every day.¹²¹

There was subsequently a clear rejection of this ‘declaratory theory’ of law, given plain recognition by Lord Reid in 1972, when he said that:

There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the Common Law in all its splendour and that on a judge’s appointment there descends on him some magic knowledge of the words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales anymore.¹²²

Yet in spite of these moves, many of today’s judges have sometimes been reluctant to declare with the same clarity as Lord Radcliffe that “there was never a more sterile controversy than that upon the question whether a judge makes laws.”¹²³ This has become a particular issue with decisions taken pursuant to claims under the Human Rights Act. A further example of this reticence can be seen in Lord Justice Maurice Kay’s evidence on the Human Rights Act during a joint session of the (then) Constitutional Affairs Committee and Home Affairs Committee. Although he argued that judges had not simply arrogated power to themselves, he went on to contend that:

Whilst some judicial decision-making is discretionary, decision-making in most of the controversial cases on human rights is not. For example, whether a domestic statute is Convention-compliant, whether the terms of a control order amount to a lawful restriction of liberty or an unlawful deprivation of liberty, whether detention without trial of foreign terrorism suspects is disproportionate and/or discriminatory, whether the

¹¹⁹ Lord Justice Etherton, Uncorrected Oral Evidence to the House of Lords Select Committee on the Constitution Inquiry on the Judicial Appointments Process, 13 July 2011, Q47

¹²⁰ Pannick, D. *The Judges* (Oxford University Press, 1987), p3

¹²¹ Zander, M. *The Law Making Process*, 6th Edition (Cambridge University Press, 2004), p361

¹²² Lord Reid, *The Judge as Lawmaker* (1972) 12 Journal of the Society of Public Teachers of Law 22

¹²³ Lord Radcliffe, *Not in Feather Beds* (London, 1968), p271

denial of asylum support to an applicant for asylum pending the determination of his claim amounts to inhuman and degrading treatment, are all issues requiring judicial decision by the application of the law to the facts of the case. That is a matter of judgment according to the law, not discretion.¹²⁴

Many would consider that to be a controversial statement indeed.¹²⁵ The decisions may not be discretionary *per se*, but they certainly involve a careful balancing of competing interests. Moreover, the statement appears to show a worrying lack of self-awareness as to how a judge's personal views might colour his or her interpretation of the law when carrying out that balancing exercise, particularly in the type of 'hard cases' heard in the Court of Appeal and Supreme Court.¹²⁶ One member of the Supreme Court, Lord Sumption, recently observed that "there are some on the [Supreme Court] whose views you can guess at and be right more often than not" arguing that there was "an obvious schism between the natural parsons who tend to look at issues in moral terms and the pragmatic realists."¹²⁷

In the 1970s and 1980s it could be argued that, in spite of the rise of judicial review, there were still significant limits to judicial law making¹²⁸ and that Parliament continued to retain the final word. Under the Human Rights Act, things are not so clear. Long gone are the days in which Lord Reid was able to draw a distinction between judicial law making where "we are dealing with 'lawyers' law'" and those cases where the courts were not to proceed on their own view of public policy:

[C]ases where we are dealing with matters which directly affect the lives and the interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers.¹²⁹

Lord Dyson MR has considered the distinction more recently when addressing the issue of the limits of legitimate development of the common law by the judges in a speech *Where The Common Law Fears to Tread*.¹³⁰ He noted the well-known decision of Sir Thomas Bingham MR (as he then was) in *R v Cambridgeshire Health Authority ex p B*¹³¹ around the issue of

¹²⁴ HC 1554-I (Session 2005–06), 31 October 2006, Q67

¹²⁵ For an informative rebuttal to the proposition that hard cases have a single, correct, solution on the basis of existing legal rules and principles, see, for example: Paterson, A, *The Law Lords* (MacMillan, 1982), pp193–4

¹²⁶ See in particular, the contrasting views of Lord Justice Etherton in *Liberty, the archetype and diversity: a philosophy of judging* [2010] Public Law 727, where he observed that: "[T]he very essence of hard cases [is] that reasonable and knowledgeable jurists, judges and other citizens may fairly disagree about their correct outcome. They may disagree widely and with passion, reflecting broad divisions – including, economic, social, religious, ethical, political, gender and ethnic – within the community. It is difficult to conceive the possibility that any judge hearing such a case would exclude his or her own view, characterising it as being unreasonable or different from the view of every other reasonable person in the community."

¹²⁷ *Financial Times*, "British Institutions: The Supreme Court", 19 April 2013. It is worth noting that the Supreme Court judges distinguished this from knowing "how their colleagues vote in elections"

¹²⁸ For an interesting historical debate on the legitimacy of judicial law making see: Paterson, A, *The Law Lords* (MacMillan Press, 1982), pp190–200

¹²⁹ *Pettitt v Pettitt* [1970] AC 777, 794–5. See also: Paterson, A, *The Law Lords* (MacMillan, 1982), p171

¹³⁰ Lord Dyson, *Where The Common Law Fears To Tread*, ALBA Annual Lecture, 6 November 2012, Lincoln's Inn

¹³¹ *R v Cambridgeshire Health Authority ex p B* [1995] 1 WLR 898

institutional competences¹³² and also recognised that the UK's adversarial system of advocacy is not always well suited to assisting the court to arrive at the best solution on policy decisions. He contended that it was still the case that precedent would suggest that it was the "common law rules which might be described as 'lawyer's law – such as witness immunity or mistake of law – that judges are most ready to develop." Yet, he also recognised the issue of "judicial temperament", stating that:

It is an inescapable fact that some judges are more conservative than others. Some are cautious and prefer to paddle in the warm and safe shallows of clear precedent. Others are more adventurous and are prepared to give it a go in the more treacherous waters of the open sea.

These issues prove more contentious when considering areas of law in which a well-educated layman might feel qualified to express an opinion – such as questions of the proportionality of Government actions under the Human Rights Act. Jonathan Sumption, in a speech given prior to his elevation to the Supreme Court, noted the gradual extension of what were perceived to be "fundamental rights" that would justify judicial interference and accepted that there was a risk of the judiciary overextending its reach. He suggested that in some cases one could readily identify a tendency on the part of judges to form a view on the merits of an underlying policy under challenge and argued that:

There is no escaping the fact that there are issues on which the problem is not so much a lack of clarity in the expression of Parliament's will as a radical difference between the collective instincts of the judiciary and those of politicians facing the usual electoral pressures.¹³³

One irony is that, while Parliamentary sovereignty continues to ensure that Parliament can easily overrule the courts on issues of lawyer's law, sometimes for politically expedient reasons (and despite the fact the court may clearly have the expertise in developing the law in a given area¹³⁴), this is rather less straightforward when questions around rights are in play – despite the fact that far more straightforward matters may be under discussion and fair minded people could reasonably disagree on the conclusions reached.

¹³² The question at issue was the allocation of resources by a health authority for medical treatment. The court said that difficult judgments had to be made as to how a limited budget would be best allocated: "that is not a judgment which a court can make"

¹³³ Sumption, J. *Judicial and Political Decision Making: The Uncertain Boundary*, The F.A. Mann Lecture, 8 November 2011, Lincoln's Inn. See also, Heydon, J.D. *Are Bills of Rights Necessary in Common Law Systems*, Speech at Inner Temple, 21 January 2013

¹³⁴ For example the Government overturned the decision of the House of Lords in the case of *Barker v Corus UK Ltd* [2006] UKHL 20 (a case on apportioned damages following wrongful exposure to asbestos) via the Compensation Act 2006 and considered overturning the judgment in the case of *Johnston v NEI International Combustion Ltd* [2007] UKHL 39 (refusal to compensate for pleural plaques) – A ruling which was overturned in Scotland and Northern Ireland. Concerns have been expressed by the House of Lords Constitution Committee about Parliament overturning court rulings in a manner that would lead to legislation having retrospective effect: see, e.g. House of Lords Constitution Committee, *Jobseekers (Back to Work Schemes) Bill*, Session 2012–13, HL Paper 155, paras 13–15

The Rule of Law and Parliamentary Sovereignty

While it may not be entirely fair to compare decision making under the Human Rights Act with the development of the common law, these questions are important because they go straight to the heart of the judicial role in law-making. As Professor Zander recognised, well before the introduction of the 1998 Act, English judges have been discreet about their legislative or creative role, perhaps on the grounds that “Parliament and the people are willing to tolerate the present exercise of executive power by judges because they do not wield the power openly”.¹³⁵ Lord Scarman acknowledged this point straightforwardly in the case of *Duport Steel Ltd v Sirs*:

The constitution’s separation of powers, or more accurately, functions, must be observed if judicial independence is not to be put at risk. For if people and Parliament come to think that the judicial power is to be confined by nothing other than the judges sense of what is right (or, as Seldon put it, by the length of the Chancellor’s foot) confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to curb the power of the judges.¹³⁶

Any judicial reticence can now be balanced with some rather bolder statements, articulated most clearly in the case of *Jackson and others v Her Majesty’s Attorney General*,¹³⁷ which considered the legality of the Hunting Act. Over the course of the judgment, Lord Steyn stated that, while it remained the general principle of our constitution, “the classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.” He was moved to claim that it was a construct of the common law, a principle created by judges, noting that: “If that is so, it is not unthinkable that circumstances could arise when the courts might have to qualify a principle established on a different hypothesis of constitutionalism.”¹³⁸ Baroness Hale stated that “the courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers”,¹³⁹ whilst Lord Hope observed that:

Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step

¹³⁵ Zander, M. *The Law Making Process*, 3rd Edition (Butterworths, London, Reissue 1993), p327. See also Atiyah, P. *Judges and Policy*, Israel Law Review 1980, p346, where he observed that “There is nothing new in this belief of the English judiciary that it is best in the long run if the public does not fully understand the creative powers of the judge”

¹³⁶ [1980] 1 All ER 529 at 551

¹³⁷ [2005] UKHL 56

¹³⁸ [2005] UKHL 56 at para 102

¹³⁹ [2005] UKHL 56 at para 159

by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.¹⁴⁰

While these statements may not be quite as contentious as those expressed by Sir Edward Coke in *Dr Bonham's case* (1610) (where he suggested that the courts might declare Acts of Parliament void under the common law);¹⁴¹ nonetheless, this is all a far cry from when Sir Thomas Bingham (as he then was) suggested, in a lecture in 1994, that:

If Parliament were clearly and unambiguously to enact, however improbably, that a defendant convicted of a prescribed crime should suffer mutilation, or branding, or exposure in a public pillory, there would be very little that a judge could do about it, except resign.¹⁴²

The obiter remarks in *Jackson* did not, in fact, meet with Lord Bingham's approval. In a book on the rule of law, published shortly before his death, he wrote that he could not accept that his colleagues' observations were correct, arguing that while the principle of parliamentary sovereignty could not be ascribed to statute, "it does not follow that the principle must be a creature of the judge-made common law which the judges can alter." He added: "the judges did not by themselves establish the principle and they cannot, by themselves, change it [...]" The British people have not repelled the extraneous power of the papacy in spiritual matters and the pretensions of royal power in temporal in order to subject themselves to the unchallengeable rulings of unelected judges."¹⁴³ When he was Master of the Rolls, Lord Neuberger also expressed his support for the doctrine of parliamentary sovereignty in a speech entitled *Who are the Masters Now?*, stating that:

¹⁴⁰ [2005] UKHL 56 at paras 104–5. For an interesting analysis of the significance of the judgment, see: Bogdanor, V. *Human Rights and the New British Constitution*, JUSTICE Tom Sargant Memorial Lecture 2009, 14 October 2009. See also: Oliver, D. *Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament* in Horne, A. Drewry, G. and Oliver, D. (eds) *Parliament and the Law* (Oxford, Hart Publishing, 2013), p309

¹⁴¹ See, for example, Goddard, A. and Groarke, M. *The Changing Perspectives on the Constitution and the Courts*, in McDougall, I. (ed) *Cases that Changed our Lives*, (London, Lexis Nexis, 2010), p3. As Lord Denning acknowledged, while "this sapling planted by Lord Coke failed to grow in England. It withered and died. But it grew into a strong tree in the United States." Quoted in Mount, F. *The British Constitution Now*, (London, William Heinmann Ltd, 1992), p210. As then Master of the Rolls Lord Neuberger has observed: "Coke's observation in *Bonham's Case* was repudiated by his successor as Lord Chief Justice, Lord Ellesmere, and by Sir Francis Bacon, then Lord Chancellor. By the 18th century, it was well-established that Parliamentary law was not enacted subject to the common law. On the contrary, the common law was subordinate to Statute" (Lord Neuberger of Abbotsbury MR, *Who are the Masters Now?*, Second Lord Alexander of Weedon Lecture, 6 April 2011)

¹⁴² Bingham, T. *Anglo-American Reflections, Inaugural Pilgrim Fathers Lecture*, 29 October 1994. See also: *Financial Times*, "British Institutions: The Supreme Court", 19 April 2013, where when a similar question was posited to the current Supreme Court Justices, it was reported that they had said that they would have to support the law or resign

¹⁴³ Bingham, T. *The Rule of Law*, (London, Allen Lane, 2010), pp167–168. See also: Jowell, J. *Parliamentary sovereignty under the new constitutional hypothesis* [2006] Public Law 562 and Lord Justice Elias, *The Rise of the Strasbourgeoisie: Judicial Activism and the ECHR*, Statute Law Society Annual Lord Renton Lecture, 24 November 2009, where he described Lord Steyn as a "revolutionary" but noted that there might be cases in which "revolutions are justified."

While our constitutional settlement has been in one of its periodic reform phases over the last two decades, the idea that Parliament is no longer legally sovereign and that the judiciary, whether at home or in Strasbourg, are the masters now is quite simply wrong.¹⁴⁴

Bingham's concerns were also reflected by Sir Ross Cranston (a former Solicitor General and current High Court Judge), who recently wrote of the "worrying opinion of some senior judges that the courts have power to strike down an Act of Parliament if it violates fundamental constitutional principles (defined, as would be the case, by the judges)." He argued that:

This is a profoundly anti-democratic doctrine, not least because it does not incorporate the parliamentary override (perhaps with special procedures) or a reversal by popular referendum, which are a feature of jurisdictions with constitutional courts.¹⁴⁵

In spite of the perceived benefits many would accept result from the move towards a rights based democracy, there is also a need for legitimacy – judges cannot simply usurp power from the elected element. Not only do judges have to consider what authority gives them the legal and moral power to legislate increasingly in wide policy areas, but they also have to consider whether the public accepts that they are exercising their powers legitimately. This latter point is not to say that the judges should bend to every public whim. The words of Lord Mansfield CJ still ring true today:

I will not do that which my conscience tells me is wrong, upon occasion, to gain the huzzas of thousands or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels.¹⁴⁶

Senior judges, however, do need to consider the legitimacy of other institutions, such as Parliament, and their own limitations (as has been observed elsewhere, judges are not expert in the formulation of policy at national or local level, nor the formulation of economic policy).¹⁴⁷ Lord Justice Etherton has acknowledged that one cannot have an "effective rule of law unless the law is complied with by virtue of respect for the law and those who administer it."¹⁴⁸ As Hayek suggests, if the idea of the rule of law "is represented as an impractical and even undesirable ideal and people cease to strive for its realisation, it will rapidly disappear."¹⁴⁹ Accordingly, it is essential for judges to carry legitimacy within society. As Vernon Bogdanor has argued:

Surely parliamentary and popular approval is also required for any alteration in the fundamental norm by which we are governed. At the present time, politicians clearly

¹⁴⁴ Lord Neuberger of Abbotsbury MR, *Who are the Masters Now?*, Second Lord Alexander of Weedon Lecture, 6 April 2011

¹⁴⁵ Cranston, R. Foreword to Horne A. Drewry, G. and Oliver, D. *Parliament and the Law*, (Oxford, Hart, 2013)

¹⁴⁶ *R v Wilkes* (1770) 4 Burr. 2527, 2561, 98 Eng. Rep. 327 at 346

¹⁴⁷ Sir Jack Beatson, *Judicial Independence and Accountability: Pressures and Opportunities*, Nottingham Trent University, 16 April 2008

¹⁴⁸ Lord Justice Etherton, Uncorrected Oral Evidence to the House of Lords Select Committee on the Constitution Inquiry on the Judicial Appointments Process, 13 July 2011, Q41

¹⁴⁹ Hayek, F.A. *The Constitution of Liberty*, (Oxford, Routledge, 2006), p181

would not agree to give judges the power that it appears some seek, to supersede the sovereignty of Parliament.¹⁵⁰

In the US context, Richard Posner has articulated a similar concern, stating that:

Political democracy in the modern sense means a system of Government in which the key officials stand for election at relatively short intervals and thus are accountable to the citizenry. A judiciary that is free to override the decisions of these officials curtails democracy.¹⁵¹

While the judges are clearly no longer “lions under the throne”, the precise demarcation of their duties and functions is currently in some degree of flux. As the only completely unelected branch of Government, it is certainly true that the judicial branch is well placed to resist populism and uphold the rule of law, but as an institution, it is also lacking in diversity and does not represent the population at large. This latter point led Dame Brenda Hale (as she then was) to suggest that a more gender balanced judiciary was important in terms of democratic legitimacy as:

[J]udges are set in authority over others and can sometimes wield enormous power over individuals and businesses. In a democratic society, in which we are all equal citizens, it is wrong in principle for that authority to be wielded by such an unrepresentative bunch.¹⁵²

She is not the only judge to voice these concerns. In 1994, Sir Stephen Sedley commented that “the judiciary comes very largely from a tranche of society whose values, culture, *données* and attitudes are homogeneous because they are socially and educationally inbred.”¹⁵³ Lord Neuberger confirmed that little had changed in 2011, accepting that most judges remained “white, public school men”.¹⁵⁴

In written evidence to the House of Lords Constitution Committee, Professor Cheryl Thomas recently commented that a lack of legitimacy is one of the reasons that elected officials ought to be included in the judicial appointments process:

¹⁵⁰ Bogdanor, V. *Human Rights and the New British Constitution*, JUSTICE Tom Sargant Memorial Lecture 2009, 14 October 2009

¹⁵¹ Posner, R. *How Judges Think*, (London, Harvard University Press, 2008), p364

¹⁵² Dame Brenda Hale, *Equality and the Judiciary: Why Should We Want More Women Judges* [2001] Public Law 489 at 502

¹⁵³ Sedley, S. *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011), p22

¹⁵⁴ *The Guardian*, “UK’s top judges ‘still white, public school men’”, 16 November 2011. However, for a countervailing view, see: Lord Sumption, *Home Truths about Judicial Diversity*, Bar Council Law Reform Lecture, 15 November 2012, in which he noted that the proportion of women in the judiciary had doubled since 1998 (as at April 2012, 23% of office holders); whilst the proportion of ethnic minority office holders has trebled (as at April 2012, 4% of office holders)

The legitimacy of unelected individuals – judges – to adjudicate on the laws passed by elected officials requires that elected officials are in some way involved, particularly in the appointments process.¹⁵⁵

Professor Kate Malleson has contended that the “corrosive impact” of the absence of certain under-represented groups (such as women, solicitors and minority lawyers) has a significant effect on the legitimacy of the senior judiciary.¹⁵⁶ It has been suggested that the current appointment system has, in effect, removed one of the potential strategies for increasing diversity that has been used in other jurisdictions, namely political leadership.¹⁵⁷ How the homogeneity within the profession impacts on both legitimacy and judicial decision-making has been canvassed extensively elsewhere¹⁵⁸ and will also be touched upon briefly later in this work.

¹⁵⁵ Cheryl Thomas, Uncorrected Oral Evidence to the House of Lords Select Committee on the Constitution Inquiry on the Judicial Appointments Process,, 6 July 2011, Q4

¹⁵⁶ Malleson, K. *Brave New World: The new Supreme Court and Judicial Appointments*, 24 Legal Studies, 2004, p106

¹⁵⁷ Cheryl Thomas, Uncorrected Oral Evidence to the House of Lords Select Committee on the Constitution Inquiry on the Judicial Appointments Process, 6 July 2011, Q21

¹⁵⁸ See for example: Malleson, K. *Diversity in the Judiciary: The Case for Positive Action*, Journal of Law and Society, Volume 36, No. 3, pp 376–402, September 2009; Rackley, E. *What a difference ‘difference’ makes: gendered harms and judicial diversity*, International Journal of the Legal Profession, Volume 15, Issue 1 & 2, March 2008, pp 37–57; Lady Hale, 10th Pilgrim Fathers Lecture, 24 October 2004; Horne A, *The Changing Constitution: A Case for Judicial Confirmation Hearings?* Study of Parliament Group Paper No. 1, 2010

Chapter 4: The Separation of Powers

Political liberty is to be found only in moderate governments; and even in those it is not always found. It is only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?

To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. (Montesquieu)¹⁵⁹

Beyond a general discussion around checks and balances,¹⁶⁰ the doctrine of the separation of powers, originally associated with Montesquieu and subsequently enshrined in a different form in the US Constitution, can be somewhat elusive. The classic formulation – that there are three distinct and separate functions of government that should be discharged by three separate entities: the legislature, the executive and the judiciary, which should not co-mingle – has never been observed in the United Kingdom.¹⁶¹ As Sir Henry Brooke has noted, not only is there the fact that until recently our most senior judges sat with the legislature, in addition, officials within the executive branch of government (such a planning inspectors and social security adjudicators) continue to perform functions which may appear quasi-judicial to some purist observers.¹⁶² Other examples of how the different branches of government work together include the fact that judges are regularly seconded to chair the Law Commission¹⁶³ (which advises on law reform) and to chair independent inquiries (an issue which will be touched on further below). At the time of the constitutional reforms which led to the creation of the Supreme Court, and the reform of the office of Lord Chancellor, Kate Maleson quite reasonably stated that the “legitimacy of the institutional arrangements governing the judiciary’s relationship with the other branches of government has traditionally been measured by its effectiveness in securing judicial independence rather than their conformity to a constitutional ideal model.”¹⁶⁴

Roger Masterman has recently suggested that (following the implementation of the Human Rights Act and the Constitutional Reform Act) there are now two distinct perspectives from which the contemporary separation of powers can be approached – either through the separation of, or distinctiveness of, governmental functions, or through the institutional divides or interactions amongst the three branches of Government.¹⁶⁵ He contends that the

¹⁵⁹ Montesquieu, C. *The Spirit of Laws*, 1748 (translated by Thomas Nugent, 1752)

¹⁶⁰ Drewry, G. *The Executive: Towards Accountable Government and Effective Governance* in Jowell, J. and Oliver, D. *The Changing Constitution* (Oxford University Press, 2004), p282–285

¹⁶¹ For a useful summary of the arguments, see for example: Barendt, E. *Separation of powers and constitutional government* [1995] Public Law 599. See also Bogdanor, V. *The New British Constitution*, (Oxford, Hart, 2009), pp285–290, where he argues that the constitutions of Bagehot and Dicey are “dead or dying” and suggests that there has always been “contrary to what Bagehot believed, at least a partial separation of powers in Britain.”

¹⁶² Brooke LJ, *Judicial Independence – Its history in England and Wales* (available from judiciary.gov.uk, last accessed 30 September 2011)

¹⁶³ Stevens, R. *The English Judges* (Oxford, Hart, 2002), p86

¹⁶⁴ Maleson, K. *Modernising the constitution: completing the unfinished business*, in Morgan, D. (ed) *Constitutional Innovation: The creation of a Supreme Court for the United Kingdom; domestic, comparative and international reflections*, (London, Lexis Nexis, 2004), p124

¹⁶⁵ Masterman, R. *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press, 2011) p33

most visible change in the latter respect can be found in the increased institutional separation brought about by the 2005 Act.¹⁶⁶ However, the most pragmatic (and attractive) approach still appears to be the one given by Eric Barendt, namely that: “the separation of powers should not be explained in terms of a strict distribution of *functions* between the three branches of government, but in terms of a network of rules and principles which ensure that power is not concentrated in one branch”.¹⁶⁷ Robert Stevens has also appeared to accept this more realistic description, referring to it as a “balance of powers”. He notes that in a system of responsible government, the different branches interact constantly and that such relationships can “exist within the acceptable levels of tolerance of the English concept of the balance of powers.”¹⁶⁸ While this approach is certainly not accepted by all commentators (Nick Barber has, for example, claimed that Barendt’s theory is too ambitious, as it equates the doctrine of the separation of powers with a theory of the state¹⁶⁹) it will nonetheless, shape the approach adopted for the remainder of this paper.

Whichever approach one takes, it is clear that Walter Bagehot’s rejection of the theory has become unfashionable in recent times, and it is further evident that the notion was well in the minds of those drafting our new constitutional arrangements. That may also reflect the concerns that Parliament, once dominant, is now frequently seen to be subservient to the executive.¹⁷⁰ Alan Paterson has claimed that it is, in fact, the movement towards a purer separation of powers in the United Kingdom which is in part responsible for the issues around accountability discussed in earlier Chapters.¹⁷¹

Jonathan Sumption has theorised that one reason for the expansion of the judicial control of Government is the declining public reputation of Parliament and a diminishing respect for the political process generally.¹⁷² This is not to say that judges would be well advised to “proclaim themselves as consciously filling a political vacuum left by an ineffective opposition”.¹⁷³ It will be interesting to analyse the impact that the Coalition Government has had on a system sometimes described as an “elected dictatorship”. Currently, many might share Sir Jack Beatson’s view that “while the House of Commons in theory controls the government, save exceptionally, it is the government which controls the House.”¹⁷⁴ Furthermore, it has been suggested that the tendency for ministers to exercise their powers

¹⁶⁶ *Ibid*

¹⁶⁷ Barendt, E. *Separation of powers and constitutional government* [1995] Public Law 599 at 608

¹⁶⁸ Stevens, R. *The English Judges* (Hart, 2002), p86

¹⁶⁹ Barber, N. W. *Prelude to the Separation of Powers*, Cambridge Law Journal 60(1), March 2001, pp59–88. See also, Paterson, A. *Lawyers and the Public Good: The Hamlyn Lecture 2011*, (Cambridge University Press, 2012) who argues that: “For centuries the unwritten constitution of the United Kingdom worked on the basis of a balance of powers between Executive, Parliament and the judiciary, with each involved in administrative, legislative and decision making tasks. However, in recent years, in a process accelerated by New Labour, we have seen the constitution evolving towards a purer separation of powers.” p135

¹⁷⁰ Stevens, R. *The English Judges* (Hart, 2002), p45

¹⁷¹ Paterson, A. *Lawyers and the Public Good: The Hamlyn Lecture 2011*, (Cambridge University Press, 2012), p137

¹⁷² Sumption, J. *Judicial and Political Decision Making: The Uncertain Boundary*, The F.A. Mann Lecture, 8 November 2011, Lincoln’s Inn

¹⁷³ Beloff, M. *Neither Cloistered Nor Virtuous? Judges and their Independence in the New Millennium*, [2000] Denning Law Journal 153–172 at 166

¹⁷⁴ Sir Jack Beatson, *Reforming an Unwritten Constitution*, 31st Blackstone Lecture, Pembroke College, Oxford, 16 May 2009

“through semi-autonomous executive agencies has introduced new elements into the constitutional triangle.”¹⁷⁵

Structural Separation of Powers and the Role of the Lord Chancellor

The clearest justifications for the introduction of new structural methods for judicial accountability come with the loss of the traditional office of Lord Chancellor, following the passage of the Constitutional Reform Act 2005.¹⁷⁶ Prior to the introduction of the 2005 Act, the Lord Chancellor had a strange and hybrid role. The complex range of responsibilities had been acquired over an extended period of time and is argued that they arose “as much from historical accident as from strategic logic.”¹⁷⁷

The Lord Chancellor acted as a senior judge, he was a member of the cabinet and he presided over the House of Lords. He was also, however, bound by collective responsibility as a member of the cabinet and, as a senior judge, sat *inter alia* on the Appellate Committee of the House of Lords.¹⁷⁸ Lord Irvine once claimed that the office allowed for a “natural conduit for communications between the judiciary and the executive, so that each fully understands the legitimate objectives of the other”.¹⁷⁹ Theoretically, the Lord Chancellor was answerable to Parliament for matters such as the administration of justice and judicial appointments, although Andrew Le Sueur has questioned the effectiveness of this form of accountability, particularly since the “Lord Chancellor’s Department was the last of the major government departments to become shadowed by a House of Commons select committee.”¹⁸⁰ Gavin Drewry has argued that historically, Lord Chancellors had “fiercely resisted any hint of parliamentary intrusion into judicial territory” founding this “claim to immunity” on a “very literal interpretation of the principles of separation of powers and judicial independence.”¹⁸¹

It is broadly accepted that, while the Lord Chancellor and the Prime Minister were responsible for judicial appointments under the previous arrangements, any political influence in the appointments process had effectively faded away in the modern era.¹⁸² Sir Thomas Legg (former Permanent Secretary of the Lord Chancellor’s Department and Clerk

¹⁷⁵ Brooke LJ, *Judicial Independence – Its history in England and Wales* (available from judiciary.gov.uk, last accessed 30 September 2011)

¹⁷⁶ See: Le Sueur, A, *Judicial Power in the Changing Constitution* in Jowell, J. and Oliver, D. *The Changing Constitution* (Oxford University Press, 2004) p 326

¹⁷⁷ Constitutional Affairs Select Committee, *Judicial appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003–04, HC 48-I, para 10. See also Oliver, D. *Constitutionalism and the abolition of the office of Lord Chancellor* (2004) 57 *Parliamentary Affairs* 754

¹⁷⁸ Horne, A. *The Changing Constitution: A Case for Judicial Confirmation Hearings?* Study of Parliament Group Paper No 1 (London, 2010), pp16–17. The Lord Chancellor did not stop sitting as a judge until 2001 (see below)

¹⁷⁹ HL Deb 25 November 1997 col 934. See also Stevens, R. *Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World*, (2004) 24 *Legal Studies* 1

¹⁸⁰ Le Sueur, A. *Parliamentary accountability and the judicial system* in Bamforth, N and Leyland, P (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013)

¹⁸¹ Drewry, G. *Parliamentary Accountability for the Administration of Justice*, in Horne, A. Drewry, G. and Oliver, D. (eds) *Parliament and the Law* (Oxford, Hart Publishing, 2013)

¹⁸² For a useful discussion of the previous system, see: Lord Mackay of Clashfern, *Selection of Judges Prior to the Establishment of the Judicial Appointment Commission in 2006*, in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (A collection of essays prepared under the auspices of the Judicial Appointments Commission), (London, 2010), pp11–33

of the Crown in Chancery) has suggested that one practical reason for this was that, in modern times, the number of senior silks, who were likely to become candidates for judicial office, but who were also involved in politics, diminished to near vanishing point.¹⁸³ Lord Mackay of Clashfern has said that during his time as Lord Chancellor, he was free to exercise his judgment:

[C]ompletely independently of any other person in the light of all the information available to me and it was never a consideration whether or not a candidate had made decisions or statements for or against the Government. At the Home Affairs Committee, I was asked whether the Prime Minister had ever differed from the Lord Chancellor's advice on judicial appointment. In view of the continuing confidential relationship, I gave a careful answer, but since that relationship is long since concluded I can now say that my advice was invariably taken by Mrs Thatcher and Mr Major as they then were.¹⁸⁴

As is now well known, the statutory nature and powers of the office of Lord Chancellor meant that the office could not simply be abolished via a ministerial reshuffle.¹⁸⁵ Ultimately, the office was retained, but gutted of most of its original functions, as the Lord Chancellor, amongst other things, ceased to be the head of the judiciary (or even a judge) and was replaced as Speaker in the Lords. The creation of the Judicial Appointments Commission limited severely his once wide-ranging powers in relation to judicial appointments.

At the time of the reforms, the House of Commons Constitutional Affairs Committee sounded a warning that:

There is a radical difference between on the one hand a Lord Chancellor, who as a judge is bound by a judicial oath, who has a special constitutional importance enjoyed by no other member of the Cabinet and who is usually at the end of his career (and thus without temptations associated with positive advancement) and on the other hand a minister who is a full-time politician, who is not bound by any judicial oath and who may be a middle-ranking or junior member of the Cabinet with hopes of future promotion.¹⁸⁶

This problem can only have been exacerbated following the creation of the Ministry of Justice, which gave the now Justice Secretary responsibility for prisons and other matters which had previously been under the purview of the Home Office. This was another significant reform where it appeared that the Government had not given great thought to the constitutional implications. Nor had it sought the views of the senior judiciary. Jack Straw recalls in his memoirs that the (then) Home Secretary, John Reid, had cavalierly floated the splitting of the Home Office in an article in the *Sunday Telegraph* in January 2007, and had done so "to knock off another, disobliging story about which they were concerned." Straw

¹⁸³ Interview with the author, October 2010

¹⁸⁴ Lord Mackay of Clashfern, *Selection of Judges Prior to the Establishment of the Judicial Appointment Commission in 2006*, in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (A collection of essays prepared under the auspices of the Judicial Appointments Commission), (London, 2010), p23

¹⁸⁵ See, for example, Le Sueur, A. *The Conception of the UK's New Supreme Court*, in Le Sueur, A. (ed) *Building the UK's New Supreme Court: National and Comparative Perspectives*, (Oxford University Press, 2004), pp4–5 and see further below

¹⁸⁶ Constitutional Affairs Select Committee, *Judicial Appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003–04, HC 48-I, para 13

suggests that Lord Falconer only learnt of his intentions through a telephone conversation the previous evening. He records that the (then) Lord Chief Justice, Lord Phillips, had commented that the impetus for the proposal was anxiety by John Reid to “clear the decks so he could make a concerted attack on terrorism. It was not because he thought it a very good idea to have a Ministry of Justice.”¹⁸⁷

A formal announcement of the plans came in late March 2007 and the new Ministry was created on 9 May 2007. The House of Lords Constitution Committee concluded that the Government seemed “to have learnt little or nothing from the debacle surrounding the constitutional reforms initiated in 2003” and that expressed the hope that “constitutional affairs remain central to the Ministry of Justice’s responsibilities and are not downgraded in importance compared to the other duties of the Ministry.”¹⁸⁸

The 2005 Act did not require the office holder to be either a lawyer or a peer. Instead, section 2 of the 2005 Act provided that the Lord Chancellor was to be “qualified by experience”, which could include experience as a Minister of the Crown, an MP or Peer, or “other experience that the Prime Minister considers relevant.” The impact of these wide ranging changes, whilst appreciated by the Constitutional Affairs Committee, was not immediately obvious. Change was incremental. The first holder of the new office, Lord Falconer, was a peer and Queen’s Counsel. Whilst famously described by Lord Woolf as either a “cheerful” or a “cheeky chappie”, depending upon which report is to be believed¹⁸⁹ he was a heavyweight politician who was, on occasion, willing to stand up for the judiciary when they were criticised by his political colleagues.¹⁹⁰ At that time, however, the Department for Constitutional Affairs resembled far more closely its predecessor than the modern Ministry of Justice.

While Lord Falconer oversaw the creation of the Ministry of Justice (which is now responsible for the courts and judiciary, civil and criminal law, criminal justice policy including sentencing and prisons, the probation service and some aspects of constitutional reform), he was replaced (fairly swiftly) by Jack Straw after Gordon Brown succeeded Tony Blair as Prime Minister. Straw describes the immediate budgetary pressures faced by the new department in his memoirs¹⁹¹ and these new responsibilities and pressures must have changed the character of the Department. But, it was still helmed by a senior politician, who had qualified as a lawyer and who had held many of the great offices of state.¹⁹²

¹⁸⁷ Straw, J. *Last Man Standing: Memoirs of a Political Survivor*, (London, Macmillan, 2012), p498

¹⁸⁸ House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151, paras 67 and 74. See also: Constitutional Affairs Select Committee, *The Creation of the Ministry of Justice*, Sixth Report of Session 2006–07, HC 466

¹⁸⁹ See: *The Guardian*, “Dropping the Crown”, 9 March 2004

¹⁹⁰ See: e.g. *The Guardian*, “Minister has to apologise for criticizing judge”, 20 June 2006. Although the House of Lords Constitution Committee criticized his handling of the what is usually referred to as the ‘Sweeney’ affair on the basis that he did not act promptly: House of Lords Select Committee on the Constitution, *Relations between the Executive, Parliament and the Judiciary*, Sixth Report of 2006–07, HL 151, paras 46–49

¹⁹¹ Straw, J. *Last Man Standing: Memoirs of a Political Survivor*, (London, Macmillan, 2012), p507

¹⁹² Including: Home Secretary 1997–2001; Secretary of State for Foreign and Commonwealth Affairs 2001–2005

Upon the formation of the current coalition Government (and thereafter) there was some speculation that the Conservatives might seek to revert to a more traditional model of Lord Chancellor. Immediately following the reforms, Lord Strathclyde, then the Conservative leader in the House of Lords, had announced that it was Conservative policy under then leader, Michael Howard, to bring back the traditional role.¹⁹³

Ironically, by 2010, it was Michael Howard himself (who was, of course, a Queen's Counsel and who had, by then, been elevated to the peerage) who was tipped for the post.¹⁹⁴ In the event, another 'big beast', Kenneth Clarke, was appointed. Mr Clarke had been a Queen's Counsel, but, like Straw, was not a peer. It is likely that, amongst other things, it was thought that a department with such significant responsibilities as the Ministry of Justice should have its Secretary of State in the House of Commons (although such concerns had not stopped Gordon Brown from appointing Lord Mandelson as Secretary of State for Business).

In September 2012, the final link to the past was broken when David Cameron appointed Chris Grayling as the new Secretary of State for Justice (it is perhaps notable that in the original press notice, the title of Lord Chancellor was omitted). He is the first non-lawyer to have held the post since the Seventeenth Century. Following Mr Grayling's appointment, there has been some further consideration of the maintenance of the office of Lord Chancellor, much of it stemming from a seminar held at Queen Mary, University of London in June 2013, as part of an AHRC funded project on *The Politics of Judicial Independence in Britain's Changing Constitution*. The event was held on a Chatham House basis, but involved senior former politicians and judges. It was suggested by one speaker that the retention of the title may have become something of a constitutional problem and that it might be better to stop pretending that the Lord Chancellor still exists so that we have a proper separation of powers. (It is probably worth referencing that around this time, contentious reforms of legal aid powers, briefly referenced in Chapter Three, had led to extreme criticism of Mr Grayling by many lawyers).¹⁹⁵

John Crook subsequently argued that "to all intents and purposes the office of Lord Chancellor was abolished in the reforms" and that the real change was that the office could be held by an "ambitious mid-career politician."¹⁹⁶ Patrick O'Brien has said that while the judiciary and lawyers have always seen the constitutional changes as being about them, this is not the Government's primary interest. He notes that there may have been a somewhat 'rose-tinted' view of the role of the Lord Chancellor in representing the interests of the judiciary, since many Lord Chancellors of recent decades had fallen out with the judiciary. Most importantly, he concluded that "if the Lord Chancellor does not really exist anymore, should we not face this fact and get rid of the title and legacy functions associated with it."¹⁹⁷

¹⁹³ *Daily Telegraph*, "Lord Chancellor is safe in our hands, promises Strathclyde", 8 October 2004

¹⁹⁴ When Kenneth Clarke was facing criticism in 2011, Howard was again suggested as a possible candidate (see: *Observer*, "Tory MP's press David Cameron for cabinet reshuffle", 19 February 2011 and *The Guardian*, "Kenneth Clarke offers hope to Tory critics of Human rights court", 20 February 2011)

¹⁹⁵ *Law Society Gazette*, "Grayling confirms legal aid concessions", 5 September 2013

¹⁹⁶ Crook, J. *The Abolition of the Lord Chancellor*, Constitution Unit Blog, 20 June 2013

¹⁹⁷ O'Brien, P. *Does the Lord Chancellor really exist*, UK Constitutional Law Blog, 26 June 2013. See also, Gee, G. *What are Lord Chancellors for?* [2014] Public Law 11

As well as reforming the office of Lord Chancellor, the 2005 Act also removed the Law Lords from the House of Lords and (combined with the House of Commons (Disqualification) Act 1975, which prohibits full time judges from standing for election to the House of Commons) from the legislature.

The apparent need to observe, more formally, the strictures of the separation of powers has led to a greater distance between the Government and the judiciary. Lord Falconer, the Lord Chancellor and Secretary of State for Constitutional Affairs who led the reforms, had said that the “overall aim of these reforms is to put the relationship between the executive, legislature and judiciary on a modern footing, respecting the separation of powers between the three”.¹⁹⁸ While ‘modernisation’ and dealing with potential constitutional issues (discussed below) may have been the main catalyst for reform, this does not appear to be the whole story. In his biography of Tony Blair, Anthony Seldon states that discussions about the reforms had taken place between Lord Irvine and the then Prime Minister. He indicated that:

Irvine favoured a ‘rights’ department, as did most of the legal profession. Blair, however, was much closer to Blunkett (and Straw before him) favouring a less liberal and more authoritarian solution with a clearer separation of the role of judges and politicians.¹⁹⁹

Interestingly, Alastair Campbell records in his diaries that “previously [Tony Blair] had argued he needed to shake things up and put an elected MP in charge of the new department.”²⁰⁰

It is suggested that although a “fundamental change” to the position of Lord Chancellor “had been in the air since 1997” (as it was not considered sustainable to have the Lord Chancellor heading both the judiciary and acting effectively as Speaker in the Lords, as well as wearing his numerous other hats), the initial plan to give “direct administrative control of the courts to the Home Office” had been scuppered by Lord Irvine, who was said to have argued forcibly “that to separate the courts from the judges would undermine judicial independence.”²⁰¹ Furthermore, it is thought that the Prime Minister had initially wanted Lord Irvine to oversee the changes, but that Irvine was “an ardent believer in the Holy Trinity.” It is also important not to overlook the personal dimension and the relationship between the men. Lord Irvine had been a “long standing mentor” to Tony Blair, the head of his chambers when he joined the Bar and the man who had introduced him to his wife.²⁰²

Seldon recalls that at the time he finally decided to remove Irvine and instigate the changes, Tony Blair had not only failed to consult the then Lord Chief Justice, Lord Woolf, about the

¹⁹⁸ HL Deb 26 January 2004 col 13

¹⁹⁹ Seldon, A. *Blair* (London, Simon & Schuster, 2004) p210

²⁰⁰ Campbell, A. *The Blair Years: Extracts from the Alastair Campbell Diaries* (London, Hutchinson, 2007), p704

²⁰¹ Seldon, A. and Snowden, P. *Blair Unbound*, (London, Simon & Schuster, 2007), p215

²⁰² *Ibid*

move, but that he had not consulted with the Leader of the House of Lords or even the Queen about the proposed abolition of the post of Lord Chancellor.²⁰³

In any event, whatever the precise political motivation for the reform, any moves towards introducing new forms of political accountability, to replace those lost through the reforms, were strongly resisted. In particular, the Government forcefully rejected the idea of judicial confirmation hearings, arguing that:

MPs and lay peers would not necessarily be competent to assess the appointees' legal or judicial skills [and] if the intention was to assess their more general approach to issues of public importance, this would be inconsistent with the move to take the Supreme Court out of the potential political arena.²⁰⁴

This need for structural separation was not accepted by many, with Lord Lloyd, a retired Law Lord, articulating the main objections in evidence to the House of Commons Constitutional Affairs Committee. Notably, he observed that:

[W]e do not in this country have what is often referred to as a separation of powers. We know that there is a separation of powers under the American constitution and, indeed, the French constitution, and that it derives from the French philosophers of the 18th century. But in England we have never had a separation of powers. We have instead the rule of law. The rule of law is one whereby everybody is under the law, including the executive.²⁰⁵

In fact, the anxieties about the previous constitutional arrangements that emerged in 2003 were as much practical as theoretical. Concerns had arisen about the role of the Lord Chancellor following the case of *McGonnell v United Kingdom*²⁰⁶ in which objections had been raised to the Bailiff of Guernsey acting as both principal judge and speaker of the island's legislature.²⁰⁷ This may have been aggravated by the fact that then Lord Chancellor, Lord Irvine, had continued to sit as a judge in the House of Lords until 2001, in spite of criticism.²⁰⁸ Furthermore, the Law Lords were finding their place within the legislature had become increasingly uncomfortable and their activities constrained. These issues had crystallised to some extent by the time that the Government had decided to undertake its constitutional reforms. The Department for Constitutional Affairs was, in effect, acknowledging that the

²⁰³ Indeed, at a seminar organized by the Politics of Judicial Independence Project, entitled *The Abolition of the Lord Chancellor 10 years on*, it emerged that the senior judiciary had been at an away day at a country house with civil servants when the changes were announced and that "the changes were explained to them while they huddled, very annoyed, around a single telephone in a pub"

²⁰⁴ Constitutional Affairs Committee, Session 2003–4, HC48-I, paras 82–3

²⁰⁵ Constitutional Affairs Committee, Session 2003–4, HC48-II, Ev 36

²⁰⁶ (2000) 30 EHRR 289 – although it is worth noting the subsequent decision of the European Court of Human Rights in *Pabla Ky v Finland* (Application No. 47221/99), 22 June 2004 which Lord Rodger interpreted to mean that that Article 6(1) of the European Convention on Human Rights "does not require that a member state should comply with any theoretical constitutional concepts as such." in *R v Secretary of State v Al Hasan* [2005] UKHL 13 at para 4

²⁰⁷ See, for example, Prince, S. *The Law and Politics, Upsetting the Applecart*, Parliamentary Affairs, 57(2) (2004), pp288–300 at 291

²⁰⁸ See: e.g. *BBC Online*, "Irvine defends role as judge", 5 July 1999 and *Daily Telegraph*, "Irvine withdraws from sitting as judge in the Lords", 21 February 2001

Human Rights Act and Article 6 of the European Convention on Human Rights “now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so.”²⁰⁹

Even if one accepts Lord Lloyd’s arguments, it becomes clear that there were structural issues to be addressed. Lord Lloyd himself recognized that “since it may be the judges who have to decide whether ministers are breaking the law or exceeding their powers or whatever it may be, it is obviously vital that the judiciary and the executive should be separate and distinct”, he simply did not accept that this meant that the judges and legislature “should be distinct and separate.”²¹⁰

However, in seeking to ensure structural separation of powers and avoid the potential politicisation of the judiciary, what was overlooked by the architects of the reforms at that time, was the fact that many other countries which clearly had due respect for the rule of law (and separation of powers) nonetheless allowed for political involvement in the selection of judges for their top courts.

An additional point is that Parliament could have acted as a check and balance on both executive²¹¹ and judiciary in the appointments process.²¹² In the United States, it is suggested that their “dual-branch” appointment process, shaped by Madison’s checks and balances, was designed “to preserve judges’ independence from incursion by either branch acting alone.”²¹³ In the UK, some issues have arisen following interventions by the judiciary. Examples include the controversy over Jack Straw’s ‘non-appointment’ of Jonathan Sumption QC (following an alleged intervention by senior judges)²¹⁴ and the *apparent* shambles over the replacement of Sir Mark Potter as Head of the Family Division.²¹⁵ Both of

²⁰⁹ Department for Constitutional Affairs, *Constitutional reform: A Supreme Court for the United Kingdom*, CP11/03, para 3. For more detailed background information on the external pressures, see for example Le Sueur, A, *Judicial Power in the Changing Constitution* in Jowell, J. and Oliver, D. *The Changing Constitution* (Oxford University Press, 2004, p334–6

²¹⁰ Constitutional Affairs Committee, Session 2003–04, HC48-II, Ev 36

²¹¹ For in spite of the reforms, the Lord Chancellor still plays a role in the selection of judges, and this has proved controversial in its own rights (for example when Jack Straw rejected the recommendation of the Judicial Appointments Commission in the appointment of Sir Nicholas Wall to the post of President of the Family Division of the High Court). See: HL Deb, 23 March 2010

²¹² Malleson, K and Hazell, R. *Increasing democratic accountability in the appointment of senior judges*, UK Constitutional Law Group Blog, 15 July 2011

²¹³ Clark, M L. *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, Louisiana Law Review, 71, no. 2 (2011): 451–502 at 460

²¹⁴ *The Times*, “Supreme ambition, jealousy and outrage”, 4 February 2010

²¹⁵ The Times reported that the then Lord Chancellor, Jack Straw, had not approved of the appointment of Sir Nicholas Wall and asked the appointments panel to reconsider its choice. It suggested that Jack Straw had only declined to veto Sir Nicholas’s appointment after the panel had presented his name for a second time. This may have been because he would then have been required to give a public reason for his veto. *The Times*, “Expect doughty fighter for family justice to speak up; Jack Straw stepped back from a public row over Sir Nicholas Wall”, 8 April 2010. However, Jack Straw touched upon the reasons for his decision and rejected the idea that his actions could have been construed as remotely party political in a later lecture, following Sir Nicholas’s retirement from the judiciary on health grounds: see *The Guardian*, “Jack Straw on judicial appointments: ‘Labour went too far’”, 4 December 2012

these incidents demonstrated not only a lack of transparency in the process, but also the potential for the judiciary to interfere in a decisive fashion.

This need for checks and balances has become increasingly important in relation to Supreme Court appointments, where critics of the process have suggested that what is, in effect, happening in the UK is that judges are appointing judges (and that there are very real dangers if judges are perceived as a self-appointing oligarchy).²¹⁶ As Robert Stevens has declared: “Judges choosing judges is the antithesis of democracy.”²¹⁷

Given that the executive retains a role in the appointment process (which many would see as a necessary check on the judicial branch dominating the appointments process), it is difficult to object to a similar role for Parliament based solely on the theory of the separation of powers. It is also worth noting that the Constitutional Reform Act did not remove Parliament’s role in removing senior judges. Witnesses to the House of Lords Constitution Committee inquiry into judicial appointments noted that one of the justifications for pre- or post-appointment hearings was that “the judges should meet the body vested with the constitutional power to dismiss them.”²¹⁸

A number of observers expressed doubts about the process of appointing Supreme Court Justices, particularly the fact that the President and Deputy President of the court made up two of the five person panel, and have suggested expanding the panel and the number of lay members on it.²¹⁹ In an interview with the author, a former Permanent Secretary at the Lord Chancellor’s Department confirmed that historically, prior to the reforms of 2005, the Lord Chancellor would normally pay great attention to the views of the most senior judges – the Law Lords for appointments to the House of Lords and the Heads of Division and the Lord Chief Justice for the Court of Appeal.²²⁰ Given the continued opacity of the current process, it is not clear what impact the view of the judges has within the appointments process. These concerns have been recognised by both the senior judiciary (particularly with reference to the fact that the President and Deputy President of the Supreme Court were required to sit on, and, in the case of the President, to chair, the selection commissions which appoint their successors)²²¹ and the Government, which implemented further reforms to the system through the Crime and Courts Act 2013 (which are discussed in Chapter Five).

²¹⁶ See for example: Cranston, R, in the forward to Horne, A. *The Changing Constitution: A Case for Judicial Confirmation Hearings?* Study of Parliament Group Paper No 1, 2010. See also the comments of Lord Justice Etherton to the Lords Constitution Committee, where he accepted that the “judges cannot be a self appointing body”, Uncorrected Oral Evidence to the House of Lords Select Committee on the Constitution Inquiry on the Judicial Appointments Process, 13 July 2011, Q41. See also, Paterson, A. *Lawyers and the Public Good*, The Hamlyn Lectures 2011 (Cambridge University Press, 2012), p149

²¹⁷ Stevens, R. *The English Judges* (Hart, 2002), p144

²¹⁸ House of Lords Constitution Committee, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, para 39

²¹⁹ See for example the oral evidence of Alan Paterson, Erika Rackley and Cheryl Thomas to the House of Lords Constitution Committee Inquiry on the Judicial Appointments Process, 6 July 2011, Qq16 and 19. This evidence was accepted by the Committee, see House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, paras 146–7

²²⁰ Interview with Sir Thomas Legg QC, October 2010

²²¹ See: House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, para 142 and 146

Institutional Independence and the Need for Judicial Accountability

On a functional level, the arguments around the separation of powers theory above cannot, in and of themselves, be used to counter greater political involvement in the appointment process for the most senior judges. Countries, such as the United States, which have far greater regard for the theory nonetheless accept that introducing a political aspect into the appointments process does not impact on the subsequent independence of the judiciary.

Indeed, it could be argued that the very reforms themselves added further impetus for new methods of judicial accountability. The fact that the Lord Chancellor is no longer required to be a senior lawyer means that his ability to act as a “safety valve avoiding under tension between the judiciary and the government” has undoubtedly been compromised and curtailed.²²² This, combined with an increasing distance between judiciary and the other branches of government, may be one reason for the increased tensions.²²³ An example is the spat between the former Labour Home Secretary, Charles Clarke, and the judiciary after the former sought to have discussions with the senior Law Lord, Lord Bingham, about how to make counter-terrorism laws compatible with the European Convention on Human Rights.²²⁴ Lord Bingham refused a meeting and, following the incident, Charles Clarke said that “the judiciary bears not the slightest responsibility for protecting the public and sometimes seem utterly unaware of the implications of their decisions for our security.” He suggested that it was time “for the senior judiciary to engage in serious and considered debate as to how best to legally confront terrorism in modern circumstances”.²²⁵

The judiciary was very critical of this approach. Lord Phillips commented that such a proposal “would have been inappropriate and infringed the principle of the separation of powers”²²⁶, whilst Lord Steyn observed rather sharply that “Mr Clarke apparently fails to

²²² Lord Woolf, *The Pursuit of Justice* (Oxford University Press, 2008), p 135

²²³ See for example, Bradley, A.W. *Judicial Independence under Attack* [2003] Public Law 397. See also: Evening Standard, “David Blunkett – I won’t give in to the judges, 12 May 2003; *The Times*, “Victory for Afghan hijackers fighting to remain in Britain”, 5 August 2006; *The Times*, “Shadow minister calls for power to be given back to the people”, 9 July 2009

²²⁴ For additional background, see for example: Bradley, A.W. *Relations between the executive, judiciary and Parliament: an evolving saga* [2008] Public Law 470 at 476, and Paterson, A. *Final Judgment* (Oxford, Hart, 2013), p303

²²⁵ House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151, para 94. These conflicts between the Home Office and the judiciary were not unprecedented. The previous Home Secretary, David Blunkett, had warned the judges in 2001 that “the law will be made by those who are held to account for making it and changing it” and subsequently said, in 2003: “Frankly, I’m fed up with having to deal with the situation where Parliament debates the issues and judges overturn them.” Jack Straw criticized the judgment in the Belmarsh case as “simply wrong” and while he later admitted that it had been a “silly thing for me to do”, he also noted that “some of the language used by their Lordships in the Belmarsh case was, in truth, as intemperate as their political critics had been. Straw, J. *Last Man Standing: Memoirs of a Political Survivor*, (London, Macmillan, 2012) p283–284

²²⁶ Lord Phillips of Worth Matravers, *Judicial independence and accountability: a view from the Supreme Court*, 8 February 2011, p15. Robert Stevens has recorded that historically such approaches were not unprecedented. In particular, he states that in 1983, Lord Donaldson MR “had been consulted by civil servants on ‘how the judiciary could play a more constructive role in industrial relations’” and that Lord Hailsham was said to have defended such meetings as normal. Stevens, R. *The English Judges: Their Role in the Changing Constitution*, (Oxford, Hart, 2002), p87. See also, Paterson, A. *Lawyers and the Public Good: The Hamlyn Lecture 2011*, (Cambridge University Press, 2012) pp131–133

understand that the Law Lords and Cabinet ministers are not on the same side.”²²⁷ The judges were plainly concerned about the impact of advising the Government, clearly not wishing to return to the Seventeenth Century practice of giving advice to the Crown where the law appeared to be doubtful and rendering extra-judicial opinions.²²⁸

Yet this critique is perhaps not as clear-cut as that presented by the judges. After all, Lord Lloyd of Berwick, a Law Lord, had conducted a review of the counter-terrorism legislation in 1996, whilst Lord Phillips acknowledged that he frequently met with the Lord Chancellor and regularly with the Home Secretary to discuss “matters of common interest.”²²⁹ Hence the judges’ reluctance to meet and discuss issues with the executive might be seen as somewhat selective.²³⁰ The question of judicial dialogue with the executive was addressed in the Latimer House Principles on the Three Branches of Government, agreed by representatives from over 20 Commonwealth countries in 1998 which provides:

While dialogue between the judiciary and government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

Judges can have a dialogue with Parliament, both in public (by way of appearances before Select Committees) and privately (by, for example, meeting Select Committee Chairs).²³¹ They can also be involved in law reform, through the Law Commission. Under Section 5 of the Constitutional Reform Act, the Lord Chief Justice²³² is able to “lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice” – the so called “nuclear option”.²³³

Judges are also doing an unprecedented amount of public speaking, and speeches and lectures are now being broadcast and retained for posterity on various official websites. The content of these speeches has also changed. As has been observed elsewhere,²³⁴ we have come a long way since 1955 when Lord Kilmuir denied a request from the BBC for judicial co-operation with a series of radio broadcasts about great judges of the past by stating:

The overriding consideration, in the opinion of myself and my colleagues, is the importance of keeping the judiciary in this country insulated from the controversies of the day. So long as a judge keeps silent his reputation for wisdom and impartiality

²²⁷ Lord Steyn, *Democracy, the rule of law and the role of the judges* [2006] EHRLR 243 at 248

²²⁸ Shetreet, S. *Judges on Trial* (Amsterdam, North-Holland, 1976), pp4–5

²²⁹ Lord Phillips of Worth Matravers, *Judicial Independence*, Commonwealth Law Conference 2007, Kenya, 12 September 2007

²³⁰ House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151, para 56

²³¹ Unless the existence of private meetings is recorded and some record is kept about their content, this does little to enhance transparency

²³² Lord Chief Justice of Northern Ireland and the Lord President of the Court of Session in Scotland are also entitled to lay such representations

²³³ House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151, para 114

²³⁴ Novarese, A. *If judges don’t want to get involved in politics, maybe they should stop giving speeches*, Legal Week, 11 November 2011

remains unassailable: but every utterance he makes in public, except in the course of ... his judicial duties, must necessarily bring him within the focus of criticism.

Since the revocation of the Kilmuir rules²³⁵ in 1987, by then Lord Chancellor Lord Mackay, initially it may have been more usual for judges to have been advised to speak on “technical legal matters, which are unlikely to be controversial.”²³⁶ More recently, judges have chosen to speak out on contentious matters in a fashion that might perhaps be described as ‘injudicious’.²³⁷

The most recent guide to judicial conduct (drafted not by the Ministry of Justice, but by a working group of judges set up by the Judges’ Council, under the chairmanship of Lord Justice Pill, and published by the Judges’ Council in August 2011) contains a whole host of caveats, but notes that there is no objection to contributions to, or participation in, lectures and seminars “provided the issue directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice.”²³⁸ The (then) Lord Chancellor, Kenneth Clarke, appeared someone uneasy about this development suggesting that, in principle, the Government and the judiciary “get on better” where the judges avoided making political speeches or commenting on decisions in Parliament and that there was a risk that “these conventions get weaker if you are not careful”.²³⁹ The (then) Master of the Rolls, Lord Neuberger, also expressed some concerns, stating that judges should be cautious “not only in the choice of subject, but also in the manner in which their contributions to public debate are phrased”. He suggested that if they chose “to be brave, to quote Sir Humphrey [...], they should not be surprised to find themselves facing a robust response from the executive or the legislature” and that it would be hard for them “to retreat behind the shield of judicial independence and complain about the nature or tone of any responses.” He added:

A judge can scarcely complain about Ministers criticising him for the way he is doing his job if he criticises Ministers for the way they are doing their jobs. And if they slang each other off in public, members of the judiciary and members of the other two branches of government will undermine each other, and, inevitably, the constitution of which they are all a fundamental part, and on which democracy, the rule of law, and our whole society rests.²⁴⁰

²³⁵ Which constrained the way a judge could communicate to the media outside of court. See: Bradley, A.W. *Judges and the media – the Kilmuir Rules* [1986] Public Law. 383. See also, Mount, F. *The British Constitution Now*, (London, William Heinemann, 1992), p208

²³⁶ Lord Chancellor’s guidance on outside activities and interests of judges, June 2000. For comments on earlier views on the system, see for example: Sedley, S. *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011), pp23–4

²³⁷ See for example: Novarese, A. *If judges don’t want to get involved in politics, maybe they should stop giving speeches*, Legal Week, 11 November 2011; and, Gardener, C. *Lady Hale’s injudicious speech*, Head of Legal Blog, 2 December 2011

²³⁸ Guide to Judicial Conduct, August 2011, available at www.judiciary.gov.uk

²³⁹ Joint Committee on Human Rights, *The Government’s Human Rights Policy and Human Rights Judgments*, 20 December 2011, HC 1726-i, Q12

²⁴⁰ Lord Neuberger, *Where Angels Fear to Tread*, Holdsworth Club Presidential Address, 2 March 2012

In 2000, Keith Ewing, having regard to the increased propensity for judges to publish in law journals, posed the question:

If judges are prepared to publicize their views in this way, why not directly before a body representing people in a public forum, such as a Select Committee of the House of Commons?²⁴¹

Whilst judges have increasingly been willing to give their lectures in public *fora*, at universities or before NGOs, they do not seem to be content to be questioned on those views or engage in dialogue with parliamentarians.

Finally, senior judges have been willing to sit on public inquiries and commissions that consider policy issues.²⁴² While it is probably not conceivable that a judge who had been involved in such activities would subsequently hear a relevant case, it does demonstrate that judges are willing to be involved in activities that go well beyond their precise judicial role. Sir Jack Beatson has recognised the dangers in this, contending that:

The experiences of Lord Scott and Lord Hutton who chaired inquiries in 1996 and 2003 into the sale of arms to Iraq and the death of Dr David Kelly, show the risks when judges chair [politically charged inquiries]. The appointment of a judge does not depoliticise an inherently political issue.²⁴³

The recent experience of Lord Leveson in chairing the inquiry into media standards would seem to support this view.²⁴⁴ One might conclude from all of this that the senior judiciary have been willing to enter treacherous terrain as long as they retained a degree of control over their outputs and interlocutors.

It is in their day job that the judges face the greatest dangers. As Bogdanor has noted, “the more judges are asked to provide the answers to complex moral and political questions, which are the subject of debate in society, the greater will be the pressure to make them politically accountable”.²⁴⁵ Lord Justice Etherton has also recognised the risks, noting that while the senior judiciary might be making policies quite legitimately, or exercising policy-making powers conferred upon them by Parliament, this meant that “there has to be a much

²⁴¹ Ewing, K.D. *A Theory of Democratic Adjudication: Towards a Representative Accountable and Independent Judiciary* (2000) 38 Alberta LR 708 at 725

²⁴² Particularly relevant are Lord Lloyd’s Inquiry into Legislation Against Terrorism in 1996 and the more recent appointments of Sir Peter Gibson to chair a judicial inquiry into Britain’s role in torture and rendition since the al-Qaida attacks of September 2001; and Lord Justice Leveson to chair an inquiry into the culture, practices and ethics of the press

²⁴³ Sir Jack Beatson, *Judicial Independence and Accountability: Pressures and Opportunities*, Nottingham Trent University, 16 April 2008. For more on judicial inquiries see for example: Susskind, R. *The Susskind Interviews: Legal Experts in Changing Times* (Sweet and Maxwell, 2005) pp278–280 and Flinders, M. *Mechanisms of Judicial Accountability in British Central Government*, Parliamentary Affairs 54(1) (2001) pp54–71 at 66

²⁴⁴ A Select Committee on the Inquiries Act 2005 was appointed on 16 May 2013 to consider and report on the law and practice relating to inquiries into matters of public concern

²⁴⁵ Bogdanor, V. *The New British Constitution* (Hart, 2009) p66. See also Bogdanor, V. *Human Rights and the New British Constitution*, JUSTICE Tom Sargant Memorial Lecture 2009, 22 October 2009

more intense focus on the appointments process for those higher courts in order to provide constitutional legitimacy for them in a democratic society".²⁴⁶

The need for checks and balances does not only apply to an overreaching executive, a point recognised by both Lord Scarman and Lord Diplock in *Duport Steel*.²⁴⁷ If the judges are perceived to be acting as lawmakers, it becomes increasingly clear that it is worth reassessing the existing model.

The real issue to be addressed is to ensure that any new methods of accountability do not undermine the independence of the judiciary. Section 3(1) of the Constitutional Reform Act 2005 provides that the Lord Chancellor and Ministers of the Crown "must uphold the continued independence of the judiciary." As has been noted elsewhere, the section does not impose a duty on the judges to be independent, or seek to define judicial independence (although it is "taken for granted" that they will be independent as a matter of common law and by virtue of Article 6 of the European Convention on Human Rights).²⁴⁸ The Act also clearly spells out that the Lord Chancellor and other Ministers of the Crown "must not seek to influence particular judicial decisions through any special access to the judiciary."²⁴⁹

Historically, Dicey had observed that:

Our judges are independent, in the sense of holding their office by permanent tenure, and of being raised above the direct influence of the Crown or the Ministry; but the judicial department does not pretend to stand on level with Parliament; its functions might be modified at any time by an Act of Parliament; and such a statute would be no violation of the law.²⁵⁰

While the preceding Chapters demonstrate the increased importance of the judicial branch, the changes of 2005, the creation of the Ministry of Justice and the Government's more recent reforms (discussed in Chapter 5) highlight the continuing relevance of Dicey's second proposition.

Shimon Shetreet has observed that the term independence of the judiciary "carries two meanings: the independence of individual judges in the exercise of their judicial functions, and the independence of the judiciary as a body".²⁵¹ As to the first, Lord Justice Brooke has argued that judicial independence may be defined as "the ability of a judicial officer to conduct [...] work free from improper pressure by executive government, by litigants and by

²⁴⁶ Lord Justice Etherton, Uncorrected Oral Evidence to the House of Lords Select Committee on the Constitution Inquiry on the Judicial Appointments Process, 13 July 2011, Q47

²⁴⁷ [1980] 1 All ER 529

²⁴⁸ Lady Justice Arden, *Judicial Independence and Parliaments* in Ziegler, K, et al, *Constitutionalism and the Role of Parliaments*, (Oxford, Hart, 2007), p193

²⁴⁹ Constitutional Reform Act, s 3(5)

²⁵⁰ Dicey, A.V. *Introduction to the Study of the Law of the Constitution*, (Indianapolis, Liberty Fund, from the text of the 8th Edition, 1915)

²⁵¹ Shetreet, S. *Judges on Trial* (Amsterdam, North-Holland, 1976), p17. A second edition of this book, co-authored with Sophie Turenne, was published by Cambridge University Press towards the end of 2013

particular pressure groups.”²⁵² Concerns about Governmental pressure seem particularly strong – the judiciary’s own website stated that:

The responsibilities of judges in disputes between the citizen and the state have increased together with the growth in governmental functions over the last century. The responsibility of the judiciary to protect citizens against unlawful acts of government has thus increased, and with it the need for the judiciary to be independent of government.²⁵³

There is a long list of statutory and other conventions which have been established over many centuries to try to ensure the independence of the judiciary. These include the provision of the Act of Settlement (now the Senior Courts Act 1981 as amended by the Constitutional Reform Act 2005) providing that the senior judges²⁵⁴ hold office *quamdiu se bene gesserint*²⁵⁵ and can only be removed on an address of both Houses of Parliament; and that judicial salaries should be immune from governmental interference. Judges are also given immunity from prosecution for any acts that they carry out in performance of their judicial function and benefit from immunity from being sued for defamation for the things they say about parties or witnesses in the course of hearing cases.

The procedure to remove a judge has only ever been used on one occasion, when Sir Jonah Barrington was removed from the Irish High Court in 1830, having been found guilty of embezzlement.²⁵⁶ Although it is worth highlighting Gordon Borrie’s observation that modern writers seem to have ignored the fact that “there have been many *attempts* at removal and consequently many debates in Parliament concerning the conduct of particular judges, mostly in the nineteenth century.”²⁵⁷

It is also said that “judges have been ‘eased out’ from time to time.” Robert Stevens says, for example, that Lord Hailsham (Lord Chancellor under Edward Heath and Margaret Thatcher) “had to urge Lord Chief Justice Widgery and Lord Denning on their way.”²⁵⁸

As Masterman has documented, the abovementioned provisions have been reinforced by the Appellate Jurisdiction Act 1876, the Supreme Court Act 1981 and the Constitutional Reform Act 2005,²⁵⁹ although again it is worth noting that the former President of the Supreme Court, Lord Phillips, has expressed concerns over funding arrangements for the Supreme Court and

²⁵² Brooke LJ, *Judicial Independence – Its history in England and Wales* (available from judiciary.gov.uk, last accessed 30 September 2011)

²⁵³ See: www.judiciary.gov.uk - Judicial Accountability and Independence (last accessed 30 September 2011)

²⁵⁴ Judges at the lower levels can only be removed after disciplinary proceedings

²⁵⁵ During good behaviour

²⁵⁶ Masterman, R. *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press, 2011) p209. Although in his lecture *Judicial Independence – Its history in England and Wales*, Lord Justice Brooke noted the case of Grantham J in 1906, where a debate was held in the House of Commons on the judge’s conduct in connection with the trial of the Yarmouth Election Petition, where “very strong views were expressed during the debate about the judge’s political prejudices”. See also: O’Brien, P. *When Judges Misbehave: The Strange Case of Jonah Barrington*, UK Const. L. Blog (7th March 2013) (available at <http://ukconstitutionallaw.org>, last accessed 27 August 2013)

²⁵⁷ Borrie, G. in Shetreet, S. *Judges on Trial* (North-Holland, 1976, Amsterdam), p xvii. For detailed examples see Shetreet, pp85–155

²⁵⁸ Stevens, R. *The English Judges: Their Role in the Changing Constitution*, (Oxford, Hart, 2002), p80

²⁵⁹ Masterman, R. *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press, 2011) p209

the residual levels of control that this allows the Lord Chancellor and the Ministry of Justice.²⁶⁰ In a speech in 2011 (given whilst he was still in office), Lord Phillips went as far as saying that the funding arrangements for the courts meant that the court was dependent each year upon what it could persuade the Ministry of Justice of England and Wales to give it by way of “contribution”. He argued that this was “not a satisfactory situation for the Supreme Court of the United Kingdom. It is already leading to a tendency on the part of the Ministry of Justice to try to gain the Supreme Court as an outlying part of its empire.”²⁶¹ Following his retirement, Lord Phillips sought to introduce amendments into the Crime and Courts Bill to ensure that the Chief Executive of the Supreme Court was answerable to the President of the Court, and not the Ministry of Justice.²⁶² Lord Pannick, who tabled the amendment with Lord Phillips, said:

There is [...] an important point of principle: of course, the Supreme Court acts independently of the Executive, but it must also be seen to do so. Indeed, that was the major reason why the Supreme Court was created by the 2005 Act and why the Law Lords left this place. For the President of the Supreme Court to have the responsibility for appointing the chief executive would emphasise to all concerned that this is an independent institution.²⁶³

Making clear that he was speaking on behalf of Lord Phillips, Lord Pannick noted that “the existing appointment provision led more than once to confusion in parts of the Government machine that the chief executive should in some sense be acting at the behest of Ministers.” A second issue raised by the amendment was to ensure that the chief executive had a “direct accountability to Parliament for the proper use of the court’s resources and that she acts independently from ministerial discretion.”²⁶⁴ Changes reflecting these amendments were enacted in section 29 of the Crime and Courts Act 2013, which leaves the President of the UK Supreme Court solely responsible for appointing the chief executive; and the chief executive responsible for determining the number of staff and officers of the court.²⁶⁵ As an aside, it might be wondered why Parliament is a suitable venue to hold the chief executive of the court to account, but not the judges.²⁶⁶

Most recently, a conflict has arisen between the judiciary and the current Lord Chancellor, Chris Grayling, over plans to potentially privatise, or make self-funding, parts of the Her

²⁶⁰ Lord Phillips of Worth Matravers, *Judicial independence and accountability: a view from the Supreme Court*, 8 February 2011, pp7–12

²⁶¹ *Ibid*, p12. See also Constitutional Affairs Committee, Session 2003–04, HC48-I, paras 98–100 and the evidence of Professor I.R. Scott

²⁶² For more on the role of the Chief Executive of the Supreme Court, see Gee, G, *Guarding the guardians: the Chief Executive of the UK Supreme Court* [2013] Public Law 538

²⁶³ HL Deb, 4 December 2012, c649

²⁶⁴ *Ibid*

²⁶⁵ It is worth noting that these reforms appear to reflect what Lord Phillips states was originally promised by the Lord Chancellor, Lord Falconer, during the passage of the Constitutional Reform Act 2005. See: Lord Phillips of Worth Matravers, *Judicial Independence and accountability: A view from the Supreme Court*, 8 February 2011

²⁶⁶ The amendments were backed by the House of Lords Constitution Committee, which wrote to the Lord Chancellor indicating its support. House of Lords Select Committee on the Constitution, *Sessional Report 2012–13*, First Report of Session 2013–14, HL Paper 7, para 7

Majesty's Courts and Tribunals Service (HMCTS).²⁶⁷ The Guardian newspaper published leaked correspondence sent by the (now former) Lord Chief Justice, Lord Judge, to the Lord Chancellor. The letter contained a note on reform of HMCTS (written by Lord Justice Gross) which stated, *inter alia*, that "certain matters are or should be axiomatic: no governance or funding arrangements could be countenanced which threatened the independence of the judiciary (from the two other branches of the state) the rule of law or access to justice."

On governance, the note said that the judiciary saw "the need for an HMCTS [...] independent of direct ministerial control" and argued that it was "essential that the Judiciary is involved in the governance" of any new Courts and Tribunal Service (CTS) "at all levels." The note also stated that in relation to "internal arrangements concerning the leadership and management of the judiciary" this must "remain with the judiciary" whilst the Judicial Office "would continue to have a major and perhaps enhanced role."²⁶⁸

While this is all a long way from suggesting that any new CTS should be run directly by the judiciary, the abovementioned moves in respect of the Supreme Court, combined with concerns about funding for the current HMCTS, makes such an option seem at least feasible in the longer term.

Whereas once it might have been an accepted view to argue that the function of the judge was to decide cases and it was only necessary for the judge to have some control over what has been described as "the administrative penumbra immediately surrounding the judicial process, such as listing" the judiciary has more recently argued that "the rule of law has to be founded on the institutional independence of the judiciary", namely "the ability of the judiciary as an institution and a separate branch of government to be free of executive interference in a wider context".²⁶⁹

A practical example of this separation can be seen in the governance arrangements that have been established since the passage of the Constitutional Reform Act. Sir Jack Beatson had earlier highlighted this in a speech on judicial accountability and independence, in which he commented that the judiciary has had to "take an institutional position on the matters which it is responsible", developing governance mechanisms through the Judicial Executive Board and a "revived and reinvigorated Judges' Council."²⁷⁰ Judicial training has also been left in the hands of the judiciary through the Judicial Studies Board, which has also developed new

²⁶⁷ The Guardian, "Lord Chief Justice warns Chris Grayling on courts privatization plans", 24 June 2013

²⁶⁸ The Guardian, "Lord Judge's correspondence with Chris Grayling on court privatization", 25 June 2013

²⁶⁹ Thomas LJ, *The Position of the Judiciaries of the United Kingdom in the Constitutional Changes*, Address to the Scottish Sheriffs' Association, Peebles, 8 March 2008. See also: Neudorf, L. *The Supreme Court and new judicial independence*, Cambridge Journal of International and Comparative Law (2012) 1(2), 25–43

²⁷⁰ Sir Jack Beatson, *Judicial Independence and Accountability: Pressures and Opportunities*, Nottingham Trent University, 16 April 2008. For a history of the Judges Council, see Thomas LJ, *The Judges' Council*, [2005] Public Law 608. For full consideration of the transfer of functions and roles to the judiciary, see: Le Sueur, A. *Parliamentary accountability and the judicial system* in Bamforth, N and Leyland, P (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013). He notes that the Judicial Executive Board is chaired by the Lord Chief Justice and comprises nine senior judges with management responsibilities and the chief executive of the Judicial Office, whilst the Judicial Office now consists of 190 FTE civil servants who report directly to the Lord Chief Justice, rather than to ministers

strands of training, such as “leadership and management.”²⁷¹ Lord Justice Thomas has gone further in spelling out these reforms, indicating that “if the judiciary are to govern their branch of the state, they must have their own structure of governance to ensure the proper governance of the system.” He noted that the transfer of the headship of the judiciary (of England and Wales) to the Lord Chief Justice enables the judiciary to alter its governance structures “internally without recourse to Parliament”, with the relevant checks and balances being those “already inbeing within the judiciary, namely what was known as ‘the extended family’ and the Judges Council.”²⁷²

Whilst it seems likely that the judiciary might resent any additional political influence on appointments²⁷³ and contend that it threatens judicial independence, this approach might well risk the counter-argument that the judiciary was seeking to maintain its own interests. In that context, it may be worth considering the influence of the abovementioned bodies and the judicial hierarchy and its impact on the independence of individual judges.²⁷⁴ It has also been suggested that the judiciary is not above simply resisting change that it dislikes by citing concerns around judicial independence.²⁷⁵ It is worth remembering that when Lord Mackay proposed ending barristers’ monopoly in respect of advocacy in the higher courts, the cry went up that this was “a gross threat to judicial independence and the rule of law.”²⁷⁶ Certainly, the senior judiciary has never explained how enhancing political accountability in the appointments process would “almost inevitably transform accountability into unacceptable influence and thereby undermine judicial independence.”²⁷⁷

As regards the question of appointment hearings, or other political involvement in appointments, the issue is less the structural or institutional independence, but as Malleson has suggested, the need to ensure that the ability of a judge to impartially determine the cases that come before them is not impaired.²⁷⁸ Whilst Article 6(1) of the ECHR might require the courts to be impartial and avoid the appearance of bias, it is difficult to see how this, in itself, would preclude a political aspect to the appointments process particularly given the

²⁷¹ Thomas LJ, *The Position of the Judiciaries of the United Kingdom in the Constitutional Changes*, Address to the Scottish Sheriffs’ Association, Peebles, 8 March 2008

²⁷² Thomas LJ, *The Position of the Judiciaries of the United Kingdom in the Constitutional Changes*, Address to the Scottish Sheriffs’ Association, Peebles, 8 March 2008

²⁷³ Lord Phillips has been quoted as having said: “The idea that we expose ourselves to some kind of public examination would have a danger of simply unbalancing the appointment process”, Grant, J, *A law unto itself*, Prospect Magazine, 25 May 2011

²⁷⁴ Thomas LJ, *The Position of the Judiciaries of the United Kingdom in the Constitutional Changes*, Address to the Scottish Sheriffs’ Association, Peebles, 8 March 2008. An example of the potential influence of the judiciary as a hierarchical institution on the individual judge can be seen in the *Guidance for Judges appearing before or providing written evidence to Parliamentary Committees* approved by the Judicial Executive Board in 2008. This asks judges who are invited to give written or oral evidence to Parliamentary Committees to “consult the office of the relevant Head of Division or the Senior Presiding Judge.”

²⁷⁵ Paterson, A. *Lawyers and the Public Good*, The Hamlyn Lectures 2011 (Cambridge University Press, 2012), p138

²⁷⁶ See: e.g. Drewry, G. *Parliamentary Accountability for the Administration of Justice*, in Horne, A. Drewry, G. and Oliver, D. (eds) *Parliament and the Law* (Oxford, Hart Publishing, 2013)

²⁷⁷ Lord Clarke of Stone-cum-Ebony, *Selecting Judges: Merit, Moral Courage, Judgment and Diversity*, 22 September 2009

²⁷⁸ Malleson, K. *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999) pp62–3 See Also Stephens R *The English Judges* (Hart, 2002), p96

way that the judges of the Strasbourg court are themselves appointed.²⁷⁹ As mentioned above, the current domestic system still retains a role for the executive, and this has been recognised by the judiciary. For example, in 2007 Lord Phillips observed that:

Although in general I can see no role for the executive in selecting judges, there is a case for a limited power of veto in relation to the most senior appointments. The senior judiciary today have, to some extent, to work in partnership with government. It would, I think, be unfortunate if a Chief Justice were appointed in whose integrity and abilities the Government had not confidence.²⁸⁰

More recently, giving evidence to the House of Lords Constitution Committee, he said that while the process should not be political and should be focused on selecting the best candidate for the job:

[O]ne has to recognise that at the highest level it is pretty disastrous if you have in position a judge who simply has not got the confidence of the government – who, for one reason or another, is anathema to them. I think it is highly desirable there should be a mechanism that will, all things being equal, prevent that happening.²⁸¹

It remains important that a perception does not develop that the judiciary governs itself in its own interest (rather than in the interests of the country as a whole).²⁸²

²⁷⁹ For a discussion of the appointment of the most recent UK judge to the European Court of Human Rights, see: *The Guardian*, “Paul Mahoney appointed UK’s new judge in Strasbourg”, 27 June 2012

²⁸⁰ Lord Phillips of Worth Matravers, *Judicial Independence*, Commonwealth Law Conference 2007, Kenya, 12 September 2007

²⁸¹ House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, Oral Evidence Q171

²⁸² Thomas LJ, *The Position of the Judiciaries of the United Kingdom in the Constitutional Changes*, Address to the Scottish Sheriffs’ Association, Peebles, 8 March 2008

Chapter 5: The Government Responds

How judges are selected is a matter of constitutional significance. Selection is not just about sterile processes. It is about balancing independence, accountability and legitimacy, and ensuring that the process for selection is not captured by any vested interest. (Baroness Prashar)²⁸³

Despite the fact that the Constitutional Reform Act was only passed in 2005 (and that it was subject to extensive consultation and a Concordat between the executive and the judiciary) it would be wrong to think that either the Labour or subsequent Coalition Government found that it had settled matters, or put the judiciary on a modern footing.²⁸⁴ Indeed, there were many further legislative changes.

It might be argued that the later reforms were not particularly predicated on theoretical concerns around the separation of powers or judicial independence (insofar as those reforms that were actually enacted focused far more on encouraging diversity). Nonetheless, it is worth noting that shortly after the passage of the 2005 Act, there were additional changes to eligibility for judicial appointments, made under the Tribunals, Courts and Enforcement Act 2007), which altered (and loosened) the criteria for appointment to a number of judicial offices.

Furthermore, the executive's involvement in judicial appointments was the subject of some discussion during the final years of the Labour Government. In October 2007, the Government produced a consultation document entitled *The Governance of Britain – Judicial Appointments*. The consultation posed a number of questions seeking views on the existing functions of the executive, legislature and judiciary in relation to appointments and considered the scope of transferring functions. In March 2008, the Government published a White Paper and a Draft Bill setting out proposals for further changes to the system of judicial appointments. In particular, the Labour Government stated that it believed “that the role of the executive in the appointment of judges should be reduced, that the existing arrangements for these appointments should be streamlined and that those who exercise power should be made more accountable.”²⁸⁵ It was suggested that the Lord Chancellor should be removed from the selection process of judicial appointments below the High Court level and that the Prime Minister should be removed from the appointments process completely. In addition, it was proposed that the Lord Chief Justice should no longer be required to consult the Lord Chancellor, or to obtain his concurrence, before deploying, authorising, nominating, or extending the service of judicial office holders (unless there were “financial implications”).

During the course of the various *Governance of Britain* consultations, the Government again noted the opposition to the idea of any role for the legislature “in the selection or making of

²⁸³ Baroness Prashar, *Translating Aspirations into Reality: Establishing the Judicial Appointments Commission in Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (A collection of essays prepared under the auspices of the Judicial Appointments Commission), (London, 2010), p43

²⁸⁴ For a discussion of the system of judicial appointments in place immediately before the passage of the Constitutional Reform Act 2005, see for example: Malleon, K. *Selecting Judges in the Era of Devolution and Human Rights*, in Le Sueur, A. *Building the UK's New Supreme Court: National and Comparative Perspectives*, (Oxford University Press, 2004), pp295–313

²⁸⁵ *The Governance of Britain: Constitutional Renewal*, March 2008, Cm 7342-I, para 113

judicial appointments, and in particular to confirmation hearings for individual appointments to judicial posts.”²⁸⁶ Nonetheless, it accepted that “there could be merit in a meeting of the House of Commons Justice Affairs Committee and the House of Lords Constitution Committee to hold the system to account on an annual basis.”²⁸⁷

These suggestions failed to make it into the Constitutional Reform and Governance Act 2010, but ideas for tinkering with the system did not end there. In November 2011, the Ministry of Justice issued a further consultation paper, entitled *Appointments and Diversity: A Judiciary for the 21st Century*.²⁸⁸ The paper acknowledged a need to address “the degree of transparency surrounding some appointments.” The consultation recognised the fact that the Lord Chancellor was required to make the vast majority of judicial appointments.²⁸⁹ But, it set out a number of alternative frameworks, including transferring the Lord Chancellor’s decision-making role and his power to appoint to the Lord Chief Justice (in relation to appointments below the Court of Appeal or High Court). The consultation also questioned whether the Lord Chancellor should be consulted prior to the start of the selection process for the most senior judicial roles and whether the Lord Chancellor should participate on the selection panel for the appointment of the Lord Chief Justice and President of the Supreme Court (and in so doing, lose the right to a veto). The thorny question of whether judges should be involved in appointing their successors was also addressed.

The resistance to change and the introduction of new forms of political accountability (particularly from the judiciary) can be seen from the most recent report on these issues by the House of Lords Constitution Committee, *Judicial Appointments*, which was published in March 2012. The Committee acknowledged that there were a number of arguments in favour of greater accountability²⁹⁰ (discussed in more detail below). In spite of this, the Committee stated that it was against any proposals to introduced pre-appointment hearings for judges since “such hearings could not have any meaningful impact without undermining the independence of those subsequently appointed”; and, in any event, “judges’ legitimacy depends on their independent status and appointment on merit, not on any democratic mandate.”²⁹¹ It also determined that, unless a judge served a leadership role, such as the Lord Chief Justice or the President of the Supreme Court, “post-appointment hearings of senior judges would serve no useful purpose.”²⁹² Finally (and again ignoring the role of the democratic mandate), the Committee claimed that while there might be a need for greater ‘lay’ involvement in the process of appointments, “parliamentarians, acting in that capacity, should not sit on selection panels for judicial appointments” as “there is no useful role that

²⁸⁶ *The Governance of Britain: Constitutional Renewal*, March 2008, Cm 7342-I, para 133

²⁸⁷ *Ibid*

²⁸⁸ Ministry of Justice, *Appointments and Diversity: A Judiciary for the 21st Century*, Consultation Paper CP19/2011, November 2011

²⁸⁹ Noting that, in 2010, the Lord Chancellor had approved 686 judicial appointments: 400 for the Tribunal Service; 284 for the Courts Service; and 2 for the UK Supreme Court. The Lord Chancellor accepted every recommendation put forward by the Supreme Court and the JAC except for one

²⁹⁰ House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, paras 39–45

²⁹¹ *Ibid*

²⁹² *Ibid*, para 48

parliamentarians could play that could not be played by lay members on selection panels.”²⁹³ This conservatism on the part of the Committee was underpinned by the views expressed by the vast majority of the judges that gave evidence to it.

The Government did end up pursuing further changes to the judicial appointments system and the criteria for appointment through the Crime and Courts Act 2013 – which again focused *almost* entirely on diversity.²⁹⁴ The approach to judicial appointments taken during the passage of that Bill varied and may have been impacted on by the change of Lord Chancellor mid-way through the process.²⁹⁵ Schedule 13 of the 2013 Act made a number of amendments to the Constitutional Reform Act 2005. These included an amendment to allow for there to be fewer than 12 full time equivalent Supreme Court judges at any time – the new provision means that rather than simply specifying the Court consists of 12 judges, the Court could instead consist of those persons appointed as its judges – provided that there be no more than the full time equivalent of 12 at any time. This would theoretically permit part-time Supreme Court judges. One of the more notable of the changes that was enacted was the introduction of the “tipping point” principle, which (following a late amendment) could be applied to appointments to the Supreme Court where two candidates were of equal merit. This would allow a selection commission to take diversity into consideration when making the final selection decision between two candidates of equal merit. However, the provision is designed so that it would only come into play when two candidates for a Supreme Court appointment have satisfied the merit criteria. The relevant (and somewhat complex) part provides:

Diversity considerations where candidates for judicial office are of equal merit

9 In section 27 of the Constitutional Reform Act 2005 (selection for appointment to Supreme Court to be on merit etc) after subsection (5) insert –

“(5A) Where two persons are of equal merit –

(a) section 159 of the Equality Act 2010 (positive action: recruitment etc) does not apply in relation to choosing between them, but

(b) Part 5 of that Act (public appointments etc) does not prevent the commission from preferring one of them over the other for the purpose of increasing diversity within the group of persons who are the judges of the Court.”

10 (1) Section 63 of the Constitutional Reform Act 2005 (judicial appointments to be solely on merit) is amended as follows.

²⁹³ *Ibid*, para 52

²⁹⁴ O’Brien, P. *Changes to judicial appointments in the Crime and Courts Act 2013* [2014] Public Law 179

²⁹⁵ For some background on the changing proposals relating to judicial appointments during the passage of the Bill, see: e.g. Gee, G, *The Crime and Courts Bill and the JAC*, UK Const. L. Blog (1 November 2012) (available at <http://ukconstitutionallaw.org>, last accessed 18 March 2013) and O’Brien, P. *Three Thoughts About the Crime and Courts Bill and Judicial Appointments*, UK Const. L. Blog (2 July 2012) (available at <http://ukconstitutionallaw.org>, last accessed 18 March 2013)

(2) In subsection (1) (selections to which subsections (2) and (3) apply) for “and (3)” substitute “to (4)”.

(3) After subsection (3) insert —

“(4) Neither “solely” in subsection (2), nor Part 5 of the Equality Act 2010 (public appointments etc), prevents the selecting body, where two persons are of equal merit, from preferring one of them over the other for the purpose of increasing diversity within —

(a) the group of persons who hold offices for which there is selection under this Part, or

(b) a sub-group of that group”.

Helpfully, the Explanatory Notes to the Act indicate that Part 2 of Schedule 13 “amends section 27 of the Constitutional Reform Act to provide that the UK Supreme Court is not prevented from preferring one candidate over another for the purposes of increasing diversity where two candidates are of equal merit.”

In addition, new criteria were introduced in relation to the composition of selection commissions for the UK Supreme Court appointments. Following on from the recommendations of the House of Lords Constitution Committee, no politicians were included on the panel. Instead, the selection committee would have to include: a minimum of 5 members (and in any case an odd number of members); at least one serving judge of the Supreme Court; at least one non-legally qualified member; and at least one member from the Judicial Appointment Commission, the Judicial Appointment Commission of Scotland and the Northern Ireland Judicial Appointment Commission.

New provisions were also included in relation to the composition of selection commissions for the appointment of the President and Deputy President of the Supreme Court (again following a recommendation of the House of Lords Constitution Committee). These changes ensure that when such appointments are made, the President or Deputy President are precluded from sitting on the selection panel convened to select their replacement.

The Act also made changes to the selection process for the Lord Chief Justice and Heads of Division (the details of which were moved to secondary legislation). The role of the Lord Chancellor in the appointments process was also diminished, as the power to decide upon selections made by the Judicial Appointment Commission was transferred to the Lord Chief Justice, or Senior President of Tribunals for certain judicial offices below High Court.

Finally, following the enactment of the 2013 Act, three statutory instruments were published: The Draft Judicial Appointment Regulations 2013; the Draft Judicial Appointments Commission Regulations 2013; and, the Draft Supreme Court (Judicial Appointment) Regulations 2013. These Regulations were developed in conjunction with the judiciary and the Judicial Appointments Commission (and the JAC Regulations and Supreme Court Regulations were agreed with the Lord Chief Justice and President of the Supreme Court respectively).

Helen Grant, the Parliamentary Under-Secretary of State at the Ministry of Justice tasked with piloting the regulations through the Delegated Legislation Committee, summarised the effect of them. Noteworthy changes included: a revision of selection panels for senior judicial offices, comprising the Lord Chief Justice, Heads of Division, the Senior President of Tribunals and ordinary judges of the Court of Appeal. Helen Grant said that the panels would be increased in size, made more diverse and that lay representation on them would also increase. In addition, the Lord Chancellor would be provided with a consultative role, reflecting the existing role in relation to Supreme Court appointments, on the selection of Lord Justices of Appeal and the Senior President of Tribunals. The Minister argued that: “Given the importance of those judicial offices to the administration of justice and the leadership that they provide to the judiciary, there is a clear case for the Executive to be able to express their view for reasons of accountability to the public and Parliament”.²⁹⁶

The House of Lords Constitution Committee welcomed the fact that many of the eventual changes had stemmed from the recommendations in its report *Judicial Appointments*, noting that it had also succeeded in helping to “improve the bill” by recommending that the Lord Chancellor should not be included on selection panels and in securing a “diversity duty” for the Lord Chancellor and Lord Chief Justice – amendments which were “widely supported on all sides of the House during the Bill’s passage.”²⁹⁷

It is plain that the bulk of these provisions were designed to increase the diversity of the court and hence its legitimacy; but the decision leaves a number of other underlying questions unanswered. Even amongst the Supreme Court Justices, there did not appear to be unanimous support on changes relating to diversity. Lord Sumption, who had previously sat as a member of the Judicial Appointment Commission, questioned the concept of ‘equal merit’, arguing that at the “upper end of the ability range, there is usually clear water between every candidate once one looks at them in detail.” He went on to contend that:

If you dilute the principle of selecting only the most talented candidates by introducing criteria other than merit, you will by definition end up with a bench on which there are fewer outstanding people. But there is a more serious problem even than that. It is the impact that the changes would have on applications [...] Outstanding candidates will not apply in significant numbers for judicial appointments if they believe that the appointments process is designed to favour ethnic or gender groups to which they do not belong.²⁹⁸

Lord Sumption is not the only person to have expressed such doubts. In 2003, at the time of the original reforms, Sir Thomas Legg, the former permanent secretary at the Lord Chancellor’s Department, set out his views on the real tensions that could occur when attempting to “diversify the judiciary on the one hand and appointing on merit on the other – at least merit as we have hitherto understood it”. He contended that:

²⁹⁶ Hansard, HC DLC Debate, 9 July 2013, c4

²⁹⁷ House of Lords Select Committee on the Constitution, *Sessional Report 2012–13*, First Report of Session 2013–14, HL Paper 7, paras 6–11

²⁹⁸ Lord Sumption, *Home Truths about Judicial Diversity*, Bar Council Law Reform Lecture, 15 November 2012. See also, *The Times*, “If not now for a woman Lord Chief Justice, when?”, 18 July 2013

This tension cannot be finessed away by redefining merit as somehow including reflectiveness of the community. Selection on merit can have one of at least two quite separate meanings. One of those meanings is what one might call *maximal* merit. On this approach, there is only one candidate who is fit for appointment, namely the single candidate who is judged to be the best available. This approach leaves no room at the point of decision for supplementary policies about the social makeup of the judiciary [...] The other approach, which I have called *minimal* merit is where all candidates who are judged to reach the agreed minimum standard are treated as equally qualified for appointment. The appointing authority is then entitled to select among the qualified candidates in accordance with any relevant supplementary policy [...] Both of these approaches can genuinely claim to be appointment on merit, but they can lead to very different results.²⁹⁹

It is unclear whether the Government's most recent reforms will move selections more towards what Legg has described as a *minimal* merit approach (perhaps, to use a less emotive term, a 'threshold test').³⁰⁰ The most recent selection of Sir John Thomas as Lord Chief Justice (ahead of the heavily tipped Lady Justice Hallett) suggests, that, as Joshua Rozenberg put it, the selection panel was determined to "put traditional judging skills ahead of a career in the criminal law" and were "not prepared to be swayed by the feeling that it would be good for diversity to have a woman at the top."³⁰¹ Rozenberg will no doubt have disappointed critics of the current system when he concluded on the issue of appointments more generally: "with most of the applicants being male, the chances that a woman will be the strongest candidate, judged by traditional criteria, are statistically small. Nobody wants to change those criteria."³⁰²

Yet those who have concerns about a 'tipping point' approach, and the impact that it could have in the future, might find that the latest innovation supports the idea of Parliamentary confirmation of candidates (to ensure that 'merit' is not diluted by other considerations).³⁰³

A Considered Response?

While it is true to say that the response of the Government and the Lords Constitution Committee did not suggest a great deal of openness to the idea of increased political accountability or appointment hearings, the depth of the analysis might well be challenged,

²⁹⁹ Legg, T. *Brave New World – The New Supreme Court and judicial appointments*, in Morgan, D. (ed) *Constitutional Innovation: The creation of a Supreme Court for the United Kingdom; domestic, comparative and international reflections*, (London, Lexis Nexis, 2004), pp50–51

³⁰⁰ At the time of writing, a consultation exercise by the Judicial Appointments Commission entitled *Changes to the Judicial Appointments process resulting from the Crime and Courts Act 2013: Consultation on diversity considerations where candidates are of equal merit* (CP 01/13) May 2013 had just closed

³⁰¹ *The Guardian*, "Choice of Sir John Thomas as Lord Chief Justice sees tradition prevail", 15 July 2013

³⁰² *Ibid*

³⁰³ For thoughts on other relevant considerations, see: Hazell, R. and Malleson, K. *Increasing Democratic Accountability in the Appointment of Senior Judges*, UK Constitutional Law Blog, 15 July 2011 (last accessed 27 August 2013)

particularly given the fact that little comparative law work was carried out, looking at equivalent systems in other common law countries.³⁰⁴

Moreover, one could see a developing concern amongst individual Members of Parliament from across the political spectrum who had thought about the subject more deeply. Some of these are self-declared ‘radicals’, such as Douglas Carswell MP, who has said that “there should be a degree of democratic control over judicial appointments” along with “a process of transparent Parliamentary hearings to confirm senior appointments to the judiciary.”³⁰⁵ During consideration of the Draft Judicial Appointment Commission Regulations 2013 and the Draft Supreme Court (Judicial Appointments) Regulations 2013, he deprecated the Government’s changes claiming that they had failed to bring real reform to judicial appointments. He said:

At a time when judges are incredibly active in deciding not only what the law says, but what they think it should say, we should be introducing regulations to democratise the process of judicial appointments. Unfortunately, the draft regulations do little to improve democratic accountability [...].

He contended that the recent changes represented a “squandered opportunity” making plain that he felt that the measures “will do nothing to make accountable these powerful officials with enormous scope to decide how the country is run.”³⁰⁶

David Lammy MP, a former junior minister at the Department for Constitutional Affairs, has argued that:

The US system is more honest. Senior judges go through confirmation hearings in which elected politicians ask them to set out some of their broad assumptions and prejudices. This is an explicit recognition that we all have inclinations and biases that influence the judgments we make. Making these public helps sift out those with extreme attitudes and implicitly encourages judges to guard against pushing their own views to hard. We should adopt the same practice for senior judges in Britain, with prospective high court judges going through confirmation hearings in parliament, which would themselves be televised.³⁰⁷

Most notably, Jack Straw (a former Lord Chancellor who was familiar with the current appointments system) gave a *Hamlyn Lecture* in December 2012, focusing on the issue of judicial appointments. He recognised the need for political accountability in two cases (although he focused on the role of the Lord Chancellor, rather than that of Parliament). The

³⁰⁴ It is arguable that international comparisons would render some of the objections to enhanced political accountability less significant. See, e.g. Paterson, A. and Paterson, C. *Guarding the Guardians?* Centre Forum, March 2012, Chapter 5 (available at: <http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf>, last accessed 8 April 2013) and Malleson, K. and Russell, P. (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the world* (University of Toronto Press, 2006)

³⁰⁵ Carswell, D. *Direct Democracy: modernisation and the rebirth of Tory radicalism*, October 2006 (available at: <http://www.douglascarswell.com/publications/essay-in-forward-magazine/110>, last accessed 15 March 2013)

³⁰⁶ Hansard, DLC Deb, 9 July 2013, c7

³⁰⁷ Lammy, D. *Out of the Ashes: Britain After the Riots*, (London, Guardian Books, 2012) pp163–164

first case was when dealing with an appointment to a post with senior managerial responsibilities. He observed that:

The Lord Chief Justice is by law the head of the judiciary. This post, and those of his immediate colleagues, the heads of division, require not only high skills as jurists but also considerable leadership and administrative expertise and the ability to relate effectively with the Ministry of Justice, the courts service and other organs of government. Since the Lord Chancellor has responsibility to parliament for these services, and crucially for the vote of their money, the Lord Chancellor has an entirely legitimate interest in the qualities of those who fill these posts.³⁰⁸

The second case was when dealing with the most senior members of the judiciary – the members of the Supreme Court. He argued that:

The Supreme Court's role is wide, and its judgements inevitably have an impact on our politics and our lives. However much the individual members are themselves detached from party politics, who they are – their perspective, their life experience, their approach – matters and is evident from their judgments too.³⁰⁹

If one accepts both of these views, and believes that Parliament should also have a role to play in this process, then one next needs to pose the question: whether Parliament has the institutional capacity to conduct appointment hearings, or whether some other model should be preferred.³¹⁰

³⁰⁸ *The Guardian*, "Jack Straw on judicial appointments: 'Labour went too far'", 4 December 2012

³⁰⁹ *Ibid*

³¹⁰ See for example, Paterson, A. and Paterson, C. *Guarding the Guardians?* Centre Forum, March 2012, p 66. The authors considered a suggestion that three Parliamentarians could be selected to sit on an appointment commission for the senior judiciary. The paper suggested certain restrictions on eligibility, such as membership of the House of Commons Justice Committee, or House of Lords Constitution Committee, or other stipulations to ensure relevant expertise. This might ensure a "much needed connection to the democratic process and therefore enhanced legitimacy for the candidate ultimately appointed", but would not be a particularly transparent process

Chapter 6: Do Parliamentary Select Committees have the Capacity to Conduct Judicial Confirmation Hearings?

We need somebody who's got the heart, the empathy, to recognise what it's like to be a young teenage mom, the empathy to understand what it's like to be poor, or African-American, or gay or disabled or old – and that's the criterion by which I'll be selecting any judges. (Barack Obama)³¹¹

I wouldn't approach the issue of judging in the way the President does. He has to explain what he meant by judging. I can only explain what I think judges should do, which is judges can't rely on what's in their heart. They don't determine the law. Congress makes the law. The job of a judge is to apply the law. (Sonia Sotomayor)³¹²

One of the hurdles that stand in the way of introducing confirmation hearings for judicial appointments is the question of whether Parliament's select committees actually have the institutional capacity to conduct useful and informative interviews with candidates. Some may be sceptical as to whether Parliament has overcome the reputation that it had gained at the beginning of the 21st Century as having lost influence and become subordinate to the executive. After all, in 2000, in a paper entitled *Mr Blair's Poodle*, Andrew Tyrie MP stated:

Parliament has safeguarded freedom and limited government for hundreds of years – many of our liberties stem from parliamentary tussles with successive governments. Parliament is probably less well-equipped to engage in these battles now than ever before in peace time.³¹³

This Chapter will consider these questions in the light of a number of studies examining the effectiveness of recently introduced parliamentary hearings (for more general public appointments). The Chapter will also reference interviews carried out by the author with the Chairman of the Justice and Liaison Committees, Sir Alan Beith, a former Lord Chancellor, Lord Falconer QC and a former Permanent Secretary at the (then) Lord Chancellor's Department, Sir Thomas Legg QC.

There has been limited academic study of the broad effectiveness of UK select committees.³¹⁴ In his book, *Who Runs this Place: The Anatomy of Britain in the 21st Century*, the late Anthony Sampson contended that the Westminster Committee system had "serious limitations" and that the committees themselves lacked the "teams of lawyers and researchers" seen in Washington. Moreover, he criticised the quality of questioning by Members of Parliament and the lack of any "special counsel" to assist with this task. Whilst an earlier article by the author, focusing on the work of the (then) Constitutional Affairs Select Committee attempted

³¹¹ Obama, B. Speech before Planned Parenthood Action Fund, 17 July 2007

³¹² Sotomayor, S. Confirmation hearing, 14 July 2009

³¹³ Tyrie, A. *Mr Blair's Poodle: An Agenda for Reviving the House of Commons*, (Centre for Policy Studies, 2000), p4

³¹⁴ For some recent examples, see: Rogers, R and Walters, W. *How Parliament Works*, 6th Edition, Pearson, 2006; pp371–77; Hindmoor, A, Kennon, A and Larkin, P. *Assessing the Influence of Select Committees in the UK: The Education and Skills Committee, 1997–2005*, *Journal of Legislative Studies*, Vol 15, No 1, pp71–89; Horne, A. *Parliamentary Scrutiny: An Assessment of the Work of the Constitutional Affairs Select Committee*, *JUSTICE Journal*, 2006, Vol 3, No 2, pp62–74) and Benton, M and Russell, M *Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons*, *Parliamentary Affairs* (online) May 2012

to rebut part of this critique³¹⁵ it is important to recognise that despite being frequently described by the press as “powerful” or “influential”, UK select committees have variable reputations and are certainly not as well-resourced as their US counterparts.

There have been significant reforms of the select committee system in recent years (discussed further below) and it is argued that the “election of select committee chairs by the House and of members by party colleagues is also likely to have increased select committees’ credibility and legitimacy.”³¹⁶

The practice of parliamentary committees conducting public hearings in respect of public appointments did not start with the reforms of 2008. Rather, it commenced with the Treasury Committee in 1997,³¹⁷ which announced the intention to hold hearings with individuals nominated to the Monetary Policy Committee (MPC) of the Bank of England.³¹⁸ The Institute for Government recorded, in 2011, that there had been a total of 24 MPC hearings, and that the Committee only asked the Government to “think again” on one occasion. The Government exercised its prerogative to proceed with the appointment. The Institute noted: “Reflecting on the Chancellor’s decision to disregard its objections, the committee concluded that the hearings played an important function nonetheless.”³¹⁹

Subsequent interest in these types of hearings was fairly extensive.³²⁰ In 2002, scrutiny of major public appointments was included in the ten core tasks for select committees drawn up by the Liaison Committee. The Public Administration Committee published a report in 2003, *Government by Appointment: Opening up the Patronage State*, whilst the issue was also considered by the Power Commission, in its paper *Power to the People: The Report of Power, an Independent Inquiry into Britain’s Democracy* in 2006.³²¹

Following Gordon Brown’s appointment as Prime Minister, further reform was proposed. The *Governance of Britain Green Paper*, published in July 2007 recommended that Government nominees for certain key positions “should be subject to a pre-appointment hearing with the relevant select committee”. It was suggested that the hearing “would cover issues such as the

³¹⁵ Horne, A. *Parliamentary Scrutiny: An Assessment of the Work of the Constitutional Affairs Select Committee*, JUSTICE Journal, 2006, Vol 3, No 2, pp62–74 at 62–63

³¹⁶ Kelly, R. *Select Committees: Powers and Functions*, in Horne, A. Drewry, G. and Oliver, D. (eds) *Parliament and the Law* (Oxford, Hart Publishing, 2013)

³¹⁷ Although the Institute for Government notes that the idea can be traced back to 1979 and measures were introduced in respect of the Comptroller and Auditor General in 1983. See: Institute for Government, *Balancing Act: The Right Role for Parliament in Public Appointments*, March 2011, p13

³¹⁸ See: Treasury Select Committee, *Accountability of the Bank of England*, HC 282, 29 October 1997 and Treasury Select Committee, *The Monetary Policy Committee of the Bank of England: Confirmation Hearing*, HC 822, 19 June 1998. Although the idea may have been raised first by Tony Benn in 1979. See: Riddell, P. *Parliament Under Pressure*, Victor Gollancz, London, 1988, p209

³¹⁹ Institute for Government, *Balancing Act: The Right Role for Parliament in Public Appointments*, March 2011, p13

³²⁰ For further background information, see: Maer, L. House of Commons Library Research Paper 08/39, *Parliamentary Involvement in Public Appointments*, April 2008

³²¹ The Power Committee concluded that: “Select Committees should be given independence and enhanced powers including the power to scrutinise and veto key government appointments and to subpoena witnesses to appear and testify before them. This should include proper resourcing so that committees can fulfil their remit effectively.”

candidate's suitability for the role, his or her key priorities and the process used in selection".³²²

This proposal was welcomed by both the Public Administration Select Committee, which published a report on the subject in January 2008,³²³ and the House of Commons Liaison Committee. The latter produced a set of guidelines for the conduct of hearings. A final list of posts that would be subject to this new form of scrutiny was agreed between the Liaison Committee and the Government in May 2008.³²⁴

At this stage, the committees did not have a veto power over any appointments, and the experiment was subject to assessment and review. The Liaison Committee commissioned the Constitution Unit at University College London to conduct a research project on the operation and impact of hearings.³²⁵ The Constitution Unit study conducted by Peter Waller and Mark Chalmers and entitled *An Evaluation of Pre-Appointment Scrutiny Hearings* was published in February 2010. The authors interviewed over 60 individuals who were involved in the process, including Committee Chairs, Members and Clerks, preferred candidates and Departmental Officials.

The final report noted that there had been "a positive benefit from the new approach in terms of democracy and transparency" although it concluded that "it has been a modest step not a giant stride". It also stated that the majority of the preferred candidates "supported the hearings" and felt that they were "beneficial to them" and justified on "democratic grounds".³²⁶ The study did not record any "deterrent effect to good quality candidates" arising from the hearings.³²⁷

One significant issue that arose, however, was what should happen if a committee produced a negative report on a candidate. Out of the 18 hearings considered by the Constitution Unit, this only occurred once (the appointment of the Children's Commissioner for England). Whilst the majority of candidates interviewed by the Unit had suggested that they would not take up a role following a negative report, in the case of the Children's Commissioner the then Secretary of State, Ed Balls, chose to confirm the appointment of the preferred candidate, who accepted the position. The report recorded that there was considerable press coverage of the issue following Ed Balls' decision and there was some speculation that the dispute arose as "part of a wider political conflict between the Committee and the Secretary of State".³²⁸

Whatever the reason for the decision, the case was the first example of a recommendation not to appoint and led some observers to suggest that the process was "a sham".³²⁹ Since then,

³²² Ministry of Justice, *The Governance of Britain*, Cm 7170, July 2007, p29

³²³ Public Administration Select Committee, *Parliament and Public Appointments: Pre-appointment hearings by select committees*, HC 152, 16 January 2008

³²⁴ House of Commons Liaison Committee, *Work of the Committee in Session 2008-9*, HC 426, 16 March 2010, p23

³²⁵ *Ibid*, p25

³²⁶ Constitution Unit, *An Evaluation of Pre-Appointment Scrutiny Hearings*, 9 February 2010, p4

³²⁷ *Ibid*, p5

³²⁸ *Ibid*, p63

³²⁹ *Ibid*

issues have been raised about candidates for positions as the Chief Inspector of Probation; the Chair of the Statistics Authority (in 2011); and the Director of the Office for Fair Access (in 2012). These recommendations met with mixed responses as some candidates reluctantly withdrew, while others, such as Professor Les Ebdon, were appointed in any event.³³⁰ This would be a significant issue if this type of hearing was introduced for Supreme Court judges. As noted elsewhere, if a veto power were not included, supporters of the idea of hearings would have to clarify what would happen if the committee did not express confidence in a candidate at a pre-appointment hearing and whether the candidate could still be appointed (and retain the confidence of the Court).³³¹

Following the May 2010 election and the formation of the Coalition Government, there was an agreement to “strengthen the powers of Select Committees to scrutinise major public appointments”.³³² In a response to the Liaison Committee’s pre-election report, the Government said that it would offer pre-appointment hearings for major public appointments “on a permanent basis”.³³³ It also agreed to “examine further the need for consolidated guidance where committees are minded to recommend against Ministers’ preferred candidates.”³³⁴ This reform was combined with Parliament’s adoption of the proposal of the Wright Committee to introduce election (by the whole House of Commons) for Chairs of departmental select committees,³³⁵ giving rise to at least a perception of an increasingly powerful select committee system.

Another important development was a concession, by the Government, of a veto power over appointments to the new Office for Budget Responsibility (OBR). This control was granted in the form of a statutory power, contained in Schedule 1 to the Budget Responsibility and National Audit Act 2011.

The precedent was extended in February 2011, when Lord McNally gave a written ministerial statement announcing that the Government would strengthen Parliament’s role in the appointment of the next Information Commissioner by allowing the Justice Select Committee a pre-appointment hearing with veto powers.³³⁶ He stated that, upon the appointment of the next commissioner in 2014, the Government would offer the Justice Select Committee “a pre-appointment hearing with the preferred candidate and will accept the committee’s conclusion on whether or not the candidate should be appointed.” He said that this would “make the appointment process more open and transparent and enhance the independence of the office.”³³⁷

³³⁰ Bowers, P, Kelly, R and Maer, L. *Parliamentary Involvement in Public Appointments*, House of Commons Library Standard Note SN/PC/04387 (last updated 2 March 2012)

³³¹ Horne, A. *Confirmation Hearings for Appointments to the Supreme Court: Some Practical Hurdles*, UKSC Blog, 23 February 2010

³³² HM Government, *The Coalition: Our Programme for Government*, 2010, p21

³³³ House of Commons Liaison Committee, *Pre-appointment Hearings: Further Government Responses to the Committee’s Second Report of Session 2009–10 (Work of the Committee 2008–09): Second Special Report of 2010–11*, HC 564, 2 November 2010, p2

³³⁴ *Ibid*, p3

³³⁵ House of Commons Reform Committee, *Rebuilding the House*, HC 1117, November 2009

³³⁶ HL Deb, 16 February 2011, col WS80

³³⁷ *Ibid*

Further analysis of the success of these new public appointment hearings was offered in a paper published in March 2011 by the Institute of Government. In a report drafted by Akash Paun and David Atkinson, entitled *Balancing Act: the right role for parliament in public appointments*, the Institute recommended that Parliament should be given an effective veto on appointments from what it described as an “A list” of 25 top public appointments as it had over the head of the OBR. In a foreword to the report, Lord (Andrew) Adonis, a former minister in the Labour administration and the Director of the Institute, argued that:

In a parliamentary democracy, effective parliamentary scrutiny and accountability are vital to the legitimacy of government. These proposals, which build on existing good practice, will serve to enhance that legitimacy.³³⁸

The paper acknowledged Parliament’s increasing role in the public appointments process and argued that involving Parliament in the appointments process brought a number of advantages, including increasing the transparency of the appointment process and the democratic accountability of executive functions carried out at ‘arm’s length’ from ministers.³³⁹

The Institute for Government concurred with the Constitution Unit’s analysis that the “public nature of pre-appointment hearings and other forms of parliamentary scrutiny enhances the transparency of the appointments process.” It also argued that the “transparent nature of committee scrutiny can be a way to put pressure on government to follow better practice during the appointment process itself” and that MPs can test is the ability of the preferred candidate “to stand up to robust public scrutiny.” It concluded that “the expansion of parliamentary scrutiny of public appointments has delivered (albeit small) benefits in terms of improved governance and accountability.”³⁴⁰

Amongst all of this there seemed a growing recognition that the “cult of the non political”, as Sir Ross Cranston has dubbed it, has had only limited success, since it is not possible to take the politics out of important decisions by entrusting them to quangos or appointment commissions.³⁴¹

³³⁸ Institute for Government, *Balancing Act: The Right Role for Parliament in Public Appointments*, March 2011

³³⁹ Institute for Government, *Balancing Act: The Right Role for Parliament in Public Appointments*, March 2011, p6

³⁴⁰ *Ibid*, pp18–19

³⁴¹ Cranston, R, (foreword) in Horne, A. *The Changing Constitution: A Case for Judicial Confirmation Hearings*, Study of Parliament Group Paper No. 1, January 2010. Whilst still a Labour MP, Cranston said: “We have to be careful about saying that politics can be taken completely out of the process. The members of any appointment committee will come to the job with particular values: they may not be political, but they will have social values or non-party political assumptions, and so on.” He also noted Robert Steven’s arguments about the cult of the non political having elements of Mussolini’s corporatism about it. HC Deb, 27 May 2004, col 511WH. By contrast, Sir Jeffrey Jowell has argued that there is a growing international consensus in favour of independent judicial appointment commissions, (pointing to, e.g. the Venice Commission’s report adopted in March 2010 on the Independence of the Judicial System, Part 1). See: Jowell, J. *The Growing Consensus in Favour of Independent Judicial Appointment Commissions* in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (A collection of essays prepared under the auspices of the Judicial Appointments Commission), (London, 2010), pp1–10

Are there any Lessons to be Drawn?

When considering whether any lessons can be drawn from the apparently successful rollout of pre-appointment hearings for public appointments, one first has to consider some of the obstacles that have been noted in the past.

As indicated elsewhere,³⁴² proponents of a move towards parliamentary confirmation hearings have some significant obstacles to overcome. These include some practical issues around the current select committee system, such as the effect of the devolution settlement (and whether Scotland, Northern Ireland and even Wales³⁴³ would be content to have ‘their’ Supreme Court appointments confirmed by the Westminster Parliament).

Another issue, which was raised by the Institute of Government study, was the capability of parliamentary select committees to “exercise meaningful assessment of professional competence in highly specialist areas”.³⁴⁴ This is one area where the currently unreformed House of Lords could prove of assistance, as there is considerable legal expertise in the House of Lords Constitution Committee. This was an option favoured by Sir Thomas Legg, in an interview with an author; he suggested that hearings ought to be conducted with representatives of the whole of Parliament. The American analogy, as far as is relevant, points to at least some involvement of the upper House.³⁴⁵

However, not only is the future composition of the House of Lords unclear, but the use of unelected Peers would detract from the democratic nature of the process. If one looks to the House of Commons, it is also worth noting that as the Ministry of Justice little resembles its historic predecessor, the Lord Chancellor’s Department; the Justice Committee has moved a long way from its first incarnation and the judicial appointments system is now only one of a large number of significant priorities. Finally, there is the issue of trust in politicians and the political process. As has been observed elsewhere, the “opinion formed by Parliament is not necessarily based on evidence and reason, it is the upshot of the reflections of a collection of political individuals, it is likely to be – and entitled to be – influenced by considerations of political expediency.”³⁴⁶

Historically, select committees have been unenthusiastic about idea of judicial confirmation hearings. The (then) Constitutional Affairs Select Committee resisted any moves towards a confirmation process when it considered the issue in 2004, noting that it had “heard no convincing evidence to indicate that confirmation hearings would improve the process of

³⁴² Horne, A. *Confirmation Hearings for Appointments to the Supreme Court: Some Practical Hurdles*, UKSC Blog, 23 February 2010

³⁴³ This is not intended as a slur on the capacities of the National Assembly for Wales, but more an acknowledgement that the Welsh Government recently concluded against the establishment of a separate legal jurisdiction for Wales – see: *Law Society Gazette* “Wales says no to separation – for now”, 18 February 2013. It is, however, important to note that there may be continuing pressure for the appointment of a Welsh member of the Supreme Court

³⁴⁴ Institute for Government, *Balancing Act: The Right Role for Parliament in Public Appointments*, March 2011, p19

³⁴⁵ Interview with Sir Thomas Legg QC, October 2010

³⁴⁶ Oliver, D. and Drewry G. *The Law and Parliament* in Oliver, D. and Drewry, G. (eds), *The Law and Parliament* (London, Butterworths, 1998) p12

appointing senior judges".³⁴⁷ It appeared to accept the Government's arguments that "MPs and lay peer would not necessarily be competent to assess the appointees' legal and judicial skills" and that if the intention was to assess "their more general approach to issues of public importance" then this would be "inconsistent with the move to take the Supreme Court out of the potential political arena".³⁴⁸

During the course of the *Governance of Britain* reforms, the Government did briefly revisit the idea of restructuring the judicial appointment system. However, it quickly backed away from this idea, after reporting that a substantial majority of respondents to its consultation had "opposed any role for the legislature in the selection or making of judicial appointments, and in particular to confirmation hearings".³⁴⁹ The Lords Constitution Committee seemed to welcome this development, suggesting that it is no more enamoured with the idea than its former Commons counterpart.

Finally, in interviews with the author, it was suggested by both Lord Falconer and Sir Alan Beith that there was a difference between appointing quango chiefs and senior judges. Sir Alan argued that "we appoint judges not for their opinions, but for their ability to set aside their opinions and make fair judgements." He said that with quango candidates, it was "perfectly legitimate" for committees to try to establish the candidate's interest and sympathy with the policy direction which the Government had for the continuance (or even setting up) of non-departmental public bodies, but that "policy questions were not reasonable or appropriate questions to ask a judge".³⁵⁰ This was the view taken by the House of Lords Constitution Committee, which concluded that:

The benefits of pre-appointment hearings in respect of senior public appointments are many, but the relationship between Parliament and the judiciary is a unique one. Parliament is best placed to protect the independence of, for example, ombudsmen from the executive. Judges must be independent of both the executive and Parliament: it is imperative that they remain one step removed from the political process.³⁵¹

While he accepted that there might be differences where judges were taking up an administrative role, such as Head of the Family Division, Sir Alan argued that the select committee was better off talking to the appropriate judge according to the inquiry the committee was carrying out at any given time. He also took the view that parliamentary committees had a number of disadvantages when seeking to interview someone as though they were the candidate for a job, since they did not meet the other candidates, and were not able to carry out the sort of exercises or tests that are done to see whether people are suitable for particular posts.

³⁴⁷ Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003–04, HC 48-I, para 87

³⁴⁸ *Ibid*, paras 82–83

³⁴⁹ Ministry of Justice, *The Governance of Britain: Constitutional Renewal*, Cm 7342, March 2008

³⁵⁰ Interview with Sir Alan Beith, September 2010

³⁵¹ House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, para 43

Lord Falconer agreed with Sir Alan's view on the nature of the roles, contending that Parliament was not holding the judges to account; rather it was there to ensure that the appointments system was fair and reasonable. He said that "trying to draw a parallel between the Children's Commissioner and similar jobs on the one hand and the judges on another is a dangerous route."³⁵²

He also went further by questioning whether committees would have sufficient standing, so that people would respect their views of a particular prospective candidate. Many of the principled objections to the introduction of confirmation hearings seemed to stem from a fear of heading towards the US model of Senate confirmation hearings.³⁵³ Malleson notes the traditional view that since "the highly politicized US Senate confirmation hearings of candidates Robert Bork and Clarence Thomas the use of confirmation hearings has become almost as distasteful in the UK as judicial elections."³⁵⁴ In evidence to the House of Lords Constitution Committee, Roger Smith (then director of the NGO JUSTICE) described the proposal as "a quagmire into which no one would want to go."³⁵⁵ Conversely, it is sometimes suggested that in the US, candidates are used to the process and can row back from controversial views that they might once have expressed, leading to hearings that are "so anodyne as to be 'redundant'".³⁵⁶ An example of this can be seen in the quote from Sonia Sotomayor at the start of this Chapter.

Few have seemed willing to look at other jurisdictions, such as the recently established Canadian model, notwithstanding the fact that it has been suggested that "the general consensus is that these hearings have been very successful."³⁵⁷ The first of these hearings took place in February 2006, when Marshall Rothstein, a judge of the Federal Court of Appeal, appeared before a committee of parliamentarians chaired by an academic lawyer, Peter Hogg. The hearing lasted for over three hours and it is suggested that on most accounts, the questioning was "respectful." At the end of the meeting, the Minister of Justice asked the members of the committee to communicate their views on Justice Rothstein to the Prime Minister. In the words of Peter Hogg, "the nominee's credentials, his statement to the committee, and his answers to the questions left no doubt as to his suitability for appointment, and the reaction of the committee members left no doubt that they would

³⁵² Interview with Lord Falconer, September 2010

³⁵³ Some commentators, such as Graham Gee, have sought to debunk the "myths" about the US experience. Gee has contended, amongst other things, that "the Senate's involvement provides a means to protect the Supreme Court from presidential attempts to transform the interpretation and construction of the Constitution"; that the "hearing is only one part in the Senate's scrutiny of the President's nominee"; and, that the "questioning of a nominee has multiple purposes, only one of which is to elicit information. It also provides a forum for the Senate to discuss issues of national importance – and, in this, to signal the Senate's concerns to the judiciary and public at large." Gee, G. *Judicial Appointments in the UK and US (Part 1)*, Constitution Unit Blog, 11 July 2011

³⁵⁴ Malleson, K. *Selecting Judges in the Era of Devolution and Human Rights*, in Le Sueur, A. (ed) *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford University Press, 2004) p309

³⁵⁵ House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, para 45

³⁵⁶ Paterson, A. and Paterson, C. *Guarding the Guardians?* (Centre Forum, March 2012), p54

³⁵⁷ *Ibid*, p57. See also: Hogg, P.W. *Appointment of Justice Marshall Rothstein to the Supreme Court of Canada* (2006) 44 Osgoode Hall Law Journal 527

advise the Prime Minister to proceed with appointment.”³⁵⁸ These hearings have now been used for the appointment of several more Canadian Supreme Court Justices including Justices Moldaver and Karakatsanis in 2011 and Justice Wagner in 2012.

What Difference Would it Make?

It would be wrong to think that the introduction of pre-appointment hearings would be a panacea and end the tensions between the various branches of Government – such a suggestion would be ridiculous and it is arguable that the current tensions that exist are inevitable in any system in which the powers of one branch are checked by another. Furthermore, while the introduction of pre-appointment hearings might eventually have an impact on the domestic courts, it would have no impact on the development of the law by foreign courts, such as the European Court of Human Rights and the Court of Justice of the European Union.

In those circumstances, and given the challenges listed above, what difference would the addition of pre-appointment hearings have, and what would be the benefit of introducing them?

Although the House of Lords Constitution Committee recently concluded against the idea of confirmation hearings,³⁵⁹ it did receive evidence from supporters, who pointed out a number of potential benefits. These included the fact that Parliament has the power to scrutinise all acts of the executive – appointments of senior judges are an important exercise of ministerial discretion and should be subject to parliamentary scrutiny which is a useful check against political bias; that Parliamentary hearings could act as a check on political patronage, help to ensure that independent and robust candidates are appointed and add to the appointee’s legitimacy; and that Parliament nowadays has little contact with the judges: the senior judges are largely unknown to MPs; Supreme Court Justices will be unknown to the Lords now that the law lords have departed – through dialogue, political and judicial actors can better understand the constraints under which the other operates.³⁶⁰ Sir Thomas Legg considered it to be “more and more desirable that our most senior judges should be able to ground their mandate on the authority, not only of the executive, still less of the judges themselves and a few laymen alone, but of Parliament itself.”³⁶¹

Andrew Le Sueur, a former special adviser and legal adviser to a number of parliamentary committees, including the Lords Constitution Committee and the House of Commons Constitutional Affairs Select Committee, has recently contended that:

³⁵⁸ Gee, G. *The Politics of Judicial Appointments in Canada* in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (A collection of essays prepared under the auspices of the Judicial Appointments Commission), (London, 2010), p110–111

³⁵⁹ House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, para 46. The Committee concluded that: “We are against any proposal to introduce pre-appointment hearings for senior members of the judiciary. However limited the questioning, such hearings could not have any meaningful impact without undermining the independence of those subsequently appointed or appearing to pre-judge their future decisions.”

³⁶⁰ House of Lords Select Committee on the Constitution, *Judicial Appointments*, 25th Report of Session 2010–12, HL Paper 272, para 39

³⁶¹ *Ibid*, para 41

Select committees have acquired a central role in accountability practices relating to the judicial system. They provide the most rigorous sort of parliamentary scrutiny, conducting thematic inquiries based on oral and written evidence. On occasion, the launch of an inquiry makes front-page news.³⁶²

The effectiveness of committees should not be underestimated.³⁶³

³⁶² Le Sueur, A. *Parliamentary accountability and the judicial system* in Bamforth, N and Leyland, P (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013)

³⁶³ Le Sueur, A. *Developing mechanisms for judicial accountability in the UK* in Morgan, D. (Ed) *Constitutional Innovation – The Creation of a Supreme Court for the United Kingdom; domestic, comparative and international reflections*, (A special issue of Legal Studies, Butterworths, 2004), p77, 97–98

Chapter 7: Conclusion

It is said that former parliamentarian and minister, Tony Benn, used to ask anyone in a position of power: “What power have you got; where did it come from; in whose interests do you exercise it; and, to whom are you accountable?”³⁶⁴ These are questions that members of the senior judiciary are now being expected to answer.

There is a growing recognition that senior judicial appointments, particularly at the Court of Appeal and Supreme Court level, are not made in a particularly transparent or accountable way.³⁶⁵ It is hard to say that press coverage of the process of appointments has been any more positive than when the discredited “secret soundings” process was used by previous Lord Chancellors. The, frankly opaque, process that is currently employed to select the most senior judges does not appear sustainable as the choice of senior judges is “too important to be left to a quango” or a committee dominated by the judges.³⁶⁶

While the reputation of the judiciary in the United Kingdom is still secure, that is not to say that one should overlook the reputational dangers to what has been described as a potentially “self-perpetuating oligarchy”.³⁶⁷ Increased transparency alone is not enough. While it may be beneficial that those who are not directly involved in the appointments process should know more about the candidates, for there to be increased confidence in the system it is arguable that there needs to be an opportunity for that knowledge to be used by those who are democratically accountable.

Whether or not one accepts that the judiciary is more ‘activist’ than in the past, it is apparent that there is an accountability deficit, having regard to its new constitutional position and its role in making policy. Professor Peter Russell has argued that the UK’s judicial appointment processes are “the least accountable” in the common law world because they rely on judicial appointment commissions that have “no elected politicians in [their] membership and no devices to enhance transparency.”³⁶⁸ Mary Clark has gone as far as suggesting that the Constitutional Reform Act 2005 “substantially substituted the judiciary for the executive in judicial appointments, bolstering the power of the judiciary to check the executive.”³⁶⁹ In spite of the most recent constitutional reforms, changes to these arrangements have not been significant (and in relation to more junior judicial appointments, the influence of the judges has increased). Therefore, one might argue that some form of additional public accountability may be more important than the justices’ fear of politicisation.³⁷⁰

³⁶⁴ Sampson, A. *Who Runs This Place?* (John Murray, 2004), p1

³⁶⁵ *The Times*, “Judges Oppose Appointment of Sumption QC to Supreme Court” 15 October 2009; *The Times* “Supreme Ambition, Jealousy and Outrage”, 4 February 2010; *The Guardian*, “Lords to debate whether parliament should scrutinise judicial appointments”, 1 June 2011

³⁶⁶ Stevens, R. *The English Judges* (Hart, 2002), p144

³⁶⁷ Paterson, A. *Lawyers and the Public Good*, The Hamlyn Lectures 2011 (Cambridge University Press, 2011), p149

³⁶⁸ Russell, P. “Conclusion,” in Malleon, K. and Russell, P. (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*, (University of Toronto Press, 2006), p429

³⁶⁹ Clark, M L. *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, *Louisiana Law Review*, 71, no. 2 (2011): 451–502 at 482

³⁷⁰ Grant, J, *A law unto itself*, *Prospect Magazine*, 25 May 2011

It is clearly both impossible and undesirable to seek to introduce a form of hard accountability (in the sense of requiring judges to account to politicians for their decisions). As this paper demonstrates, it is essential to keep in mind how any changes might impact on concepts such as judicial independence, since these are likely to form the nucleus around which objections to any reform will form. It will also be necessary to consider how any relaxation of the structural separation of powers, so recently confirmed by the last Labour Government, can be justified and whether introducing political accountability has any impact on the balance of powers that we recognise in the UK.

If one accepts the need for additional accountability, then it is important to consider the interaction between the concepts of independence and accountability alongside the necessary level of accountability. The new structures and hierarchies introduced by the judiciary are an interesting development that may lead to further consideration about the doctrine of judicial independence and the also ways in which the judiciary should be held accountable. First, in spite of the new reluctance to appear before select committees, discussed above, it is likely that at some point Parliament will wish to consider the managerial capacity (and competence) of the judiciary. This is a very distinct issue from the conduct of individual cases and it is at least arguable that the judiciary should be properly held to account as to management and expenditure. This is likely to prove increasingly relevant following the most recent reforms to the management of the Supreme Court.

In the past, it has often appeared that judges have been given a relatively easy ride (as they are usually questioned about the sufficiency of the resources provided by the Ministry of Justice, rather than whether the judiciary as an institution could make changes for the sake of efficiency). The House of Lords Constitution Committee has already confirmed that it believes that “it is clearly acceptable for committees to question judges on the administration of the justice system and the way in which the judiciary is managed.”³⁷¹ In those circumstances, parliamentarians may come to regret conceding the point that the Lord Chief Justice can (at least theoretically) select judicial attendees before Committees (since they may wish to speak to those who are at the coalface).

Second, the new arrangements may well fundamentally alter the structure of the judiciary as an institution. When the constitutional reforms that resulted in the Constitutional Reform Act 2005 were being discussed, there was still fundamental opposition to the idea of a ‘career judiciary’ on the continental model (although greater a need for greater flexibility was acknowledged).³⁷² Slowly, with the structural changes instituted by the judges, combined with the new criteria for appointment brought in by the Tribunals, Courts and Enforcement Act (designed to help recruit more diverse candidates) one can see such a transformation

³⁷¹ House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151, para 125

³⁷² The Constitutional Affairs Select Committee in its report, *Judicial appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003–04, HC 48-I, observed: Judges (especially in the junior ranks) who wish to be promoted but who may be dealing with cases in which the Government is a party must not be put in a position where their future professional prospects are – or may seem to be – open to influence as a result of decisions in particular cases. This might be the case if a continental system of career judges were adopted. We agree that such a system would not fit with the legal system in England and Wales

happening (albeit very incrementally).³⁷³ The tone of the consultation, *A Judiciary for the 21st Century*, suggested that this trend was likely to accelerate.

Finally, historically, those commenting on the concept of judicial independence often focused on the independence of the individual judge. Again, this has changed slowly; so that there is now at least as much focus on institutional independence. While recognising the judiciary as a proper branch of government may be beneficial, it opens up new dangers, particularly in respect of the independence of individual judges. They may now be subject to management and discipline from other judges (including Heads of Divisions and the Lord Chief Justice) and offered 'guidance' from bodies such as the Judicial Executive Board (which has been described as being like a "sort of judicial Cabinet"³⁷⁴), the JSB and the Judges' Council. Under the current appointments process, their prospects for promotion may also be impacted by the views of the most senior judges. This issue will become even more relevant if the Government comes to accept the idea of a career judiciary. Few, if any, other institutions are moving towards self-regulation in this way.

What, if any, conclusions can be drawn from all of this? One could start out by saying if one rejects the concept of a 'pure' separation of powers, in favour of Barendt's emphasis on the nature of checks and balances within the constitution; it becomes possible to see advantages in giving Parliament a role in the judicial appointments process. Some overlap of functions and office holders may be welcome.³⁷⁵ As Lord Neuberger has observed "our system of government is and has always been based on pragmatism, not on principle, on organic practical development not detailed theoretical codes."³⁷⁶

On that basis, it is worth reflecting on the fact that, while the judiciary has always seemed extremely nervous about allowing Parliament any input in appointments and any real oversight over the system, during many of the Government's hasty constitutional reforms, it has been Parliament that has protected the position of the judiciary. In particular, it was parliamentary committees that acted during the Government's botched reforms of 2005;³⁷⁷ and over the creation of the Ministry of Justice in 2007.³⁷⁸ More recently, it was the House of Lords Constitution Committee which intervened during the passage of the Crime and Courts Act 2013 and helped the judges secure what they saw as 'improvements' to the legislation (while resisting changes which they did not support). In such circumstances, it is difficult to

³⁷³ An example of this is that the first recommendation of the *Report of the Advisory Panel on Judicial Diversity 2010* (established by the then Lord Chancellor, Jack Straw) was that: "There should be a fundamental shift of approach from a focus on individual judicial appointments to the concept of a judicial career. A judicial career should be able to span roles in the courts and tribunals as one unified judiciary."

³⁷⁴ House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151, para 100

³⁷⁵ Barber, N. W. *Prelude to the Separation of Powers*, Cambridge Law Journal 60(1), March 2001, pp59–88 at 60

³⁷⁶ Lord Neuberger, *Where Angels Fear to Tread*, Holdsworth Club Presidential Address, 2 March 2012

³⁷⁷ Constitutional Affairs Select Committee, *Judicial Appointments and a Supreme Court (court of final appeal)*, First Report of Session 2003–04, HC 48-I and *Constitutional Reform Bill [Lords]: the Government's proposals*, Third Report of Session 2004–05, HC 275-I and Select Committee on the Constitutional Reform Bill, *Constitutional Reform Bill [HL]*; Report of Session 2003–04, HL 125-I

³⁷⁸ Constitutional Affairs Select Committee, *The Creation of the Ministry of Justice*, Sixth Report of Session 2006–07, HC 466 and House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151

see why the judiciary would feel that Parliament was an inappropriate forum; whereas the executive has maintained its accountably function.

As to judicial independence, the initial question remains unchanged since Robert Stevens spelled it out (and Sir Stephen Sedley echoed his words) in the early 1990s: “How far beyond the independence of individual judges does England want to go? [...] How far is it prepared to provide support for a concept of the separation of powers, and within that a concept of judicial independence which would allow the English judges to be thought of as a co-ordinate branch of Government?”³⁷⁹

If, as appears to be the case, the judiciary wishes to be accepted as a proper branch of government, then perhaps the need for checks on its own power becomes more apparent. Certainly this author would argue that there are two separate reasons for looking at methods of increasing accountability. The first relates to the transfer of powers and responsibility to the judiciary. Views about the separation of powers, parliamentary sovereignty and the constitutionally acceptable role of judges are highly contested within the senior judiciary;³⁸⁰ therefore these appointments are constitutionally significant. The second is the need to ensure that there is some oversight of the new judicial empire, its management and efficiency. Parliament, as the “apex of accountability in the political process”, seems the proper forum for any such oversight.³⁸¹

The question then arises that even if one agrees that there is a role for Parliament in the appointments process, what that role should be. Erika Rackley has suggested two broad options – either Parliament has a supervisory role, overseeing the running and remit of the appointments process, or it has a role in deciding which candidate to appoint.³⁸² While both options may have advantages, this author would contend that the latter would be preferable.

While this may seem ambitious, when considering the nature of the accountability mechanism that might be acceptable, it is worth revisiting the division between the judicial accountability and accountability for the appointments process.

Additional systems of accountability for appointments are likely to have only a limited impact on the (perhaps more old fashioned) notion of judicial independence as it relates to the individual judge – once appointed, a judge is not subject to any form of improper influence. Moreover, as long as there is a continued role for an independent judicial appointments commission to recruit and screen candidates at first instance, the extent of any politicisation could effectively be restrained.

³⁷⁹ Sedley, S. *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011), p28

³⁸⁰ See for example: Sumption, J. *Judicial and Political Decision Making: The Uncertain Boundary*, The F.A. Mann Lecture, 8 November 2011, Lincoln’s Inn and the response to this speech. See also the abovementioned extracts from *Jackson v Attorney General* (on parliamentary sovereignty) and contrast them with the views expressed extra judicially by Lord Bingham who concluded “I cannot for my part accept that my colleagues’ observations are correct.” Lord Bingham of Cornhill, *The Rule of Law and the Sovereignty of Parliament*, 31 October 2007

³⁸¹ House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, Sixth Report of Session 2006–07, HL 151, para 123

³⁸² Rackley, E. *Women, Judging and the Judiciary*, (Oxford, Routledge, 2013) p89

A last thought is that while it seems settled that it is for the courts to act as the fetter on the legislature and executive when creating law and exercising administrative power under the law, if additional methods of political accountability are not introduced, what fetter could (and should) be placed on judicial lawmaking and how else can one enhance the legitimacy of an increasingly powerful senior judiciary; or in the more common parlance, *Quis custodiet ipsos custodes?*

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