CHAPTER - IV
JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE UNITED KINGDOM

4.1 Introduction

The United Kingdom is one of the oldest democracies in the world and a model to many states for the shaping of their democracies. Rule of law and parliamentary sovereignty run like a thread throughout the Constitution of the United Kingdom. Measures designed to protect the independent judicial process have a lengthy heritage in the development of the Constitution in United Kingdom. The *Magna Carta* of 1215, for instance, endorses the independence of the trial process from the influence of the prosecuting authority. Lord Hewart describes it, thus, “Every student of history knows that many of the most significant victories for freedom and justice have been won in the English Law Courts, and that the liberties of Englishmen are closely bound up with the complete independence of the judges.” Commenting on judges in United Kingdom, another noted scholar, C. A. Allen said:

“...The English judge exercises a function more avowedly creative than a continental judge and that at its early formative period of common law took it shape from doctrines consciously evolved by the royal courts. If we examine the great legal tendencies of the 19th century, we shall find the hand of the judge equally active in moulding the doctrine of the law.”

All courts of justice in England have been derived, mediately or immediately, from the power of the Crown. The King is said to be the fountain of justice. The administration of justice is one of the prerogatives of the Crown. Where criminal justice is concerned the prosecution is in the name of the King. A judge’s power is only an emanation from his Royal prerogative. The courts are totally dependent on the sovereign for their legal authority, in-general, in the sense of applying the law he has provided,

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prerogative, which has long been exercisable only through duly appointed courts and judges. The various courts and their jurisdiction are now almost entirely on a statutory basis.\(^8\)

The English judiciary is not generally regarded as an institution that welcomes radical change. Yet, despite its reputation for conservatism, for the past twenty years it has been undergoing a process of transformation in its structure and style which has long-term implications for its future role. The United Kingdom’s Constitution has witnessed significant change in recent years. The tremendous pace of change is part of an effort to modernize the Constitution, which has had a significant impact on the judiciary.

As a part of a comparative study of this research, the present chapter focuses on the historical background of the judiciary in the United Kingdom, as also the role of Lord Chancellor, the background for creation of the new judicial appointments’ process and recent developments relating to securing judicial independence and judicial accountability in the United Kingdom.

### 4.2 The Historical Background of Judiciary in United Kingdom

The history of the English judiciary reveals that a centralised judicial system began after the Norman Conquest in 1066. The Norman Kings had great control over the functions of the courts and they exercised judicial powers themselves.\(^9\) By the end of the 15\(^{th}\) Century the King's role in exercising judicial powers decreased, but judges were part of the government.\(^10\) During the periods of the Tudors\(^11\) and early Stuarts\(^12\) judges were an integral part of the Royal administration and were under the strict control of the Crown.\(^13\) As a rule judges served at the pleasure of the Crown and could be removed by the Crown without a need to show any cause.\(^14\) A number of judges were removed or forced by the Crown to retire because of their failure to act in accordance with the Royal wishes.\(^15\)

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\(^11\) The period of Tudors began in 1485 and continued until the accession of the Stuarts in 1603.

\(^12\) The period of Stuarts began in 1603 and continued until in 1688 overthrown by the English Revolution.


The independence of the judiciary became an important issue in the early Stuart period in the 17th Century when there was a struggle for power between the Crown and Parliament. In this struggle both the Crown and the Parliament looked to the courts for support and began to exercise control over the judiciary in every possible way. The Crown could exercise control over the judiciary in numerous ways including removal, suspension, and transfer and asking judicial opinions in respect of disputed Royal prerogatives and pending cases. On the other hand, the Parliament sought to exercise control over the judiciary by impeachment or calling for explanations of judicial decisions or conduct of judges.\textsuperscript{16} During this period a series of conflicts arose between the Edward Coke C.J. and King James I. In 1608, James I had claimed that:

“He was the supreme judge; inferior judges his shadows and ministers ...and the King may, sit and judge in Westminster Hall in any Court there, and call their judgments in question. The King being the author of the laws [sic] is the interpreter of the Law [sic].”\textsuperscript{17}

On the other hand, Edward Coke J. was of the opinion that the common law was the supreme law in the state and the judges were the sole interpreters of this supreme law. He said:

“…the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or between party and party, concerning his inheritance, chattels, or goods, etc., but this ought to be determined and adjudged in some court of justice, according to the law and custom of England.”\textsuperscript{18}

At this, the King became angry and said that it means he ‘shall be under the law, which it is treason to affirm.’ Coke J. replied, ‘\textit{quod Rex non debet esse sub homine, sed sub Deo et lege}’ - The King should not be under man, but under God and the Law.\textsuperscript{19} The most important conflict between the King and Edward Coke J. arose in 1616 when, in the famous Case of Commendams,\textsuperscript{20} Edward Coke J. and other judges refused to stop or delay proceedings in accordance with a Royal order. Consequently, they were summoned before King James I and his Council. The King himself explained the offence presented

\textsuperscript{16} Shimon Shetreet, \textit{supra} note 13, pp.2-8.
by the judges' conduct. All the judges, except Edward Coke J., submitted and promised to act in accordance with Royal wishes. Edward Coke J. alone, attempted to defend his stance but finally he was dismissed from office. But when the Parliament, in 1691, wanted to put the matter on a statutory basis owing to the doubt whether at common law “good behaviour” meant only good behaviour in relation to the Crown, William refused his consent because the Bill charged their salaries on the hereditary revenues. Finally the Act of Settlement, 1701 established security of tenure for judges.

4.3 The Act of Settlement, 1701

Article III of the Act of Settlement, 1701, provided that ‘judges’ commissions be made *quam diu se bene gesserint* [during good behaviour], and their salaries ascertained and established, but, upon the address of both houses of Parliament, it may be lawful to remove them. Originally it was enacted that judges should be removed upon the address of either House of Parliament, but subsequent amendment provided both Houses. Consequently, judges were no longer to hold office during the pleasure of the Crown; their tenure was secure during good behaviour. Nevertheless, the independence of the judges was not complete because the tenure during good behaviour ceased on the death of the reigning King. Subsequently, the Acts of Anne and George III which provided that their tenure of office should not be affected by the demise of the Crown gave the courts the superior position which they occupy in the modern Constitution. When, in 1761, George III declared that “he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of this subjects; and as most conducive to the honor of the Crown,” he was not only expressing the view universally held in the eighteenth century, but also a political truth of universal application. During this period Montesquieu observed that ‘while the British Parliament had achieved legislative supremacy over the Crown and the

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26 6 Anne c.7 sec.8; I George III c.23.
independence of judges had been declared, the Crown still exercised executive power over the judiciary.\textsuperscript{28}

\textbf{4.4 The Office of the Lord Chancellor}

The office of the Lord Chancellor was, unique to the United Kingdom and an ancient one,\textsuperscript{29} dating back to the reign of Edward the Confessor in the eleventh century. The Lord Chancellor acted as secretary to the King, being responsible for the supervision, preparation, and dispatch of the Royal letters, which were then authorized by the use of the Sovereign’s seal. Over time, the office of the Lord Chancellor grew in status, the holder exercising further powers on behalf of the King.\textsuperscript{30} While successive Lord Chancellors fulfilled a variety of often perilous public functions throughout English history, two being martyred, it had been their consistent duty to retain the Great Seal of the Realm, which came to represent the significance of the office. Symbolism apart, the appointment became increasingly powerful, once the King ceased to attend Parliament in person and the Chancellor, in view of his importance in the King’s Council, came to preside in his place.\textsuperscript{31} The inherited legitimacy of the contemporary Lord Chancellor’s role as Speaker of the House of Lords is derived from these distant origins. His other functions, as head of the judiciary and a senior Cabinet Minister, coalesced over the years and were never designed as part of a rational whole.\textsuperscript{32}

The special and peculiar position of the Lord Chancellor is most intimately connected with the independence of the judges.\textsuperscript{33} Every Lord Chancellor, by the nature of things, is well acquainted with the attainments of most, at any rate, of the leading members of the Bar; to say nothing of many other channels of information, including the reports of decided cases which he knows so well, he actually hears many of the members of the Bar in the conduct of cases before the House of Lords, sitting as the final Court of Appeal. He has lived, and to a great extent still lives, in a legal atmosphere. He is able,

\textsuperscript{31} Lord Woolf, \textit{supra} note 29, p.807.
\textsuperscript{33} Lord Hewart, \textit{supra} note 3, p.104.
from actual personal knowledge, and his own skilled and experienced judgment, to assess the relative merits of conceivable candidates for judicial appointment. He is therefore in the ideal position to encourage good sense on all sides of the political debate.

Before the *Constitutional Reforms Act*, 2005 was enacted, the Lord Chancellor was head of the judiciary with an entitlement of sitting judge to hear final appeals to the Law Lords. He was formally recognised as President of the Supreme Court under the *Supreme Court Act*, 1981. The administration of the Supreme Court and the County courts is the responsibility of the Lord Chancellor. Magistrates are appointed by the Lord Chancellor. High Court Judges, Circuit judges and Recorders are appointed by the Crown on his advice. The dismissal of magistrates, without showing cause, and Circuit judges, for incapacity and misbehaviour, is within the Lord Chancellor’s power. The Lord Chancellor has responsibility for the court service, legal aid and advice schemes, the Land Registry and the Public Records Office. He also presides over the court of Protection. Lord Woolf described Lord Chancellor’s position in England as:

“The Lord Chancellor was a lubricant extraordinary. He lubricates relations between the judiciary and the government, and the judiciary and Parliament. He is the voice that the government uses to communicate with the judiciary, and that the judiciary use to communicate with the government and Parliament.”

Lord Chancellor has the threefold function of executive, legislator, and jurist—a complete refutation of the principle of separation of powers so dear to Montesquieu.

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35 The Law Lords constitute the final court of appeal for the whole of the United Kingdom. Appeals come to them from the Court of Appeal in England, the Inner House of the Court of Session in Scotland, and from the Court of Appeal of Northern Ireland; Sir Sydney Kentridge, “The Highest Court: Selecting the Judges,” 62 *CLJ* 1 (2003), p.55.
36 Supreme Court consists of Court of Appeal, High Court and Crown Courts.
39 *Justices of the Peace Act*, 1979, s.6.
40 *Courts Act*, 1971, s.17(4).
41 *Ibid*, s. 29(1).
42 *Registry Act*, 1862.
43 *Land Registry Act*, 1862.
44 *Mental Health Act*, 1959.
However, in the 20th century, his department has grown dramatically, closely into the party political arena. 47

4.5 Elements of Judicial Independence in United Kingdom

The paramount importance of courts of justice in United Kingdom was stated in 1653 in the case of Capt. John Sweater through Mr. Selden’s address to the Lords and Commons assembled in 1628, based on the Magna Carta-

“...the law is of no benefit, if that the way be not open to obtain the benefit of the law. My Lords, defended a nation, that make it happy, fruitful and prosperous. The frontiers of a nation may be guarded with men at arms, but it will not be preserved thereby: it must be justice in the midst of it... Injustice discontents a people and usually the foundations of charges are laid upon the discontent of the people.” 48

Many aspects of society are organized on the basis that the judiciary is independent of the other ‘arms’ of government, but the doctrine of ‘separation of powers’ has never been part of United Kingdom’s unwritten constitutional framework. 49 The concept of separation of powers to the Britishers was only a question of the secondary importance; the question of the real importance was the reservation of sovereignty to the Parliament. 50

The prevailing influence from that quarter has been the maintenance of judicial independence in terms of institutional independence through the protection of tenure and remuneration, 51 and an afforded statutory protection in the Act of Settlement, 1701, as opposed to the protection of judicial power in a functional sense. 52 Martin Shapiro, commenting on the English judiciary, said that “one of the central building blocks of conventional notions of English judicial independence is the functional specialization of courts.” 53

49 Lord Woolf, supra note 29, p.23.
53 Martin Shapiro, supra note 7, p.67.
4.5.1 Appointment of Judges

In England, historically, as in the countries of the continent, the judicial function was visualized as part of the Royal prerogative of the sovereign. Gradually, by reason of the pressure of other responsibilities, the King came more and more to turn his judicial duties over to judges appointed by him from among the royal clerks, who in early times were naturally men of the cloth because of their peculiar opportunities for learning. At first, judges were not the professional personnel known today; they were merely assisting the King who, at any time, might mount the bench. In the latter part of Henry III’s reign (1216-1272) some judges were being selected from among these professional practitioners of the law. By 1400 the Serjeants at law, appointed by the Crown from the legal practitioners, formed a select body from which judges were appointed. In the 16th and 17th centuries, although the judges were appointed from the legal profession, the Serjeants lost their former importance.

The Lord Chief Justice, Master of the Rolls, President of the Family Division, Vice Chancellor, Lords of Appeal in Ordinary and Lord Justices of Appeal were appointed by the Prime Minister (formally by the Crown) consultation with Lord Chancellor. As far as the High Court judges and the subordinate judiciary are concerned, they were appointed by the Crown on the advice of the Lord Chancellor. These are the most eminent judicial posts- the gifts of the executive.

4.5.2 Tenure

The Act of Settlement, 1701 secured a judge’s tenure of office during good behavior. Section 6 of the Appellate Jurisdiction Act, 1876 and section 12(1) of the Supreme Court of Judicature (Consolidation) Act, 1925 held the same. More modern expression is given to this protection under the Supreme Court Act, 1981, which provides

56 *Supreme Court Act*, 1981, s.10(1), (2).
59 Section 6: “Every Lord of Appeal in ordinary shall hold his office during good behavior … but he may be removed from such office on the address of both Houses of Parliament.”
60 Section 12(1): “All the Judges of the High Court and the Court of Appeal, with the exception of the Lord Chancellor, shall hold their offices during good behaviour subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament.”
that ‘a person appointed shall hold office during good behavior, removable only by Her Majesty on an address presented to her by both Houses of Parliament.’

Senior judges cannot be dismissed for political reasons. They can be removed by compulsory retirement if they are incapacitated or if unwilling to resign in spite of incapacity.

The *Judicial Pensions and Retirement Act*, 1993 introduced the retirement age of 70, which may be extended to 75 if in the public interest. From 1959, the retirement ages were set at 75 for a High Court judge and 72 for a Circuit judge, although judges appointed before this date were permitted to remain in office.

### 4.5.3 Impeachment

In England, historically, the impeachment process was largely chief instrument for the preservation of the government. By means of impeachment, Parliament, after a long and bitter struggle, made ministers chosen by the King accountable to it, rather than the Crown, replacing absolutist pretensions by parliamentary supremacy.

Impeachment began in the late 14th century when the House of Commons undertook to prosecute before the Lords the most powerful offenders and the highest officers of the Crown. From an ‘appeal to the nation against wicked ministers,’ impeachment was transformed into a clumsy instrument for striking at unpopular royal policies; and it was then supplanted by an address of Parliament to the King asking for removal of a minister. This came to be regarded as a vote of censure and no confidence,

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62 *Supreme Court Act*, 1981, s.11(3).
63 *Ibid.*, s.11(8), (9).
64 Sir William Holdsworth describes the origin of impeachment as- impeachment means accusation; and the word gradually acquired the narrower technical meaning of an accusation made by the House of Commons to the House of Lords. The practice of impeachment originated in the prevalent political ideas and conditions of that period. Firstly, at that period, and indeed all through the Middle Ages, political thinkers and writers throughout Western Europe taught that the ideal to be aimed at by rulers and princes and their officials was government in accordance with law. Secondly, the House of Commons and the House of Lords were united in desiring to limit the activities of the royal officials or favorites and to prevent them from breaking the law. Thirdly, the limits of the jurisdiction of the House of Lords were ill defined. It was open to receive petitions and complaints from all and sundry; and it could deal with them judicially or otherwise as it saw fit. It was essentially a court for great men and great causes; and it occasionally seems to have been thought that it could apply to such causes a *lex parliament*- a law which could do justice even when the ordinary law failed. Probably some such thought as this was at the back of the minds of those who in Edward III’s Statute of Treason gave the king and parliament a power to declare certain acts to be treasonable. Sir William Holdsworth, *A History of English Law*, Vol. IX, (London: Sweet and Maxwell, 1938, reprint.1966), p.380.
and thus by degrees ministerial accountability to the Parliament was achieved. As Sir William Holdsworth describes it, “Impeachment was a reflection of colonial partiality to the legislative branch.” Assemblies were their own, whereas Governors and judges had been saddled on the colonists by the King or his minions. It was yet another cog in the system of check and balances, an exception to the separation of powers, albeit a narrowly channeled exception. During the early Act of Settlement, 1701, judges were Royal servants, as Royal servants; they were dismissable at the King’s pleasure. Judges were frequently dismissed for political reasons. Coke J. heads the list in 1616. Then followed Chief Justice’s Crew and Heath in 1626 and 1634.

According to the Act of Settlement, 1701 unlike most other Crown servants, the judges are not dismissable at the Monarch’s pleasure; tenure for the judges was secured and they could be dismissed only for misbehavior, and under an address to the Crown made by the two Houses of Parliament. The Supreme Court of Judicature (Consolidation) Act, 1925, section 12 in effect continues the protection of the Act of Settlement for the benefit of their descendants. But this protection was only for the High Court and other superior court judges. Below the High Court, responsibility for the removal of a judge rested, before 2005, in the hands of the Lord Chancellor. He could dismiss a judge up to and including circuit judges on the grounds of ‘incapacity and misbehaviour’ and Recorders-lower judges- are removable for “failure to comply with any requirements” of their appointment. In cases involving other serious misconduct, the threat of action was usually enough to induce a resignation. Before 2005, the

68 Ibid, p.5.  
71 Article III.  
72 Warmington L. Crispin (ed.), supra note 5, p.296.  
73 Courts Act, 1971, s.17(4).  
74 Section 21(6).  
process for removing a judge was not set in statute and left a wide measure of discretion to the Lord Chancellor.\textsuperscript{76}

\textbf{4.5.4 Salaries}

The salaries of the judges are set by the Act of Parliament.\textsuperscript{77} In order to protect the judiciary from political debate, their salaries, too, are not voted annually, like those of most other Crown servants, but are permanently charged upon the Consolidated Fund.\textsuperscript{78} Judicial salaries are relatively high, on the basis that it is in the national interest ‘to ensure an adequate supply of candidates of sufficient caliber for appointment to the judicial office.’\textsuperscript{79}

\textbf{4.5.5 Disqualification}

Holders of full time judicial appointments are barred from legal practice,\textsuperscript{80} and may not hold paid appointments as directors or undertake any professional or business work. Judges are also disqualified from membership of the House of Commons.\textsuperscript{81} Membership of the House of Commons does not, however, disqualify that person from appointment to the Bench. The establishment of a United Kingdom Supreme Court under the \textit{Constitutional Reforms Act}, 2005, removed the institutional link between the highest Court of Appeal and the upper chamber of Parliament.\textsuperscript{82}

\textbf{4.5.6 Judicial Immunity}

Judicial independence has been enhanced by the development of the common-law doctrine of judicial immunity.\textsuperscript{83} The judges of the superior courts are deliberately placed in an independent position as the law can place them.\textsuperscript{84} Thus their administration cannot be debated in Parliament when Civil Estimates are presented, as can the administration of most other Crown servants. Indeed, it is a rule of Parliamentary procedure that a judge is not to be criticized except upon a substantive motion.

\textsuperscript{76} O. Hood Phillips, \textit{supra} note 51, pp.114-117.
\textsuperscript{77} Section 1(2) of the \textit{Ministerial and Other Salaries Act}, 1972.
\textsuperscript{78} \textit{Supreme Court Act}, 1981, s.12.
\textsuperscript{79} \textit{HC Deb.}, Vol. 23 Cols. 257-61.
\textsuperscript{80} \textit{Courts and Legal Services Act}, 1990, s.75 and Schedule II.
\textsuperscript{81} \textit{House of Commons Disqualification Act}, 1975, s.1 and Schedule I.
\textsuperscript{82} Roger Masterman, \textit{supra} note 2, p.209.
\textsuperscript{83} The Common Law rule of judicial immunity has since been codified in the provisions of the \textit{Judges Protection Act}, 1848, the \textit{Justices of the Peace Act}, 1979 and the \textit{Magistrates Courts Act}, 1964.
\textsuperscript{84} Sir Ivor Jennings, \textit{supra} note 69, p.243.
All judges have immunity from legal action in the performance of their judicial functions. The absolute privilege accorded by the law of defamation to those taking part in judicial proceedings extends to magistrates as well as judges. Judges are exempt from civil liability for things done while acting within their jurisdiction, even if done ‘maliciously’ and ‘without reasonable’ or ‘probable cause’. Judges of superior courts are apparently not liable for judicial acts done outside their jurisdiction and the acts of a superior court are presumed to be within their jurisdiction. Anyway, there is no tribunal to enforce such liability. In *Sirros v. Moore*, Lord Denning MR and Ormrod L J ruled that:

“Every judge- irrespective of rank and including the lay magistracy- is protected from liability in respect of his judicial function provided that he honestly believed that the action taken was within his jurisdiction.”

*The Crown Proceedings Act*, 1947 also provides protection for the Crown from liability for conduct of any person discharging ‘responsibilities of a judicial nature vested in him’ or in executing the judicial process.

Judicial immunities are not however applicable in their entirety to the judges of inferior courts. County court judges can be dismissed by the Lord Chancellor for inability or misbehavior and justices of the Peace can be struck off the commission of the Peace without any cause being shown. County court judges are protected against judicial proceedings unless they knowingly act without jurisdiction, and the same rule applies to the justices of the Peace.

### 4.6 Reasons for Creation of the New Judicial Appointments Process

In the United Kingdom, the developments in the judiciary after 1960s demanded various reasons for reforms in the judicial appointments process.

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87 *Anderson v. Gorrie* [1895] 1 Q.B. 670 (colonial Court); Leading Cases, No.93; see also *Scott v. Standfield* (1868) L.R. 3 Ex. 220 (County Court).
88 *Hamond v. Howell* (1677) 2 Mod. 219; *Anderson v. Gorrie* [1895] 1 Q.B. 670 (colonial Court).
92 *Crown Proceedings Act*, 1947, s. 2(5).
93 *Justices Protection Act*, 1848.
4.6.1 The European Convention on Human Rights

The United Kingdom was one of the founder members of the Council of Europe and an originating signatory to the European Convention on Human Rights. Article 6 of the European Convention on Human Rights required that, signatory states ‘respect and protect’ the entitlement of everyone within their jurisdiction to an independent and impartial tribunal for the determination of civil and criminal proceedings.

The European Court of Human Rights, in its jurisprudence on Article 6, had made it clear that ‘independence and impartiality are essential, not only in actual substance but also in appearance’ and a person cannot be assured of a fair hearing if a law which deprives a court of its judicial discretion or seeks to exercise judicial power would offend “due process” of a constitutional guarantee of separation of powers. Another requirement is immunity from any legal liability for acts done within jurisdiction. Independence thus means “independence from the executive or the legislature and independence from either party.”

However, in V and T v. United Kingdom, the European Court of Human Rights began to move towards a more clear separation of executive and judicial functions on the basis of Article 6(1). In Millar v. Dickson, the Privy Council found a violation of Article 6, it was observed “Central to the rule of law in a modern democratic society is the principle that judiciary must be and must be seen to be independent of the executive.”

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94 The Council of Europe is the continent's leading human rights organization, founded in 1949. It includes 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. Available at http://www.coe.int/aboutCoe/, visited on 27.06.2015.
95 The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. Available at http://www.echr.coe.int/pages/home.aspx?p=basictexts, visited on 27.06.2015.
97 The European Court of Human Rights was set up in 1959 in the protection mechanism established in Strasbourg to examine alleged violations and ensure compliance by the States with their undertakings under the Convention.
98 Lord Windlesham, supra note 32, p.817.
100 In re., Mc., (1985) AC 528 (HL).
103 (2002) 3 All ER 1041.
The European Court of Human Rights’ decision in *McGonnell v. The United Kingdom*,\(^{104}\) only served to emphasise the potential for the dual role of the Law Lords to compromise the requirements of Article 6(1).\(^{105}\) In the light of the requirements of Article 6(1) the *European Convention on Human Rights* stated that courts be independent of the executive branch, as well as being objectively structurally, and individually, impartial, to avoid perceptions of bias- it can be argued that institutional separation is necessary for the purposes of safeguarding the impartiality of an individual court, and for guaranteeing the idea of judicial independence more broadly construed.\(^{106}\) At an even more basic level, the fact that the most senior judges are all members of the House of Lords, is itself, a direct contradiction of the separation of powers’ principle, while the Chancellor is the greater offender in breaching all three boundaries-head of the judiciary, the speaker of the House of Lords and a member of the Government.\(^{107}\)

### 4.6.2 Lack of Diversity in Judicial Appointments

A substantive and pressing rationale for change was the need to tackle the lack of diversity in the composition of the judiciary.\(^{108}\) The narrow background, from which the judiciary was drawn, particularly at the senior level, had, by the late 1990s, almost the only fact that many people knew about judges in England and Wales was that they were generally elderly, white, male barristers educated at private schools and at Oxbridge.\(^ {109}\) The failure of the Lord Chancellor’s Department to make significant progress in this area prompted the government to promote radical change.\(^ {110}\)

The reason for seeking a more diverse judiciary is not to create a body which is representative in the sense used in relation to elected politicians. 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. It is also ‘unacceptably essentialist.’ The fact that a

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\(^{105}\) Roger Masterman, *supra* note 2, p.217.

\(^{106}\) Ibid, p.212.

\(^{107}\) Lord Steyn argued that, for this reason, the head of the judiciary should be the Lord Chief Justice.


judge is a woman, for example is only one individual characteristic, amongst many, which will affect her decision making. The assumption that women judges will inevitably represent the interests of women more effectively than their male counterparts is both theoretically weak and empirically questionable.\textsuperscript{111} One can hope that a more diverse judiciary may include a wider range of skills and experience which will enhance the quality of its decision-making in a general sense. But the primary rationale for wishing to appoint judges from more diverse backgrounds is to strengthen the legitimacy of the judiciary. Irrespective of whether or not the inclusion on the bench of members of under-represented groups such as solicitors, women, minority lawyers and disabled lawyers will have a significant effect on the decision-making of courts; the corrosive impact of their absence on the legitimacy of the judiciary is now too great to ignore.\textsuperscript{112} The Association of Women Barristers and of Women Solicitors, the founder of the Women Lawyer Forum the Societies of Asian Lawyers and of Black Lawyers, and the African Caribbean and Asian Lawyer’s Group demanded for consideration of diversity in judicial appointments.\textsuperscript{113}

4.6.3 Human Rights Act, 1998

The enactment of \textit{Human Rights Act}, 1998,\textsuperscript{114} which took effect in October 2000, rendered the European Convention on Human Rights directly applicable in English courts\textsuperscript{115} and the effect of the growth in judicial review was to bring an increasing number of politically and socially sensitive issues before the court, which had led to greater tension between the executive and judicial branches. By 2003, a view was emerging among some senior judges and leading constitutional lawyers that the United Kingdom was in a transitional phase moving from a system based on parliamentary

\begin{itemize}
\item \textsuperscript{111} \textit{Ibid}, paras.27 and 28.
\item \textsuperscript{112} Kate Malleson, “Creating a Judicial Appointments Commission: Which Model Works Best?,” 2004 \textit{P.L.}, p.106.
\item \textsuperscript{113} Dama Brenda Hale, \textit{supra} note 108, p.490.
\item \textsuperscript{114} The \textit{Human Rights Act}, 1998 is an Act of Parliament of the United Kingdom which received Royal Assent on 9 November 1998, came into force on 2 October 2000. Its aim was to incorporate into UK law the rights contained in the European Convention on Human Rights. The Act makes a remedy for breach of a Convention right available in UK courts, without the need to go to the European Convention on Human Rights in Strasbourg.
\end{itemize}
sovereignty to that of a constitutional democracy.\footnote{Alison L. Young, “Judicial Sovereignty and the Human Rights Act,” 61 CLJ (1) 2002, pp.53-65.} This, in turn, gave rise to fears that the conventions which underpinned the constitutional arrangements would come under increasing pressure. In addition to these long-term fears, there was also a feeling that the system needed, not only to be free of the danger of political interference, but also visibly seen to be so in order to maintain its legitimacy.\footnote{Kate Malleson, supra note 75, p.119.}

4.6.4 Lack of Transparency in Judicial Appointments

The British system of judicial appointments was plagued with allegations of nepotism and appointments being made by a class conscious elite for whom political patronage, family and social connections and factors other than merit were the determining factors.\footnote{Kate Malleson, supra note 112, p.104.} Professor Griffith criticized it, thus- “Judges promotions depended on wishes of governments or ministers. How far judges consciously or unconsciously subserved the wider interests of governments is another and more important question.”\footnote{J.A.G. Griffith, The Politics of the Judiciary, (Manchester: Manchester University Press, 1977), p.30.} Until 1993, the system of judicial appointments in the United Kingdom was described by the Home Affairs Committee as, “a closed system of selection by peers and supervisors which is free from scrutiny and largely free from challenge or redress.” In an increasing skeptical climate, the British public became more questioning as to whether it was, in truth, possible for the Lord Chancellor to play all his roles. This was particularly true in relation to his role in making judicial appointments.\footnote{Lord Woolf, supra note 29, p.24.}

4.7 Background for Creation of the New Judicial Appointments Process

The arguments for the creation of a judicial appointments commission were debated by academicians and policy-makers over a number of years. During the Labour Government, from 1997-2010, constitutional reform were a strong contender. Under a broad ‘modernisation’ manifesto, a number of changes were envisaged and introduced and have reshaped the constitutional map of the United Kingdom. Indeed, one of the most paradoxical and striking features of the reforms was that they effected a fundamental shift of power away from the executive.\footnote{Supra note 110.}

In 1997, Tony Blair led the Labour party with a landslide victory in the British
House of Commons. The Labour party had for long perceived the British judiciary, “as a bastion for the privileged elites.” Predictably, Lord Irvine, the Labour party governments’ Lord Chancellor announced the appointment of Sir Leonard Peach, the former Public Appointments Commissioner, to examine the selection procedure for appointing judges and Queen’s Counsel. The Peach Report: An Independent Scrutiny of the Appointment Process of Judges and Queen’s Counsel in England and Wales, was submitted in 1999 to the government. This report laid the ground work for the Tony Blair government’s policy for judicial reforms on judicial appointments.

In July 2003 the Department for Constitutional Affairs issued a consultation paper entitled ‘Constitutional Reform- A New Way of Appointing Judges,’ the objective is ‘to preserve the standards which have given the judiciary, its outstanding international reputation for integrity and competence while at the same time disentangling the conflicts, confusions and contradictions of the old supervisory arrangements.’ The consultation paper made clear that the decision to restructure the judicial appointments’ process was one part of a wider programme of modernization which included the abolition of the office of Lord Chancellor, setting up a new Supreme Court and the abolition or reform of the Queen’s system. The consultation paper argues that change to the judicial appointments’ process is needed because: “many of the most fundamental features of the system, including the role of the Lord Chancellor, remain rooted in the past.” While the claim that the system is backward-looking is empirically justified, it is not sufficient on its own to justify the uncertainty and extra public expense which will be brought about by a root and branch change to the judicial appointments process.

The first report of England’s Constitutional Committee of the House of Commons, which, while dealing with the establishment of Supreme Court, states:

“...the process must be transparent; it must have the confidence of the government, the judiciary, the legal profession and the public- it must be clearly merit-based and the independence of judges must be assured; .... There must be some level of democratic accountability in the process...”

122 Ibid.
123 Ibid.
Moreover, close precedents, the process for commission-based judicial appointment existed in the form of the Judicial Appointment Board in Scotland, created in 2002\textsuperscript{125} and the formulation of the framework for a judicial appointments commission in Northern Ireland.\textsuperscript{126} The establishment of the new Judicial Appointments Commission for England and Wales therefore finalized the creation of a more coherent and rational system of judicial appointments in the context of the newly devolved powers of the United Kingdom.\textsuperscript{127} This coherence was reinforced by the fact that each of the three regional appointment bodies would, under the \textit{Constitutional Reforms Act, 2005}, provide a member for the new Supreme Court Judicial Appointments Commission so as to reinforce its status as a Supreme Court for the United Kingdom.

4.8 The \textit{Constitutional Reforms Act, 2005}

With an overwhelming majority in Parliament, the Labour Party Government was all set to bring in constitutional reforms. On the 12\textsuperscript{th} of June, 2003, the Prime Minister of England, Tony Blair, announced that the office of the Lord Chancellor would be abolished and in its place there would be a new Secretary of State for Constitutional Affairs.\textsuperscript{128} He also announced that the Law Lords of the House of Lords would be transferred to the new Supreme Court and a Judicial Appointments Commission would be established.\textsuperscript{129} This dramatic development, which ended in the \textit{Constitutional Reforms Act, 2005},\textsuperscript{130} was the culmination of a relentless battle for a more transparent and politically independent appointments policy. The Queen’s speech in the House of Lords, on 26\textsuperscript{th} June 2003, the formal wording of the passage on Lords reform contained no surprises. It consisted of two brief, but explicit, paragraphs endorsing the intentions of her


\textsuperscript{126} The framework for establishing a commission was set out in the \textit{Justice (Northern Ireland) Act, 2002}. The Commission started work in June 2005.

\textsuperscript{127} The need for a degree of consistency in judicial appointments procedures throughout the UK will be more pressing once the Supreme Court of the UK is set up. The task of selecting its judges is likely to be given to a commission drawn from members of the three appointing bodies (those of England and Wales, Scotland and Northern Ireland).

\textsuperscript{128} Lord Woolf, \textit{supra} note 29, p.25.


\textsuperscript{130} \textit{Constitutional Reforms Act, 2005}, contains 149 sections and 18 Schedules.
ministers:

“My Government will continue their programme of constitutional reform by establishing a Supreme Court, reforming the judicial appointments system and providing for the abolition of the current office of Lord Chancellor. Legislation will be brought forward to reform the House of Lords. This will remove hereditary peers and establish an independent Appointment Commission to select non-party members of the Upper House.”

The *Constitutional Reforms Act*, 2005 was designed, ‘to enhance the independence of the judiciary and to ensure clarity in the relationship between the Executive and the Judiciary.’ Lord Chancellor, Lord Falconer of Thoroton summed up the issue well when he said,

“In a modern democratic society, it is no longer acceptable for judicial appointments to be entirely in the hands of a government minister. For Example, the judiciary is often involved in adjudicating on the lawfulness of the actions of the Executive. And so the appointments system must be, and must be seen to be, independent of Government.”

At the heart of the new arrangements, finalized in the provisions of the *Constitutional Reform Act* 2005, was the removal or reform of the central role of the Lord Chancellor in the areas of judicial appointments, complaints, discipline and dismissal. Abolition of the office of Lord Chancellor resulted in the retention of the title, but its transformation to something far closer to that of a minister of justice. The position of head of the judiciary in England and Wales would be taken by the Lord Chief Justice, who would become responsible for the administration of justice, judicial training and discipline and for representing the views of the judiciary to Parliament and to the Lord Chancellor. Nowhere is the centrality of judicial independence to the new settlement

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133 Kate Malleson, *supra* note 75, p.117.
134 Section 7 (5) In section 1 of the *Supreme Court Act*, 1981 (c. 54), subsection (2) (Lord Chancellor to be president of the Supreme Court of England and Wales) ceases to have effect.
135 Section 7. President of the Courts of England and Wales
(1) The Lord Chief Justice holds the office of President of the Courts of England and Wales and is Head of the Judiciary of England and Wales.
136 Section 7(2) As President of the Courts of England and Wales he is responsible—
(a) for representing the views of the judiciary of England and Wales to Parliament, to the Lord Chancellor and to Ministers of the Crown generally;
(b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor;
(c) for the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales and the allocation of work within courts.
more evident than in the specific direction in section 3(1) of the *Constitutional Reforms Act* that ‘the Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.’\(^ {136}\) This provision in favour of the ‘institutional independence’ of courts is buttressed by a supplementary provision in support of the ‘individual independence’ of the judicial process- section 3(5) provides: ‘the Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary. In discharging the functions of the office of Lord Chancellor, the holder is also given statutory directions to have regard to:

(a) The need to defend [judicial ] independence;

(b) The need for the judiciary to have the support necessary to enable them to exercise their functions;

(c) The need for public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.\(^ {137}\)

The Act also provides for the Lords of Appeal to be removed from the Upper House of Parliament and for the creation of a new Supreme Court\(^ {138}\) as a final court of appeal for the United Kingdom- a reform which is already in place since 2009. The Supreme Court enjoys the jurisdiction of the former Appellate Committee of the House of Lords and also the jurisdiction of the Judicial Committee of the Privy Council.\(^ {139}\) The United Kingdom now has new statutory rules which prohibit Supreme Court justices form membership of the legislature.\(^ {140}\)

The *Constitutional Reforms Act* gives the Judicial Appointments Commission some very specific responsibilities, including three statutory duties. The first of these is to

\(^{136}\) Section 4.

\(^{137}\) Section 3(6).

\(^{138}\) Section 23 The Supreme Court
(1) There is to be a Supreme Court of the United Kingdom.
(2) The Court consists of 12 judges appointed by Her Majesty by letters patent.
(3) Her Majesty may from time to time by Order in Council amend subsection (2) so as to increase or further increase the number of judges of the Court.


\(^{140}\) Section 137.
select candidates solely on merit. The second duty is to select only people of good character. And the third duty is to have regard to the need to encourage applications from a wider range of candidates. Guidance on procedures and on the encouragement of diversity may be issued by the Lord Chancellor after consultation with the Lord Chief Justice and subject to approval by resolution of each House.

4.8.1 The Form of Judicial Appointment Commissions

The first feature to note about the new appointments’ system is that it encompasses two commissions- one for the United Kingdom Supreme Court and one for all other ranks of judges in England and Wales. The Supreme Court Commission is a small ad hoc body, convened only when a vacancy arises, consisting of the President of the Supreme Court (who chairs it), the Deputy President and one of each of the three United Kingdom appointments commissions or boards (England and Wales, Northern Ireland and Scotland). The Judicial Appointments Commission for England and Wales, in contrast, is a larger, permanent body responsible for appointing all the permanent and most of the fee-paid judges and tribunal members to courts in England and Wales including the offices of the Lord Chief Justice, Master of the Rolls,

141 Section 27(75) for Supreme Court judges. Section 63 Merit and good character
(1) Subsections (2) and (3) apply to any selection under this Part by the Commission or a selection panel (“the selecting body”).
(2) Selection must be solely on merit.
(3) A person must not be selected unless the selecting body is satisfied that he is of good character.
142 Section 64 Encouragement of diversity
(1) The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.
(2) This section is subject to section 63.
143 Sections 65 and 66; Kate Malleson, supra note 112, p.107.
144 Section 26, Schedule 8.
145 Judges appointed in Northern Ireland by The Northern Ireland Judicial Appointments Commission.
146 Judges appointments in Scotland by The Judicial Appointments Board for Scotland.
147 Schedule 8 Rule 1 (1) A selection commission consists of the following members- (a) the President of the Supreme Court; (b) the Deputy President of the Supreme Court; (c) one member of each of the following bodies- (i) the Judicial Appointments Commission; (ii) the Judicial Appointments Board for Scotland; (iii) the Northern Ireland Judicial Appointments Commission.
148 Section 61 The Judicial Appointments Commission
(1) There is to be a body corporate called the Judicial Appointments Commission.
(2) Schedule 12 is about the Commission.
149 Commission recommends candidates for appointment as judges of the High Court and to all offices listed in Schedule 14. Additionally, the Lord Chancellor may request our assistance in connection with other appointments. It does not, however, appoint the lay magistrates who number over 30,000 and deal with the majority of criminal cases in England and Wales. Magistrates are appointed by the Lord Chancellor.
President of the Queen’s Bench Division, President of the Family Division, Chancellor of the High Court, Lord Justices of Appeal and High Court Judges. The Judicial Appointments Commission has a substantial secretariat, equivalent to the section of the government department which previously carried out the day-to-day judicial appointments work for the Lord Chancellor. The judiciary is fully and officially independent of the government, and the Lord Chancellor, no longer has the power to choose which judge to appoint.

Both the Supreme Court’s Appointments Commission and the Judicial Appointments Commission for England and Wales are technically, recommending commissions- leaving the final selection to be made by the Lord Chancellor. The Lord Chancellor can reject a name only on the ground, that the person is not suitable for the office concerned. Similarly, the power to refer a name back to the commission can be exercised only in certain limited circumstances, if there is evidence that the person is not the best candidate on merit.

4.8.2 Membership of the Judicial Appointments Commission for England and Wales

The Judicial Appointments Commission for England and Wales was officially launched on 3rd April, 2006; Fifteen Commissioners, had been selected through open competition, except three who were selected by the Judge’s Council. The Lord Chancellor appointed the commissioners for England and Wales after consultation with an advisory body consisting of the Lord Chief Justice, the chair of the commission and additional lay members, appointed by the Lord Chancellor. In relation to the judicial

on the advice of local Advisory Committees. Available at https://jac.judiciary.gov.uk/organisation, visited on 28.06.2015.

Section 68 to 98.

Kate Malleson, supra note 75, pp.120-121.


Section 91(2)(a), in case of candidate for judge of the Supreme Court s.30(2)(c).

Schedule 12 is about the Commission. The Commissioners

1 The Commission consists of- (a) a chairman, and (b) 14 other Commissioners, appointed by Her Majesty on the recommendation of the Lord Chancellor.

2 (1) The chairman must be a lay member. (2) Of the other Commissioners- (a) 5 must be judicial members, (b) 2 must be professional members, (c) 5 must be lay members, (d) 1 other must be the holder of an office listed in Part 3 of Schedule 14, and (e) 1 other must be a lay justice member.

(3) Of the Commissioners appointed as judicial members- (a) 1 must be a Lord Justice of Appeal; (b) 1 must be a puisne judge of the High Court; (c) 1 other must be either a Lord Justice of Appeal or a puisne judge of the High Court; (d) 1 must be a circuit judge; (e) 1 must be a district judge of a county court, a
and legal members, the Lord Chancellor must also consult the judicial council and legal
governing bodies, respectively. Although the posts are advertised and selected through
open competition, little information is publicly available about the exact details by which
the appointments are made.  

4.8.3 Theories and Methods to Achieve Diversity

Sir Thomas Legg, a former Permanent Secretary of the Department for
Constitutional Affairs, has argued that selection on merit could have two widely differing
meanings. One of these meanings is that there is only one candidate who is fit for
appointment, namely one candidate who is judged to be the best available. This,
according to Thomas Legg, would leave no room for supplementary policies about the
social and professional make-up of the judiciary. The other approach is, where all
candidates who reach an agreed minimum standard are treated as equally suitable for
appointment; selection, to be made in accordance with any supplementary policy like for
instance to have more women or ethnic judges. Both of these approaches claim to be
appointments on merit, but leads to very different results.  

4.8.4 Complaints on Appointment Process by Rejected Candidates

The Constitutional Reforms Act, 2005 also includes a provision for making
complaints about the appointments’ process by which complaints may be made to the
Commissioners for Judicial Appointments. The statutory post is called the ‘Judicial
Appointments and Conduct Ombudsman.” The Ombudsman is appointed by the
Queen on the recommendation of the Lord Chancellor, and must never have been a judge,
a practicing lawyer, a civil servant, an MP, or worked with the Judicial Appointments
Commission and should not be inappropriate for the office.

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District Judge (Magistrates’ Courts) or a person appointed to an office under section 89 of the Supreme
Court Act, 1981 (c. 54).

(4) Of the Commissioners appointed as professional members- (a) 1 must be a practising barrister in
England and Wales; (b) 1 must be a practising solicitor of the Senior Courts of England and Wales.

Kate Malleson, supra note 75, p.124.

Sir Thomas Legg QC, “Judicial Reform: Function, Appointment and Structure,” Speech delivered at the
Cambridge Center for Public Law, 17 October 2003, quoted in Santosh Paul, “Choosing Hammurabi –
p.83.


Section 62, Schedule 13.
Complaints to the Judicial Appointments Commission or the Lord Chancellor’s Department may be made only by a person who claims that he was adversely affected in the selection process due to maladministration. Complaints must be investigated by the Commission or the Department, within 28 days of receipt of complaints. This may lead to a further investigation by the Ombudsman. Other complaints about the appointments’ process may be made to the Ombudsman at any time. As with other ombudsmen, the main functions of the Ombudsman will be to investigate complaints within his remit, to report on his investigations (to the Lord Chancellor, the Judicial Appointments Commission and the complainant), and to make recommendations for any further action, including compensation.

4.8.5 Criticism of Working of the Judicial Appointments Commission

However, in 2010 the Judicial Appointments Commission recommended the appointment of Sir Nicholas Wall to the post of President of the Family Division. The Lord Chancellor referred the decision back to the Commission. It, in turn, resubmitted his name after which he was duly appointed. No information was made public by the Lord Chancellor or the Commission leading to the speculation in the press that the Lord Chancellor had sought to block his appointment because of earlier critical comments Sir Nicholas had made publicly about the resourcing of the Family Courts. The lack of transparency in the process means that it is not possible to assess whether there is any basis for this claim.

Another area in which the new judicial appointments’ process has attracted criticism, particularly in the early years, concerned the delays in processing applications. Given the size of the system which the commission inherited, with over 900 appointments being made each year, it was perhaps not surprising that it suffered from teething problems.

This last criticism is particularly significant, given the central importance of diversity in the rationale for setting up the Commission. In 2009, the former Lord Chancellor, Jack Straw, acknowledged in evidence to Parliament that progress in

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159 Section 99.
160 Section 100.
161 Section 101.
162 Section 102.
163 Kate Malleson, supra note 75, p.124.
increasing diversity had been disappointing. In the same year, a report by the Equalities and Human Rights Commission on Women in Power concluded that ‘at current rates of progress, it would take fifty-five years to achieve gender equality in the judiciary.’ In response to these concerns, an Advisory Panel on Judicial Diversity was established in 2009 to ‘identify the barriers to a more diverse judiciary and to make recommendations to more speedily to achieve a judiciary that is more representative of the community.’ The Panel’s report was produced in 2010. It recommended a fundamental shift in approach from a focus on selection processes towards a judicial career.

4.8.6 Performance Appraisal of the Judicial Appointments Commission

The Judicial Appointments Commission appointed a substantial number of members of tribunals and judges in the various years. The judiciary, in the United Kingdom has been nevertheless under relentless attack from the right, left and the liberals. The lack of diversity in the judiciary has been a continuing complaint. An inquiry into the Judicial Appointments Process for the Courts and Tribunals of England and Wales and Northern Ireland (including first instance courts) and for the United Kingdom Supreme Court was highlighted in the year 2012. The report called for redefining the concept of merit and raised the concern that the judiciary was becoming a self perpetuating oligarchy. The Report included statistics showing that in 2011, only 5.1 percent of judges were Black, Asian and Minority Ethnic (BAME) and just 22.3 percent were women. The Committee recommends improving diversity, while appointments based on merit are vital and should continue, the Committee supported the application of section 159 of the Equalities Act, 2010 to judicial appointments. This would encourage diversity to be a relevant factor.

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167 The *Equality Act*, 2010 applied a general equality duty to public authorities to have due regard to the need to: Eliminate unlawful discrimination and harassment, promote equality of opportunity and promote good relations / attitudes between people of different racial groups, with and without disabilities, and of both genders.

4.9 Judicial Accountability in the United Kingdom

In the United Kingdom, during the last thirty years a number of different factors have come together to increase the pressure on the judiciary for the introduction of greater accountability. Before the 1960s the courts held that, actions of administrators could be classed either as administrative or judicial and that the former were not reviewable except under the basis of illegality.169 This restrained approach which effectively excluded large areas of government from the scrutiny of the courts, was strongly linked to the doctrine that ‘the judges should be upholders of the law rather than its makers.’ The rationale for this principle was summarized by Lord Greene in 1944:

“The function of the legislature is to make the law, the function of the administration is to administer the law and the function of the judiciary is to interpret and enforce the law. The judiciary is not concerned with policy. It is not for the judiciary to decide what is in the public interest. These are the tasks of the legislature, which is put there for the purpose, and it is not right that it should shirk its responsibilities.”170

The general political reforms in England began in the mid 1980s designed to enhance the position of the public as ‘consumers’ of services, have gradually affected all areas of public life. In 1986, the exercise of prerogative powers by ministers was made legally accountable.171 These changes reinforced the increasing expansion of a greater degree of openness in government. Introduction of Citizens’ Charters,172 more open complaints processes and greater accessibility of information about public service became indicative of this wider trend.173 One of the key rationales which underpin public accountability is that those who are responsible for spending public funds must account for their decisions. Downey G. reiterates it as:

“…those who are entrusted with the use of public resources should not only act in the public interest but should be seen to do so; and should be subject to public censure if they do not.”174

169 Liversidge v. Anderson (1942) A.C.
170 J.A.G. Griffith, supra note 119, p.36.
171 In the GCHQ case: Council of Civil Service Unions v. Minister for Civil Service [1985] AC 374, HL.
172 The concept of Citizens’ Charter enshrines the trust between the service provider and its users. The concept was first articulated and implemented in the United Kingdom by the Conservative Government of John Major in 1991 as a national programme with a simple aim: to continuously improve the quality of public services for the people of the country so that these services respond to the needs and wishes of the users.
The development of judicial review over the last 30 to 40 years has transformed a small element of the courts’ work into an extensive field of law. Successive areas of public life have been brought within the scrutiny of the courts to the point where no field of government activity is off-limits. In 1994 Lord Griffiths highlighted the enlargement of the judges’ role in scrutinizing and checking administrative action:

“…the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either human rights or the rule of law.”

The publication of a guide to civil servants in 1987 and updated in 1995 entitled The Judge Over Your Shoulder, illustrates the extent to which the judges have come to oversee the work of government, in its broadest sense. This process of increasing judicial activism is about to enter a new phase with the passing of the Human Rights Act, 1998, incorporating the European Convention on Human Rights into domestic law. As the decisions of the courts may increasingly affect all aspects of individuals’ lives, demands have grown for the quality of the decision-making and the background and views of the decision-makers to be subject to scrutiny. A driving force behind this pressure is the increase in the spending power of the courts. This development in the judiciary is the increasing pressure for greater accountability.

The institutional changes to the judicial appointments’ process implemented in 2006 have mirrored, similarly, far-reaching changes to the system of judicial complaints, discipline and removal. The details of the new arrangements were initially determined in an agreement (the “Concordat”) negotiated in private between the then Lord Chancellor, Lord Falconer and the then Lord Chief Justice, Lord Woolf.

4.9.1 Removal

Under the new changes those above the High Court, have been largely unaffected; under the terms of the Concordat, as set out in the Constitutional Reform Act 2005, the power to remove or suspend a judge below the High Court continues to rest with the Lord Chancellor. However, before this power can be exercised, the Lord Chancellor must

176 Kate Malleson, supra note 173, p.7.
178 Kate Malleson, supra note 75, p.126.
179 Constitutional Reform Act, 2005, s.134(2).
consult with the Lord Chief Justice. In addition, a tribunal must be established, either by the Lord Chancellor after consulting the Lord Chief Justice or by the Lord Chief Justice after consulting the Lord Chancellor, to enquire into the allegation against the judge.\textsuperscript{180} Removal may occur only if the tribunal has reported to the Lord Chancellor recommending that the judge be removed on grounds of ‘misbehaviour’ or ‘inability’ to perform the functions of the office.\textsuperscript{181} Each review body consists of four members: two judicial office holders and two lay persons. The members of the tribunal are appointed by the Lord Chancellor in consultation with members of the senior judiciary.

To date, the establishment of such a tribunal had led to one case in which a judge was removed. In 2009, a district judge was dismissed by the Lord Chancellor after the tribunal recommended her removal for, among other things, ‘inappropriate, rude and petulant’ behavior to solicitors appearing before her. The decision represented a significant departure from the earlier more limited interpretation of misbehaviour as being restricted to criminal activity. In general, consensus has been that the public has a right to expect that judges should be dismissed when they are found, through a fair and rigorous investigation, to have failed to meet basic standards of competence and professionalism.\textsuperscript{182}

4.9.2 Discipline and Complaint

Judicial discipline is a difficult and sensitive area- where the protection of the public from inadequate performance or misconduct by judges has to be balanced against the equally vital public interest in judicial independence.\textsuperscript{183}

Traditionally, the judicial discipline system was essentially self-regulatory in that it was largely left to the individual judge to determine what constituted acceptable and unacceptable behaviour, with support and advice from their peers. When this judicial self-control failed in a serious way, then the entire responsibility shifts on the Lord

\textsuperscript{180} Section 135(2).
\textsuperscript{181} A new provision gives the Lord Chief Justice the power, exercisable with the agreement of the Lord Chancellor, to suspend a senior judge from office while she or he is subject to proceedings for an address for their removal in Parliament (s.108(6)); the Lord Chief Justice may suspend other holders of judicial office while they are under investigation for an offence (s.108(7)).
\textsuperscript{182} Kate Malleson, \textit{supra} note 75, p.129.
\textsuperscript{183} Sir Thomas Legg QC, “Brave New World-The New Supreme Court and Judicial Appointments,” \textit{Legal Studies}. 2012, p.53.
Chancellor.\textsuperscript{184} Moreover, under the \textit{Courts Act}, 1971 there was no action less draconian than dismissal which the Lord Chancellor could invoke in response to poor judicial conduct. By convention, he could admonish a judge whose behaviour had been criticized and issue a public rebuke. In practice, it was very rare for a reprimand to be made public. Moreover, there was no requirement that the complaint be informed that any action had been taken.\textsuperscript{185}

Generally, the informal complaints and disciplinary system was increasingly incompatible with the creation of more developed forms of accountability within the rest of the legal system. Formal grievance mechanisms, through Citizens’ Charters and access to Ombudsmen are now an inherent feature of government. The members of the public have been encouraged to consider themselves as consumers of the legal system with rights to expect a minimum level of service and to complain if they do not receive it. In addition, the development of independent disciplinary and complaints procedures in the professions, including both branches of the legal profession, increasingly stood out in marked contrast to the arrangements for the judiciary.\textsuperscript{186} The combined effect of these internal and external pressures was to increase demand for more formalized and open procedures through which to set minimum standards of judicial behavior, investigate complaints and provide corrective action when a judge’s conduct is found to have been at fault.

Under the \textit{Constitutional Reform Act} 2005, the Lord Chief Justice has the power, exercisable only with the agreement of the Lord Chancellor, to give a judicial office holder formal advice about a disciplinary matter, or a formal warning or reprimand.\textsuperscript{187} In addition, the Lord Chief Justice (with the agreement of the Lord Chancellor) may suspend a judge who is subject to criminal proceedings, serving a sentence imposed in criminal proceedings or has under certain circumstances, been convicted of an offence.\textsuperscript{188}

\textsuperscript{185} Kate Malleson, \textit{supra} note 75, p.129.
\textsuperscript{186} In 1996, the Law Society established the Office of Supervision of Solicitors including lay members, in response to criticism of its failures to deal with the rising numbers of complaints against solicitors. Similarly, in 1997, the bar set up formal complaints machinery headed by an independent lay complaints commissioner.
\textsuperscript{187} \textit{Constitutional Reforms Act}, 2005, s.108 (2). The Lord Chief Justice can continue to give informal advice as before.
\textsuperscript{188} Section 108(4), (5).
The Act has also created an Office of Judicial Complaints as an associated office of the Ministry of Justice on 3 April 2006, which has the role of receiving complaints about judges and for advising and supporting the Lord Chancellor and Lord Chief Justice in their responsibilities for the complaints and discipline system. The Office of Judicial Complaints will investigate complaints from members of the public, litigants, professionals (or on referral by the Lord Chancellor or Lord Chief Justice) about judicial conduct that falls within its limit.189

The work of the Office of Judicial Complaints, and indeed the Judicial Appointments Commission, is also now subject to the review and scrutiny of a new body—the Judicial Appointments and Conduct Ombudsman, whose role is to investigate complaints about the judicial appointments process and the handling of matters involving judicial discipline or conduct. Application to the Ombudsman can be made by candidates for judicial office about the way in which their application for appointment has been handled, provided they have already made a formal complaint to the Judicial Appointments Commission, or there are complaints about judicial behaviour whom they are not satisfied with the way their complaints have been handled by the Office of Judicial Complaints. The Ombudsman can also investigate complaints from judges about the work of the Office of Judicial Complaints. The power of the Ombudsman is limited to identifying procedural failure or some other maladministration.190 She or he has the power to set aside a disciplinary finding where there has been maladministration that makes it unreliable.191

4.9.3 Guide to Judicial Conduct

In addition to the creation of formal mechanisms for dealing with and overseeing complaints and discipline in Constitutional Reforms Act, the Guide to Judicial Conduct192 was drafted by a working group of judges set up by the Judges’ Council.193

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189 Para 10.1.
190 Section 110(1).
191 Section 111(5).
193 Judges Council first created in 1873. The duties of the Judges’ Council (which is broadly representative of the judiciary as a whole) is to advise the Lord Chief Justice on a range of matters, including judicial independence, career development, terms and conditions of employment (including pay and pensions).
under the chairmanship of Lord Justice Pill and published by the Judges’ Council after extensive consultation with the judiciary. The *Guide to Judicial Conduct* was drafted on the basis of standards enshrined in various international instruments predominantly in the *Bangalore Principles of Judicial Conduct, 2001.*

The *Guide to Judicial Conduct* is designed to act as a code of conduct and covers the issues normally found in judicial codes of conduct in other jurisdictions. It was drafted on intended to offer assistance to judges on issues rather than to prescribe a detailed code and to set up principles from which judges can make their own decisions and so maintain their judicial independence. It will prove to be a valuable tool in assisting judges to deal with difficult ethical problems with which they will be inevitably faced. As important requirements as to conduct are also set out in each member of the judiciary’s terms and conditions of appointment, the *Guide to Judicial Conduct* must be read in conjunction with those terms and conditions.

The development of the new guide to judicial conduct represents one further step away from the informal system of self-regulation towards the creation of common and open standards of professional conduct against which the behavior of individual judges can be measured.

The standards set in the Guide are permissive rather than restrictive; but they are also highly ambiguous as befits principles intended to guide the conduct of those by whom they have been written. On the one hand, ‘a judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly,’ provided that ‘in exercising such rights’, a judge ‘always conducts himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.’

The *Guide to Judicial Conduct* contains various issues relating to conduct of judges inside and outside the court. The Guide in its first part, contains the general principles of judicial accountability; judicial independence, impartiality, integrity,

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195 Kate Malleson, supra note 75, p.132.

propriety, competence and diligence. It also lays down on personal relationships and perceived bias of judges.\textsuperscript{197} The other part of the Guide elaborately contains the activities of judges outside the court\textsuperscript{198} and also restriction on practice after the retirement.\textsuperscript{199}

4.10 Conclusion

The United Kingdom had a long history of judicial appointments which were by and large made by the Lord Chancellor, a key member of the executive. The appointment process in the United Kingdom was severely criticized for being secretive and lacking in transparency. New developments the ‘abolition’ of the office of Lord Chancellor (followed by a modification of this office), the establishment of the Judicial Appointments Commission, the opening up of some judicial appointments to public competition and the creation of the new Supreme Court for the United Kingdom, have served to ensure better separation of powers and safeguard the independence of the judiciary.\textsuperscript{200}

The Judicial Appointments Commission is a unique model for effecting appointments. It now stands at the cross roads of the constitutional history of the United Kingdom. It has challenged a secretive and well entrenched system of appointments, which was far from fair or transparent. The Lord Chancellor now makes an annual report to Parliament on judicial appointments.\textsuperscript{201} The credit goes to the lawyers, judges, the academics and the politicians who, with foresight and the best interests of the nation at hand, chose a path not trodden without compromising on the independence of the judiciary. It has made the appointments’ process accountable, transparent and fair.

The United Kingdom model has been exemplary, where politicians have no role, whatsoever, in the Judicial Appointments Commission. The present Judicial Appointments Commission adopts a wider consultative process, a transparent selection

\textsuperscript{197} Para.7.
\textsuperscript{198} Para.8 of the \textit{Guide to Judicial Conduct} broadly explain about avoidance of media publicity, participation in public debate, restriction on commercial activities, involvement in community organisations, references, remuneration, business cards, restriction on receiving gifts hospitality and involvement in social activities, use of equipment, reporting minor offences, use and restriction on social networking, Judicial Office Holder’s duty to notify legal proceedings and other matters relating to conduct to the Lord Chief Justice.
\textsuperscript{199} Para.9.
procedure, a conscious effort to encourage diversity and to ensure that the selection of candidates is based solely on merit. It has made great strides in promoting judicial vacancies and encouraging a wider range of applicants. For making the process itself more streamlined and objective, advertising is now more widely-online as well as through traditional print media and working closely with a wide range of organizations, from the Association of Women Barristers to the Black Solicitors Network, to make sure that, as many eligible candidates as possible, find out about vacancies.