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## Paper No. 1

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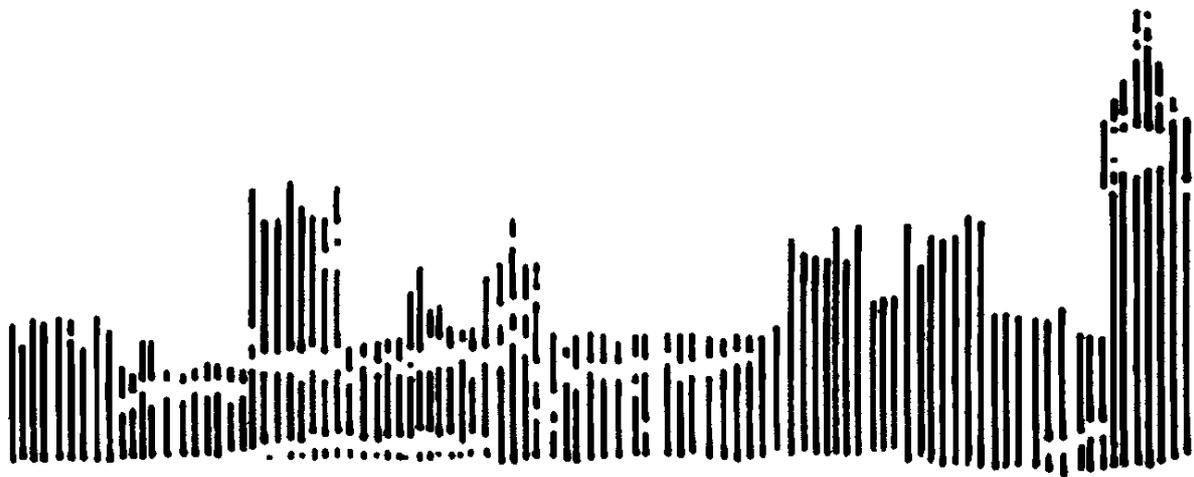
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# The Changing Constitution: A Case for Judicial Confirmation Hearings?

With a foreword by Sir Ross Cranston FBA

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LONDON: STUDY OF PARLIAMENT GROUP, 2010

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#### **Acknowledgments**

I would like to express my gratitude to all those who provided support and advice during the completion of this paper. In particular, I warmly thank Professor Bill Bowring who kindly agreed to first read the dissertation that eventually became this paper, at very short notice, whilst on holiday in France. Special thanks go to Sir Ross Cranston, who generously contributed the foreword. I am also grateful to Professor Kate Malleon, Bryn Morgan, Collette Rawnsley, and John Horne for their assistance and comments on subsequent drafts.

Any remaining shortcomings or infelicities are entirely my own, as are the views expressed, which should not be taken to reflect the views of any other person or organisation.

## The Changing Constitution: A Case for Judicial Confirmation Hearings?

### Table of Contents

|   |   |    |
|---|---|----|
|   | Note on the author                                      | ii |
|   | Acknowledgments   | ii |
|   | Foreword  | iv |
| 1 | Introduction  | 1  |
| 2 | Background  | 2  |
|   | 2.1 Some historical perspective                         | 2  |
|   | 2.2 Administrative Law Pre-1960                         | 4  |
| 3 | The new political element                               | 4  |
|   | 3.1 Growth in claims for judicial review                | 4  |
|   | 3.2 The politics of the judiciary                       | 6  |
|   | 3.3 The effect of the Human Rights Act 1998             | 9  |
|   | 3.4 Parliamentary sovereignty and judicial deference    | 13 |
| 4 | The Constitutional Reform Act 2005                      | 16 |
| 5 | Judicial Appointments                                   | 18 |
|   | 5.1 Background – A problem of numbers and outlook?      | 19 |
|   | 5.2 Merit and diversity                                 | 21 |
|   | 5.3 Difference and decision making                      | 23 |
|   | 5.4 The panel and the balance of cases                  | 25 |
|   | 5.5 The new Judicial Appointments Commission            | 27 |
|   | 5.6 Criteria and eligibility for appointment            | 27 |
| 6 | Political accountability                                | 28 |
|   | 6.1 Confirmation hearings?                              | 29 |
|   | 6.2 Some alternative models                             | 30 |
|   | 6.3 The German model                                    | 30 |
|   | 6.4 A brief comment on the American and Canadian models | 32 |
| 7 | Conclusion  | 33 |
|   | Bibliography  | 39 |

## Foreword

There are at least two constitutional principles which must inform any consideration of the policy implications of this important work. The first is the principle of democratic accountability; the second, that of mutual respect between the three branches of government. The first principle is not one which appears prominently in constitutional tomes, although the successful struggle for a representative democracy over a period of centuries was a distinguishing feature of our constitutional history compared with that of most of our European partners. The second principle recognises the sometimes delicate balance between Parliament, the executive and the courts. It manifests itself in a range of practices and conventions such as the rules of parliamentary debate inhibiting Members from commenting on judicial decisions, the notion of judicial deference (perhaps wrongly labelled, but nonetheless real) and what should be the caution which ministers exhibit when they are confronted with an adverse judicial decision.

When I was a parliamentarian these principles led me to express a number of conclusions about judicial appointments. The first was that there needed to be a greater degree of democratic accountability, especially in the appointment of judges of the Supreme Court. At the time of the passage of the Constitutional Reform Bill I was critical of the Government's decision that the appointment commission should be able to put forward the name of only one nominee to the Lord Chancellor, rather than the three names originally proposed. In debate I also drew attention to the "cult of the non-political", the delusion that politics can be taken out of important decisions by entrusting them to quangos. In several debates I invoked Professor Robert Hazell's critique, that judicial appointments are too important to be left to the judges and that there are very real dangers if judges are perceived as a self appointing oligarchy. I also raised the possibility of nominees for the Supreme Court appearing before a parliamentary committee, along the lines of the practice for those appointed to the monetary policy committee of the Bank of England, who appear before the Treasury Select Committee of the House of Commons. The principle of mutual respect meant that judges had little to fear from such an experience. (Readers will understand that as serving judge I now have no opinions on these matters, whatever I may have said in the past.)

Alex Horne has performed an invaluable service in drawing together a series of threads, culminating in a sophisticated discussion of the issue of whether our most senior judges ought to be subject to something along the lines of confirmation hearings. As background to that discussion he is able to draw on his expertise and experience as a lawyer, as an adviser to the Justice Committee of the House of Commons, and now as an expert in legal and constitutional matters working in the House of Commons. There is reference to the arrangements in places such as Germany and Canada, as well as to the well known practice in the United States where the Senate must approve Supreme Court appointments. Importantly, Alex Horne rightly places the appointment issue in its proper context of constitutional principle and history. Thus, anyone reading this work will gain an added bonus of a crash course in constitutional reform in the United Kingdom over recent decades. Horne's work is bound to become a standard reference in the inevitable debates about this, an unfinished part of that business.

**Sir Ross Cranston FBA**

## The Changing Constitution: A Case for Judicial Confirmation Hearings?

### 1 Introduction

*I will do right to all manner of people, after the laws and usages of this realm, without fear or favour, affection or ill-will. (Judicial Oath)*

This paper will focus on what the former Law Commissioner and now High Court judge Sir Jack Beatson has described as “a quiet constitutional upheaval”<sup>1</sup> which has occurred in England and Wales since 1997. Starting with the enactment of the Human Rights Act 1998, the constitutional reform introduced by the Labour government<sup>2</sup> has resulted in a greater focus than ever before, by the media, politicians and academic commentators, on the character and decision making of the judiciary.

While the role of the judiciary has always had a significant effect on politics, this paper will consider the impact of the changes wrought over the last decade and examine how the establishment of human rights ‘norms’, the increasing influence of administrative law, moves to reform the judicial appointments system and conflicts between the judiciary, executive and Parliament have influenced the development of the judiciary as an institution. In order to address these issues, the paper provides some historical context and a short description of the advance of administrative law. It argues that the increase in applications for judicial review, coupled with the entry into force of the Human Rights Act (and the consequential claims), have resulted in an impression that the judiciary has become increasingly activist and politicised, particularly following the post-war extension of the powers of the administrative state.

The paper goes on to consider the reasons for and the impact of the constitutional changes in 2005. It then reviews some of the literature on judicial appointments and diversity, asking whether (given that the judiciary does not reflect the social makeup of the country) concerns about its institutional legitimacy to determine quasi-political issues are warranted. It focuses on issues relating to Parliamentary sovereignty, democratic accountability and whether talk about the “rule of law” can be seen to carefully camouflage judicial preferences. It provides some background information about practices in other states (mainly Germany and Canada) and argues that in order to address the accountability gap, there should be some move towards a confirmation process for the most senior judicial appointments.

In examining these issues (despite its obvious relevance), this paper will not consider the impact of the Government’s devolution legislation on the constitutional framework relating to the judiciary;<sup>3</sup> rather it will focus predominantly on the role of the senior judiciary<sup>4</sup> in

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<sup>1</sup> Beatson, J. *Judicial Independence and Accountability: Pressures and Opportunities*, Speech at Nottingham Trent University, 16 April 2008

<sup>2</sup> Vernon Bogdanor has noted 15 significant changes to the constitution over the course of the past 12 years. See: Bogdanor, V. *The New British Constitution*, (Hart, 2009) and also Rozenberg, J. *The Times* “Britain’s new Supreme Court: Why has a fundamental change in the constitution been so little reported and debated”, 2 September 2009

<sup>3</sup> This is significant, as the new Supreme Court is a court for the UK. While this paper considers appointments in England and Wales, at least two of the judges selected will be from Scotland and one from Northern Ireland. In time, Wales may also come to consider it has a claim to a place on the bench. See: Goodall, K. *Ideas of ‘Representation’ in UK Court Structures*, in Le Sueur, A. (Ed) *Building the UK’s New Supreme Court: National and Comparative Perspectives*, (Oxford, 2004), p 67

England and Wales. Danny Nicol has constructed a useful (if rather wide) definition of “politics” which assists in crystallising the area to be considered:

Politics can be viewed as a way of handling conflicting choices between a multiplicity of moral maps, struggling with fundamental questions of how life should be lived. It is an ongoing struggle between competing visions of the common good, in which different ideological groups engage in a quest for competitive advantage.<sup>5</sup>

This paper is not the place to explore all changes that have been engendered by the 1998 Act: the literature on this issue is already substantial. It will, however, consider the impact of the Act (with reference to the increased importance of public law and human rights).<sup>6</sup>

## 2 Background

### 2.1 Some historical perspective

Following the revolution in the 17<sup>th</sup> century, the doctrine of the supremacy of Parliament was generally accepted (in England and Wales). Dicey encapsulated this in his primary proposition that:

Parliament [...] has [...] the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.<sup>7</sup>

This is not to say that the judges did not have a role to play. Wade and Forsyth point to a period “*par excellence*”<sup>8</sup> for the rule of law in the eighteenth century, and note that administrative law “kept pace” with the expanding powers of the state in the nineteenth century. However, they describe the beginning of the twentieth century (and particularly during and after the Second World War) as a period when “deep gloom settled upon administrative law”.<sup>9</sup> Robert Stevens notes, during this period, “democracy was to be protected by Acts of Parliament not by the judges.”<sup>10</sup> Accordingly, Dicey’s second principle (and his definition) of the rule of law,<sup>11</sup> which left little room for wide judicial discretion, was “to dominate legal thinking until the 1960s and to be important throughout the twentieth century.”<sup>12</sup>

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<sup>4</sup> High Court and above

<sup>5</sup> Nicol, D. *Law and Politics after the Human Rights Act* [2006] Public Law 722 at 723

<sup>6</sup> See e.g. The balancing of security and freedom in counter-terrorism cases; issues such as the right to die (*R (on the application of Pretty) v Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61 and to a lesser extent *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45); the right to reproduce) *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727; and, the creation of a new right to privacy (*Campbell v MGN Ltd* [2004] UKHL 22)

<sup>7</sup> Dicey, A. *Introduction to the Study of the Law of the Constitution*, 10<sup>th</sup> Edition, (Macmillan, 1959), pp 39-40

<sup>8</sup> Wade, H. and Forsyth, C. *Administrative Law*, 10<sup>th</sup> Edition, (Oxford, 2009), p 12. This is not to say the same of the judiciary, which was not professionalised until the 1860s and had a reputation for being subject to political influence. Stevens, R. *The English Judges: Their Role in the Changing Constitution*, (Hart, Oxford, 2002), pp 10-13

<sup>9</sup> Wade, H. and Forsyth, C. *Administrative Law*, 9<sup>th</sup> Edition, (Oxford, 2004), pp 15-16

<sup>10</sup> Stevens, R. (N8 above) p 16

<sup>11</sup> Dicey, A., (N7 above) pp 183-205 (in particular 195-202) and the analysis by E.C.S. Wade at pp cii-cxxv. See also, Mount, F. *The British Constitution Now*, (Mandarin, 1993), p 58

<sup>12</sup> *Ibid* and also Jowell, J. *Politics and the law: constitutional balance or institutional confusion?* Justice Journal, Vol 3, No. 2, December 2006, p 19

During the latter stages of the twentieth century there have been various challenges to the doctrine of the supremacy of Parliament, principally following the passage of the European Communities Act 1972.<sup>13</sup> A number of other factors were important, particularly, following the election of the Labour government in 1997, and the passage of the Human Rights Act.

A further challenge came with the re-emergence of administrative law in the 1960s and the acceptance of a perhaps new and rather different form of “rule of law”,<sup>14</sup> the importance of which was confirmed, if not defined, in section 1 of the Constitutional Reform Act 2005.<sup>15</sup> In *X Ltd v Morgan-Grampian Ltd* [1991] 1 AC 1, Lord Bridge observed that:

The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon the twin foundations of the Queen in Parliament in making the law and the sovereignty of the Queen’s courts in interpreting and applying the law.

As Michael Fordham QC has recognised, the “rule of law is a theme which pervades the law of judicial review. It is not found in any statute, nor any constitutional document such as a written constitution.”<sup>16</sup> Rather, it has evolved through time as a self recognition by the courts of their central sovereign role.

In spite of some of the hysteria surrounding the Human Rights Act, the phenomenon of judicial power is hardly a new one. The judiciary in England and Wales has always had a politically contentious role. From the 1686 case of *Godden v Hales* (in which the assembled common law judges upheld that the Kings of England were sovereign princes and that the laws of England were the King’s laws)<sup>17</sup> to more recent disputes of the early twentieth century such as *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426,<sup>18</sup> the courts have made decisions which have not only had a political impact, but could be attributed to personal preference or political pressure brought to bear on the judiciary.<sup>19</sup> Lord Irvine claimed that: “judges in the House of Lords, and below, have traditionally made decisions, under the law, which were highly controversial – in landmark cases on civil liberties, on trade union immunities, and on citizen’s rights in the time of war”.<sup>20</sup>

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<sup>13</sup> Reinforced following the rulings in *Factortame No.2* [1990] 1 A.C. 603 and *R v Secretary of State for Employment, ex p. Equal Opportunities Commission* [1995] 1 A.C. 1

<sup>14</sup> See e.g. Lord Bingham, *The Rule of Law*, Centre for Public Law, 16 November 2006; Lord Goldsmith QC, *Government and the Rule of Law in the Modern Age*, Lecture, Clifford Chance, 22 February 2006 and Malleon, K. *The New Judiciary: The Effects of Expansion and Activism*, (Ashgate, 1999), pp 13-15

<sup>15</sup> See e.g. 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 23-26 and Appendix 5, where Paul Craig attempts to “shed light” on the precise meaning of the rule of law, and Robson, G. *The Rule of Law*, Criminal Law and Justice Weekly, Vol 173, 28 March 2009

<sup>16</sup> Fordham, M. *Judicial Review Handbook*, 4<sup>th</sup> Edition (Hart, 2004)

<sup>17</sup> Bradley, A.W. *Relations between Executive, Judiciary and Parliament: an evolving saga*, [2008] Public Law 470

<sup>18</sup> Where the House of Lords reversed a decision of the Court of Appeal that an injunction was not available against the threat of a strike and that officers of a union were not to be personally responsible for the damages flowing from a strike

<sup>19</sup> See also: *Roberts v Hopwood* [1925] A.C. 578; *Prescott v Birmingham Corporation* [1955] Ch 210 and *Bromley LBC v Greater London Council* [1983] 1 A.C. 768

<sup>20</sup> Lord Irvine of Lairg, Foreword to Elliot, M, *The Constitutional Foundations of Judicial Review*, (Hart, 2001)

## 2.2 Administrative Law Pre-1960

It is broadly accepted that, pre-1960, the English judiciary played a minor role in the development of administrative law. Stevens identifies *Arlidge v Local Government Board* [1915] AC 120 as a low point, stating that the Lord Chancellor, Lord Haldane, put together a panel of Law Lords, all who had been active Liberal politicians, who concluded that to require even procedural due process would be:

[I]nconsistent, ... with efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action ... that the judiciary should presume to impose its own methods on administrators or executive officers is a usurpation.<sup>21</sup>

He argued that, “by denying the courts even a limited role in protecting procedural due process, British administrative law was to sleep for the next fifty years.”<sup>22</sup> Wade and Forsyth noted that in the early part of the twentieth century, the courts “showed signs of losing confidence in their constitutional function and [...] hesitated to develop new rules in step with the mass of new regulatory legislation.”<sup>23</sup> Hence they were described by Anthony King as “dogs that seldom barked or even growled”.<sup>24</sup> Following *Arlidge*, it has been argued that the political element in judicial appointments also declined, since judges were gradually removed from decision-making in politically sensitive areas.<sup>25</sup> After the election of the post-war Labour Government, Bevan was said to have argued that the discretionary powers increasingly conferred on Ministers should not be troubled by judicial review since he wished to avoid “judicial sabotage of socialist legislation”.<sup>26</sup> As with many other things, it was in the 1960s that one saw a rapid change and development in the role of the judiciary.<sup>27</sup>

## 3 The new political element

*It is the job of the judges to ensure that the government of the day does not exceed its powers, which is a permanent desire of all governments.* Lord Donaldson (July 2005)

### 3.1 Growth in claims for judicial review

Over the last 40 years, there has been a substantial increase in public law cases coming before the courts. Stevens has argued that in terms of the expansion of judicial influence:

[T]he most obvious and public change concerned the expansion of judicial review to provide an extensive power for the courts to intervene in procedural due process over a wide range of public and quasi public matter[s].<sup>28</sup>

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<sup>21</sup> *Arlidge v Local Government Board* [1915] AC 120 at 137-8

<sup>22</sup> Stevens, R. (N8 above) p 19

<sup>23</sup> Wade, H and Forsyth, C. (N9 above), p 15

<sup>24</sup> King, A. *The British Constitution*, (Oxford University Press, 2007), p 115

<sup>25</sup> See e.g. Stevens, R. *The Independence of the Judiciary*, (Clarendon Press, Oxford, 1993), p 23; Malleon, K. (N14 above) p 8 and Nicol, D. (N5 above) at 724

<sup>26</sup> Jowell, J. (N12 above) p 19. See also: Loughlin, M. *Sword and Scales: An Examination of the Relationship between Law and Politics*, (Hart, 2000), p 101

<sup>27</sup> Encouraged by the Report of the Committee on Administrative Tribunals and Enquiries (hereafter the Franks Committee) and the passage of the Tribunals and Inquiries Act 1958. See also, Mount, F. (N11 above) pp 69 and 260-261

<sup>28</sup> Stevens, R. (N8 above)

Nicol suggests that while, during the 1940s and 50s, judging was still conceived as a “technical enterprise” which accentuated the “distinction between law and politics”, by the 1960s, the judges “belatedly roused themselves from their [...] stupor and sought to impose order on a burgeoning regulatory state.”<sup>29</sup> In part this seems due to the expanding role of the state. As Martin Loughlin observed, “once the state uses law to realize notions of distributive justice [...] the judiciary cannot easily avoid being drawn into matters of political controversy.”<sup>30</sup>

From this period, there was not only an increasing interest in administrative law, but also a more general recognition that the judiciary was involved in the law-making process. David Pannick has noted that for centuries English judges had “deceived each other into thinking that they merely applied the law made by Parliament and that their job was only ‘to interpret law’” but that this has now changed since, as Lord Reid put it in 1972, “we do not believe in fairy tales any more.”<sup>31</sup> Lord Radcliffe argued that:

[T]here was never a more sterile controversy than that upon the question whether a judge makes laws. Of course he does. How can he help it?<sup>32</sup>

Wade and Forsyth contend that the House of Lords decision in *Ridge v Baldwin* in 1963 revived the principles of natural justice. They argue that “from then on a new mood pervaded the courts” and that this “was given still further impetus by a group of striking decisions in 1968-9” founded on the concept of *ultra vires*.<sup>33</sup> The fifth edition of *De Smith, Woolf and Jowell* records that, between 1959 and 1980, judicial review of administrative action was “inevitably sporadic and peripheral”, but acknowledged that, by 1995, caution was needed “before relegating judicial review to a minor role in the control of official power.”<sup>34</sup>

Conor Gearty has suggested that:

The first expansionary device was to insist that disputes between the state and individuals should mimic the court-room through the adoption of various rules of natural justice that were either magicked out of the common law or confidently read into statutes that made no explicit allowance for them. This was followed by an increased propensity on the part of the higher courts to allow their view of this or that administrative action as unreasonable to mature into a ruling that it was ‘so unreasonable that no reasonable authority could have done it’ and was therefore also unlawful: thus did a throwaway judgment of the court of appeal in 1948 (the *Wednesbury* case) come to be deployed as a quasi-constitutional control on not the procedural correctness but the substance of executive action.<sup>35</sup>

Gearty also notes that “we forget now quite how controversial these expansions of the judicial remit were when they were first being essayed in the late 1960s and through the

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<sup>29</sup> Nicol, D. (N5 above) at 723-4

<sup>30</sup> Loughlin, M. (N26 above) p 108

<sup>31</sup> Pannick, D. *Judges*, (Oxford University Press, 1987), p 3

<sup>32</sup> Quoted in Stevens, R. (N8 above) p 33

<sup>33</sup> Wade, H. and Forsyth, C. (N9 above) pp 17-18. See also: *Conway v Rimmer* [1968] A.C. 910; *Padfield v Minister of Agriculture* [1968] A.C. 997; and, *Anisimic v Foreign Compensation Commission* [1969] 2 A.C. 147

<sup>34</sup> De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, (Sweet and Maxwell, London, 1995), p 19

<sup>35</sup> Gearty, C. *Are judges now out of their depth?*, JUSTICE Tom Sargant memorial annual lecture, October 2007

1970s.”<sup>36</sup> *De Smith* records that “from the 1970s onwards a number of pressure groups consciously adopted “test case strategies” in which judicial review, in conjunction with other forms of legal proceedings and together with conventional forms of political action, was used to seek changes in government policy”.<sup>37</sup> A “streamlined” application for judicial review was established in the early 1980s.<sup>38</sup>

In 1987 the Government published the first edition of *The Judge Over Your Shoulder*. Its opening lines acknowledged the changing landscape:

You are sitting at your desk granting licences on behalf of your Minister. Your enabling statutory powers are in the widest possible terms: ‘The Secretary of State may grant licences on such conditions as he thinks fit’. With power like that you might think that there could be no possible ground for legal challenge in the courts whatever you do. But you would be wrong.

The publication is now into its fourth edition. The 2000 edition indicated that judicial review was:

[A] growth industry. In 1974 there were 160 applications for leave to seek judicial review in England and Wales. By 1998 the figure was 4,539.<sup>39</sup>

In 2005, there were 10,500 cases.<sup>40</sup> Many did not contain a particular political ‘angle’ (a large proportion related to immigration and asylum).<sup>41</sup> Nonetheless, it is clear that claims are brought by human rights campaigners to highlight particular issues (sometimes irrespective of their strict legal merits<sup>42</sup>). The surge in applications for judicial review (and more recently human rights claims) has coincided with an increased perception of judicial activism or politicisation on the part of the public, the media and politicians.

### 3.2 The politics of the judiciary

The actual politics of the judiciary are strikingly opaque. Commentators in the 1980s and 90s frequently complained about the “conservative judiciary”. Most well known are the comments of J.A.G. Griffith, who observed:

[J]udges in the United Kingdom cannot be politically neutral, because they are placed in positions where they are required to make political choices which are sometimes presented to them, and often presented by them, as determination of where the public interest lies; that their interpretation of what is in the public interest and therefore politically desirable is determined by the kind of people they are and the positions they

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<sup>36</sup> *Ibid*

<sup>37</sup> De Smith, Woolf and Jowell, (N34 above)

<sup>38</sup> RSC Ord. 53, SI 1977 No. 1955; Supreme Court Act 1981, s 31. Loughlin, M. *Legality and Locality*, (Clarendon Press, Oxford, 1996), pp 400 and 411

<sup>39</sup> Treasury Solicitor, *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 3rd Edition, 2000

<sup>40</sup> Horne, A. *Judicial Review: A short guide to claims in the Administrative Court*, House of Commons Library, 28 September 2006, p 32 and see also Woolf, H, Jowell J and Le Sueur, A. *De Smith’s Judicial Review* (Sweet and Maxwell, 2007), p 27, Table 1, which shows the judicial review caseload of the Administrative Court between 1998 and 2005

<sup>41</sup> *Ibid*, pp 28-35

<sup>42</sup> See for example: Lewis, J. *Winning the Campaign or Winning the Case?* [2007] *Judicial Review* 107

hold in society; that this position is part of the established authority and so is necessarily conservative and illiberal.<sup>43</sup>

During the closing stages of the Conservative government, Will Hutton observed that “the judiciary and Conservative Party hierarchy largely [shared] an education, culture and outlook”<sup>44</sup>, while in contrast, Joshua Rozenberg stated that “despite the assumptions of journalists like Will Hutton, the senior judges are a modern and liberal-minded group of people.”<sup>45</sup>

Many politicians, particularly those in Government, seem to believe that the judiciary is unreasonably liberal. In recent years, the convention that politicians should not disparage the decisions of the judiciary seems to have gradually eroded. Ministers (usually from the Home Office) of both of the main political parties have been overtly critical of judicial decisions.

Former Home Secretary, David Blunkett MP, argued that the:

relationship has changed beyond all recognition over the past 30 years, thanks to the use of judicial review ... Judges now routinely use judicial review to rewrite the effects of a law that Parliament has passed.<sup>46</sup>

Tony Blair complained about Mr Justice Sullivan’s decision in relation to a group of Afghans who had hijacked a plane.<sup>47</sup> John Denham, formerly Chairman of the Home Affairs Select Committee, was also critical of the judiciary, claiming that “the current culture is dismissive of the elected Parliament and the difficult decisions we have made about public policy.”<sup>48</sup> The previous Conservative administration made similar complaints in 1996 when Mr Justice Collins struck down an attempt by Michael Howard and Peter Lilley to block measures to remove welfare support from rejected asylum seekers.<sup>49</sup> Even the Conservative’s Shadow Justice Secretary, Dominic Grieve QC, (who has supported the 1998 Act<sup>50</sup>) recently argued that “an increasing trend toward judicial legislation, under the Human Rights Act, has created tension with elected lawmakers in Parliament.”<sup>51</sup>

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<sup>43</sup> Griffith, J.A.G. *The Politics of the Judiciary*, 3<sup>rd</sup> Edition, (London, 1985), p 225.

<sup>44</sup> Quoted in Raab, D. *The Assault on Liberty What Went Wrong With Rights*, (Fourth Estate, London, 2009), p 68

<sup>45</sup> Rozenberg, J. *Trial of Strength*, (Richard Cohen Books, 1997), p 13

<sup>46</sup> *Evening Standard*, David Blunkett MP, “I won’t give in to the judges”, 12 May 2003 and see also, Bradley, A.W. *Judicial Independence Under Attack*, [2003] Public Law 397. Lord Bingham later responded noting that “Dicey and a host of later authorities might have been surprised to learn from Mr Blunkett that ‘Judicial review is a modern invention.’” Lord Bingham, *The Rule of Law*, Centre for Public Law, 16 November 2006

<sup>47</sup> Commenting: “We can’t have a situation in which people who hijack a plane, we’re not able to deport back to their country. It’s not an abuse of justice for us to order their deportation, it’s an abuse of common sense, frankly, to be in a position where we can’t do this. *The Times*, “Victory for Afghan Hijackers fighting to remain in Britain” 5 August 2006

<sup>48</sup> Horne, A. (N40 above) p 36

<sup>49</sup> See: *The Guardian* “Judges Swipe at Asylum Law”, 9 October 1996 and *The Times* “Judges Dismayed Tory Ministers – Asylum ruling”, 8 September 2001

<sup>50</sup> Allegedly ‘demoted’ from Shadow Home Secretary for being too in favour of the 1998 Act (see: *Sunday Telegraph*, “Grieve loses plum”, 7 March 2009)

<sup>51</sup> *The Times*, “Shadow minister calls for power to be given back to the people”, 9 July 2009

The press is also concerned about perceived judicial activism. The editor of the *Daily Mail*, Paul Dacre, broadly summarised the mood when he testified to the House of Lords Constitution Committee that:

[T]he Human Rights Act is placing judges in a position where they are making more and more contentious decisions which fly in the face of views of politicians and the general populace ... the demand for judges to be accountable is going to grow.<sup>52</sup>

A panel of legal journalists, giving evidence to the same Committee noted that judges are increasingly seen as “too left-wing, too bleeding liberal, too wet” and “too pro-human rights and too soft”. They also pointed to a perception that “the Government tries to get tough and do things to help the public and the judges sabotage it”. Frances Gibb, Legal Editor of *The Times*, added that people are more willing to speak out nowadays because “it is not off limits to attack anyone in authority in the way it might have been 30 years ago”.<sup>53</sup>

Academics have frequently considered the effect of judicial politics on decision making. Aileen McColgan has stated:

Judicial politics (whether with a small or a capital ‘P’) clearly influence decision making. The Public Law Project, in its analysis of judicial review cases during the 1990s, found ‘a huge disparity in the divisional court over how willing judges were to go forward against the government’. The proportion of cases which individual judges allowed to proceed varied between 20 per cent and 80 per cent.<sup>54</sup>

One reason for this shift may be that the judges have filled a perceived vacuum left by Parliament. While Blackstone may have described Members of Parliament as “the guardians of the English Constitution” in the eighteenth century,<sup>55</sup> rather more recently Beatson has observed that “while the House of Commons in theory controls the government, save exceptionally, it is the government which controls the House.”<sup>56</sup>

Another issue may be the frequency with which judges are now having to adjudicate on political issues and hence are faced with making political decisions. The former Department for Constitutional Affairs (DCA) has acknowledged that “the considerable growth in judicial review in recent years has inevitably brought the judges more into the political eye”<sup>57</sup> while Kate Malleson noted:

The emergence of the judiciary as the third branch of government, checking and scrutinising the executive, has removed the gap between the functions of the senior judiciary and elected politicians. Judges are not politicians in wigs but they are

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<sup>52</sup> House of Lords Constitution Committee, Minutes, 7 March 2007

<sup>53</sup> 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 142

<sup>54</sup> McColgan, A. *Women Under the Law: The False Promise of Human Rights* (Longman, 2000), p 26

<sup>55</sup> Blackstone, W. *Commentaries on the Laws of England* vol. 1 (1765-9) p 9

<sup>56</sup> Sir Jack Beatson, *Reforming an Unwritten Constitution*, 31st Blackstone Lecture, Pembroke College, 16 May 2009. As has been observed elsewhere, “any scepticism towards the [role of the] judges has to be tempered by criticism of executive dictatorship”. Gearey, A, Morrison, W and Jago, R. *The Politics of the Common Law*, (Routledge-Cavendish, 2008), p 6

<sup>57</sup> Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*; CP 11/03 July 2003

increasingly required to reach decisions in relation to politically controversial issues which cannot be resolved without reference to policy questions.<sup>58</sup>

Gearty identified the *potential* problem, contending that a new “hoop” namely: “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.” He suggests that:

Many of the judges who subscribe to these views are widely admired in our society. Their supporters in the legal profession and in the academic world command authority and respect. But admirable individuals though they are, these men and women are judicial rather than political personalities. Their views as to what is an egregious human rights breach or as to what is right or wrong are just that – views. We might trust them, just as they trust themselves – but this does not make the jurisdiction they are claiming one that is right.<sup>59</sup>

My own contention is that while Gearty’s diagnosis of the problem is probably correct, his solution – that judges are out of their depth and should retreat to the “shallow end”<sup>60</sup> – is unambitious and that a better option would be to allow more political involvement in the initial appointment process, to give the judiciary greater legitimacy.

### 3.3 The effect of the Human Rights Act 1998

The Human Rights Act has led to further politicisation. The DCA observed that myths are frequently perpetuated about the effect of the Act.<sup>61</sup> Moreover, right-wing commentators are often inherently suspicious of the legislation. Whilst some critiques are certainly predicated on a principled opposition to anything deemed to be European, other commentators look at the Act (and the Convention behind it) rather differently. They believe that while the text of the European Convention on Human Rights, agreed in 1950, may be fundamentally sound, it is “a pale reflection of the body of human rights law now in place”.<sup>62</sup>

Dominic Raab has articulated the concern particularly well, arguing that following *Tyrer v UK* in 1978, the Convention became “a living instrument which [...] must be interpreted in the light of present day conditions”.<sup>63</sup> The practical consequence of this is that the Convention can be “interpreted so as to reflect societal changes”. This, along with the introduction of a doctrine of proportionality, which permits the judiciary to balance competing interests, has allowed judges to expand Convention rights well beyond the intention of the original drafters. One example Raab provided is the metamorphosis of a duty not to subject individuals to torture or inhuman treatment into a practical bar on deporting dangerous terrorist suspects to third countries where such treatment could occur.<sup>64</sup>

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<sup>58</sup> Maleson, K.E. *Rethinking the Merit Principle in Judicial Selection* (2006) 33 *Journal of Law and Society* 126

<sup>59</sup> Gearty, C. (N35 above)

<sup>60</sup> *Ibid*

<sup>61</sup> Department for Constitutional Affairs, *Review of the implementation of the Human Rights Act*, July 2006, and also, Horne, A. and Peck, M. *The Human Rights Act, Myths, Misconceptions and Realities*, House of Commons Library, 13 June 2007

<sup>62</sup> Raab, D. (N44 above) p 129

<sup>63</sup> *Ibid*, p 130

<sup>64</sup> In the case of *Chahal v UK* [1996] 23 EHRR 413

Part of this is down to the drafting of the Convention itself. As Lord Denning observed in *R v Chief Immigration Officer, Heathrow Airport ex parte Bibi* (1976) 1 WLR 979:

The Convention is drafted in a style very different from the way in which we are used to in legislation. It contains wide general statements of principle. They are apt to lead to much difficulty in application: because they give rise to much uncertainty. They are not the sort of thing that we can easily digest. Article 8 is an example. It is so wide as to be incapable of practical application.

Denning was correct in his assumptions about Article 8. One striking example is *Hatton v UK* (2003) 37 EHRR 611, in which the European Court of Human Rights decided that night flights at Heathrow could amount to a violation of the rights of local residents to privacy and family life. In that case, Judge Costa said:

It is true that the original text of the Convention does not yet disclose an awareness of the need for the protection of environmental human rights. In the 1950s, the universal need for environmental protection was not yet apparent. [But] as the Court has often underlined: The Convention is a living instrument, to be interpreted in the light of present-day conditions" [...] This "evolutive" interpretation by the Commission and the Court of various Convention requirements has generally been "progressive" in the sense that they have gradually raised the level of protection afforded to the rights and freedoms guaranteed by the Convention.

Prior to the introduction of the 1998 Act, where there was clear conflict between rights under the European Convention on Human Rights and domestic statute law, litigants were forced to apply to the Strasbourg court for relief. This "was not a course adopted very often; party because of the modest financial benefits that were likely to accrue and the considerable expense and delay involved in the process."<sup>65</sup> Lord Denning described the position in *Taylor v Co-operative Retail Services* [1982] ICR 600 (ironically, for those on the right of the political spectrum, a case about a man who was dismissed due to his refusal to join a trade union). This restriction naturally acted as a brake on applications and ensured that Parliament maintained the upper hand, as it was not required to implement Strasbourg decisions (although it has almost inevitably complied).<sup>66</sup>

Raab has argued that the "Human Rights Act has compounded the worst effects of judicial activism in Strasbourg".<sup>67</sup> With incorporation, judges have to take into account decisions from Strasbourg.<sup>68</sup> While the Act does not give the judiciary the power to strike down legislation, in the vast majority of cases where the UK courts have made a declaration of incompatibility, the Government has quickly sought to amend domestic legislation.

The progressive nature of the Convention is not limited to the "gradual raising of human rights standards". It is also the case that where rights come into conflict, the expansion of

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<sup>65</sup> Faulks, E and Warnock, A. *The Impact of the Human Rights Act in the Court*, Paper for the Society of Conservative Lawyers, May 2007

<sup>66</sup> While the Government usually indicates that it will comply with the decisions of the Strasbourg Court, it sometimes drags its feet; for example, the issue of prisoner voting has been under discussion for years

<sup>67</sup> Raab, D. (N44 above) p 137

<sup>68</sup> In *Jones v Saudi Arabia* (2006) 2 WLR 1424, Lord Bingham observed that this means that a domestic court would "ordinarily follow" a decision of the Strasbourg court

rights often seems to favour the opinions of 'progressive' politicians.<sup>69</sup> Hence the courts have been slow to uphold religious rights, particularly where these conflict with the rights of others<sup>70</sup> (and in spite of the clear wording of section 13 of the 1998 Act<sup>71</sup>), but have been willing to move on issues such as gay and transsexual rights (which in the 1990s were effectively opposed by many on the political right). Rozenberg has commented that most people would now agree with Lord Justice Simon Brown's remarks in *R v Secretary of State ex. p Smith* [1996] QB 517,<sup>72</sup> as they seem just and right, however as Lord Bingham subsequently recognised it can be undesirable and damaging to the independence of judges "if they become protagonists in a debate".<sup>73</sup>

Complaints do not only come from the socially conservative. Concerns have also been raised that judges have been slow to accept more 'libertarian' rights, such as freedom of expression (again despite the fact that this appeared to have been specifically enhanced under section 12(4) of the 1998 Act) in favour of developing a new right to privacy.<sup>74</sup>

At a lecture, Sir Nicolas Bratza (the UK judge at the European Court of Human Rights) made no effort to disguise the court's progressive approach towards societal change, saying:

Transsexuals had for long sought to use Article 8 to achieve recognition of their new gender. In a succession of cases against the United Kingdom they failed in their search [...] The [ECtHR] nevertheless repeatedly warned of the need to keep legal measures in the area under review. In its strong judgments in the cases of *Christine Goodwin v United Kingdom* the [...] Court finally lost patience. In a unanimous decision it found that the clear and uncontested evidence of a continuing international trend in favour of legal recognition of the new sexuality of post-operative transsexuals, combined with the serious indignities endured by the applicants as a result of the non-recognition of their new gender, rendered the continued stance of the United Kingdom unacceptable.<sup>75</sup>

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<sup>69</sup> Baroness Hale has admitted that "there is a tendency to equate judicial 'activism' with a liberal or reforming agenda, such as that shown by the Warren Court of the 1950s and 1960s where racial segregation in schools was struck down and women given some control over their own reproductive capacity", *A Minority Opinion*, Maccabaeen Lecture in Jurisprudence, 13 November 2007

<sup>70</sup> Horne, A. *Focus on Article 9: Religious Rights in an Increasingly Secular Society* [2008] *Judicial Review* 101

<sup>71</sup> It provides that: "If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right"

<sup>72</sup> When (while upholding the ban on homosexuals in the military) he observed: "Lawrence of Arabia would not be welcomed in today's armed forces" and that "I have to say the balance of the argument [...] appears to me to lie clearly with the applicants. The tide of history is against the ministry. Prejudices are breaking down; old barriers are being removed. It seems to me improbable, whatever this court may say, that the existing policy can survive for much longer"

<sup>73</sup> Rozenberg, J. (N45 above) p 44

<sup>74</sup> Raab, D. (N44 above) p 161, not to mention the perceived failure to safeguard historic rights, such as *habeas corpus*, trial by jury and the presumption of innocence

<sup>75</sup> Bratza, N. *Reflections on the Early Years of the New Strasbourg Court*, Howard League for Penal Reform Cripps Lecture 2006

Again, while it may be that only a few would now object to these changes, the question was clearly as much a moral and political one as it was a legal one.<sup>76</sup> Indeed, the court clearly considered “the continuing international trend in favour of the new sexuality of post-operative transsexuals”.<sup>77</sup> The difficulty with this approach is that if it is not handled cautiously, it could encourage the sort of ‘culture wars’ that are seen in the United States. Unlike the US Supreme Court, both the Strasbourg court<sup>78</sup> and the new UK Supreme Court lack the shield of political accountability.<sup>79</sup> As Maik Martin has observed “if it becomes readily apparent that personal convictions and beliefs of judges become the dominant factor in deciding a politically or morally controversial case, this may undermine the legitimacy of the courts’ position.”<sup>80</sup> Moreover, as former Attorney General, Sir Hartley Shawcross concluded in 1950, if judges permit themselves “to ventilate from the bench the views they might hold on the policy of the legislature it would be quite impossible to maintain the rule that the conduct of judges is not open to criticism or question”.<sup>81</sup>

Attempts by human rights activists to extend the remit of the 1998 Act, for example, toward social, economic and “third generation”<sup>82</sup> rights would also tend to fix or entrench policies considered politically desirable by many on the left into potential “human rights”. Yet, this attempt to establish new norms has not been entirely accepted even by politicians of the centre-left. Following a recent recommendation by the Joint Committee on Human Rights for non-binding economic and social rights to be included in a new Bill of Rights, the Government responded that:

The Government notes the Committee’s recommendation but re-iterates its concern over any new constitutional document which could result in increased judicial

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<sup>76</sup> When the House of Lords considered the question in *Bellinger v Bellinger* [2003] UKHL 21, it held “a change in the law as sought by Mrs Bellinger must be a matter for deliberation and decision by Parliament”. Ross Cranston observed of all of this that the reluctance of the House of Lords to deal with the question was consistent with the view of those “who believe in the supremacy of politics in our society”. Cranston, R. *How Law Works: The Machinery of Civil Justice*, (OUP, 2006), p 136

<sup>77</sup> Bratza, N. (N75 above)

<sup>78</sup> See the comments of Lord Hoffman, that: “An international court such as Strasbourg should be particularly cautious in extending its reach [...] That is because, unlike the Supreme Court of the United States or the Supreme Courts of other countries performing similar roles, it lacks constitutional legitimacy [...] This is not an expression of popular Euro scepticism. Whatever one may say about the wisdom or even correctness of the decisions of the Court of Justice in Luxembourg, no one can criticise their legitimacy in laying down uniform rules for the European Union in those areas which fall within the scope of the Treaty. But the Convention does not give the Strasbourg Court equivalent legitimacy. As the case law shows, there is virtually no aspect of our legal system [...] which is not arguably touched by human rights. But we have not surrendered our sovereignty over all these matters. Lord Hoffman, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19 March 2009

<sup>79</sup> Baroness Hale records that the former President of the European Court of Human Rights, Judge Wildhaber, told her that the court was obliged to take a “cautious” approach to abortion rights in *Tyriac v Poland* as this was “felt necessary to preserve the very existence of the Court, given the strength of opposition to abortion in some of the member states.” See: Baroness Hale, *Law Lords at the Margin: Who Defines Convention Rights*, JUSTICE Tom Sargant Memorial Lecture 2007, 15 October 2008

<sup>80</sup> Horne, A and Martin, M. *Proportionality: Principles and Pitfalls – Some Lessons from Germany* [2008] Judicial Review 169

<sup>81</sup> HC Deb, 3 May 1950, col 1762

<sup>82</sup> Rights which have attained international recognition as human rights, but are not easily classified either a civil or political rights or economic and social rights – such as the right to natural resources, sustainability and self determination

intervention in areas involving resource allocation in the socio-economic sphere which should, in its view, remain a matter for democratically accountable institutions of government.<sup>83</sup>

Even if there is no further extension of the Act, as a result of the frequent need to balance rights under the Human Rights Act, judicial decision making can become politicised, whether or not judges intend to be drawn into political questions.

### 3.4 Parliamentary sovereignty and judicial deference

A final issue, worth brief consideration, is the effect of judicial power and decision making on the doctrine of parliamentary sovereignty (and the associated matter of decreasing judicial deference when applying the proportionality test in human rights cases). It is a long time since (the then) Sir Thomas Bingham observed that “[i]f 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”.<sup>84</sup> The court’s approach to the supremacy of Parliament can be said to have undergone at least a minor conversion.

In *Jackson v Her Majesty’s Attorney General* [2005] UKHL 56, Lord Steyn famously commented that:

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. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.<sup>85</sup>

Nevertheless, Gearty has argued that the very structure of the 1998 Act reflects the need to defer to Parliament, since the judges cannot strike down primary legislation, but can merely make a declaration that the legislation is incompatible with the Convention – as he puts it, “a declaration not of defiance but of deference, a judicial observation rather than court order.”<sup>86</sup> Wade and Forsyth have suggested that the sovereignty of Parliament is an “ever-present threat to the position of the courts; and it naturally inclines judges towards caution in their

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<sup>83</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK? Government response to the Committee’s Twenty-ninth Report of Session 2007-08*, 19 January 2009, HL Paper 15 HC 145, 2008-09, pp 19-20

<sup>84</sup> Sir Thomas Bingham, *Anglo-American Reflections*, Inaugural Pilgrim Fathers Lecture, 29 October 1994

<sup>85</sup> Lord Hope added: “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 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”

<sup>86</sup> Gearty, C. (N35 above)

attitude to the executive.”<sup>87</sup> Other commentators have asserted that the English courts have been meek in the face of the executive’s measures relating to national security (particularly following *A v Secretary of State for the Home Department* [2004] UKHL 56 and the subsequent introduction of ‘control orders’, which were only challenged successfully in the Strasbourg court).<sup>88</sup>

How cautious the judges remain is open to question.<sup>89</sup> Certainly they remain reticent in some spheres;<sup>90</sup> however, in addition to their comments on the limits of Parliament’s legislative sovereignty, the courts have made it clear that, while there remain situations where the judiciary ought to defer to other decision makers on democratic grounds, this is by no means the end of the matter. Adam Gearey has described a situation akin to a “dialogue” between the judges and Parliament – where “the judges no longer assume deference to Parliament” but instead “attempt to define the correct roles of each branch of the State that upholds human rights values”.<sup>91</sup>

Deference is controversial, but in essence comes from the widely recognised principle that a primary decision maker enjoys a “discretionary area of judgment”, which can sometimes be referred to as a “margin of appreciation”.<sup>92</sup> Thus when the courts apply the proportionality test (because in the area of administrative and public law, the courts do not conduct a ‘full merits’ review) they are expected to defer to some extent to the views of the primary decision maker. The extent of this deference is not particularly clear. It has been suggested that decisions taken by elected decision makers should be treated with greater deference than those by mere administrators on the grounds of democratic accountability. It has also been argued that greater deference should be shown towards an Act of Parliament and less to a decision of the executive. Wade and Forsyth note that the reason for deference can be more to do with institutional competence than democratic accountability.<sup>93</sup>

*De Smith on Judicial Review* makes plain that when adjudicating on the scope of interference with Convention rights:

“[T]he courts need not defer to the executive on the ground of their responsibility to Parliament. Nor need they defer to Parliament on the ground that it is elected; though deference to elected members may be legitimate on the ground that they, rather than the courts, are better equipped at deciding particular questions requiring an

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<sup>87</sup> Wade, H. and Forsyth, C. (N9 above) p 26

<sup>88</sup> See e.g. Ewing K. and Tham, J.C. *The Continuing Futility of the Human Rights Act* [2008] Public Law 668 and Dyzenhaus, D. *An Unfortunate Outburst of Anglo-Saxon Parochialism*, *Modern Law Review*, (2005) Vol 68, Issue 4, p 672 at 674 where he appears to suggest that (at least in relation to Lord Hoffmann’s judgement in the case of A.) that the UK courts have not moved much beyond the situation in *Liversidge v Anderson*, in circumstances where they accept that there is a valid derogation from the ECHR

<sup>89</sup> For a contrasting view on these issues, see: Kavanagh, A. *Judging the Judges under the Human Rights Act: Deference, Disillusionment and the “War on Terror”* [2009] Public Law 287. See also the response of Lord Woolf, when the Government introduced an ouster clause in the Asylum, Immigration (Treatment of Claimants Etc) Bill, (Squire Centenary Lecture, *The Rule of Law and a Change in the Constitution*, 3 March 2004) demonstrating, as Dyzenhaus recognised (at p 675), that when they feel the situation merits, English judges continue to resist “statutory provisions which tell judges that they do not have review authority over executive action”

<sup>90</sup> Jowell, J. (N12 above) p 21

<sup>91</sup> Gearey, A, Morrison, W and Jago, R. (N56 above) p 5

<sup>92</sup> Wade, H and Forsyth, C. (N8 above) p 308

<sup>93</sup> *Ibid*

assessment of the public interest. The courts possess the legitimacy to guard the invasion of those rights that now form the basis of our constitutional democracy.<sup>94</sup>

*De Smith* accepts that there remain limitations in the courts' institutional capacity, including: in relation to matters that are "in essence matters of preference"; matters in which the court lacks expertise; and, matters which are polycentric.<sup>95</sup> The issue remains complex, despite recent consideration by the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11. Various models of restraint or deference have previously been considered including "the margin of appreciation", due deference, the principle/policy decision and relative institutional competence.<sup>96</sup> In *Huang* the court held that:

Giving weight to factors such as [the views of public officials, policy and fairness concerns] is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up competing considerations on each side and according appropriate weight to the judgments of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.

Whatever view is taken, since the introduction of the 1998 Act, the general constraints imposed on the courts under the *Wednesbury* principles<sup>97</sup> (as refined in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and subsequently<sup>98</sup>) have gradually been loosened. In cases raising human rights issues, while the courts have not shifted to a full merits review, they apply the much more stringent proportionality test, considering whether the restriction placed on a freedom guaranteed by the Convention was proportionate to the legitimate aim pursued and no more than was necessary to accomplish the legitimate objective.<sup>99</sup> Gearty has argued that:

Now as we know, via the opening allowed by the imperative of permitting exceptions to Convention rights ('necessary in a democratic society' and the like), proportionality is everywhere. It is a looser test than ever *Wednesbury* was, requiring analysis of means and ends, the assessment of the legitimacy of statutory objectives, and much else in a similar vein.<sup>100</sup>

Richard Clayton QC has suggested that "it is the constitutional character of the Human Rights Act which authorises a court to engage in a detailed factual examination to test whether legislative decisions use the least restrictive means of accomplishing their objective."<sup>101</sup>

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<sup>94</sup> Woolf, H, Jowell J and Le Sueur, A. (N40 above) p 18

<sup>95</sup> Polycentric matters frequently involve the distribution of limited resources, particularly amongst competing claims (for more on this, see e.g. King, J.A. *The Pervasiveness of Polycentricity*, [2008] Public Law 106

<sup>96</sup> King, J.A. *Institutional Approaches to Judicial Restraint*, Oxford Journal of Legal Studies, Volume 28, No. 3 (2008) pp 409-441 at 411

<sup>97</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

<sup>98</sup> See e.g. *R v Ministry of Defence, ex p. Smith* [1996] QB 517

<sup>99</sup> See e.g. *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries and Housing* [1999] 1 A.C. 69 at 80; *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 A.C. 532; *R v Shaylor* [2003] 1 A.C. 247, para 33 and subsequent discussions in *R (application of Begum) v Denbigh High School Governors* [2007] 1 A.C. 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] 1 W.L.R. 1420

<sup>100</sup> Gearty, C. (N35 above)

<sup>101</sup> Clayton, R. *Proportionality and the HRA 1998: Implications for Substantive Review* [2002] JR 124

One positive result from this change, at least for those of a liberal persuasion, is a move towards what is sometimes described as “the harm principle” – Mill’s philosophy that “the only purpose for which power can be rightfully exercised over any member of the civilized community, against his will, is to prevent harm to others.”<sup>102</sup> Lady Justice Arden has noted that the Convention, as Mill’s principle, requires the state to show a “pressing social need” for interferences with rights.<sup>103</sup>

Others have suggested that this may eventually evolve into a more “comprehensive subsidiary catch all right” against any state action limiting an individual’s freedom of choice.<sup>104</sup> Such a move would mark a more coherent approach than the current insistence on claimants inserting their arguments within the framework of the vaguely defined Convention rights,<sup>105</sup> but is likely to lead to further political decision making on the part of the judiciary and hence the need for greater political legitimacy.

#### 4 The Constitutional Reform Act 2005

A throwaway line from Anthony Trollope’s well known novel, *The Prime Minister* (by the fictional Duchess of Omnium) is often quoted by constitutional lawyers and political scientists:

“... ‘Anything is constitutional, or anything is unconstitutional, just as you choose to look at it.’ It was clear that the Duchess had really studied the subject carefully.”

Trollope beautifully demonstrated the flexibility of the British Constitution, yet the Government’s proposed reforms on judicial appointments and a new Supreme Court for the UK, announced on 12 June 2003 as part of its “continuing drive to modernise the constitution and public services”, demonstrated the limits of that maxim.<sup>106</sup> On the same day, the Government also announced what at first appeared to be the abolition of the office of Lord Chancellor. Embarrassingly for the Prime Minister, it transpired that this aspiration was not immediately achievable. This initially botched<sup>107</sup> attempt at constitutional reform included a second consultation on judicial appointments and was followed some time later by a subsequent, detailed statement to Parliament.<sup>108</sup>

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.

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<sup>102</sup> Mill, J.S. *On Liberty*, 1859

<sup>103</sup> Lady Justice Arden, *Building a Better Society*, JUSTICE 10th Annual Rights Law Conference, 21 October 2008

<sup>104</sup> Horne, A and Martin, M. (N80 above) at 174; See also: Craig, P. *Administrative Law*, 6th Edition, (Sweet and Maxwell, 2008), p 637-638

<sup>105</sup> *The Guardian*, Cragg, S. “A victory for human rights”, 20 July 2009

<sup>106</sup> DCA Consultation Paper CP 11/03 *Constitutional Reform: A Supreme Court for the United Kingdom*, 12 June 2003

<sup>107</sup> Months later, the then Prime Minister, Tony Blair, accepted that “I think we could have in retrospect – this is entirely my responsibility – done it better. Liaison Committee, 3 February 2004, HC 310-i. See also *The Guardian*, “Derry Irvine reveals Blair row over Lord Chancellor abolition”, 2 November 2009, where Lord Irvine was revealed to have pleaded with the Prime Minister that “this should be done in a seemly, measured and balanced way, instead of the incoherent, unworked up and piecemeal approach.”

<sup>108</sup> DCA Consultation Paper CP 10/03 *Constitutional Reform: A New Way of Appointing Judges* and HL Deb, 26 January 2004, cols 13-17 respectively

These responsibilities arose “as much from historical accident as from strategic logic.”<sup>109</sup> He was a senior judge, a member of the cabinet and he presided over the House of Lords. He was also in the uncomfortable position of being bound by collective responsibility as a member of the cabinet, yet as a senior judge he sat *inter alia* on the Appellate Committee of the House of Lords.<sup>110</sup>

Despite these arrangements, when the proposals were introduced, it was thought that the office was “held in great respect by the judiciary”.<sup>111</sup> At the time the office was set to be abolished, the Law Lords argued that “the important constitutional values which the office of Lord Chancellor supported should continue to be effectively protected. In the past the Lord Chancellor’s role was to uphold constitutional propriety and champion judicial independence. The constitution would be gravely weakened if that safeguard were removed and not replaced.”<sup>112</sup>

The Law Lords were not universally happy with the proposed reform and, while approximately half came out in favour of the proposal for a new Supreme Court, all complained that they had not been properly consulted. Lord Hope stated that “I saw it on the news at Heathrow on my way home to Edinburgh one evening. Certainly I was not consulted, none of us were.”<sup>113</sup>

Similar grounds were cited for the reform of the Lord Chancellor’s office and the establishment of a Supreme Court. The arguments about the role of the Lord Chancellor were probably well merited.<sup>114</sup> Those in favour of the Supreme Court were not so straightforward. Both changes were clearly tied in with the Human Rights Act, although there were also external pressures.<sup>115</sup> In relation to the new Supreme Court, the DCA observed that:

The Human Rights Act, specifically in relation to 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. So the fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature.<sup>116</sup>

This argument, based in part on the doctrine of separation of powers, was clearly misconceived. At the time the proposals were under discussion, the potential problem had been acknowledged and addressed by the Lords of Appeal’s statement that, in view of the Human Rights Act, they would refrain from commenting on matters of a partisan nature or which might disbar them from hearing appeals.<sup>117</sup>

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<sup>109</sup> Constitutional Affairs Select Committee, *Judicial appointments and a Supreme Court (court of final appeal)*, HC 48-I, 10 February 2004, para 10

<sup>110</sup> *Ibid*

<sup>111</sup> *Ibid*, para 12

<sup>112</sup> Law Lords’ response to CP 11/03

<sup>113</sup> Constitutional Affairs Select Committee, HC 48-I, para 14

<sup>114</sup> Bogdanor, V. (N2 above) p 66

<sup>115</sup> Le Sueur, A. *Judicial Power in the Changing Constitution*, in Jowell, J. and Oliver, D (Eds). *The Changing Constitution*, 5th Edition, (Oxford, 2004), pp 334-336

<sup>116</sup> DCA Consultation Paper CP 11/03, para 3

<sup>117</sup> Constitutional Affairs Select Committee, HC 48-I, para 19

Lord Lloyd noted that freedom of the citizen in the UK was guaranteed by the rule of law, not the separation of powers; while the Constitutional Affairs Select Committee (CASC) noted that “[a]n argument based on the separation of powers (such as the reference to Article 6) cannot be conclusive in the United Kingdom, where it is a constitutional principle that ministers should be members of one or other House of Parliament.”<sup>118</sup>

The then Lord Chief Justice, Lord Woolf, accepted that the change was “largely symbolic”, but recognised that:

[...] symbols can have unexpected results. Separating the House of Lords from its legislative capacity from its activities as the Final Court of Appeal, could act as a catalyst causing the new court to be more proactive than its predecessor. This could lead to tensions.<sup>119</sup>

The reforms were first considered by CASC, which produced a report in February 2004.<sup>120</sup> Subsequently, they were also considered by the House of Lords Select Committee on the Constitutional Reform Bill, which reported in July 2004.

Despite initial concerns, a compromise was reached, whereby the Lord Chancellor’s role was preserved (with almost all its traditional powers removed), the Law Lords were removed to the new Supreme Court (only after several years, once most of the protagonists had retired) and a new system of judicial appointments was established, whereby appointments up to (but not including) the new Supreme Court Justices fell to the Judicial Appointments Commission.

This tranche of constitutional reforms is likely to have a profound effect in shaping the politics of the judiciary.<sup>121</sup> In effect, the judges have lost their voice in Cabinet, and their place in the legislature. One result of the change is that “appointments to the new [Supreme] court will attract far greater interest than has been the case hitherto”.<sup>122</sup> On a more practical level, the judges can now communicate directly with the public.<sup>123</sup> Their speeches are published on a new judicial website, with summaries of important judgments and information about appointments and judicial practices. Judges are also now appearing before Select Committee in Parliament. Thus, it could be said that the judiciary is finally emerging into its proper place as an independent branch of Government.

## 5 Judicial Appointments

*Of course you must have impartiality. What do I mean by impartiality? I mean you mustn't introduce yourself, your own preconceived notions about what is right. You must try, as far as you can – it's impossible for human beings to do so absolutely, but just as far as you can – not*

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<sup>118</sup> *Ibid*, para 20

<sup>119</sup> Woolf, H. *The Pursuit of Justice*, (Oxford University Press, 2008), p 126

<sup>120</sup> *Judicial appointments and a Supreme Court (final court of appeal)* HC 48-I

<sup>121</sup> Lord Collins has commented that once the constitutional anomalies are all removed, it may be that the Supreme Court “will feel freer to have a more activist role”. This also reflects the reported views of Lord Falconer and Lord Turnbull. *Law Society Gazette*, 3 September 2009

<sup>122</sup> Bradley, A.W. (N17 above) p 489

<sup>123</sup> Through a new Judicial Communications Office, see: 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 161-171

*to interject your own personal interests, even your own preconceived assumptions and beliefs.*  
 Judge Learned Hand, *Spirit of Liberty* (1952).

### 5.1 Background – A problem of numbers and outlook?

Complaints about the lack of judicial diversity are hardly new. In 1915, on the appointment of the former Liberal MP, Stanley Buckmaster, as Lord Chancellor, the Master of the Rolls is said to have written to him to say “all the judges, without exception, are members of the Athenaeum, and I presume you will wish to be a member”.<sup>124</sup> Not much had changed by the 1960s. In 1962, Anthony Sampson wrote of the detachment of judges from society at large in the seminal *Anatomy of Britain*:

Nor do the judges necessarily have a wide experience to furnish their wisdom: while they give their views on morals, criminology and politics, their actual experience outside the law is usually small. They rarely visit prisons to which they sentence criminals: their own lives revolve around medieval institutions: and their preoccupation has been with the interpretation of the law, rather than its making. [...] More than any other group, judges are detached from everyday life [...] The British bench has grown up detached from society and sociological developments.<sup>125</sup>

In particular, he noted that “judges come from a small and conservative section of the community [...] Of the forty two judges who list their education in *Who’s Who*, seven came from Christ Church Oxford, six from Trinity, Cambridge, and only one from a Redbrick university.”<sup>126</sup>

A quote from Lord Devlin from the same period gives an impression of the homogeneity within the profession (and of the establishment as a whole):

In most cases the facts aren’t really very difficult to get at: no, the most important thing for a judge is – curiously enough – judgment. It is not so very different from the qualities of a successful businessman or civil servant. I’m always struck by how alike men in high positions seem to be. It’s rather like seeing a lot of different parts of the stage, and finding that they’re all Gerald du Maurier in the end.<sup>127</sup>

In his book, *Friends in High Places*, Jeremy Paxman noted that “Britain entered the nineties with no female Law Lords, only one woman among the thirty lord justices of appeal, and one other among eighty high court judges”.<sup>128</sup> Whilst recognising that there were “more women barristers to be seen around beneath the horsehair wigs, and the occasional black or Asian face” he argued that the law remained “a deeply conservative trade which has resolutely resisted most attempts to bring it into the twentieth century”.<sup>129</sup>

Like many others, Paxman blamed this lack of diversity on two factors, namely the ‘secret soundings’<sup>130</sup> taken about prospective candidates and the fact that judges were only recruited

<sup>124</sup> Pannick, D. (N 31 above) pp 49-50

<sup>125</sup> Sampson, A. *Anatomy of Britain*, (Hodder, London, 1962), at p 153

<sup>126</sup> *Ibid*, at p 153

<sup>127</sup> *Ibid* at p 156

<sup>128</sup> Paxman, J. *Friends in High Places: Who Runs Britain*, (Penguin, London, 1991) p 315

<sup>129</sup> *Ibid* at p 108

<sup>130</sup> See also: Barrett, M. *The Law Lords*, (Macmillan, 2001), p 31

from “among advocates who have already distinguished themselves by their performance in court.”<sup>131</sup> By 2004, Sampson observed that “Since [1962] their range has widened very little, while British society has been transformed. When a prominent solicitor Tim Taylor carried out a survey of top judges in 2003, he found that all were white, 98 per cent were male, 84 per cent went to Oxbridge and 78 per cent had a ‘full house’ – white, male, public school and Oxbridge.”<sup>132</sup> He added “The Law Lords could not claim to represent, or know about, a wide section of the British population, and most of them came from similar backgrounds to forty years ago”.<sup>133</sup>

Not all commentators believed that the secret soundings were negative. Sir Thomas Legg QC, who ran the system as Permanent Secretary at the Lord Chancellor’s Department, was “an unrepentant believer”. It is certainly possible that some of the criticism of the former system may well be misleading in respect of senior appointments. It has been suggested that some women or minority candidates are not sufficiently ‘visible’ – however, given the limited number of appointments made to the High Court bench each year, one would expect any practitioner seeking appointment to be known to the legal community and to have a sound record and recommendations (in Chambers and Partners, or elsewhere).

Nonetheless, there have been concerning criticisms from inside the system. Lord Lester QC argued before CASC that “I have been sounded [...] and nothing is more arbitrary, I promise, than being able in confidence to put down your views about colleagues with no comeback.”<sup>134</sup> He revealed a colleague from the Lord Chancellor’s Department was “shocked by some of the comments that judges were making about would-be candidates.”<sup>135</sup> These processes were ended following the passage of the Constitutional Reform Act and the recruitment of judges has been left in the hands of the Judicial Appointments Commission.<sup>136</sup>

Interestingly, in spite of the secret soundings, and the party political position of the Lord Chancellor, at the time of the reforms, it was not suggested that the process was subject to any significant party political influence.<sup>137</sup> Historically, it has been suggested that this was due to the Lord Chancellor’s special position as a judge, the fact that he will have been a bencher at an Inn of Court and a barrister with a substantial legal practice.<sup>138</sup>

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<sup>131</sup> Paxman, J. (N128 above) p 109

<sup>132</sup> Sampson, A. *Who Runs This Place? The Anatomy of Britain in the 21st Century*, (John Murray, London, 2004) p 183

<sup>133</sup> *Ibid* at p 186 and see also, Zander, M. *The Law Making Process* (Cambridge University Press, 2004), pp 338-9

<sup>134</sup> Constitutional Affairs Select Committee, HC 48-I, para 148

<sup>135</sup> *Ibid*

<sup>136</sup> For background on the proposed changes in the rest of the UK, see: Le Sueur, A. (N 115 above) pp 327-328

<sup>137</sup> Malleson, K. *The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles* in Malleson, K. and Russell P. (Eds) *Appointing Judges in the Age of Judicial Power*, (Toronto University Press, 2005), p 41. Oft quoted is the appointment of Lord Justice Sedley, a former Communist, by the Tory Lord Chancellor, Lord Mackay of Clashfern

<sup>138</sup> Stevens, R. (N25 above) p 82

## 5.2 Merit and diversity

It is generally accepted that the lack of diversity in the judiciary has a damaging effect on public confidence and leads to the loss of potentially talented judges.<sup>139</sup> The first female Law Lord, Baroness Hale, has been outspoken about the need for a more diverse judiciary. She has referred to the Human Rights Act as one of the factors which has “clearly increased the social and ‘small p’ political content of the judging task”,<sup>140</sup> arguing that this has made it all the more important that the judiciary becomes more diverse.

Judicial appointments have traditionally been dominated by the assumption that those best fitted for appointment – and thus fitted for the best appointments – are those who have done best in independent practice as barristers. This has excluded large numbers of very able lawyers from consideration and limits selection to a comparatively small and homogenous group. [...] That homogenous group is very largely male, almost all white [...] and from a comparatively narrow range of social and educational backgrounds.

In June 2008, (the then) Sir Lawrence Collins remained “the only solicitor to be appointed directly from private practice to the High Court and [only] the second solicitor to be appointed to the High Court bench.”<sup>141</sup> Baron Collins (as he now is) is also the first solicitor to be appointed as a judge in the House of Lords. In 2008 he said: “I don’t think the judiciary should reflect society. What I believe is important is that all members of society should have an equal opportunity to fulfil positions of responsibility. However, that is quite hard when the judiciary comes essentially from the most successful practitioners at the Bar”.<sup>142</sup> It is questionable whether Collins, who attended an independent school and Cambridge and was a partner at the city law firm Herbert Smith, really represents the type of diversity sought by critics of the current system. By contrast, Mrs Justice Dobbs, the first black female High Court judge, has suggested that equality of opportunity may not, of itself, be sufficient, stating that “clients are entitled to walk into court and feel that at least one judge there understands where they are coming from”.<sup>143</sup>

Following the announcement of the constitutional reforms in 2003, CASC found serious conflict between those who believed that maintenance of the quality of the judiciary was paramount (and that a trickle down effect would ensure better representation) and those who believed that some proactive policies had to be pursued. Even those who accepted the need for proactive policies could not agree as to their extent and duration. During the course of these debates, there was dispute about how the merit of individual candidates could be measured.

Sir Thomas Legg QC argued that:

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<sup>139</sup> See for example Genn, H. *Paths to Justice: What People Do and Think About Going to Law* (Hart, 1999), pp 239-247, Banner, C. and Deane, A. *Off with their wigs*, (Policy Exchange, 2003), pp 129-139 and Malleon, K. *Diversity in the Judiciary: The Case for Positive Action*, *Journal of Law and Society*, Volume 36, No. 3, pp 376-402, September 2009

<sup>140</sup> 10th Pilgrim Fathers Lecture, 24 October 2004

<sup>141</sup> Law Society Gazette, *History Man*, 12 June 2008

<sup>142</sup> *Ibid*, pp 16-18

<sup>143</sup> *Ibid*

Selection on merit can have one of at least two quite separate meanings. One of these meanings is what I have elsewhere called 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 and professional make-up of the judiciary. That is the approach which has been adopted up to now. [...] The other approach, which I have called minimal merit, is where all candidates who are judged to reach an agreed minimum standard are treated as equally suitable for appointment, and you are then entitled to select among them in accordance with any supplementary policy you happen to have, for example about a need to have more women or ethnic judges. The concern must be that the policy implied by the [consultation] paper will generate so much pressure to diversify the composition of the judiciary that it will in practice lead to numerous appointments on a basis of minimal merit.<sup>144</sup>

In contrast, Malleon has observed that in circumstances where a comparison was required between similarly qualified candidates:

[...] the maximalist approach may be modified to allow for the possibility of the application of a 'tie-break' approach to merit. This arises where two or more candidates are identified as equally qualified and one is from an underrepresented group such as a women; the latter's disadvantaged status then serves as a 'tie-breaker' giving her the advantage.<sup>145</sup>

This latter view was certainly not accepted by all witnesses to the Committee. Oba Nsugbe QC expressed concern that minority candidates could be disadvantaged if it were thought that they had not been appointed on merit, arguing that while targets might be acceptable, positive discrimination was not, since "it would raise question marks about the credibility of an appointment" if there was some suggestion that people were appointed "just to make up a number."<sup>146</sup>

Difficulties can also arise when seeking to measure comparative disadvantages: for example during the course of the hearings, Ann Cryer MP put to Nsugbe that a woman who had attended a comprehensive school, followed by a former polytechnic might be more disadvantaged than an ethnic minority candidate who had benefited from other advantages.<sup>147</sup> Certainly on that basis even the 'Nsugbe approach' towards targets seems problematic.<sup>148</sup>

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<sup>144</sup> Sir Thomas Legg QC, *Judicial Reform: Function, Appointment and Structure*, Speech delivered at the Cambridge Centre for Public Law, 17 October 2003 and see also Constitutional Affairs Committee, HC 48-I, para 149

<sup>145</sup> Malleon, K. (N58 above) pp 126-40

<sup>146</sup> Constitutional Affairs Committee, HC 48-II, Qq 420-424. For more on the issue of merit, diversity and judicial appointments, see Lord Clarke of Stone-Cum-Ebony, *Selecting Judges, Merit, Moral Courage, Judgment and Diversity*, Speech delivered on 22 September 2009

<sup>147</sup> For further, see: Horne, A. *Judicial Appointments*, House of Commons Library, 16 June 2008. For difficulties in respect of entering the Bar, see also: Lord Neuberger of Abbotsbury, *Entry to the Bar Working Party: Final Report*, The Bar Council, November 2007

<sup>148</sup> Research by the JAC shows that *all* eligible candidates think that there is "inherent prejudice" in judicial selection. Respondents from BME ethnic groups and women said that their race or gender is a disadvantage, while white respondents, men and barristers were just as likely to feel disadvantaged "with some seeing the desire to increase diversity as indistinguishable from positive discrimination". *Law Society Gazette*, "Inherent prejudice' in judicial selection", 4 June 2009

To complete the picture, Leslie Moran has suggested that although data and scholarship on sexuality is limited, available empirical evidence suggests that once sexual orientation becomes visible, it can significantly affect the experiences of court users (and presumably therefore potential appointees). He cites a number of studies (including a Californian study in which 56 per cent of respondents reported bias occurring where their contact with the courts involved a sexual orientation issue) and suggests that:

[L]imited and problematic as it may be [the research] offers some support for the hypothesis that sexual orientation bias in the courts in general, and the judiciary, in particular, may fail to serve the needs of a sexually diverse community and thereby fail to establish and maintain legitimacy in the service of a sexually diverse democracy.<sup>149</sup>

It is suggested that a diverse judiciary “has a greater capacity to be sensitive to the needs and experiences of the diverse users of the judicial system”;<sup>150</sup> however, as Malleon has recognised “the idea that a judge can represent the interests of a group from which he or she is drawn is clearly incompatible with the notion of impartial justice.”<sup>151</sup>

### 5.3 Difference and decision making

How judges reach decisions (and the associated question of statutory interpretation) is a complicated one and has been subject to much discussion.<sup>152</sup> While the official theory of statutory interpretation works on the understanding that “judges are neutral and objective when they interpret legislation”<sup>153</sup> it has also been claimed that any interpretative approach allows judges to consciously or unconsciously give effect to their own ideological preferences and that accordingly, the “values of ‘the law’ are inescapably shaped by the values of those who interpret legal rules”.<sup>154</sup> As Pannick has identified, “because ‘judges are men, not disembodied spirits’, their judgments are inevitably influenced by judicial character and experience.”<sup>155</sup> In the aforementioned case of *Tyrer*, the dissenting judge, Sir Gerald Fitzmaurice, argued that birching young offenders did not amount to degrading treatment, admitting that his view may have been coloured by his experience of corporal punishment in school.<sup>156</sup> Randall Graham has contended that a diverse group of legal academics believe that judicial decision making is obviously open to *sub rosa* ideological influence and that judges “inevitably reshape legal language according to their political philosophies”,<sup>157</sup> even though

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<sup>149</sup> Moran, L. *Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings*, Sydney Law Review, Volume 28, No. 4, December 2006, at 568

<sup>150</sup> *Ibid*, Abstract

<sup>151</sup> Malleon, K, *Creating a Judicial Appointments System: Which Model Works Best*, [2004] Public Law 102 at 106

<sup>152</sup> Addressed in depth by Lord Justice Etherton in his lecture *Liberty, the Archetype and Diversity: a Philosophy of Judging*, 9 July 2009, Institute of Advanced Legal Studies. For more on the interaction with the concept of the rule of law, see for example, Dworkin, R. *Law’s Empire* (Fontana, 1986); Lord Bingham (N46 above); and Jowell and Oliver (Eds.), *The Changing Constitution* (Oxford University Press, 5<sup>th</sup> Edition, 2000)

<sup>153</sup> Graham, R. *What Judges Want: Judicial Self-Interest and Statutory Interpretation*, Statute Law Review, Volume 30, No. 1, 38-72 (2009) at 41

<sup>154</sup> *Ibid* at p 42

<sup>155</sup> Pannick, D. (N31 above) pp 43-44

<sup>156</sup> *Ibid*

<sup>157</sup> Graham, R. (N 153 above) at 42

the judges' role involves a self denying ordinance "that they should seek to apply society's law, not their own unmediated will".<sup>158</sup>

It is often argued that the mere fact of difference, be it in gender, race, age,<sup>159</sup> or sexual orientation, can have a substantial effect on judicial decision making. Erika Rackley examined the "developing jurisprudence of Baroness Hale" and suggested that her candid recognition and articulation of the gendered nature of the experiences and violence in the case of *Secretary of State for the Home Department v. K* [2006] UKHL 46 revealed "not only the difference 'difference' (in whatever form) might make to understandings of the judge, judging and justice but also the importance of recognising the transformative potential of judicial diversity to create a space in which difference is celebrated and valued on its own terms."<sup>160</sup>

Baroness Hale herself has noted that "most judges in this country never have occasion to own up to a personal philosophy, whether of life or of judging", yet she has indicated that:

Diversity of background and experience enriches the law. Women tend to lead different lives from men [...] By and large, the interaction between our own internal sense of being a woman and the outside world's perception of us as women leads to a different set of everyday and lifetime experiences. The same is true for other visible minorities. It is just as important that these different experiences should play their part in shaping and administering the law.<sup>161</sup>

She has argued that "introducing different perspectives may help develop new understandings" and that "out of today's minority opinion can sometimes come the orthodoxy of tomorrow".<sup>162</sup> This view was echoed by Ruth Bader Ginsberg at her inauguration to the US Supreme Court, when she said that women, like persons of different racial groups and ethnic origins, contribute "a distinctive medley of views influenced by differences in biology, cultural impact and life experience".<sup>163</sup>

These arguments have been supported by the social sciences who have explored the perils of 'groupthink'. In a different context, Alison Maitland observed that "if you get people all from the same background and who have had the same experiences and are on a board or in a team working together, they are less likely to challenge each other and they are less likely to ask difficult questions because they are all thinking in the same way".<sup>164</sup> This argument seems equally applicable in the judicial context, particularly at the level of the Court of Appeal and new Supreme Court, where judges sit in panels and prejudices and assumptions can either be reinforced or challenged by colleagues. It would also support the idea of a politically balanced bench.

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<sup>158</sup> Webber, J. *Supreme Courts, Independence and Democratic Accountability* 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 65

<sup>159</sup> Blom-Cooper, L. *Age of Judicial Responsibility*, [2009] Public Law 429

<sup>160</sup> 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 37-56 at p 37

<sup>161</sup> Baroness Hale (N 140 above)

<sup>162</sup> *Ibid*

<sup>163</sup> Quoted in Zander, M. (N 133 above) p 352

<sup>164</sup> *The Guardian*, "Could crash spell doom for City's boys' club", 26 July 2009

#### 5.4 The panel and the balance of cases

The impact of selection on decision making can also be seen in the substantial number of comments about how, if the panel of judges on any particular case had been altered, a different decision could have been reached.<sup>165</sup> Lord Hoffmann referred to “cases in which one feels that a slight change in the composition of the Appellate Committee would have set the law on a different course”.<sup>166</sup> More recently, Lord Pannick QC put the matter bluntly when he observed, in relation to the well known case of *YL v Birmingham City Council* [2007] UKHL 27 that:

With three Chancery judges (Lord Scott, Lord Mance and Lord Neuberger) outvoting Lord Bingham and Baroness Hale, the House of Lords decided on the meaning and application of s.6(3)(b) of the Human Rights 1998.<sup>167</sup>

This somewhat sneering reference to the former Chancery judges reflected the view of many in the human rights community that they should have deferred to the views of their public law orientated brethren. In fact, despite their generally expressed preference for judicial independence and against overt criticism of judges, both human rights NGOs and practitioners strongly disparaged the judgment of the majority, demonstrating that the political criticism cuts both ways. At the time Liberty indicated that “we are very disappointed by today’s majority decision” arguing that “the reasoning seems to have been largely that private care providers are motivated by profit and governed by contract rather than public service values.”<sup>168</sup>

Other interesting arguments have been formulated as to whether appointments would become more ‘political’ if the court sat *en banc* or in panels and the associated question of who is to have the power of deciding the composition of the panels.<sup>169</sup> Baroness Hale has observed that:

Sitting *en banc* avoids the risk of the composition of the panel affecting the outcome of the case (one only has to think of the Pinochet saga to accept that there is a risk).<sup>170</sup>

The balance of cases heard by our highest courts is also relevant. After a detailed study of the petitions for leave to appeal heard by the Appeal Committee of the House of Lords, Sangeeta Shah and Thomas Poole observed that not only has there been a substantial increase in human rights claims before the courts, “but the success of such petitions has also been high – substantially higher indeed than for other categories of case (including rights related cases).”<sup>171</sup> They conclude that “this last finding indicates deliberate selection – the Lords seem keen to hear human rights cases.”<sup>172</sup>

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<sup>165</sup> See for example, Robertson, D. *Judicial Discretion in the House of Lords*, (Clarendon Press, Oxford, 1998) p 17

<sup>166</sup> *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 502.

<sup>167</sup> Pannick, D. *Functions of a Public Nature*, [2009] Judicial Review 109

<sup>168</sup> Liberty Press Notice, 20 June 2007

<sup>169</sup> Legg, T, *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*, (A special issue of Legal Studies, Butterworths, 2004), p 47

<sup>170</sup> Hale, B. *A Supreme Court for the United Kingdom?* Legal Studies, 24(1–2), 2004, pp. 36–44

<sup>171</sup> Shah, S and Poole, T. *The Impact of the Human Rights Act on the House of Lords*, [2009] Public Law 347

<sup>172</sup> *Ibid*, p 370

Again, the selection of different types of cases is likely to be impacted by the type of person appointed – for example, Baroness Hale suggested that there could be some benefit if the court heard “only cases of real constitutional importance”.

These would include the ground-breaking human rights cases, cases about our relationship with Europe or the rest of the world, including important cases interpreting international treaties or concepts such as sovereign immunity, and devolution cases. They might also include those public law cases which raised points of real significance.<sup>173</sup>

She appeared sceptical about the court continuing to hear commercial and “big money shipping cases” which she described as being “important only to the parties and their insurers” and argued that there would be some merit in “taking away the ordinary criminal and civil cases, no matter how much money is involved, and leaving them to the domestic courts of each jurisdiction.”<sup>174</sup> Finally, she contended that there could also be an advantage in having judges from “a much wider range of professional backgrounds and experience than our Law Lords”, including taking people directly from the Chief Prosecutor's or Attorney General's Office, or other public service, or the Universities, or private practice, or even direct from politics.<sup>175</sup>

Robert Hazell has echoed Baroness Hale's view on case selection, noting the that this “has been the experience of the Canadian Supreme Court over the last 25 years” and “our new Supreme Court” will gradually follow suit and transform into more of a constitutional court.<sup>176</sup> He has also recognised that “all this will stimulate much greater interest in who the judges are and how they came to be appointed.”<sup>177</sup> Shah and Poole suggest that their research on leave applications paints “a picture of a busier court, more inclined to devote attention to the public law nature of its work”,<sup>178</sup> although they go on to record that while the Lords are keen on hearing human rights claims, the win ratio of claimants is low and (in spite of the views of some of the court's anti-activist detractors) they claim that statistically the court is “not particularly sympathetic in general to human rights *claims*”.<sup>179</sup> Nonetheless, one imagines that if there is a substantial shift towards human rights and constitutional law work, the type of lawyer appointed to our highest court might change and (given the earlier

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<sup>173</sup> Department for Constitutional Affairs, Response to Consultation Paper 11/03: *A Supreme Court for the United Kingdom*. See also: Lord Neuberger of Abbotsbury (Master of the Rolls), *The Supreme Court: Is The House of Lords 'Losing Part of Itself'?* The Young Legal Group of the British Friends of the Hebrew University, Lecture 2 December 2009, particularly paras 23-32

<sup>174</sup> In contrast, Lord Woolf highlighted the economic benefits brought by commercial law, arguing that “London has the necessary legal infrastructure that is required by a financial centre. The legal profession and the judiciary are deeply involved in the provision of legal services, not only to those who live and trade in the UK but those from abroad as well [...] If one is looking for practical, economic illustrations of the value of the rule of law, one need look no further than the city, and courts of London.” Woolf, H. (N 119 above) p 414

<sup>175</sup> Department for Constitutional Affairs, Response to Consultation Paper 11/03

<sup>176</sup> Hazell, R. *The Continuing Dynamism of Constitutional Reform*, Parliamentary Affairs 2007 60(1):3-23 at 17

<sup>177</sup> *Ibid*, p 18

<sup>178</sup> See also: Woolf, H, Jowell J and Le Sueur, A. (N40 above) p 29, which notes that between 1998-2005, 118 of 551 judgments handed down by the House of Lords were appeals from claims for judicial review, 21% of total claims

<sup>179</sup> Shah, S and Poole, T. (N171 above) at 371

comments about the “Chancery judges” and their motivations<sup>180</sup>) that in turn could impact on the decision making.

### 5.5 The new Judicial Appointments Commission

The establishment of the Judicial Appointments Commission (JAC) was designed to cure many of the concerns about political involvement in the appointment process. Launched in April 2006, it comprises fifteen Commissioners, all recruited and appointed through open competition (with the exception of three judicial members who are selected by the Judges’ Council).<sup>181</sup> The Lords Constitution Committee published a report explaining the changes made by the Constitutional Reform Act 2005 and this paper will not seek to provide an elaborate account of the new procedures.<sup>182</sup> The new Supreme Court has a separate appointments commission, due, in part, to the devolution requirements. Both are recommending, rather than appointing, Commissions.

### 5.6 Criteria and eligibility for appointment

While the 2005 Act provides that appointments have to be made “solely on merit”, it also introduced a provision<sup>183</sup> that when making appointments, the JAC “must have regard to the need to encourage diversity in the range of persons available for selection for appointments” (although s 64(2) makes clear that this is a subsidiary aim).

The eligibility requirements for holding a judicial appointment did not change at the same time as reforms were made to the appointments system. Prior to the Tribunals Courts and Enforcement Act 2007, eligibility for appointment to professional judicial office was dependent upon applicants possessing “rights of audience” for a prescribed number of years.<sup>184</sup> The 2007 Act altered the eligibility requirements, to encourage judicial diversity.<sup>185</sup>

Sadly, the initial impact of the changes has been to reduce the proportion of minority candidates appointed. In May 2008, it was reported that the year before the JAC started work in 2006, about 14% of judicial posts were being given to black and Asian applicants, and 41% to women. Figures released in April 2008 showed that, under the JAC, those percentages had been reduced to 8% and 34% respectively.<sup>186</sup> Ironically, one of the reasons for this is, of course, the lack of political patronage allowed under the new system. Whereas previously it had been recognised that Lord Irvine had been encouraging<sup>187</sup> high profile minority candidates the new committee based approach would restrict such opportunities. Indeed, the

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<sup>180</sup> In 1998, David Robertson noted that judges appointed to the House of Lords “overwhelmingly come from either the Commercial Bar or the Chancery Bar”. Robertson, D. *Judicial Discretion in the House of Lords*, (Clarendon Press, Oxford, 1998) p 19

<sup>181</sup> <http://www.judicialappointments.gov.uk/about-jac/about-jac.htm>

<sup>182</sup> Select Committee on the Constitution, *Constitutional Reform Act*, 5th Report of Session 2005–06, HL 83

<sup>183</sup> At section 64

<sup>184</sup> Under the Courts and Legal Services Act 1990

<sup>185</sup> Such as an extension of eligibility to holders of legal qualifications other than barristers and solicitors and a reduction in the number of years for which it is necessary to have held the relevant qualification and gained legal experience

<sup>186</sup> *The Guardian*, “Judicial Diversity Goes into Reverse”, 19 May 2008

<sup>187</sup> Malleon, K. (N137 above) p 43

end of the 'tap on the shoulder' may, in the short term, actually harm the prospects of candidates who would not necessarily think to apply for appointment.<sup>188</sup>

## 6 Political accountability

In order to secure judicial independence, there is a difficulty in making the judiciary properly accountable. Andrew Le Sueur has identified a number of formal and informal methods of judicial accountability. These include: 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.<sup>189</sup> These examples are all well and good, but it is plain that, at the highest level, the decisions of the House of Lords (particularly on questions of balancing of rights) are more or less final, unless the case is taken to the even less accountable European Court of Human Rights. While the architecture of power may have shifted towards the judiciary, the only new move to encourage greater accountability has been the appearance of senior judges before Parliamentary Select Committees.<sup>190</sup> This may allow the committees the opportunity to question judges over practical issues of court administration, while allowing the judges an opportunity to voice their concerns about how government proposals (including allocation of resources) will impact upon the administration of justice; however, it is far from a satisfactory method of ensuring accountability.<sup>191</sup>

This can become problematic when judges are determining essentially political issues and can lead to questions being asked as to when they should legitimately defer to the will of the democratically elected element and where they should step in and create new law if the Government fails to act. Ross Cranston has compellingly argued (prior to his elevation to the bench) that:

In a properly functioning representative democracy judges simply should not do certain things. [...] The dominant view is the belief that if the law is settled, judges ought to apply it even if the particular results are undesirable. Change in such circumstances must come from Parliament, possibly at the initiative of law reform bodies, but not from the courts, which do not have the institutional capacity to handle issues with major social or economic ramifications.<sup>192</sup>

In spite of this stricture, Parliament has shown a general reluctance to engage on a whole range of constitutional issues, such as the valid extent to the right to privacy, and more recently whether there should be a 'right to die'. It is also argued that the elected branch has been slow to resist the executive. In those circumstances the courts will tend to step in, considering individual and often hard cases. It is then that these questions of accountability come to the fore. Prior to the establishment of the JAC, this may have been dealt with by the

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<sup>188</sup> See for example the evidence of Lord Phillips to the Lords Constitution Committee, 6 December 2007

<sup>189</sup> 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

<sup>190</sup> Horne, A. *Parliamentary Scrutiny: an assessment of the work of the Constitutional Affairs Committee*, Justice Journal, Vol 3, No. 2, December 2006, p 70

<sup>191</sup> *Ibid*

<sup>192</sup> Cranston, R. (N76 above) p 135

control the Lord Chancellor (and hence the executive) exercised over judicial appointments. In other jurisdictions, one method of dealing with this accountability gap has been the establishment of confirmation hearings for the highest judicial appointments.

### 6.1 Confirmation hearings?

Historically, the concept of political involvement in judicial appointments was not shocking. Lord Salisbury famously observed that:

There is [...] no clearer statute in that unwritten law than that party claims should always weigh very heavily in the disposal of the highest legal appointments. [...] Perhaps it is not an ideal system – some day, no doubt the Master of the Rolls will be appointed by competitive examination in law reports, but it is our system for the present.<sup>193</sup>

Moreover, the idea of holding confirmation hearings of the type that occur in the US is hardly novel, but it has never really found favour in the UK.<sup>194</sup> The suggestion was discounted by the DCA in 2003. When the matter was later considered by the CASC, it concluded that it had “heard no convincing evidence to indicate that confirmation hearings would improve the process of appointing senior judges.”<sup>195</sup> CASC reiterated that while Legg and Hazell had promoted the idea of confirmation hearings “to ensure that Parliament had confidence in the judiciary”, the government had dismissed this. The government contended “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.”<sup>196</sup>

The Commons Committee went on to argue that this in no way precluded Parliamentary Committees from seeking the views of the judiciary and holding evidence sessions with them to ensure a constructive dialogue on constitutional issues.

The issue was recently considered by the Lords Constitution Committee.<sup>197</sup> The Committee noted two main developments.<sup>198</sup> The first was the announcement by Stephen Harper, the Prime Minister of Canada, that his candidate for a Canadian Supreme Court vacancy (Justice Marshall Rothstein of the Federal Court of Appeal) had agreed to appear before an ad hoc committee of the Canadian House of Commons (co-chaired by a law professor who was not an MP). The professor, Peter Hogg, had reportedly warned the committee against straying into the judge’s personal beliefs or examining historical and hypothetical cases.

In spite of the example considered by the Lords Committee, the abovementioned model has not always been followed for subsequent appointments. Thomas Cromwell was appointed to the Canadian Supreme Court in December 2008 without any form of parliamentary hearing:

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<sup>193</sup> Cited in Stevens, R (N8 above), p14

<sup>194</sup> Horne, A. (N40 above) p 42

<sup>195</sup> Constitutional Affairs Committee, HC48-I, para 87

<sup>196</sup> *Ibid*, paras 82-83

<sup>197</sup> House of Lords Select Committee on the Constitution, HL 151 paras 132-135

<sup>198</sup> 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 132-135

the Canadian Prime Minister instead personally consulted with the leader of the opposition. He cited the urgency of filling the eight-month vacancy on the Supreme Court as the source of this exception, and restated his commitment to returning to a formal mechanism through which Parliament can scrutinize future Supreme Court nominees.

The second and more important development was the proposal of the Ministry of Justice (MoJ) in *The Governance of Britain* Green Paper to introduce pre-appointment or post-appointment committee hearings for certain key public posts. The Paper referred to judicial appointments: “The Government is willing to look at the future of its role in judicial appointments: to consider going further than the present arrangement, including conceivably a role for Parliament itself, after consultation with the judiciary, Parliament and the public, if it is felt there is a need”.

Despite floating these innovative changes,<sup>199</sup> the Government concluded that a substantial majority of respondents “opposed any role for the legislature in the selection or making of judicial appointments, and in particular to confirmation hearings”.<sup>200</sup> It agreed however, that there could be merit in a meeting of the Commons Justice Committee and the Lords Constitution Committee to hold the system to account on an annual basis.

## 6.2 Some alternative models

Some commentators have recognised that there is a case for both parliamentary and executive involvement in the appointment of some senior judges.<sup>201</sup> Keith Ewing has said that there is a role for a parliamentary committee in promoting accountability by “confirming judicial appointments (particularly at the highest level)”.<sup>202</sup> Moreover, while not acceding to that practice, Lord Phillips admitted there needs to be executive involvement in top appointments and he would be concerned about the appointment of a Lord Chief Justice in whom the executive had no confidence.<sup>203</sup>

While the UK Government has currently discounted moving to a confirmation process, that should not be the end of the matter (much can be gained from assessing the operation of such models abroad.<sup>204</sup>) One can see systems in place in countries such as Germany, the US and Canada. This paper will provide a brief summary.

## 6.3 The German model

The German Federal Constitutional Court, established in 1951, is tasked with ensuring that all institutions of the state obey the constitution of the Federal Republic of Germany (Basic Law). In 1969, an individual right to petition the court (originally created by statute in 1951) was enshrined in the constitution and since then, individuals (not just citizens) have the

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<sup>199</sup> Ministry of Justice, *The Governance of Britain: Judicial Appointments*, October 2007, CP 25/07

<sup>200</sup> Ministry of Justice, *The Governance of Britain: Constitutional Renewal*, March 2008, Cm 7342-I

<sup>201</sup> See for example: Bradley, A.W. (N17 above) at 488, and Legg, T. *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*, (A special issue of Legal Studies, Butterworths, 2004), p 46

<sup>202</sup> Ewing, K. *A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary* (2000) 38 *Alberta Law Review* 708 at 733

<sup>203</sup> Quoted in Bradley, A.W. (N17 above) at 488

<sup>204</sup> See: Ministry of Justice, CP 25/07, pp 58-70 for a list of comparative examples

*constitutional* right to petition the court where they believe their rights have been violated.<sup>205</sup> The court comprises sixteen judges, elected by the two Federal legislative bodies (Bundestag and Bundesrat). Half of the judges are elected by the Bundestag and half by the Bundesrat, each by a two-thirds majority. Rainer Nickel notes that:

The two leading parties, the Christian Democrats and the Social Democrats, have to reach a consensus over the candidates to be elected. There are no public hearings, and the outcome of an election is mostly a result of ‘package deals’ and negotiations behind closed doors. Consequently, each justice has entered the court on a ‘party ticket’. However, this does not mean that the elected candidate is actually a party member [...] in fact, even if justices were clearly sympathetic to one or other political party before they were elected, many of them turned out to be rather independent from party lines, and in some cases party politicians deeply regretted their choice afterwards.<sup>206</sup>

The term of office is twelve years and re-election is not allowed. The Court itself is made up of two Senates (panels) with eight members each.<sup>207</sup> The Federal Constitutional Court’s website explains that:

The work of the Federal Constitutional Court [...] has political effect. This becomes particularly clear when the Court declares a law unconstitutional. But the Court is not a political body. Its sole review standard is the Basic Law. Questions of political expediency are not allowed to play any part as far as the Court is concerned. It merely determines the constitutional framework for political decision-making. The delimitation of State power is a feature of the rule of law.<sup>208</sup>

Christine Landfried described the appointments process for Constitutional Court Judges in *Appointing Judges in the Age of Judicial Power*. In particular, she states that Constitutional Court judges in Germany are selected by a very small group of leading members of political parties both of the Bundestag and of the second chamber, the Bundesrat.<sup>209</sup> Landfried is critical of the “secret bargaining amongst political parties” arguing that the “Constitutional Court Judges have only limited power because they are not directly elected by the people”.<sup>210</sup>

In a wider context, this would miss two crucial points: first, that the judiciary is expected to protect minorities (and given that in the UK senior judges tend to be appointed singly, when vacancies arise, public election would not easily safeguard those interests); second, that one of the better arguments for representative democracy is that the chosen representative may be better placed to decide on complex issues than the general population. In the UK context, where representative democracy is generally accepted, the German approach may merit further investigation. Moreover, as Landfried acknowledges, “according to the research

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<sup>205</sup> Nickel, R. *The German Federal Constitutional Court: Present State, Future Challenges* in Le Sueur, A. (Ed) *Building the UK’s New Supreme Court: National and Comparative Perspectives*, (Oxford, 2004), p 180

<sup>206</sup> *Ibid*, pp 183-184

<sup>207</sup> See: <http://www.bundesverfassungsgericht.de/en/organization/organization.html>

<sup>208</sup> See: <http://www.bundesverfassungsgericht.de/en/organization/task.html>

<sup>209</sup> Landfried, C. *The Selection Process of Constitutional Court Judges in Germany*, in Malleson, K. and Russell P. (Eds) *Appointing Judges in the Age of Judicial Power*, (Toronto University Press, 2005), pp 196-8

<sup>210</sup> *Ibid*, p 198

literature, while political parties determine the selection process, once elected the party affiliation of judges does not play a decisive role in their decision making.”<sup>211</sup>

The German courts have more experience of applying a proportionality test when considering fundamental rights. Martin records that the Constitutional Court faced problems when dealing with “politically charged litigation”. In order to ensure the judiciary did not overstep the bounds of constitutionality, the Constitutional Court made it clear (in the 1950s and 1960s) that where primary legislation was challenged on grounds of disproportionate infringement of fundamental rights, the courts would be likely to allow Parliament considerable leeway when called upon to decide whether an impugned law was pursuing a legitimate objective and whether there was a less-intrusive but similarly effective alternative. Where decisions by Parliament were based on a “prognosis of societal or technical development, or the effectiveness of new and untested measures”, Parliament is accorded a “‘prerogative of judgment’ (Einschätzungsprärogative)” or margin of appreciation.<sup>212</sup>

Other German commentators, such as Bernhard Schlink, accept that general societal consensus and personal subjective value judgments have a substantial part to play in the adjudication process in the German courts.<sup>213</sup>

#### **6.4 A brief comment on the American and Canadian models**

In the US, federal judges are appointed by the President with Senate approval. The process is not universally respected; indeed, Malleson has said that one explanation for the UK’s rejection of the confirmation process “lies in a widely held view of the US Senate confirmation hearings as invading the privacy of individual candidates and undermining judicial independence.”<sup>214</sup>

She observed:

Critics of this aspect of the US judicial appointments process have argued that the highly partisan nature of the process is such that the hearings can sometimes be little more than a choreographed dance in which very little useful information is revealed. However, the decision of the Canadian Parliament to introduce nomination hearings for their Supreme Court judges in March 2006 as part of a reform designed to reduce party political influence, illustrates the growing awareness outside the UK of the need to explore new ways to enhance democratic accountability in the judicial appointments process whilst at the same time removing political patronage. The debate in Canada which took place before the hearings were introduced almost exactly mirrored that which took place at the time of the passage of the Constitutional Reform Act. The first Canadian parliamentary Supreme Court hearing was widely regarded to have been a success and future hearings will no doubt be watched with interest.<sup>215</sup>

The US system was considered by the Canadians when they were establishing their own processes. The Canadian Bar Association noted that:

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<sup>211</sup> *Ibid*, p 196

<sup>212</sup> Horne, A and Martin, M. (N80 above) at 175

<sup>213</sup> *Ibid*, p 176

<sup>214</sup> House of Lords Select Committee on the Constitution, HL 151, Appendix 3

<sup>215</sup> *Ibid*

The McKelvey Report<sup>216</sup> found that the U.S. style confirmation process draws the harshest criticism in Canada. At confirmation hearings in the U.S., potential judicial candidates can be subject to an “intensive grilling” by the Senate Judiciary Committee concerning their views on current social and political questions. The Senators’ prying into the candidates’ private lives can amount to a virtual inquisition, especially if the political complexion of the committee differs from that of the candidate.

It is almost universally accepted that the American model is not the way forward in the UK. Admittedly, it may well be more honest, as it accepts that in essence the constitutional questions answered by the judges are essentially political as well as legal and that given that the appointment is more or less permanent, the public (at least by electing the politicians) should have some say in the outcome. The process is also extremely divisive. Issues arose over the appointment of new Supreme Court Justice Sotomayer when she expressed the sentiment that “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white man”. This came back to haunt her at the confirmation hearing, although it echoed comments by the Republican nominated Justice Alito, that “when I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background”.<sup>217</sup>

It is probably too early to comment on success the Canadian model, but once it has been up and running for some years, it may well be worth investigating further.<sup>218</sup>

## 7 Conclusion

While the increase in the ‘small p’ political aspect in judging has been recognised by most fair minded commentators, the idea that the answer to this issue is to “isolate the judges from political pressures”<sup>219</sup> is sadly flawed, as it is incompatible with the increasing role that they play in our society, adjudicating on administrative, constitutional and human rights law.

In truth, the fact that there are now fewer (practising) lawyers in Parliament combined with the removal of the judges from the legislature, means that in future, there will be even less informal contact between judges and the politicians. Historically, the Attorney General once kept his chambers in the Royal Courts of Justice and the Lord Chancellor worked directly with the Law Lords. It has also been suggested that even until the late 1990s, the judiciary was not averse to meeting with ministers to discuss their concerns.<sup>220</sup> This old boys’ network has now all but ended and, in future, it appears that arrangements will be conducted under the concordat agreed pursuant to the Constitutional Reform Act.

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<sup>216</sup> In 1984, the CBA established the Committee on the Appointment of Judges in Canada (the McKelvey Committee) which reported in 1985

<sup>217</sup> *The Guardian*, “Britain trumps the US on a diverse judiciary, but only in the abstract”, 27 July 2009. For more on the Sotomayer appointment and comment on the recent US experience, see for example: Cornes, R. *International Survey – Editor’s Introduction: Appointing Supreme Court Justices in the United States and the United Kingdom – what role for the legislature?* [2009] Public Law 836

<sup>218</sup> For background see: Morton, F.L. *Judicial Appointments in Post-Charter Canada* in Malleson, K. and Russell P. (Eds) *Appointing Judges in the Age of Judicial Power*, (Toronto University Press, 2005) p 56

<sup>219</sup> Bogdanor, V. (N2 above) p 66

<sup>220</sup> Rozenberg, J. (N45 above) pp 37-41

Judges now show a marked reluctance to meet with the executive to discuss matters of policy<sup>221</sup> and there appear to be “inadequate formal channels of communication.”<sup>222</sup> This seems some way from the human rights “dialogue” discussed by Gearey since, if all Parliament has to go on is the (sometimes unclear)<sup>223</sup> judgments of the courts, the right avenue can be hard to find. Given the paucity of communication between the judiciary and the executive to date, it seems likely that the current misunderstandings and tensions are only likely to be exacerbated when the former Law Lords are transposed to their new home across Parliament Square. The fact that the Lord Chancellor is now also responsible for prison policy gives room for additional tensions.<sup>224</sup>

Increasing claims of politicisation and activism present the judiciary with particular challenges when seeking to uphold the rule of law. There may be many positive things that can be said about judicial activism. However, as Cranston has observed, “advocates of judicial activism [often] fail to specify in detail the respective spheres of judicial or parliamentary action or to give sufficient attention to the issue of judicial accountability in a democratic society”.<sup>225</sup> While it has been argued that the general principles of judicial review “rest upon a constitutional imperative of judicial self-restraint” on the grounds that the courts are “ill equipped to deal with policy decision and lack the democratic imperative”,<sup>226</sup> the judges themselves seem to have moved beyond these strictures. A former Attorney General, Lord Rawlinson, was recently quoted as having said that in his experience of 50 years he had never known “such antagonism as there is at the moment between the judiciary and the executive”.<sup>227</sup>

The fact is that, as Vernon Bogdanor notes, “the more that 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”.<sup>228</sup> Looking at the models in operation in both Germany and the US, the most honest answer to this question is to recognise that allowing some overt political accountability in the appointment and selection of senior judges does not necessarily preclude judges from being independent as long as their tenure in office is subsequently protected.

Furthermore, it is necessary to recognise that it is political accountability that is important, not simply the question of diversity. Perhaps inadvertently, Baron Collins has identified the problem, when he suggested that:

[I]t is a paradox [that judges are criticised for being conservative] because I don't think anybody is saying that, at the moment, the judiciary is very conservative in any field –

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<sup>221</sup> Although such meetings do take place, see: House of Lords Select Committee on the Constitution, HL 151, para 56

<sup>222</sup> Le Sueur, A. (N 189 above) p 98

<sup>223</sup> See for example the extended litigation around the ‘control orders’, considered by the Law Lords twice as the first judgment was not conclusive

<sup>224</sup> See: House of Lords Select Committee on the Constitution, HL 151, para 68 and the evidence of Lord Phillips, to the Constitution Committee on 6 December 2007

<sup>225</sup> Cranston, R. (N76 above) p 136

<sup>226</sup> Lord Irvine of Lairg (N20 above)

<sup>227</sup> King, A. (N24 above) p 143

<sup>228</sup> Bogdanor, V. (N2 above) p 66. See also, Bogdanor, V. *Human Rights and the New British Constitution*, JUSTICE Tom Sargant memorial annual lecture 2009, 22 October 2009

not in discrimination, nor civil rights. If you say that most of the judges are white, middle class and public school, it doesn't follow that they conform in terms of judicial decisions to that stereotype. They don't.<sup>229</sup>

Gearty warns proponents of judicial activism (who rely on the current liberal model of judge) may be unpleasantly surprised to find that they are something of an aberration noting that "we must be vigilant against the mistake of allowing our enjoyment of a particular generation of unusually progressive and thoughtful judges to mature into a theory that would give their successors as well as the current incumbents power over our democratic branch."<sup>230</sup>

Ideally, however, the judiciary should not be criticised for being politically partisan; instead, there should be a good mixture of political views to reflect those held in the country at large. The alternative is a lack of balance and conflict. After all, as Gearty accepts,<sup>231</sup> those on the right of the political spectrum may also seek to rely on human rights in answer to certain political challenges.<sup>232</sup>

Yet to observers on the political right, many of the more recent developments are perceived to be efforts to entrench what are in effect liberal political and moral orthodoxies, rather than fundamental human rights. A number of examples of this can be identified, including recent attempts to use the Human Rights Act as a quasi-tort statute<sup>233</sup> and strenuous efforts by some (in what has been dubbed as the human rights "industry" by the right wing press<sup>234</sup>) to include vaguely defined "socio-economic rights" as human rights. Costas Douzinas has pointed out that "law making in the huge business of human rights has been taken over by government representatives, diplomats, policy advisors, international civil servants and human rights experts" and that "this is a group with little legitimacy".<sup>235</sup> The danger is that by trying to extend human rights law well beyond universally accepted boundaries and values, these representatives will so dilute the concept as to render it meaningless.

Some commentators consider that all that is needed to deal with the political issues that arise under human rights litigation is a 'diverse' judiciary. However, while it may grant greater legitimacy, diversity alone cannot guarantee that the views of judges will be representative of

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<sup>229</sup> Law Society Gazette, (N141 above) pp 16-18

<sup>230</sup> Gearty, C. (N35 above)

<sup>231</sup> *Ibid*

<sup>232</sup> For example: against the fox hunting ban; moves against private or religious schools; or moves to re-nationalise assets without market compensation

<sup>233</sup> See e.g. *R (Greenfield) v. Secretary of State for the Home Department* [2006] 2 A.C. (in which Lord Bingham observed that the Human Rights Act "is not a tort statute" and that its objects "are different and broader" (at 19) and *Van Colle v. Chief Constable of Hertfordshire Police; Smith v. Chief Constable of Sussex Police* [2008] UKHL 50 (See Lord Brown at para 138). In *Van Colle* the Court of Appeal noted counsel's argument that if damages are lower under the HRA than in tort, "the HRA will not so much have brought rights home as have created a parallel system of remedies which involves a real tension between the HRA and the common law." See: Steele, J. *Damages in Tort and Under The Human Rights Act: Remedial or Functional Separation?* Cambridge Law Journal, 67(3), November 2008, pp. 606–634 at 606 and Lady Justice Arden, *Human Rights and Civil Wrongs: Tort Law Under the Spotlight*, Hailsham Lecture, May 2009

<sup>234</sup> See for example: *Daily Mail* "1,000 Law firms feeding off ten years of human rights" 8 November 2008

<sup>235</sup> Douzinas, C, *The End of Human Rights*, (Hart, 2000), p 119

society, or of particular minority interests that may need protection under the law.<sup>236</sup> Moreover, it is irrational to allow identity politics<sup>237</sup> into the equation, while ignoring the (potentially) more important political philosophy of candidates.

There is a risk that a gulf could open up between the politics of the judiciary and that of the public at large. The former Lord Chancellor, Lord Falconer, has observed:

Justice cannot be done unless it carries broad support: the aggregated assent of the people in wanting justice to be done. That assent rests on a number of issues – probably most centrally, that the justice being done is the justice people want done. But that confidence in justice rests too on confidence in those dispensing justice.<sup>238</sup>

A gap between the “tyranny of the majority” and the rule of law is necessary to protect minority rights, for “human rights are not justified on majoritarian grounds”.<sup>239</sup> Nonetheless, while the judiciary may once have been considered not only pale, male and stale, but also a bastion of conservatism; *one* contemporary view of the judges is that they have been overtaken by a new metropolitan, liberal orthodoxy. In part, this may be on the one hand due to misconceptions about the Human Rights Act and on the other, to a series of judgments in the counter-terrorism field that has left the Government in some difficulties.

While it may hardly matter if newspapers such as the *Daily Mail* engage in hostile sniping at the judiciary,<sup>240</sup> the fact that Government ministers now feel able to criticise individual judicial decisions is more concerning. The Constitution Unit has chronicled how public opinion has appeared to turn against the Human Rights Act in the face of a hostile media and high-profile cases:

It was Labour Party policy in 1997 first to incorporate the European Convention on Human Rights (ECHR) into domestic law, and then to move to a British Bill of Rights as a second stage. The second stage was dropped once the ECHR had been incorporated [...], and the Human Rights legislation became the subject of a sustained onslaught from the tabloid press. This reached crescendo in summer 2006, when the Labour and Conservative leaders sought to outdo each other in attacking the Human Rights Act, echoing tabloid outrage at a court decision about deportation. Tony Blair ordered a review of the operation of the Act, and David Cameron went one stage further and promised to scrap the Act and replace it with a British bill of rights.<sup>241</sup>

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<sup>236</sup> As Ann Cryer MP indicated, if there remains a *perception* that a person who attended a comprehensive school, or former polytechnic, is then disadvantaged for the rest of their career, however able they are, it will still appear that the judiciary is a profession only open to an elite, whether or not appointments are opened up to women and minorities

<sup>237</sup> Malleon, K. (N151 above) at 106

<sup>238</sup> Lord Falconer of Thoroton QC, *Increasing judicial diversity: the next steps*, Speech for Commission for Judicial Appointments at Institute of Mechanical Engineers, London, 2 November 2005:

<sup>239</sup> Gearey, A., Morrison, W. and Jago, R. (N56 above) p 6

<sup>240</sup> The House of Lords Constitution Committee is not relaxed about this development, stating: “We believe that the media [...] all too often indulge in distorted and irresponsible coverage of the judiciary, treating judges as ‘fair game’. A responsible press should show greater restraint and desist from blaming judges for their interpretation of legislation which has been promulgated by politicians.” House of Lords Select Committee on the Constitution, HL 151, p 46, para 146

<sup>241</sup> Hazell, R. *Towards a New Constitutional Settlement: An agenda for Gordon Brown’s first 100 days and beyond*, The Constitution Unit, June 2007

Phil Woolas is just one in a line of Home Office ministers who, in the wake of an unsuccessful case in the courts, has said “we will consider our options, including looking at what amendments we could make to the Human Rights Act.”<sup>242</sup> While any action on this continued refrain may seem like unlikely, it is worth noting that the current Government has already attempted to introduce an ‘ouster clause’ to prevent judicial review of asylum and immigration decisions.

The response of any new Conservative administration, which has been more hostile to the 1998 Act, is difficult to predict, but it would be inadvisable to think that tensions would ease. As the mood has slowly shifted away from the human rights agenda, it is evident that supporters of the 1998 Act have been wary about engaging with talk of a new Bill of Rights for fear of reducing the rights currently enjoyed under the Convention.<sup>243</sup> It is also noticeable that some on the right who have engaged with the language of rights now talk about affording the state “a greater margin of appreciation”,<sup>244</sup> while others hope that a pragmatic repeal of the 1998 Act may once again act as a handbrake, stopping all but a tiny fraction of applications from reaching Strasbourg.

In truth, we have probably gone beyond this point. The judges have found their voice and have, in some cases, been willing to challenge the power of Government. While the rule of law remains undefined under the Constitutional Reform Act, the judiciary has not only developed a system of administrative law,<sup>245</sup> to ensure that unfettered administrative action is rejected,<sup>246</sup> it has also all but stated that it will not allow the Government to determine what is and is not justiciable.<sup>247</sup>

Even if one disagrees with the legal analysis (relating to increasing judicial power, coupled with decreasing deference),<sup>248</sup> as Hazell has noted, it resonates with the press, the public and many in the political classes and has created a strong (if not perhaps entirely accurate) *perception* of activist judges. Whether or not one accepts the conservative critique of the expansion of rights at the expense of liberty, most recently set out by Dominic Raab<sup>249</sup> and

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<sup>242</sup> *Daily Express*, “Move to overhaul rights law”, 4 May 2009

<sup>243</sup> See for example Klug, F. *A Bill of Rights: Do We Need One or Do We Already Have One*, [2007] Public Law, 701

<sup>244</sup> Surprisingly endorsed by Lord Hoffman, who said “The court treats the margin as a matter of concession to Member States on the ground that they are likely to know more about local conditions than the judges in Strasbourg. [...] They assume in principle they are competent to decide any question about the law of a Member State which is arguably touched by human rights, but sometimes abstain from exercising this vast jurisdiction on the ground that it is something which the local judges are better equipped to do. What I think they should recognise is that we are concerned with a matter of constitutional competence, that is whether they have the right to intervene in matters on which Member States of the Council of Europe have not surrendered their sovereign powers.” Lord Hoffman (N78 above)

<sup>245</sup> Wade, H and Forsyth, C. (N8 above) p 14

<sup>246</sup> Wade, H and Forsyth, C. (N9 above) p 17

<sup>247</sup> See for example the comments of Lord Steyn and Lord Hope in *Jackson v Her Majesty’s Attorney General*. See also the comments of Lord Donaldson on the proposed ouster clause, where he argued that the judges would have said “We’re not having this”, Hansard, HL Deb, c 746

<sup>248</sup> See for example: Jowell, J. (N12 above) p 20, where he argued this was a myth, as it was the Franks Committee “which recommended that tribunals and inquiries of the welfare state should no longer be located in the realm of policy, but in the realm of justice”, and Parliament which enacted the Tribunals and Inquiries Act (and subsequently the Human Rights Act)

<sup>249</sup> Raab, D. (N44 above)

echoed by former Shadow Justice Secretary Nick Herbert,<sup>250</sup> it is at least arguable that some additional political legitimacy could actually enhance the position of the judiciary, who may well feel exposed when relying on what is frequently termed “Labour’s Human Rights Act”.<sup>251</sup>

Transparency remains important. As Legg has contended:

Parliamentary confirmation will not bring the new [Supreme] Court into the political arena any more than it will be anyway, and may help to keep it out. The question is one of transparency and, above all, legitimacy – of which the new Supreme Court will need as much as it can get.<sup>252</sup>

In spite of this recommendation, it is difficult to see (under the present arrangements) how any form of confirmation process could work satisfactorily. While the House of Lords probably contains the expertise and sense to avoid being drawn into obviously politically partisan games, it lacks the necessary democratic legitimacy that such a process would require. Equally, the Commons, while enjoying its democratic mandate, lacks substantial legal expertise and would not be best placed to consider the suitability of candidates for the highest office.

Reform of the House of Lords could provide new opportunities. Currently, the only alternative would be the formation of an *ad hoc* committee made up from members of both Houses. This would clearly be a compromise position, but while it is unlikely that such a Committee could have time to examine the appointment of the vast majority of appointees, it could consider those put forward for our new Supreme Court. Such a move would mean that, once confirmed, it would be somewhat more difficult for politicians to criticise individual judges and would also ensure that candidates enjoyed the confidence of Parliament. This could be perceived as a significant impact on the independence of the judiciary, but one does not have to move towards the US model; the German arrangement, briefly described above, demonstrates that it is possible to have a system with overt political involvement, without the culture wars of the US. Indeed, the German Constitutional Court, with far greater powers than our own, has been described as “one of the most powerful and most respected constitutional institutions in Germany”.<sup>253</sup>

One wonders whether British politicians, considering various proposals for a new Bill of Rights, would be more relaxed in taking the dramatic step of allowing the courts the power to strike down legislation that violates any newly established constitutional rights, if Parliament were allowed a greater say in the appointments process. After all, without such a power, it is difficult to see how constitutional rights could be protected, and such a process can be seen to work (albeit in different forms) in most countries that establish a bill of rights.<sup>254</sup>

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<sup>250</sup> *Daily Telegraph*, “Army of 1,000 lawyers formed in first decade of Human Rights Act”, 7 November 2008, where he said: “Labour’s Human Rights Act has fuelled a decade of rights without responsibilities, allowing a culture of grievance to devalue the concept of fundamental rights, yet failing to protect important liberties.”

<sup>251</sup> *Ibid*

<sup>252</sup> Legg, T. (N169 above) p 46

<sup>253</sup> Nickel, R. (N 205 above) p 175

<sup>254</sup> Such as the US, South Africa, Germany and to a lesser extent, Canada. See: Bogdanor, V. (N2 above) p 80

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