THE 'GOOD CHAP' AND A 'NEW TYPE OF JUDGE': THE UK CONSTITUTION UNDER STRESS

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Sumario

The Constitutional Reform Act 2005 ('CRA') sought to revolutionise the position of the Lord Chancellor in the UK Constitution; instead, it paved the way for a new account of the UK judicial role and judicial independence.

Once the head of the judiciary with responsibility for judicial appointments, the Lord Chancellor was also speaker of the House of Lords and a senior cabinet minister. This role was refashioned in the CRA, and a judicial selection process independent from the Lord Chancellor was created. The Lord Chancellor today has no power to appoint anyone who has not been recommended by the selection panel convened under the provisions of the CRA. The power to depart from a panel recommendation goes only in one direction: it is a veto role only and currently insulates the judicial appointments process from politicians and political issues. This arrangement is however regularly challenged, mostly on the basis that it only maintains a 'self-perpetuating judicial oligarchy'.[1] At the time of writing, reform along the lines of introducing a three-person shortlist from which the Lord Chancellor may choose is quite conceivable. Indeed, the appointment of judges by

1 Lord Howard, former Chairman of the Conservative party, raising questions in Oral Evidence, House of Lords Select Constitution Committee, 'Inquiry into the role of the Lord Chancellor and other legal officers' (Transcript, May 2022).

the executive is permissible, provided, says, the European Court of Human Rights, that appointees are free from influence or pressure when carrying out their adjudicatory role.[2]

However, our point is not to ask what the correct model of appointment for any highest court should be, as there can be no blanket rule for every jurisdiction. Instead, we need to determine the relevant factors for jurisdictions to consider, from which different solutions might reasonably result from jurisdiction to jurisdiction. We need to understand the assumptions and values about the judiciary, and about the legal practices that reinforce, supplement or nuance these assumptions and values on, e.g. the issues of independence, appointments and judicial decision making.[3]

Evidently, the legal acumen and experience of the candidates are the most important factors, and few would doubt that promoting diversity in terms of ethnicity and gender is at least of some relevance. But we would add to the list the importance of considering the wider cultural adherence to the rule of law by the executive, and the role played by the Supreme Court in guarding constitutional values. In other words, the broader legal and extra-legal environment matters to understand the set of beliefs and attitudes which condition judicial activity and therefore influence the judicial appointments design. When these are considered, we would argue that, in the current climate, the UK should resist the move to a three-person shortlist for its Supreme Court appointments and continue to develop mechanisms of accountability to the wider society.

To this end, we consider in turn the history of appointments to the higher courts, the recent accompanying changes to the role of the Lord Chancellor, the changing perception of the judiciary in the media and political circles, the present constitutional role played by the Supreme Court and the vulnerability of judges to politically motivated attacks. In the UK, a consideration of such factors, we suggest, points towards rejection of greater involvement of the Lord Chancellor in senior judicial appointments, at least for now. Whilst these factors may be less decisive in other countries, we suggest that they are always to be considered, because they illustrate the four factors which prominently shape the character of a judiciary:[4] the historical development of the judiciary as an institution, its allocated judicial role and organisational structure and the values about the judiciary.

2 *Henryk Urban and Ryszard Urban v. Poland*, App. no. 23614/08 (ECHR, 30 November 2010), para. 49; *Campbell and Fell v. the United Kingdom*, App. no. 8342/95 (ECHR, 28 June 1984), para. 79; *Maktouf and Damjanović v. Bosnia and Herzegovina*, App. No. 2312/08 and 34179/ 08 (ECHR, 18 July 2013), para. 4.

3 Bell, J., *Judiciaries within Europe*. Cambridge: Cambridge University Press, 2006, p. 2.

4 *Ibidem.*, p. 351.

I. CONSTITUTIONAL EXPERIENCES

We need to look at the past to understand how far the current ways of thinking are shaped by past practice and experience. To start with, it is worth remembering that the principle of judicial independence was inscribed the Act of Settlement 1701 in reaction to the King's frequent exercise of his power to dismiss judges from office on political grounds.[5] The principle of judicial independence was implicitly recognised as the Act established judicial tenure and required fixed salaries during good behaviour for senior judges. It gave them protection from unilateral removal by the Crown since senior judges can only be removed by the Queen if both Houses of Parliament pass a resolution requiring them to go,[6] and no English judge from a senior court has been removed from office under such procedure. Parliament's intention in 1701 may have been truly directed at curbing the executive power, but it remains that attempts to secure a compliant judiciary were rebuffed by parliament, and it enabled judges to free themselves over time from royal influences and royal patronage. The independence of the individual judge from the executive became the core characteristic of judicial independence in England, and the independence from parliament developed over time as arrangements whereby judges would sit in Parliament, let alone cabinet, were criticised.

There are good reasons to think that political influence over judicial appointments remained for as long as appointments were made by government ministers without the filtering of applicants by appointing committees (i.e., until the CRA 2005). The extent to which this occurred was the subject of a lively exchange in a meeting of House of Lords Constitution Committee in May 2022:

'Lord Howard of Lympne: But, as Lord Burnett agreed when he came before us, under the old system, the pre-2005 system, since —I think he said— the 18th century, there had never been any suggestion when the responsibility was the sole responsibility of the Lord Chancellor that these appointments were made on political grounds.

Lord Judge*:* With great respect, that is completely wrong. Lord Halsbury[7] appointed Conservative Members of Parliament. When they were no longer wanted in the House for whatever reason, they were appointed to the High Court. The history is absolutely plain as a pikestaff. It was a shocking period of appointments. Lord Halsbury was completely shameless about his

5 Shetreet, S. y Turenne, S., *Judges on Trial*, 2ª ed. Cambridge: Cambridge University Press, 2013, pp. 22-31; Keeton, G., "The Judiciary and the Constitutional Struggle 1660-88", *The Journal of the Society of Public Teachers of Law*, 7, 1962, p. 56 y ss.

6 S. 11(3) Senior Courts Act 1981; see, in the case of illness or disability, s. 11(8 and 9) Senior Courts Act 1981.

7 Lord Halsbury was Lord High Chancellor in 1885-1886, 1886-1892 and in 1895-1905.

appointments and political careers. I think Lord Burnett's memory must have failed him.'[8]

We understand Lord Judge to have been thinking of judicial competence (or the lack of it) rather than simply of the shocking involvement of the Lord Chancellor in appointments. In fact, Hanretty has suggested that, for much of the 20th century, appointment to the senior judiciary was 'governed by a soft form of political preferment', with different types of political preferences such as that 'governments tended to promote judges they had appointed before…, to reward judges who tended to rule in favor of the government…, and to use political affiliation as a tie-breaking criterion between legally well-qualified candidates'.[9]

The main challenge to the appointment process, at the time of the Constitutional Reform Act 2005 was that it served to persuade candidates to apply by a 'tap on a shoulder'. The appointment then heavily depended on the visibility of the individual to the judges through social and work networks[10]- and women began to enter the judiciary in 1965, later than in a number of European countries.[11] So the appointment system worked in favour of white men who were already over-represented in the higher courts, more than it was a system based on their political preferences.

Reform came nonetheless by virtue of the Constitutional Reform Act 2005 (CRA). One ground for reform to appointments was that it had become increasingly difficult to justify the lack of a clear or formal separation of powers between the judiciary, the executive and parliament in light of the right to a fair trial under Article 6(1) ECHR.[12] This was one reason, and indeed a sufficient reason, to create the Judicial Appointments Commission (JAC), though the reform only gained sufficient momentum as part of wider reforms to the anomalous role of the Lord Chancellor, as we shall see.

The new JAC was created following consideration of three different models: an Appointing Commission (which would remove ministers completely from judicial appointments); a Recommending Commission (which could leave it to a minister to select from all qualified candidates); or a Hybrid Commission (which would be a mix of the two).[13] The main human rights charity, JUSTICE, had in fact called for a judicial nominating commission as far as 1972, and the idea had

8 Oral Evidence, House of Lords Select Constitution Committee, 'Inquiry into the role of the Lord Chancellor and other legal officers' (Transcript, May 2022), p. 26.

9 Hanretty, C., *A Court of Specialists: Judicial Behavior on the UK Supreme Court*. Oxford: Oxford University Press, 2021, chapter 1, the public records in respect of judges are kept closed for a long time.

10 Peach, L., *Report on Judicial Appointments and QC Selection*, 1999, p. 5.

11 Mcglynn, C., "The Status of Women Lawyers in the United Kingdom", Schultz, U. y Shaw, G. (eds.). *Women in the Worlds' Legal Professions*. Londres: Hart Publisking, 2003, pp. 139-158.

12 Most famously in *Procola v. Luxembourg*, App. no. 14570/89 (ECHR, 28 September 1995); *McGonnell v. UK*, App. no. 28488/95 (ECHR, 8 February 2000); *Findlay v. UK,* App. no. 22107/9 (ECHR, 25 February 1997).

13 HL Select Constitution Committee, 'The office of Lord Chancellor' (HL Paper 75, 11 December 2014).

been regularly mooted since then.[14] The choice of a Recommending Commission, with only a veto role for the Lord Chancellor, was justified against the backdrop of a system (the sole responsibility of selection and appointments in the hands of the Lord Chancellor) which 'no longer command[ed] public confidence':[15] it created a transparent process based on merit and on the non-politicisation of judicial appointments.[16] The Lord Chancellor's veto role (only) was perceived as striking the right balance between enhancing his accountability for the overall process and the need to protect the independence of the judiciary and the principle of appointment on merit only.[17]

Besides, the choice of a Recommending Commission is widespread in the Commonwealth of Nations:[18] more than 80% of the independent Commonwealth jurisdictions have a Commission which plays some part in appointments to the higher courts.[19] The case was reinforced by the creation, in 2002, of a Judicial Appointment Board in Scotland and the creation of the framework for establishing a judicial appointment commission in Northern Ireland.

The JAC today has responsibility for all judicial selection except at Supreme Court level, and includes a substantial number of lay members besides judges.[20] At Supreme Court level, the process for selection is overseen by an ad hoc selection commission including the Court's President and representatives of the JAC, of the Judicial Appointments Board for Scotland, and of the Northern Ireland Judicial Appointments Commission. At first, the Lord Chancellor had the power to veto nominations for appointments at all levels of the judiciary. In 2011, however, the Ministry of Justice issued a consultation paper aiming to achieve '…the proper balance between executive, judicial and independent responsibilities', and a greater involvement of the Lord Chancellor was also considered.[21] At the

14 Malleson, K. E., "Modernising the Constitution: Completing the Unfinished Business", *Legal Studies*, 24(1-2), 2004, p. 120.

15 UK Department for Constitutional Affairs. *Constitutional Reform: a New Way of Appointing Judges*. CP 10/03, July 2003, pp. 17-18.

16 House of Lords, Select Committee on the Constitution. *Judicial Appointment Process: Oral and Written Evidence*. March 2012.

17 Points reasserted in the HoL Constitution Committee, 'Judicial Appointments' (HL 272 2012), para. 34. There is hostility to towards pre-appointment hearings for UK judges, as noted by that Report. It is unlikely to have changed in light of recent developments regarding both the appointment of judges to the US Supreme Court and its case law.

18 J. Van Zyl Smit, *The appointment, tenure and removal of judges under Commonwealth principles. A compendium and analysis of best practices*. Bingham Law Centre, 2015.

19 Though this says little: in spite of the Commission's involvement, appointments to the highest court remain in the hands of the executive in a significant minority of states (27%) parliamentary confirmation requirements apply to some judicial appointments in 21% of Commonwealth member states, mostly as an additional check on nominees put forward by a commission, and not a direct confrontation with the executive's nominees as occurs in the United States, ibid.

20 See ss. 25-31 and Schedule 8, of the CRA 2005, as amended by the Crime and Courts Act 2013.

21 See, for a full picture, the Ministry of Justice, *Response to its Consultation on Judicial Appointments and Diversity: A Judiciary for the 21st Century*. CP19/2011, 11 May 2012.

end of the day, however, the role of the Lord Chancellor in relation to senior appointments remained unchanged, while the duty to appoint judges beneath the High Court was transferred to the Lord Chief Justice.[22] A candidate for the Supreme Court, once nominated, can be rejected or referred back for reconsideration, and it remains that only those who have been recommended for appointment can be nominated by the Lord Chancellor.[23] A former Lord Chief Justice later drew parallels between his scrutiny of the JAC recommendations for appointments beneath the High Court and the Lord Chancellor's veto role: '…I had to read all the appointment papers. I used to go back and say, "Are you sure that you're satisfied this person, because of his or her experience, can do the job?" Then one would get an answer.' His view is that it is perfectly legitimate for the Lord Chancellor to apply the same scrutiny and that the Lord Chancellor's veto power must be taken very seriously indeed.[24]

We will return to the role of the Lord Chancellor shortly but emphasise for now that the constitutional reforms greatly enhanced transparency in judicial appointments and put the need for greater diversity of the judiciary firmly on the judicial agenda. The most recent appointments to the Supreme Court have narrowed the gender divide within the Court rather than introducing any obvious political bias.[25] There has in fact been no suggestion that politics matters for appointments to the Supreme Court.[26] In typical pragmatic fashion, the principle of separation of powers was formally introduced in the CRA, and it now provides the principal framework within which the relationship of the courts to the other branches of government is resolved, even though courts were not originally the principal focus of the doctrine.[27] As ever, however the meaning of the doctrine of separation of powers is contested. The boundaries between the courts, parliament and the executive, between law and politics, judicial role and its independence are conceived within the realm of boundaries between the courts and Parliament, are subject to constantly changing dynamics, that is 'whether the courts and Parliament neatly complement each other, whether there is competition or rivalry between them, and, in the event of disagreement, how it may be resolved'.[28] Our next developments consider these changing dynamics, how

22 Crime and Courts Act 2013, amending Section 27(9) of the CRA 2005.

23 The rules governing the appointment of Supreme Court justices are set out in the Constitutional Reform Act 2005, supplemented by the Supreme Court (Judicial Appointments) Regulations 2013.

24 Oral Evidence, House of Lords Select Constitution Committee, 'Inquiry into the role of the Lord Chancellor and other legal officers' (Transcript, May 2022), p. 26.

25 Lady Rose, Lady Sharp were appointed after Lady Arden and Lady Hale, who was the first women appointed to the SC.

26 Hanretty, C., *A Court of Specialists: Judicial Behavior on the UK Supreme Court*. Oxford: Oxford University Press, 2021.

27 Masterman, R. y Wheatle, S., "Unpacking separation of powers: judicial independence, sovereignty and conceptual flexibility in the UK constitution", *Public Law*, 3, 2017, pp. 469-487.

28 Bradley, A., "The Sovereignty of Parliament — Form or Substance?", Jowell, J. y Olivier, D. (eds). *The Changing Constitution*, 7ª ed. Oxford: Oxford University Press, 2011, pp. 34 and 37.

they affect the role and power of the judiciary and bring into light the perception of a risk of dubious politicisation of appointments to the Supreme Court.

II. CONSTITUTIONAL TURMOIL

We mentioned already the anomalous position of the Lord Chancellor, who for centuries was a one-man (and he was always a man) exception to the separation of powers, having senior positions within the legislature executive and judiciary all at the same time. He embodied an essential part of the unwritten British constitution, 'the 'good chap' mentality, that of someone who instinctively understood and respected the various boundaries between law and politics.[29]

Reform to his role did not even come about as a result of any overt scandal by which these boundaries were not respected. Rather, they were informed by the tensions within the Cabinet between Lord Irvine, the then Lord Chancellor, and the Prime Minister Tony Blair. The Labour government announced in 2003 by press release (!) the formal separation of powers between the judiciary and the other two branches of government. There had been no consultation with the judiciary or any planning of its profound consequences on judicial governance and accountability. Simply said, the 2005 constitutional reform was the outcome of the government pursuing 'a quick fix for personal squabbles in the Cabinet'.[30] Some intense parliamentary debate followed in both Houses, and consultation with Parliament and the senior judiciary was then undertaken before proceeding with legislation. These developments conform with a British tradition of ad hoc, informal constitutional developments[31] typical of the 'the common law method with its distaste for system'.[32]

In many jurisdictions, the appointment of judges to the most senior courts is a difficult question. Whilst the USA is extreme in having candidates to the Supreme Court questioned over several hours by the Senate Judiciary Committee, in most jurisdictions one expects there to be some political involvement in the process. The question is the form that this involvement should take in light of the considerations of appointment on merit, based on a transparent and objective process. The alternative — to have judges solely responsible for determining appointment or promotion to the highest court — would risk

29 Blick, A. y Hennessy, P., "Good Chaps No More? Safeguarding the Constitution in Stressful Times", *Constitution Society Report*, 2019.

30 In the words of Lord Hoffman, see HL Deb 12 February 2004, cc1259-1260.

31 Kay, R. S., "Changing the United Kingdom Constitution: The Blind Sovereign", Rawlings, R., Leyland, P., y Young, A. (eds.). *Sovereignty and the Law: Domestic, European and International Perspectives*. Oxford: Oxford University Press, 2013, pp. 98-119.

32 Loughlin, M., "The Political Constitution Revisited", *LSE Law, Society and Economy Working Papers, 18/2017*, 2017, p. 12.

developing 'judicial inbreeding' and, in the British context, it would risk setting back any diversity agenda, since most senior judges are drawn largely from the white, male middle classes. It would, further, undermine any notion that the judiciary as a whole is accountable to others in at least *some* way for the work that it performs.

In the UK, then, at the end of the selection process, the nomination is referred to the Lord Chancellor, who may approve the appointment, reject it, or ask the selection commission to reconsider. The Lord Chancellor receives a report and a single recommendation from the independent selection panel involved, which he can accept, reject or he may invite reconsideration of it.[33] However, if s/he rejects the nominee, s/he can only do so on the ground that the person is not suitable for the post, and he must give reasons in writing for doing so.[34] This is an important safeguard against the abuse of ministerial discretion, but it is not clear which reasons will be regarded as 'legitimate', and the only fallout from any unsatisfactory decision would seem to be at a political level, since the Commission cannot re-select a candidate who has been rejected. The power to depart from a selection commission recommendation goes only in one direction, then — though, of course, to veto the preferred candidate may well have the effect of securing the nomination of his or her preferred candidate who may have made a less strong impression on the panel.

In addition, the Lord Chancellor may provide guidance as to the matters to be taken into account in making a selection, and this provides another opportunity to articulate any views it may have on the selection criteria — subject to the principle of merit.[35]

However, some have expressed dissatisfaction with this arrangement. Ten years ago, it was suggested that the Lord Chancellor should be given the choice of three candidates (per vacancy), with no order of preference, from which he or she would select a favoured candidate.[36] Clearly this would give the Lord Chancellor more choice. This might be unsatisfactory because it is hard to see what extra factors would be taken into account concerning judicial merit; and it is already the situation that the selection commission may take into account diversity when making its nomination.[37] The suggestion was dropped after criticism

33 SS 20-22, The Supreme Court (Judicial Appointments) Regulations 2013.

34 S. 21(3), The Supreme Court (Judicial Appointments) Regulations 2013.

35 Crime and Courts Act 20013, amending S. 27(9) CRA 2005. Guidance was provided in 2014, when the Lord Chancellor required that the next Lord Chief Justice must be eligible to remain in post for at least four years. This de facto excluded one of two candidates (Sir Brian Leveson) whose potential appointment was said to be viewed unfavourably by the Government.

36 See Ministry of Justice, 'Response to its Consultation on Judicial Appointments and Diversity: A Judiciary for the 21st Century' (CP19/2011, 11 May 2012).

37 See Crime and Courts Act 2013, after deleted passage, just "Schedule 13, s.9" see Section 9 of Schedule 13 of the Act the Supreme Court has clarified that this does not prevent the commission from preferring one candidate over the other for the purpose of increasing diversity within the group of persons who are judges of the Court.

from the House of Lords Constitution Committee in 2014.[38] The Committee found that the Lord Chancellor's commitment to the promotion of diversity should not be taken for granted, and, as noted in our previous section, the need to protect the independence of the judiciary from politicisation and the principle of appointment on merit only prevailed.[39]

The idea, however, did not go away, and the suggestion of a three-person shortlist for the Lord Chancellor to consider has been raised again. The arguments now raised in favour of a short-list system emphasise the excessive judicial influence over senior appointment decisions 'by virtue of the combined effect of (a) strong judicial representation on the selection bodies, (b) the likelihood that senior judicial members enjoy a predominating influence on those bodies, and (c) the scope for other senior judges to share their views of the candidates via consultation requirements'. The other main argument is that of a gap in democratic accountability of senior judges, which only flow from 'meaningful ministerial involvement in individual selection decisions for senior posts'.[40] Against this argument, points are made that judicial accountability takes many forms, including the statutory duty of the JAC to publish an annual report, the practice of requiring the person nominated as the JAC's chair to attend a pre-appointment hearing before the Justice Committee of the House of Commons, and the annual appearance of the Supreme Court President before the House of Lords Constitution Committee.

There can be many different takes on the proper balance of accountability needed on this matter; our argument is that the attitudes that affect its operation *in practice*[41] help us, for now, to take sides.

The CRA provides the Lord Chancellor with a bespoke oath to 'respect the rule of law, defend the independence of the judiciary and discharge [their] duty to ensure the provision of resources for the efficient and effective support of the courts for which [they are] responsible'. The House of Lords Constitution Committee, as it reviewed the office of the Lord Chancellor in 2014, noted that 'carrying out this duty [of upholding the rule of law] has, however, become more difficult for post-reform Lord Chancellors and more directly dependent on the personal authority and

38 HoL Constitution Committee, 'The Office of Lord Chancellor' (HL Paper 75, 2014), para. 77.

39 See HoL Constitution Committee, 'Judicial Appointments' (HL 272, 2012), e.g. para. 34. There is hostility to towards pre-appointment hearings for UK judges, as noted in that Report. It is unlikely to have changed in light of recent (2022) developments regarding both the appointment of judges to the US Supreme Court and its case law.

40 Ekins, R. y Gee, G., "Reforming the Lord Chancellor's Role in Senior Judicial Appointments", *Policy Exchange*, 9 de febrero de 2021; Gee, G., "Judging the JAC: How Much Judicial Influence Over Judicial Appointments Is Too Much?", Gee, G. y Rackley, E. (eds). *Debating Judicial Appointments in an Age of Diversity*. Londres: Routledge, 2018, p. 152-182.

41 Saunders, C., "A Constitutional Culture in Tradition", Wyrzykowski, M. (ed.). *Constitutional Cultures*. Varsovia: Institute of Public Affairs, 2000, p. 37.

attitude of the individual holding the office'.[42] By now, the first legally unqualified Lord Chancellor had been appointed and the Committee added that the Lord Chancellor 'should be a politician with significant ministerial or other relevant experience to ensure that the rule of law is defended in Cabinet by someone with sufficient authority and seniority' and the Committee urged 'Prime Ministers, when appointing Lord Chancellors…to consider the importance of the Lord Chancellor's duty to uphold the rule of law across Government'.[43]

But their fears, and those of much of the judiciary would soon be realised. The position reached its nadir when the High Court (later upheld by the Supreme Court) decided in 2016 that the Prime Minister could not withdraw the UK from the EU without an Act of Parliament authorising her to do so. The leading right-wing tabloid labelled the judges 'enemies of the people' and offered personal details of the judges which aimed to portray them as elitist; and the then Lord Chancellor, already the third to be appointed without a legal background, said only that the newspaper was entitled to voice its opinion.[44] The position of Lord Chancellor as fearless defender of judicial independence has never quite recovered in the eyes of much of the legal community, and modern senior judges have now needed to be considerably more active than in previous years in correcting unjustified attacks in the media where the Lord Chancellor has proven unwilling to assume the role.[45]

III. CHANGING PERCEPTION OF THE JUDICIARY: A 'NEW TYPE OF JUDGE'

We might pause now to observe a pronounced shift within UK politics which leads to rethink the balance between judicial independence and judicial accountability. It concerns the greater liberalism of judges — or at least the perception as such — combined with a legal framework which has required the higher courts increasingly to adjudicate on politically-sensitive issues. Even by 2005, the judiciary was slowly becoming more liberal. Griffiths famously criticised the judiciary for its political (and conservative) views in 1960s.[46] As others have famously said, in the late 1980s, the High Court judge was typically portrayed in some parts of

42 HoL Constitution Committee, 'The Office of Lord Chancellor' (HL Paper 75, 2014), para. 77.

43 HoL Constitution Committee, ibid., para. 126.

44 On this, see Rozenberg, J., *Enemies of the People? How Judges Shape Society*. Bristol: Bristol University Press, 2020.

45 Hazell and Malleson, Written Evidence House of Lords Constitution Committee inquiry into the Role of the Lord Chancellor and the Law Officer' (RLC000 6, April 2022), and see, on the need for judicial response to criticism Shetreet, S. y Turenne, S., *Judges on Trial*, 2ª ed. Cambridge: Cambridge University Press, 2013, pp. 357-418.

46 See Griffith, J. A. G., *Judicial Politics since 1920: a Chronicle*. Oxford: Oxford University Press, 1993; Griffith, J. A. G., *The Politics of the Judiciary*, 5ª ed. Londres: Fontana, 1997.

the media, as a 'portsoaked reactionary, still secretly resentful of the abolition of the birch and hostile to liberal influences of any kind'.[47] In milder terms, this was described as 'conservative normativism', as a traditional conservative understandings of how the constitution ought to operate: this refers to the British constitutional arrangements at the time, based on privileging political decision making over judicial interpretation — particularly in relation to on contentious issues such as human rights.[48]

However, as Loughlin emphasises, the growth of the administrative regulatory state and the rise of democracy were noticeable too. The judges as 'traditional guardians of conservative normativist values' were 'won over to liberal normativism, with law 'transformed from precedent or instrument into a general moral concept requiring fidelity not just to rules but to the principles of fairness and justice that legal rules presuppose'.[49] It was already the case that much of the late twentieth century, judges had expanded judicial review, which permits them to quash certain ministerial orders which are legally or procedurally flawed. But then Parliament also passed Human Rights Act 1998, which came into force on 2 October 2000, and which gave judges unprecedented powers to reinterpret legislation, or to declare it incompatible with a Convention right, and to find acts by public authorities (including policy decisions by ministers) to be unlawful. So by 2005, the stereotyped High Court judge was now, in the same parts of the popular media, criticised foremost for being 'diligently engaged in frustrating the intentions of Parliament with politically correct notions of Human Rights'.[50] This encapsulates a recurrent question on how to accommodate law within politics in the British Constitution, often presented as a tension between 'legal' and 'political' constitutionalism.

We then need to consider more closely the fundamental constitutional factor at play, that is, the unwritten nature of the UK constitution. It has always proceeded on the basis of conventions and prerogative powers as opposed to any statutory document which dictates the acquisition and management of power. Readers know that there is no formal British constitution and that much depends upon (constitutional) conventions, so that the British Constitution is solidly resting upon conventions developed over times rather than upon legal rules.[51] It is, again, mostly derived from the 'good chap' mentality.[52] In this respect, since

47 See SHETREET, S. y TURENNE, S., *Judges on Trial*…, *op. cit.*, par. 8.26.

48 LOUGHLIN, M., "The Political Constitution Revisited", LSE Law, Society and Economy Working Papers, 18/2017, 2017, p.13.

49 *Ibídem*, p. 12.

50 SHETREET, S. y TURENNE, S., *Judges on Trial*…, *op. cit*., paras 8.26-27.

51 MARSHALL, G., *Constitutional Conventions*. Oxford: Oxford University Press, 1984; and, in relation to the judiciary itself, see STEPHENSON, S., "Constitutional Conventions and the Judiciary", *Oxford Journal of Legal Studies*, 41(3), 2021, pp. 750-775.

52 The need to enhance ministerial accountability —the 'good chap' mentality— has been acknowledged some time ago, with the creation of the Commission on Standards in Public Life, which issued *the First Standards in Public Life* (the 'Nolan Principles') in 1995.

there are good grounds to doubt the legitimacy or ability of the judiciary to engage in the interpretation and development of constitutional conventions,[53] the constitutional standards adopted by the House of Lords Select Committee on the Constitution are noteworthy — also given the Committee's influence on constitutional developments since its creation in 2001.[54] Thus, the idea that 'the politicisation of the judicial appointments process should be avoided' has been described as a constitutional standard that Parliament follows in its scrutiny of bills.[55] Parliamentary constitutional standards matter all the more given the notion that Parliament is sovereign and can pass any law it wishes, restrained only by certain conventions, still hold sway, and governments which desire certain laws which might not be passed by parliament are tempted to find ways to bypass parliament altogether.

The constitutional challenges raised by the unwritten UK constitution and its emphasis on the political Constitution have always been there in theory but the controversial decision to leave the EU revealed their practical import. First, the Prime Minister in 2016 sought to give effect to the referendum result to leave the UK (which wasn't legally binding) by declaring that she could start the process by way of prerogative power, without recourse to parliament. Parliament was largely opposed to Brexit in principle, and, although expected to follow the referendum result nonetheless, it is easy to see why the Prime Minister was anxious to avoid a vote. This led to the judicial review which caused political uproar and prompted the aforementioned 'enemies of the people' headline when the High Court decided that legislation was indeed necessary.[56]

But there was, second, to be a sequel concerning Brexit. When requested to do so by Prime Minister Boris Johnson in the process of withdrawing Britain from the European Union, the Queen prorogued parliament for a five-week period in 2019. When the issue was brought before the courts, in *Cherry/Miller (No 2)*,[57] the Supreme Court found that 'a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation

53 Feldman, D., "Constitutional Conventions", Qvortrup, M. (ed.). *The British Constitution: Continuity and Change. A Festschrift for Vernon Bogdanor*. Londres: Hart Publishing, 2013, p. 93.

54 The Lords' Select Committee on the Constitution was established in 2001 'to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution', see Caird, J. S., Hazell, R. y Oliver, D., *The Constitutional Standards of the House of Lords Select Committee on the Constitution*, 3ª ed., 2017.

55 *Ibid.*, S. 3.1.3. These constitutional standards draw upon the Lords Constitutional Committee reports published between 2001 and the end of the parliamentary session of 2016-2017.

56 In the compendium of constitutional standards followed by this Committee, some fundamental rules can be found under the heading 'separation of powers', such as: 3.1.1 The independence of the judiciary should not be undermined; 3.1.2 Judges' security of tenure should be preserved; 3.1.3 The politicisation of the judicial appointments process should be avoided.'

57 *R (Miller) v. Prime Minister/Cherry v. Advocate Gen. for Scotland* [2019] UKSC 41 *('*Cherry/Miller (No 2)'*);* see, for an informative overview, G. Cowie and A. Cygan, 'The Prorogation Dispute of 2019: one year on', House of Commons Library (CBP 9006, September 2020).

has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive'.[58] The court thus asserted a constitutional role in 'ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions'.[59] In legal terms, the Court found limits to the executive's discretion to prorogue as a matter of legal principle, based on the doctrine of parliamentary sovereignty.

It is fair to say that this decision created further distance between the government and the judiciary. But the problem is arguably not that the Supreme Court was required to resolve the issue; who else? A main problem, we suggest, was that the Court, although not a specifically constitutional court,[60] emerged as the only actor with any responsibility for constitutional affairs at all. That they have responsibility for this is widely accepted and endorsed by the Supreme Court: 'ultimately…it is the judges who are the guardians of the rule of law. They have a particular responsibility to protect the constitutional rights of each citizen, as well as the integrity of the constitution by which those rights exist'.[61] The problem was that no political or legal mechanism was available within government to stop the Prime Minister from proroguing Parliament as a way to prevent a recalcitrant Parliament from passing legislation that would have thwarted the government's intentions regarding Brexit. A damaging showdown between the executive pursuing a populist agenda and the judiciary as the only public body with the responsibility of ensuring constitutional propriety was perhaps unavoidable.

Joining the dots together, the recurring concern by the Constitution Committee about the role of the Lord Chancellor since 2005 takes its roots in the apparent vacuum within the government in terms of the political responsibility for constitutional affairs.[62] In the case of prorogation of parliament, there was nothing to stop, in the words of Skeffington, 'a minority government (from) attempting to govern as if it had a majority based on the supposed legitimacy of the {Brexit} referendum conferred upon it'.[63] In his view, a 'breakdown in the understanding of political propriety required the court to step in and reassert

58 *Cherry/Miller (No 2)*, para. 50.

59 *Cherry/Miller (No 2),* para. 34.

60 It certainly has a constitutional role, albeit 'somewhat piecemeal', most noticeably in relation to devolution arrangements, see Masterman, R. y Wheatle, S., "Unpacking separation of powers: judicial independence, sovereignty and conceptual flexibility in the UK constitution", *Public Law*, 3, 2017, pp. 469-487.

61 Lord Judge, 'Constitutional Change: Unfinished Business' (University College London, 4 December 2013).

62 Lord Howard, former Chairman of the Conservative party, raising questions in Oral Evidence, House of Lords Select Constitution Committee, 'Inquiry into the role of the Lord Chancellor and other legal officers' (Transcript, May 2022), p. 8.

63 Skeffington, D., "The Political Constitution, An Idea Worth Protecting?", *Constitution Society*, February 2022, p. 20.

[the principle of parliamentary sovereignty so that the executive can be held accountable to Parliament]'.[64]

This lack of propriety and fundamental respect on the part of the executive for Parliament supports the Supreme Court's endorsement of the principle of governmental accountability to parliament, based on the understanding that the Government only holds power to the extent that it enjoys the confidence of the House of Commons, itself accountable to the people.[65] We see in action the 'negative' virtue of separation of powers, that is, it comes into play to curb, limit and check government power.[66] However, in this case, being the only political actor concerned with deciding and enforcing constitutional propriety necessarily raises the stakes; and it encourages those who wish to pursue radical political agendas to have a greater say in the composition of the Supreme Court. Yet, what is truly needed instead is a more effective set of checks and balances beyond the Supreme Court to ensure that the government acts within the scope of the British constitution, defined by fundamental principles of the common law and constitutional conventions. We need to reinstate the 'positive' virtue of separation of powers; this involves mutual respect from each institution for each other, with a cooperative engagement between the three branches of power in the joint endeavour of governance.

We have seen therefore an acceleration of the liberalizing trend in the judiciary, which in turn has been provoked by a reactionary government. The latter is prepared to take legal risks in pursuing its own agenda, confident that it will retain its popular base if it fails, and that in that event the liberal judges (who are assumed to be opponents of the Brexit agenda) can be blamed. There are some who wonder whether the government is daring the judiciary to defy it; at any rate, a recent study suggests that (in less dramatic cases) the Supreme Court has become less willing to find executive action to be unlawful.[67]

Added to this, it is well known that judges cannot respond to criticisms and engage in public debate to the same extent as others, and yet individual judges are today more vulnerable to attacks in the media. Although the conservatives returned to power from 2010, we should not leap to the conclusion that a change in government would change the picture. The Labour government (1997-2010) frequently failed to defend judges from unjustified criticism of certain sentencing decisions; and despite having authored the Human Rights Act, was far from graceful when its policies were found to be incompatible with it. This is because there is no tradition of collective decisions in the Supreme Court. Justices can

64 *Ibídem*.

65 *R (Miller) v. Prime Minister/Cherry v. Advocate Gen. for Scotland* [2019] UKSC 41, esp. paras. 46-47.

66 Kavanagh, A., "The constitutional separation of powers", Dyzenhaus, D. y Thorburn, M. (eds.). *Philosophical Foundations of Constitutional Law*. Oxford: Oxford University Press, 2016, p. 234.

67 All Party Parliamentary Group on Democracy and the Constitution, 'An independent judiciary — Challenges since 2016. An inquiry into the impact of the actions and rhetoric of the Executive since 2016 on the constitutional role of the Judiciary (Institute for Constitutional and Democratic Research. March 2022).

and often do give dissenting opinions, and the same is true in the High Court and Court of appeal (Civil Division) which also hear sensitive judicial reviews. Nor is the convention that judges should not be cross-examined in Parliamentary select commissions on their decisions always respected as once it was.[68] Recently, the aforementioned Lord Howard in the recent House of Lords Constitution Committee asked several questions to the Supreme Court President, Lord Reed, about the second *Miller* decision (concerning the prorogation of Parliament), claiming that he was entitled to do so because 'the opportunity for any Supreme Court justices to be in any way accountable are very limited'; to which the President of the Supreme court curtly told him 'We are not accountable for our judgments to any institution'.[69] This exchange speaks of a division between executive and judiciary which is not going to heal in the near future.

IV. DRAWING THE THREADS TOGETHER

There has been, in European jurisdictions, 'a tension between the desire to give the judiciary greater independence from the executive and the practice of leaving the judiciary increasingly in charge of the processes of appointment and management of the judiciary and, even, of the judicial system in place'.[70] Arguably, the same tension can now be found in the UK and reflect fast-changing dynamics in the interdependent relationships between the judiciary and other political actors. It is against the background of a vacuum in terms of institutional political responsibilities for constitutional affairs that we find it difficult to accept that Lord chancellors should have greater involvement in senior judicial appointments and have the option of picking their favourite from three choices. The result is likely to be fewer dissenting opinions in the Court of Appeal or High Court from any judge eager for appointment to the Supreme Court and continued restraint in finding against the government altogether. In the current context, trust that decisions will ultimately be made on merit is unlikely to be there.

Our answer, however, is subject to the caveat of the highly flexible nature of the British constitution. By this, we mean that specific problems are met with specific responses at one time, with no systematic approach. There is no fixed

68 Cabinet Ministers may today comment and disagree with a judgment but unacceptable for them to criticise the motives or probity of the judge who made the decision, see Lord Dyson, 'Criticising Judges: fair game or off-limits? (Third Annual BAILII lecture, 27 November 2014).

69 Lord Reed, giving annual evidence to the HoL Constitution Committee, see HoL Constitution Committee, 'Corrected oral evidence: Annual evidence session with the President and Deputy President of the Supreme Court' (6 April 2022 April 2022); and see the short piece online by legal pundit Joshua Rozenberg, 'The unconstitutional committee. Top judges, cross-examined on Miller 2 ruling, cry foul', available at: https://rozenberg.substack.com/p/the-unconstitutional-committee.

70 Bell, J., "European Perspectives on a Judicial Appointments Commission", *Cambridge Yearbook of European Legal Studies*, 6, 2004, p. 35.

pattern of response to the constitutional difficulty of making the judiciary being even more accountable for it, and we accept that our answer might change, because judicial independence is not only the consequence of legal arrangements; it is equally a product of the political realm.[71] This is also not to say that critics of the stance taken by those favouring a greater role of the Lord Chancellor in appointments should not offer compromises of their own. On our account of judicial power, separation of powers is characterised by institutional interactions and collaboration between institutional actors, geared towards limiting power and curbing its potential abuse. Senior judges could therefore do more to explain their decisions with e.g. a detailed Annual Report before Parliament, provided that they are not attacked on account of them, or told that they have got them wrong. Greater constitutional safeguards against abuse of power outside resort to the judicial process could be introduced or better enforced, most obviously by the Ministerial Code which ought to prevent ministers form proposing acts which they believe to be unlawful. Counter-proposals for enforcing greater respect for constitutional conventions may not be welcome, but they should at least be made. Most importantly, we should not consider the niceties of appointments to the highest court to be a standalone matter purely defined by the politically sensitive decisions of the highest court. They are to be made, or if necessary resisted, by reference to a whole measure of contemporary cultural concerns concerning the relationship between the executive, media and the judiciary.

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TITLE: *The 'Good Chap' and a 'New Type of Judge': The UK Constitution under Stress*

ABSTRACT: *This paper argues that the broader legal and extra-legal environment matter to understand the set of beliefs and attitudes which condition judicial activity and therefore influence the design of judicial appointments. Attitudes to the separation of powers are discussed and illustrated by the consideration of, in turn: the history of appointments to the higher courts, the recent accompanying changes to the role of the Lord Chancellor, the changing perception of the judiciary in the media and political circles, the present constitutional role played by the Supreme Court and the vulnerability of judges to politically motivated attacks. In the UK, the consideration of such factors points towards rejection of greater involvement of the Lord Chancellor in the UK Supreme Court appointments, at least for now or until a sense of basic constitutional propriety prevails among all political institutions.*

KEY WORDS: *Judicial appointments, Judicial role, British Constitution, Lord Chancellor, Separation of Powers, 'Good chap' mentality.*

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71 On this point, see GEE, G., HAZELL, R., MALLESON, K. y O'BRIEN, P., *The Politics of Judicial Independence in the UK's Changing Constitution*. Cambridge: Cambridge University Press, 2015.