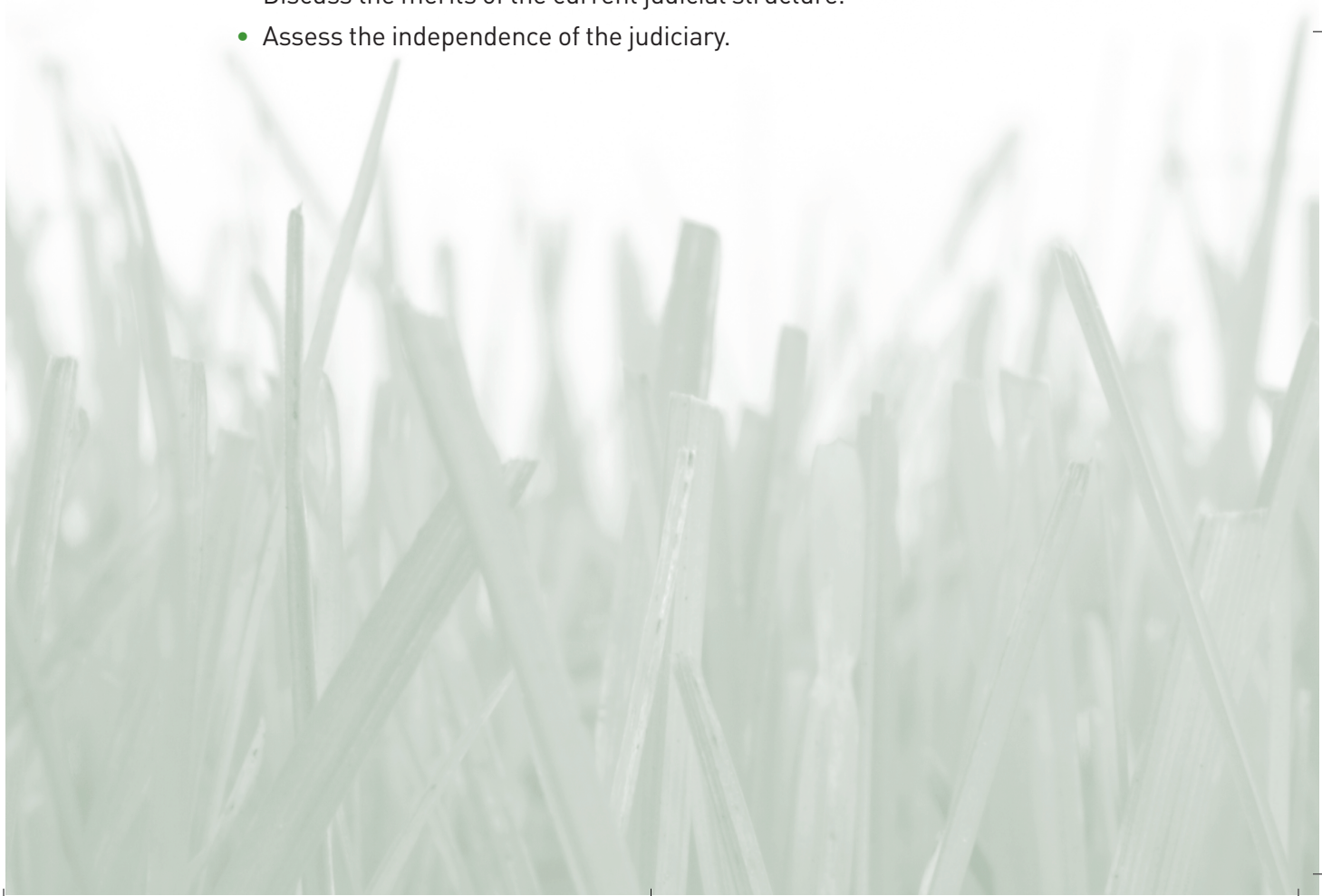
6

Judges and Judicial Independence

By the end of this chapter you will be able to:

- Identify the key judicial offices, their ranks and styles.
- Understand how judges are appointed and assess the recent changes.
- Discuss the merits of the current judicial structure.
- Assess the independence of the judiciary.



Introduction

At the heart of the English Legal System is the judiciary, a body of persons often caricatured in the media as doddery old men who are bordering on being senile. The truth, however, is that both the full-time and part-time judiciary in England and Wales are extremely professional persons who have come from the very best of the Bar and solicitors. That is not to say that controversy does not surround the judiciary and, in particular, the way that they operate and are appointed to their office. Scepticism also exists as to the role the state has in the execution of the judicial office, ie is there such a thing as judicial independence? In this chapter these issues will be discussed.

As will be seen, there are different types of judges within the English Legal System and these differences are echoed in how they are styled and referred to. The Law Reports, and many other legal publications, will use abbreviations to refer to judges. The following table helpfully summarizes how the different grade of judges are styled, abbreviated and referred to in court.

Table 6.1 Abbreviations

Judge	Styled	Abbreviation	Referred to in court
Lord Chief Justice	Lord [*n*] CJ	LCJ (or Lord [*n*] CJ)	My Lord / Lady
Master of the Rolls	Lord (or Sir[a]) [*n*] MR	[*n*] MR	My Lord / Lady
President of the Family Division	Sir[b] [*n*] P	[*n*] P	My Lord / Lady
President of the Queen's Bench Division	Sir [*n*] P	[*n*] P	My Lord / Lady
Chancellor of the Chancery Division	Sir [*n*] C	[*n*] C (formerly V-C)	My Lord / Lady
Lords of Appeal in Ordinary[c]	Lord [*n*]	Lord [*n*] / Lady [*n*]	My Lord / Lady
Lords Justice of Appeal	Lord Justice [*n*]	[*n*] LJ	My Lord / Lady
Puisne Judges	Hon. Mr(s) Justice [*n*]	[*n*] J	My Lord / Lady
Circuit Judges	His (Her) Honour Judge	HHJ[d] [*n*]	Your Honour[e]

Table 6.1 (*cont.*)

Judge	Styled	Abbreviation	Referred to in court
Recorders	Mr(s) Recorder [*n*]	–	Your Honour
District Judges (including Magistrates' Court)	District Judge [*n*]	–	Sir or Madam

a. The Master of the Rolls need not be a peer.
b. Where the Master of the Rolls or other ex officio judge is female then she will be Dame [*n*] rather than Sir [*n*].
c. When the Supreme Court is established the judges will be known as Justices of the Supreme Court (JSC). It is not yet known how they will be referred to in court but it is inconceivable that they would be referred to as anything other than 'My Lord / Lady' as with all Superior judges.
d. In Law Reports a circuit judge will normally just be referred to as Judge [*n*] but technically their title, His or Her Honour Judge [*n*] is abbreviated to HHJ.
e. Where the judge is an Honorary Recorder they are referred to as My Lord or My Lady as are all judges sitting in the Central Criminal Court ('the Old Bailey').

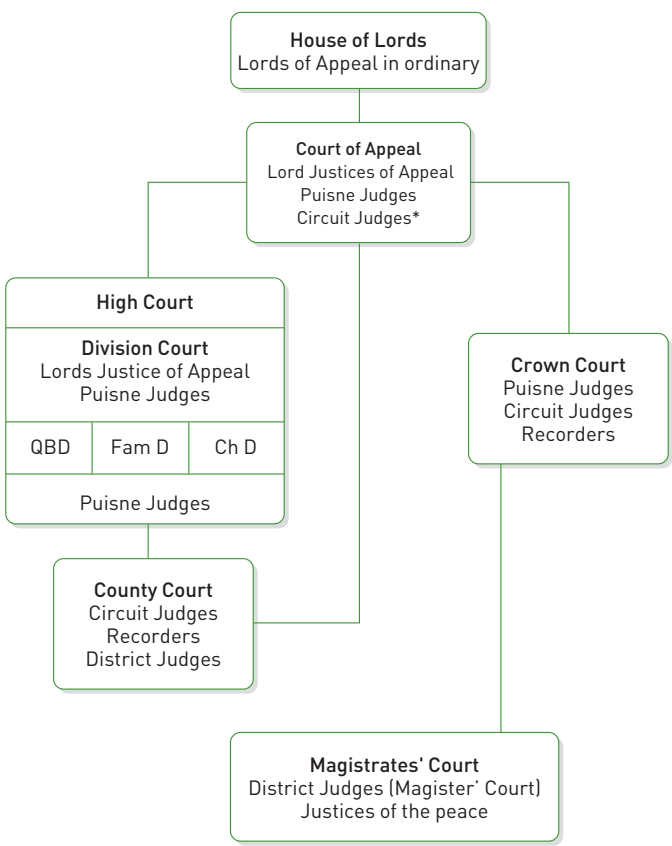


Diagram 6.1 The court and judicial structure.

To assist you in understanding where all the judges sit, Diagram 6.1 shows the court and judicial structure.

6.1 The judicial office

The position of a judge is not one that is taken by employment but it is, rather, an office that the holder possesses during his tenure. It is not the place of this chapter to discuss the differences between an office holder and an employee save to say that it normally means an office holder cannot use employment legislation as regards the performance and termination of their office, and the manner in which a person is accountable for disciplinary issues would also differ.

The style, number and type of judges has differed over the centuries but the modern English legal system now has a relatively fixed hierarchy of judicial appointments, both full and part-time. It is important to note that not all judicial appointments necessarily lead to the title 'judge', eg chairs of tribunals or tribunal appeal members, and for reasons of space it is intended to concentrate only on those who people who sit as judges in the courts. This chapter will not focus on the magistracy as they do not, strictly speaking, hold a judicial office, the office of Justice of the Peace being a distinct but related office. The appointment of the magistracy is discussed elsewhere (Chapter 7) and in order to allow a proper contrast to be drawn the position of the District Judge (Magistrates' Court) is also considered in that chapter. It should be noted, however, that the District Judge (Magistrates' Court) is a judicial officer and is appointed in the same way as an inferior judge (see below).

The judicial hierarchy can be broken down into three principal divisions:

- Senior judges.
- Superior judges.
- Inferior judges.

The appointment process differs for each division and, to a lesser degree, there are also some differences to reflect the individual office that is being appointed.

6.1.1 Senior judges

The first category of judges to examine are the most senior judges, listed as 'senior judges' by the *Constitutional Reform Act 2005* (CRA 2005) (s 60) and they are judges who combine not only a judicial post but also an administrative/leadership role. The principal office holders are:

- Lord Chief Justice (who is now also the *President of the Courts of England and Wales*).
- Master of the Rolls (who is also normally the *Head of Civil Justice*).
- Senior Law Lord / President of the Supreme Court.
- President of the Family Division (who is now also the *Head of Family Justice*).
- Chancellor of the High Court (formerly known as the *Vice-Chancellor*).
- President of the Queen's Bench Division.

There is also the power to create a series of deputies and these will be discussed below. Other judges do have administrative roles or titles but they are not considered to be senior office holders and are paid and appointed the same way as the other judges.

6.1.1.1 Lord Chief Justice

The Lord Chief Justice has always been the most senior professional judge but now, following the removal of the Lord Chancellor, he becomes the head of the judiciary with the title *President of the Courts of England and Wales*. The 2005 Act (s 7(4)) defines the courts as:

- Court of Appeal.
- High Court.
- Crown Court.
- County Court.
- Magistrates' Court.

The *Supreme Court* is not listed because, as was noted in Chapter ***, this is not a court of England and Wales but of the United Kingdom. The Lord Chief Justice is, by tradition, given a peerage upon appointment but following the constitutional reforms to the House of Lords and the removal of the Lords of Appeal in Ordinary from the House of Lords it is highly unlikely that this position will remain. However, by statute, the title remains Lord Chief Justice regardless of whether he has a peerage or not.

The Lord Chief Justice was traditionally the head of criminal justice and the 2005 Act makes him titular *Head of Criminal Justice* (s 8). The Act does, however, provide for a Deputy Head in order to allow the Lord Chief Justice to delegate some of the administrative authority and this person will be someone who is a Lord Justice of Appeal (see s 8(4)(b)).

6.1.1.2 Master of the Rolls

The Master of the Rolls, along with the Senior Law Lord, ranks joint second to the Lord Chief Justice in precedence and is traditionally the head of the Court of Appeal (Civil Division) and, following the *Courts Act 2003* (CA 2003) was created the *Head of Civil Justice* (s 62(1)). The 'Rolls' to which his title refers is the Roll of Solicitors and refers to the fact that he is ceremonially the custodian of the Rolls. This position also constitutionally means that he has oversight over much of what the Law Society does (see Chapter 7) although this work is normally delegated to others.

The CA 2003 permits a Deputy Head of Civil Justice to be created in order to assist the Master of the Rolls in his work.

6.1.1.3 Senior Law Lord / President of the Supreme Court

Until the appointment of Lord Bingham there was no post of 'senior law lord'; instead the judicial committee adopted the convention of the legislative House of Lords by regulating itself with the judge who had served the longest being 'senior' and thus administratively responsible for the allocation of judges to individual cases.

This changed on 6 June 2000 when Lord Bingham was 'promoted' to the House of Lords to become Senior Law Lord. This promotion carried with it a pay cut (the Lord Chief Justice is paid more than the Senior Law Lord) and also meant that Lord Bingham ceased to be the senior judge in the country. The 'promotion' could only occur with the consent of Lord Bingham and it was said at the time that creating a Senior Law Lord would bring a more professional management approach to the judicial committee with someone being designated as its head.

The CRA 2005 formalizes this approach and creates a *President of the Supreme Court* (s 23(5)) and a deputy will also be created. The Act also states that the first members of the court will be the current Lords of Appeal in Ordinary and, accordingly, on the date the Court begins to sit the Senior Law Lord will become the President.

6.1.1.4 Heads of Division

In chapter *** it was noted that the High Court is divided into three divisions (Queen's Bench, Family and Chancery). Each division has a Head of Division although prior to the 2005 Act only the *President of the Family Division* was a Head of Division as of right. The President of the Family Division is now also the Head of Family Justice and a Deputy (who must be a Lord Justice of Appeal) can be created.

The 2005 Act created the new offices of the *President of the Queen's Bench Division* and the *Chancellor of the High Court*. Prior to the 2005 Act the Lord Chief Justice was President of the Queen's Bench Division but this new office recognizes the fact that now the Lord Chief Justice is the head of the judiciary, a new head of division is required to oversee the work. Lord Justice Judge, who previously held the honorific title of Deputy Chief Justice (which was neither a statutory office nor remunerated differently to a Lord Justice) became the first holder of this post. The Lord Chancellor was also the president of the Chancery Division but there existed a *Vice-Chancellor* who was a de facto Head of Division. The 2005 Act has renamed this office the *Chancellor of the High Court* to reflect the fact that the Lord Chancellor no longer has any judicial responsibilities.

6.1.2 Superior judges

Those judges who are considered to be superior judges are:

- Lords of Appeal in Ordinary / Justices of the Supreme Court.
- Lords Justice of Appeal.
- Puisne judges.

These are judges who sit, as of right, in the higher courts – High Court and above. Superior judges have unlimited jurisdiction in that their jurisdiction is not limited specifically by statute. In practice this means that they can use something called the *inherent jurisdiction*, ie the common law powers, and unless a rule of law or statute limits the jurisdiction of the courts in a particular way the judges have the right to act as they seem fit.

Example Unlimited authority

A simple, but perhaps illustrative, example of the difference in authority can be seen by where a judge sits. An inferior judge can only sit in a designated court – ie one that has been approved by the Department of Constitutional Affairs as a court. However in *St Edmundsbury & Ipswich Board of Finance v Clark* [1973] Ch 323 Megarry J decided that he had an inherent power to sit anywhere (p.327). The use of the inherent power was permitted because the judicial authority for a superior judge arises from his office whereas the judicial authority for an inferior judge arises from the court. The judge therefore sat in Iken village hall to hear the evidence of a witness. The judge also, as a safeguard, asked the Lord Chancellor to designate the town as a place where the High Court could sit (p 328) but Megarry J was adamant that this was merely a 'fail-safe' procedure and through the use of the inherent jurisdiction he could sit anywhere.

6.1.2.1 Lords of Appeal in Ordinary / Justices of the Supreme Court

The creation of the Supreme Court was discussed in Chapter *** and s 23(6) of the CRA 2005 states that the ordinary judges of the supreme court are to be styled as *Justices of the Supreme Court*.

Currently the judges of the House of Lords are known as the Lords of Appeal in Ordinary, although they are often referred to as the Law Lords. The 'in ordinary' means that they are remunerated for their work. There are currently twelve Law Lords and they are (currently) granted a life peerage upon appointment, becoming *Lord* or *Lady X* upon appointment.

The twelve judges are not the only members who are entitled to sit in the House, however, and any judge who holds, or has held, a high judicial office within the meaning of the *Appellate Jurisdiction Act 1876* and who is a peer may also sit. A high judicial office in effect means someone who is a superior judge and, accordingly, when Lord Woolf was Lord Chief Justice and Lord Phillips was Master of the Rolls they could both sit in the House although neither was a Lord of Appeal in Ordinary. Those who have retired from a high judicial office but who are under the age of 75 are still entitled to sit but are not properly referred to as a Lord of Appeal in Ordinary. This system is to be reproduced for the Supreme Court with the creation of a supplementary panel (s 39 CRA 2005) consisting of senior retired judges under the age of 75.

6.1.2.2 Lords Justice of Appeal

The ordinary judges of the Court of Appeal are known as a Lord or Lady Justice of Appeal (s 63 CA 2003). Prior to the 2003 Act the statutory title for a judge of the Court of Appeal was a Lord Justice of Appeal (s 2(3) *Supreme Court Act 1981* (SCA 1981)) and this meant that when Dame Elizabeth Butler-Sloss became the first female member of the Court of Appeal she was officially known as Her Ladyship, Lord Justice Butler-Sloss. Sometime after her appointment, the Lord Chancellor and Lord Chief Justice issued a practice direction (*Practice Note (Mode of Address: Lord Justice Butler-Sloss)* [1994] 1 FLR 866) which stated that for informal purposes she was to be known as Lady Justice Butler-Sloss but it took until 2003 before the feminine alternative was formally permitted.

Upon appointment to the Court of Appeal a person is sworn in as a member of the Privy Council and is thus entitled to the prefix 'Rt Hon' and is styled *Lord/Lady Justice X*.

6.1.2.3 Puisne judges

Puisne judges (pronounced 'puny') is the formal name given to the ordinary judges of the High Court although in practice they tend to be referred to as 'High Court judges'. The term 'puisne' means lower rank and means that they are the lowest rank of the superior court judges. That said, all puisne judges rank above the inferior judges.

Puisne judges are given the honorific 'Honourable' whilst they hold that rank and are referred to as Mr or Mrs Justice X – the full title, therefore, being the *Honourable Mr(s) Justice X*. Upon appointment they are also knighted or made Dames, something that happens in a private audience with the Queen rather than at a traditional investiture (see Dunn (1993) 184).

6.1.3 Inferior judges

The inferior judges are so called because they do not exercise unlimited jurisdiction but instead their powers are defined by statute. Accordingly, if the statute does not prescribe

any authority then they may not exercise any jurisdiction. The principal inferior offices are:

- Circuit judges.
- Recorders.
- District Judges (including District Judges (Magistrates' Court)).

Tribunal chairs etc are also inferior judges as their power arises from statute but their jurisdiction will be considered elsewhere.

6.1.3.1 Circuit judges

The office of circuit judge is relatively modern, being created by s 16 *Courts Act 1971* (CA 1971) although prior to this other judicial appointments did exist, including the County Court judge although this was a civil judge. The office of circuit judge now spans both civil and criminal work and a judge can expect to sit on both types of work. When a judge is appointed he is assigned to one of the six circuits and he will, especially when quite junior, spend time sitting at the various courts within the circuit. As a judge becomes more senior it is more likely that he will sit primarily in one or two courts although they can, at any time, be asked to sit in other courts within the circuit where it is necessary to do so.

Each court centre has a Resident Judge which is the judge who is in administrative control of the criminal list and the judge will normally be the senior judge of that centre. Some Resident Judges (in the largest court centres) are paid extra for this role and are designated as Senior Circuit Judges: the other resident judges are not paid extra and the role tends to rotate according to seniority. The Resident Judge has recently been joined by the Designated Judges who have similar responsibility for the civil work. There are two types of Designated Judges, the Designated Family and Designated Civil Judges. Along with the administrative responsibilities, the Designated Judges will frequently hear High Court level work. As with Resident Judges, at the major court centres the Designated Judges will be paid as Senior Circuit Judges.

Some circuit judges also bear the title Recorder. This can be a source of confusion for law students and junior professionals as a Recorder can be either one of the most junior judicial roles or the title given to the most Senior Circuit Judges, and it is best not to confuse the two! Where it is the senior circuit judge the term is Honorary Recorder and it is an office that has existed for many years although traditionally only three full-time posts existed: those of London, Manchester and Liverpool. These Recorderships are substantive posts (ie the posts are specifically advertised as such) and they are automatically Senior Circuit Judges.[1] In the passing of the CA 1971 Parliament had specifically retained the power of local authorities to grant an Honorary Recordership of the borough (s 54). Theoretically this power was vested in the local authority (because the holder of the office becomes a borough dignity, second only in precedence to the Lord Mayor) but in practice it is made in consultation with the Department for Constitutional Affairs. No increase in pay is given to the (local) Honorary Recorders but those appointed have all tended to be the senior judge in the larger court centres (eg Middlesbrough, Bristol, Plymouth) and so were all paid as Senior Resident Judges in any event. The local Honorary Recorder is not, however, a substantive post and it lapses upon the retirement

1. By tradition the Recorders of London, Liverpool and Manchester are knighted on appointment.

of the resident judge and it is for the local authority to decide if, and when, it should be granted again.

All circuit judges are styled *His (or Her) Honour Judge X* and upon retirement are entitled to the honorific His or Her Honour. Honorary Recorders wear a different robe (it is red) and are referred to as 'My Lord' or 'My Lady' in court although upon retirement they keep only the honorific His or Her Honour.

6.1.3.2 Recorders

The second type of Recorder is the more common and is a part-time judicial role held by practising lawyers. The modern office, like the circuit judge, is relatively modern and was created by s 21 CA although part-time roles previously existed,[2] including those bearing the title Recorder and Assistant Recorder. A Recorder can be appointed to hear either civil or criminal cases but they are restricted to the circuit-bench work.

A recorder is styled as *Mr or Mrs Recorder X* when in court but is given no style or title when they are not sitting as Recorders. They are referred to in court as 'Your Honour' since they are sitting as de facto circuit judges. They may continue to practise in private practice.

6.1.3.3 District Judges

The most junior judicial rank is that of the District Judge. It is important at the outset to distinguish the District Judge from the District Judge (Magistrates' Court) with the former acting solely as a civil judge. Part-time district judges are also permitted and those appointed are known as Deputy District Judges.

The District Judge will normally hear procedural and interlocutory matters but they also hear nearly all of the claims heard in the Small Claims Court (*** X-REF ***) and some divorce matters.

District Judges are styled *District Judge X* for the duration of their appointment and are not given any honorific. They are referred to as 'Sir' or 'Madam' in court.

6.2 Constitutional reform

It was noted above that the Lord Chief Justice is now the *President of the Court of England and Wales* and is the head of the judiciary. Prior to the implementation of the CRA 2005, which brought about this change, the Lord Chancellor was the head of the judiciary but why was this change brought about?

In order to understand the reasons it is necessary to be able to identify between the three organs of state, those being:

- Legislature (ie in the United Kingdom, Parliament).
- Executive (ie the government).
- Judiciary.

Montesquieu, a seventeenth century jurist, called for the separation of powers suggesting that man cannot be free without this and that the most important freedom was the

2. These tended to be criminal-only appointments and were deputy judges of the assizes or Deputy Chairman of the Quarter Sessions.

independence of the judiciary. Whilst some jurisdictions take a strict approach to this doctrine (most notably the United States of America where the US Constitution clearly prescribes the limits of the respective organs of state) others are less clear. Montesquieu lived in England during some of his life and the separation of powers both then and now is less clear than in other jurisdictions, eg the United States. The most notable conflict is with the legislature and executive since in the United Kingdom the executive (government) tends to be drawn from the party with a majority in the legislature.

The modern encapsulation of this rule has been suggested as meaning that absolute power should not reside in one person or organ of states, that power should be shared between the bodies with checks and balances included to prevent abuse (Barnett (2002) 107). The doctrine will be explored in more detail in other subjects, most notably either *Constitutional Law* or *Public Law* but it is wise to note that its application in the United Kingdom has always been considered problematic (Barendt (1998) 14–17) and Lord MacKay, the former Lord Chancellor, even argued the doctrine had no direct application in the United Kingdom (MacKay (1991) cited in Bingham (2000) 56) something supported by at least one other commentator (Windlesham (2005) 812). However this argument is based, in part, on the belief that a strict interpretation of the separation of powers doctrine requires the elements of stage to be equal, something that they are not in the United Kingdom. However the United Kingdom is not alone in this and indeed there is nothing to suggest that the limbs must be equal and even in the United States of America there is inequality since Congress can overrule a decision of the President and even legislate to reverse a decision of the US Supreme Court (*** REF ***). It has been noted that in England and Wales the legal presumption tends to be that Parliament is sovereign, the argument being therefore that this is the 'heavier' branch. This need not necessarily displace the application of the doctrine so long as there is distinction between the branches.

6.2.1 Lord Chancellor

Where the issue was problematic however was in the application of the doctrine to the Lord Chancellor since he, prior to the implementation of the CRA 2005, belonged to all three branches.

6.2.1.1 Background to the office

The Lord Chancellor (more formally the Lord High Chancellor of Great Britain) is an historic office and was primarily designed as the Keeper of the Great Seal (the stamp by which formal documents were sealed by the monarch). The Lord Chancellor is, in the order of social precedence, outranked only by the Royal Family and the Archbishop of Canterbury. He was until the CRA 2005 also paid more than the Prime Minister although the latter obviously by convention assumed more powers.

The office was therefore an important one historically but even in its modern guise it was one of the most important appointments. The constitutional ambiguity that was debated until the inception of the CRA 2005 was the fact that the Lord Chancellor was a member of all three branches of the government.

Executive

As a political appointee he was a senior member of the cabinet and accordingly a member of the executive. In historic times the Lord Chancellor was not alone in doing so since

in historic times it was not unusual for the Lord Chief Justice to be a member of the cabinet, and occasionally the Master of the Rolls was an MP (Bingham (2000) 229) but in modern times this practice ended and no 'career' judge sat in the cabinet.

Legislature

Along with sitting in the cabinet the Lord Chancellor was also the 'speaker' of the House of Lords and thus sat in the House of Lords. As 'speaker' the Lord Chancellor did not have the same powers as the Speaker of the House of Commons as the House of Lords traditionally regulates itself but he was an important member of the House. Obviously the Lord Chancellor was not alone in being a member of the judicial and legislative branches as the Lords of Appeal in Ordinary also sit in the House (see 6.2.2. below) as does the Lord Chief Justice and the Master of the Rolls, who whilst not receiving a peerage automatically on appointment would customarily be given one after some years of service.[3] Membership of the House of Commons has also been an issue of controversy, whilst a serving full-time judge is barred from sitting in the House of Commons (s 1 when read in conjunction with sch 1 *House of Commons Disqualification Act 1975*) no such bar exists for part-time members of the judiciary. It has been noted that it was not unusual for MPs to be elevated to judgeships upon their retirement from the House (Griffith (1997) 16) although this practice fell out of favour from the 1970s onwards.

Judiciary

Finally, the Lord Chancellor was the head of the judiciary and could sit in the appellate committee of the House of Lords where he would preside. Although not every Lord Chancellor sat as judge, the majority of modern Lord Chancellors did so even though they frequently had no judicial experience before being appointed Lord Chancellor.[4] The last Lord Chancellor, Lord Falconer[5] refused to sit as a judge, in part because he was by then committed to altering the office and partly because of concerns about human rights.

Case box *McGonnell v United Kingdom*

The issue of judicial independence arose in the case of *McGonnell v United Kingdom* (2000) 30 EHRR 289. The facts of the case are relatively complicated but can be summarized as the chief judge of the island of Guernsey (known as the Bailiff) had presided over the legislature when he was the Deputy Bailiff and this had involved steering some legislation through their Parliament. When Bailiff he was asked to adjudicate on a case that related to the legislation and did so. The European Court of Human Rights held that this amounted to a breach of Article 6 in that it denied the applicant the right to a fair trial before an impartial tribunal. Some commentators have suggested that this could have implications for the Lord Chancellor and Law Lords if they participate in debates within the legislature (see, for example, (2000) 4 EHRLR 423–425).

3. Of the last ten Masters of the Rolls all apart from the current MR (Sir Anthony Clarke) have been made peers although two (Lord Denning and Lord Phillips) were already peers when appointed to the office.

4. The exception being Lord MacKay who was a Lord of Appeal in Ordinary before being appointed Lord Chancellor.

5. Who was never intended to be Lord Chancellor. When Lord Falconer replaced Lord Irvine it had been intended that he would become a mere Secretary of State (for Constitutional Affairs) but it was discovered that ending the post of Lord Chancellor required legislative action and could not be undertaken by the prerogative and so he became the Lord Chancellor *and* Secretary of State for Constitutional Affairs. Although Lord Falconer prefers to style himself as Secretary of State the post of Lord Chancellor takes precedence over all other cabinet ranks (including the Prime Minister) and so he is correctly known as the Lord Chancellor.

6.2.1.2 Reforming the office

Although the office was controversial because it appeared to be a direct contravention of the doctrine of separation of powers, this debate tended to be a theoretical rather than pragmatic argument as noted by Lord Bingham, a strong supporter of constitutional reform:

> I know of scarcely any suggestion that any Lord Chancellor since [World War II] has not honoured the convention . . . [that] when acting as head of the judiciary . . . the Lord Chancellor acts without any regard at all to political considerations (Bingham (2000) 229).

This proposition is supported by the fact that a Lord Chancellor, as the head of the judiciary, was required to take the judicial oath. This, it was thought, would demonstrate the independence that should arise in judicial matters. Whilst in practice this may have been the case it cannot be doubted that the appearance of partiality would arise and few would probably regard an oath as a sufficient constitutional safeguard.

Yet at the same time paradoxically it has been thought that the Lord Chancellor could be the guardian of judicial independence, with senior judicial figures arguing that as a 'cabinet heavyweight' he could put forward the concerns of the judiciary to cabinet and ensure the rule of law is upheld (Stevens (2004) 8). Indeed Lord Bingham argued that the Lord Chancellor was a key figure because he had no 'political ambition' (cited in Stevens (2004) 9), presumably the argument being that the only office which is de facto higher than the Lord Chancellor was the Prime Minister (although as a matter of precedence it was lower) and as a peer this avenue of progression would be denied to him.[6]

This constitutional paradox made constitutional reform difficult with it being reported that Lord Woolf, the then Lord Chief Justice, postponed his retirement until he could be certain that a constitutional settlement had been put forward that would guarantee the independence of the judiciary. The first steps for this were put forward in a document known as the Concordant which existed between the executive (through the then Lord Chancellor) and the judiciary (through the Lord Chief Justice) which set out what the rights and responsibilities of the executive and judiciary would be for the future (Windlesham (2005) 820). At the heart of this Concordant was the proposition that the executive would be bound by a statutory duty 'to respect and maintain judicial independence' (ibid) meaning that the focus of judicial independence would broaden from the Lord Chancellor to all members of the government.

Whilst the original intention was to abolish the post of Lord Chancellor the CRA 2005 has, in fact, kept the post but it does not appear that it will necessarily be the preserve of lawyers. Section 2 of the CRA 2005 states that the Lord Chancellor must be qualified 'by experience' and this includes legal practice (ss 2(2)(c), (d)) but it need not and can include experience as a minister, member of either House of Parliament or 'any other experience that the Prime Minister considers relevant'. Precisely what this means in practice is not clear but it does presumably mean that there will be a divorce between the modern and historic offices. Since the Lord Chancellor is neither the head of the judiciary (since s 7 of the CRA 2005 states that the Lord Chief Justice takes on this mantle) nor the speaker of the House of Lords (s 17 provides for a speaker to be created and the House of Lords decided that there would be 'Lord Speaker' with Baroness Hayman being

6. This convention effectively being cemented by the fact that the Earl of Home renounced his peerage to become Sir Alec Douglas-Home when invited by the Queen to become Prime Minister in 1963.

the first elected speaker) then this presumably means that the Lord Chancellor may return to being merely a counsellor and Keeper of the Great Seal.

That said, however, the Lord Chancellor will continue to be a focus for the law since the person appointed to the post must swear an oath in the following terms:

> I [name] do solemnly swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible (s 6A *Promissory Oaths Act 1868*).

In effect this ensures that the Lord Chancellor will, as now, also be the Secretary of State for the Constitutional Affairs with political responsibility for the running of the justice system. This is certainly advisable and beneficial but the changes do mean that, in effect, the department is in the same position as other departments and accordingly the Lord Chancellor need not be a lawyer in the same way that the Secretary of State for Defence need not be a former or serving member of the Armed Services. Whoever is appointed, however, has the political responsibility to secure judicial independence, this sitting alongside the more general governmental duty imposed under s 3 CRA 2005.

6.2.2 Removal of judges from the legislature

It has already been noted that one of the primary purposes of the CRA 2005 was the creation of the new Supreme Court which will, eventually, replace the appellate committee of the House of Lords. It was noted above that the separation of powers requires, inter alia, the legislature and judiciary to be separate and yet this does not happen. Aside from the office of Lord Chancellor, which has been discussed above, the Lords of Appeal in Ordinary, Lord Chief Justice and other judicial holders who have peerages are entitled to sit in the House of Lords. No serving full-time judge may sit in the House of Commons.

The Law Lords themselves were divided over the propriety of members of the judiciary sitting in the House, with some arguing that 'the Law Lords' presence in the House is of benefit to the Law Lords, to the House, and to others including the litigants' (Law Lords (2003) at [2]). The argument is that the Law Lords can intervene in debates to ensure that errors of law can be corrected during the Parliamentary process rather than merely waiting for a case to be litigated. However this is arguably over stated since in 2000 (the year the *Human Rights Act 1998* came into force), Lord Bingham as Senior Law Lord read a statement to the House of Lords on behalf of all Law Lords saying that they were bound by two principles:

1. That the Law Lords were supposed to be impartial and accordingly in matters of party-political controversy they would not normally speak.
2. Participating in Parliamentary proceedings may debar them from sitting as judge when a matter relating to the legislation appears before the Appellate Committee.7

It may be thought therefore that their presence in the legislature would not necessarily assist. That said, the matter was simply a convention and even in recent times it has not been adhered to fully when Lord Woolf, the then Lord Chief Justice, and Lord Steyn, then serving as a Law Lord, both criticized the *Assylum and Immigration Bill* (now

7. *Hansard*, HL vol 614, col 419 (22 June 2000).

Assylum and Immigration (Treatment of Claimants, etc) Act 2004) which was proceeding through Parliament and which was certainly a partisan piece of legislation (Windlesham (2006) 40–41).

Outside of partisan politics the Law Lords did seem to make a significant contribution. It was reported that twelve places on House of Lords scrutiny committees were taken by serving Law Lords and that one Law Lord had served as the chairman on no fewer than nine committees (Windlesham (2005) 813). It would seem therefore that there was benefit in the use of Law Lords for the purposes of scrutinising legislation, particularly in respect of delegated and EU legislation. However does this need to be done by the most senior judges in the country or could it be done by others? There is no suggestion that the House should be stripped of *lawyers*, merely serving judges. It will be seen below that not every lawyer wishes to become a judge and whilst the current judiciary certainly represent some of the best lawyers, it is certainly not the case that the best lawyers wish to be judges. There is no reason therefore that these positions cannot be held by professionally qualified peers or indeed former members of the Supreme Court (since one proposal is that members of the Supreme Court will automatically be given a peerage upon retirement in the same way that, for example, it is the convention for the Chief of the Defence staff to be given a peerage).

QUESTION FOR REFLECTION

The Law Lords were divided on whether the Lords should be removed from the legislature. A majority (8:4) thought that the most senior judges:

> should be appointed members of the House [of Lords] in order to give it the benefit of their experience on matters relating to the administration of justice . . .

The minority argued that:

> complete effect should be given to the separation of judicial and legislative activity: if the senior judges wish to make their views publicly known, they do not lack opportunities to do so.

Is the opinion of the minority not correct? A seat in Parliament is not the only way to raise concerns about developments in the law. Does the mere fact that the Law Lords have been 'helpful' in scrutinizing legislation justify not excluding them from the House in contravention of the doctrine of the separation of powers?

The CRA 2005 makes clear that a judge will be prohibited from sitting in either House of Parliament whilst he is an active judge (s 137). This section is not yet activated although it is believed that it will be brought into force at the same time as the Supreme Court is established. That said, some are still arguing for a relaxation of this rule and the Act could be brought into force without s 137 being activated.

The Act does not debar former judges from sitting in either House of Parliament and the government has not yet indicated whether the judges of the Supreme Court will be given peerages on retirement (in part because there is a wider discussion as to the membership of the House of Lords). What is clear is that the first members of the Supreme Court will be the existing Law Lords (s 24 CRA 2005) and accordingly when they retire from the Supreme Court they will be entitled to return to the House as they will not be required to renounce their peerage, but merely debarred from sitting.

6.3 Judicial appointments

The process of choosing judges has been the source of some debate for many years and has recently changed to reflect the constitutional changes of the late 1990s and early 2000s. Traditionally judicial appointments, particular of superior judges, was clouded in mystery and secrecy with 'secret soundings' akin to that of the QC system (see 7.4) being normal. Lord Elwyn-Jones, the former Lord Chancellor, explained the process:

> When a vacancy had to be filled, the heads of the Divisions . . . were invited into my office to consider likely names. Usually we agreed as to the one most meriting appointment. Occasionally two names were equally supported. Then the choice was left to me (Elwyn-Jones (1983) 265).

When the Lord Chancellor had decided on the appropriate person he would invite him in for a chat and ask whether they would accept a seat on the bench. It was comparatively rare for a person to refuse an appointment (Pannick (1987) 9) although some did, either because they did not wish to cease to be an advocate or because they did not want the inevitable drop in pay.

The traditional system of appointing judges was increasingly said to be untenable, not least because of concerns that the 'old boys' network' was creating a non-diverse and non-representative judiciary. In recent years two significant changes occurred. The first was the introduction of advertising for inferior judges, this being extended in 1998 to include the first advertisement for a High Court judge.[8] However this, and subsequent, advertisements were only to create a 'long-list' of suitable people from whom the Lord Chancellor could select a judge. Additionally the Lord Chancellor retained the right to invite someone who had not applied to take up a judgeship. The second important step towards accountability was the appointment of the Judicial Appointments Commissioners who had the responsibility for auditing the appointment process.[9] The Commission are independent of the government and publish annual reports on the appointment process, the most critical of which was probably their first annual report (CJA (2003)) although the 2003 review of the High Court competition (CJA (2004)) is also critical and specifically stated the idea of having a mix of invitations and advertisements was unfair (pp 23–27).

Eventually the Department for Constitutional Affairs published a consultation paper on the appointment of the judiciary, something that one commentator described as both 'logical and disappointing' (Stevens (2004) 22). Stevens argues that it is logical because the pressure for the reform of the judiciary has been building for a considerable time, and disappointing because, in his opinion, it has led to a fudge whereby the integrity of the system is not as guaranteed as in other states, most notably through a lack of majority of lay persons. The counter-argument, of course, is that whilst it is essential to have lay persons on a panel to ensure there are no deals being done, it would obviously be sensible for the panel also to contain professionals who know the system.

The CRA 2005 places judicial appointments onto a statutory basis. Two schemes apply for constitutional reasons. The first applies to members of the Supreme Court and

8. The advertisement was placed on 24 February.
9. The Commission have their own website at http://www.cja.gov.uk.

the second applies to all judicial appointments. The systems are actually comparable but the principal distinction is that the former is an ad hoc commission that is constituted when a member needs to be nominated whereas the latter will be a permanent body.

6.3.1 Judicial Appointment Commission

Focusing on the appointments in England and Wales, the CRA 2005 creates a Judicial Appointments Commission that, unlike the first commission, will have a role in the appointing of persons instead of just auditing the process. Schedule 12 of the Act states that the commission will consist of fifteen members with quite specific details as to who can sit.

Table 6.2 Membership of the Judicial Appointments Commission

Lay members	Chairman of the Commission 5 additional members
Judicial members	5 members consisting of: • 1 Lord Justice of Appeal • 1 puisne judge • 1 judge who is either an LJ or puisne judge • 1 Circuit Judge • 1 District Judge
Professionals	2 members: • 1 solicitor • 1 barrister
Lay Magistrate	1 member
Tribunal Member	1 non-lay member (either member or Chair)

No member can be appointed if they are employed in the civil service (para 3) which reinforces the fact that this system is designed to be completely independent. This list is intended, presumably, to ensure that the commission is competent to deal with all possible appointments. The Commissioners are to be appointed for a term of office no longer than five years at any one time and may not serve a total of more than ten years (para 13).

The Commission creates its own rules and processes and at the time of writing it has not yet been established and so it is not possible to know exactly how it will operate. The CRA 2005 lists three different types of selection procedures depending on grades.

6.3.1.1 Lord Chief Justice and Heads of Division

The first process is designed to select either the Lord Chief Justice or a Head of Division. Except where the vacancy is for the Lord Chief Justice, the Lord Chancellor must consult with the Lord Chief Justice to discuss the timing of the referral to the Commission.

The Commission then decides the process by which it will appoint a member, and a panel will be created which consists of (s 71 CRA 2005):

- The most senior Supreme Court judge who held a judicial office in England and Wales prior to his appointment to the court.[10]
- The Lord Chief Justice (or where this is the vacancy a person nominated by the Supreme Court judge above).
- The Chairman of the Commission or his nominee.
- A lay member of the Commission nominated by the Chair.

This will normally mean the panel is evenly split between lay and professional members as the Chair of the Commission is a lay member. The panel must also consider the selection process it wishes to use which could theoretically mean therefore that the panel decides that open competition is not required and an alternative approach could be adopted.

The statutory qualification for a Head of Division is to be qualified as a Lord Justice of Appeal (see below) or that the person is a judge of the Court of Appeal (s 10(3)(a) SCA 1981) and the latter includes Lords of Appeal in Ordinary (see s 2 SCA 1981). In practice the Lord Chief Justice tends to be appointed from either the House of Lords or the Court of Appeal although the last two (Lord Woolf CJ and Lord Philips CJ) were both Master of the Rolls prior to their appointment.

The process for appointing a Head of Division is that the panel will nominate a single person and forward that name to the Lord Chancellor (s 70 CRA 2005) who has three options:

1. Accept the recommendation.
2. Reject the recommendation.
3. Ask the panel to reconsider the selection (s 73).

The difference between option 2 and option 3 is that with the latter the nominee cannot be nominated again (s 75(2)) whereas the former simply requires the panel to consider whether they have appointed the correct person. When the panel reconvenes following a rejection or reconsideration the Lord Chancellor has the same three options open to him. If the matter reaches stage 3 (ie the nominee was rejected at stage 2 or the panel asked to reconsider) then the Lord Chancellor must accept the recommendation (s 73(4)) although where the panel was asked to reconsider at either stages 1 or 2 and the panel nominated a different person the Lord Chancellor could appoint the original nominee (s 73(5)).

6.3.1.2 Lords Justice of Appeal

The CRA 2005 also specifies a separate, yet similar, system for the appointment of Lords Justice of Appeal. The principal difference is in the constitution of the panel which becomes:

- The Lord Chief Justice or nominee (who must be a Head of Division or LJ).
- A Head of Division or LJ nominated by the LCJ.

10. In other words, if the President of the Supreme Court is a Scottish judge, the next most senior judge who is a judge in England and Wales will be nominated.

- The Chairman of the Commission (unless he is unavailable when it is another lay member of the Commission).
- A lay member of the Commission (s 80).

When a person is nominated the Lord Chancellor has the same options as before (s 82) and the process continues until a nomination is accepted (no later than stage 3). The statutory qualification for an LJ is possession of a ten-year High Court qualification (which means rights of audience to advocate in the higher courts, ie a solicitor–advocate or a barrister) or being a judge of the High Court (s 10(3)(b) SCA 1981). In practice, a Lord Justice of Appeal is always appointed from the ranks of the puisne judges.

6.3.1.3 Puisne judges and other judicial appointments

The CRA 2005 creates a single scheme for all judicial appointments for or below the grade of puisne judges (although this does not change the distinction between superior and inferior judges). The process differs in that there is no statutory panel but, rather, it is for the Judicial Appointments Commission to decide how it will fill the vacancies and, presumably, constitute panels from the members within the Commission. The Lord Chancellor still has the same three options as above (s 90) but an additional option arises because the Commission could decide that none of the applicants was suitable for appointment and decline to make a recommendation (s 88(2)) but the Lord Chancellor can ask the Commission to reconsider that decision (s 93).

Whilst it is not possible to consider the statutory qualification process for all the potential judicial appointments, the criteria for the judges discussed are as given in Table 6.3.

Table 6.3 Judicial appointments criteria

Puisne judges	Ten-year High Court qualification or being a circuit judge for two years (s 10(3)(c) SCA 1981)
Circuit judge	Ten year Crown or County Court qualification;[a] sits as a Recorder or holder of a designated judicial appointment for at least three years[b] (s 16(3) CA 1971)
Recorder	Ten year Crown or County Court qualification (s 21(2) CA 1971)
District Judge[c]	Seven year general qualification[d] (s 9 *County Courts Act 1984*)

a. Which means the right to conduct advocacy in the Crown Court (solicitor–advocates and barristers) or County Court (solicitors or barristers) (s 71 CLSA 1990).

b. CA 1971 para 1A, sch 2. The offices are certain tribunal chairs, District Judges (including District Judge (Magistrates' Court)), Masters of the High Court etc.

c. Not including a District Judge (Magistrates' Court).

d. This is a right of audience in all matters in the Crown, County or Magistrates' Court, ie a solicitor or barrister (s 71 *Courts and Legal Services Act 1990*).

6.3.2 Supreme Court appointments

Appointments to the Supreme Court have to be kept separate because it is a court of the United Kingdom and not England and Wales and the Acts of Union creating the United Kingdom guaranteed that the legal systems of Scotland and Northern Ireland would be preserved as sovereign systems in their own right, so the United Kingdom court cannot be under the direction of English procedures.

The criterion for appointment to the Supreme Court mirrors that of the House of Lords and is either holding high judicial office for a period of at least two years or having higher rights of audience for fifteen years (s 25(1) CRA 2005). In practice nobody is appointed direct from practice and the members appointed from the English courts are usually Lords Justice of Appeal although 'high judicial office' includes puisne judges. By convention two members are from Scotland and one from Northern Ireland. The CRA 2005 does not enshrine this convention into the statute although s 27(8) hints at it by stating:

> In making the selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience in, the law of each part of the United Kingdom.

It is regrettable that this language should be employed as it would have been better to use precise language requiring a judge from each of the legal systems within the United Kingdom but perhaps this phrase is sufficient to ensure the convention remains.

The Prime Minister recommends to the Queen who will be appointed to the Supreme Court (s 26(2)) but the Lord Chancellor will provide only one name to the Prime Minister for recommendation and the Prime Minister may not decline the name (s 26(3)) which is a significantly different position to the previous position where Prime Ministers had the ultimate patronage. Lord Hailsham, Conservative Lord Chancellor between 1970 and 1974 and again between 1979 and 1987, makes clear in his autobiography that Mrs Thatcher, the then Prime Minister, ensured she was involved in the discussions and that a list of possible names was submitted although he is careful to note that she did not appoint anyone that was not on the list (Hailsham (1990) 427).

No process is prescribed in statute and accordingly it will be for the Commission decide the nature of any competition, which may mean that in order to comply with the convention noted above, the Commission may decide to restrict an appointment to members of a particular jurisdiction. The statute does state (s 27 CRA 2005) that part of the process includes consulting:

- Senior judges who are not members of the Commission nor have any interest in being appointed to the Supreme Court themselves (presumably for this appointment).
- The Lord Chancellor.
- The First Minister of Scotland.
- The First Secretary of the Assembly of Wales.
- The Secretary of State for Northern Ireland.[11]

A panel, similar to that used for senior judicial appointments in England and Wales, is created (sch 8, para 1, DCA 2005), the members being:

- President of the Supreme Court.
- Deputy President of the Supreme Court.
- One member each of the judicial appointments commission for England and Wales, Scotland and Northern Ireland.[12]

11. It is not known why, in Northern Ireland, the discussion should not be to the devolved First Minister in the same way it is with Scotland.

12. At least one of these must be a non-judicial member and all must be nominated by the Chair of the respective commissions (para 6, sch 8).

Where the post of President or Deputy President is vacant then the next senior ordinary judge of the Court will join the panel instead (para 2). The panel is chaired by the most senior judge on the panel, with the President and Deputy President of the Supreme Court having precedence (para 7).

When the Commission have nominated a person then the Lord Chancellor has the same three options open to him as exist for judicial appointments in England and Wales and eventually, therefore, a nominee will be recommended to the Queen for appointment to the Supreme Court.

The President and Deputy President of the Court are selected by the same process and this would appear to suggest therefore that the tradition of seniority by appointment ended by the appointment of Lord Bingham is unlikely to return as the Commission could decide to appoint someone from outside the Supreme Court to either position.

6.3.3 Appointment Commissions: the solution?

The judicial appointments commission is certainly a marked contrast to the way in which judges have traditionally been appointed but is this the way forward and will it lead to perceived improvements? Not everyone was supportive of the idea of a commission, including those senior judges who believed that the wider constitutional reform process (including the creation of the Supreme Court) was correct. It has been noted that both Lord Bingham and Lord Woolf have argued that one person is better placed to decide on the suitability of a candidate than a committee which, Lord Woolf argues, could lead to a system of 'Buggins turn next' (Stevens (2004) 23).

An independent appointments commission should, at least, remove the potential for bias or partisan politics to play a role. Even in the most recent times there have been allegations that judicial appointments have been made not on the basis of merit but on connections to the government.

Example President of the Family Division

When Lord Falconer, the Lord Chancellor, appointed Potter LJ to the position of President of the Family Division the media instantly referred to him as a 'crony' because he was the pupil-master to both Lord Falconer and Lord Goldsmith, the Attorney-General. Did that mean the appointment was wrong? The professionals working in the Family Division (ie solicitors and barristers) were surprised as custom appeared to indicate the President would come from within the Division whereas Potter LJ was a Chancery Division judge (see, for example, Langdon-Down (2005) 22) but others believed that it was a welcome appointment as it was thought that the Family Division was becoming a little too inward-looking and needed an outside manager to ensure efficiency and a fresh look at the issues (see Hoult (2005) 10).

However others would suggest that Lord Chancellors have proven themselves to be extremely robust when making appointments that may appear controversial. The example above is perhaps one example where it has been noted that some have suggested that he is what the Family Division needed and certainly since his appointment there has been a general acceptance within the judiciary and professions that Sir Mark Potter, as President, has been a good appointment. Perhaps the classic example of Lord Chancellor's

ignoring political issues occurred in 1979 when Lord Hailsham decided to recommend to the Queen that Elizabeth Butler-Sloss, then a Registrar of the Principal Registry of the Family Division (which is comparable to, but slightly higher than, a District Judge), be elevated to the High Court bench. Civil servants were concerned because she was the sister of the Attorney-General (Lewis (1997) 268) but such concerns were brushed aside as it would be 'wrong in principle to discriminate against her' (p 269). Butler-Sloss became one of the most popular and respected judges on the bench, including being made the first Lady Justice of Appeal and first female President of the Family Division.

The Lord Chancellor has not, of course, been removed from the decision-making process and some may have concerns as to whether this underpins the integrity of the appointment system. A former Permanent Secretary of the Lord Chancellor's Department disagrees however and he states that the appointment of the judiciary is an executive act and should therefore be undertaken by a minister accountable to Parliament (Legg (2004) 52–53). Quite how this accountability will arise is perhaps less clear. It is not known whether if the Lord Chancellor ever rejects an appointment or asks the various panels to reconsider whether this will be accompanied by a public statement. It could be argued that naming the rejected or reconsidered candidate would be humiliating for that candidate but if it were to be done in secrecy there is the risk that the motives of any rejection cannot be challenged. The solution to this is likely to be a fudge whereby the Commission's Annual Report will contain (without reference to names) the number of times the Lord Chancellor exercises this power and, presumably, the Lord Chancellor can be called to account by whichever House of Parliament he sits in.

The constitution of the panels has also led to some concern. The Commission for Judicial Appointments strongly argued that lay members should constitute a majority of people appointed to the Judicial Appointments Commission (CJA (2004) para 3.4) and yet as has been seen this is not the case. Indeed when one focuses on the panels created to appoint the senior judiciary lay members will have no power of veto. The panels have four members, two of whom are lay, but the chair of the panels is the most senior judge on the panel and the chair has a casting vote where there panel is deadlocked (see ss 71(12), 80(12), 80(13)) which means that the lay members could object to a candidate being rejected but this could be overruled by the professional members. This is not the case with the new system of appointing QCs (see 7.4) and it may seem somewhat strange that lay members should have a veto on senior advocates but not senior judges. However the counter-argument is why is there a need for lay members to have a majority? Whilst it is perfectly understandable for lay members to become involved and act as an independent voice on the interview panel, it is slightly less clear why a non-lawyer would be any better at appointing judges.

6.3.4 **Diversity**

Perhaps one of they key areas of controversy of the judiciary is their diversity. A long-held criticism of the judiciary is that they are all from the same mould: white, male, middle-class, privately educated Oxbridge graduates (Griffith (1997) 18–22). This position is perhaps exemplified by the current senior judiciary. Of the most senior five judges (the Lord Chief Justice and the four Heads of Division), four list their educational background. All five are male and white. All four of those who declare their educational background were privately educated and studied at the University of Cambridge.

Speaking in 1992, Lord Taylor the then Lord Chief Justice said:

> The present imbalance between male and female, white and black in the judiciary is obvious . . . I have no doubt that the balance will be redressed in the next few years . . . Within five years I would expect to see a substantial number of appointments from both these groups. This is not just a pious hope. It will be monitored (Taylor (1992)).

6.3.4.1 Current statistical position

What is the position now – fourteen years later rather than the five Lord Taylor spoke about – in respect of gender and race?

Gender

It has been noted that the number of female students entering university to read law has been increasing since 1970 and since 1988 there have actually been more female entrants than male (Rackley (2002) 605) and since 1992 there have been marginally more newly qualified female solicitors than male solicitors (ibid). The last census reported that there was a population in England and Wales of just over 52 million people, of which approximately 26.7 million (51per cent) are female and approximately 25.3 million (49per cent) are male. It can be seen, therefore, that in both society in general, law schools and new legal professions there are slightly more females than males.

However if the judicial statistics are examined it can be seen that the position in terms of gender is extremely poor. There is currently no female Head of Division although it should be noted that prior to 2005, Lady Justice Butler-Sloss was, as the President of the Family Division, a Head of Division. Of the twelve Lords of Appeal in Ordinary (Law Lords) only one (8.3 per cent) is female. Lady Hale was appointed in 2005 and prior to that there had been no female members of the appellate committee. There are three (8.1 per cent) Lady Justices of Appeal and eleven (10.2 per cent) female puisne judges. This means of the senior judiciary as a whole, there are fifteen (9.4 per cent) female judges.

Of the more junior ranks of the judiciary the position is only marginally better. There are 71 (11.3 per cent) female circuit judges, and 133 (22.8 per cent) District Judges (the most junior branch of the judiciary). Of the part-time judiciary, there are 199 (14.2 per cent) recorders (ie part-time judges of the circuit bench) and 263 (26.3 per cent) Deputy District Judges (ie part-time district judges).

Overall this means that only 18 per cent of the judiciary are female. Why is this? The usual reason was that put forward by Lord MacKay, the then Lord Chancellor:

> As more women progress through the profession, it is to be expected that the numbers of women within the judiciary will increase (McGlynn (1999a) 89).

However this misses the point that women have been members of the profession for a considerable period of time and defies the statistics discussed above. However it has been noted that historically the judiciary have been recruited from the Bar and females have, despite their representation more generally, suffered, in the words of one commentator, 'institutional discrimination' at the Bar (McGlynn (1998) 89). By the end of the calendar year 2005 women accounted for 3,543 (30 per cent) of the 11,818 barristers practising in independent practice (the traditional route for members of the judiciary).

In employed practice the position is slightly better with 1,271 (45 per cent) of the 2,805 employed barristers but such members rarely progress to the judiciary.

There does not appear to be much evidence for the idea that the numbers will eventually increase (in line with the optimism of Lords Taylor and MacKay.) There is an expectation that full-time members of the judiciary will be drawn from part-time members of the judiciary yet currently only 20 per cent of the part-time judiciary is female so the prognosis for increased numbers does not look good.

Ethnicity

The position in respect of ethnic representation is even worse. The last census suggests that approximately 7.9 per cent of the population consider themselves to be a member of the ethnic minorities. However the latest judicial statistics demonstrate that no Head of Division belongs to an ethnic minority nor are there any Lords of Appeal in Ordinary or Lords Justice of Appeal. There is one (0.9 per cent) puisne judge and this is a recent appointment. This means that of the senior judiciary as a whole there is only one ethnic minority judge which accounts for 0.6 per cent of the judiciary.

Of the junior judicial ranks, there are ten (1.6 per cent) circuit judges who belong to an ethnic minority and nine (1.5 per cent) District Judges. Of the part-time judiciary, there are 67 (4.8 per cent) Recorders and 45 (4.5 per cent) Deputy District Judges. As a whole, only 3.8 per cent of the judiciary would consider themselves as belonging to a member of the ethnic minorities. Admittedly the position of the part-time judiciary is slightly better and there may be hope that this means that the prognosis for future appointments is good, and the latest figures for barristers practising in independent practice show that 10 per cent of the profession is a member of the ethnic minorities.

6.3.4.2 Extending diversity

Despite these figures it can be seen that the professions and senior members of the judiciary argue that they are trying to make the judiciary more diverse. The question is perhaps whether these are mere words or whether there is a true move towards the diversification of the judiciary.

Perhaps the first point of note is that whilst recent statutory reforms have allowed feminine judicial titles to be used (eg Lady Justice of Appeal instead of Lord Justice of Appeal and even provision for a Lady Chief Justice; see s 64(2) CA 2003) the title of the Law Lords has not been changed and thus Lady Hale states that when she was introduced to the House of Lords by letters patent she was introduced as a Lord of Appeal in Ordinary (Hale (2005) 72; and see s 6 *Appellate Jurisdiction Act 1876*). At a simplistic level this can be dismissed as irrelevant, with everyone knowing that Lady Hale is female, but it does demonstrate what could be perceived as an inherent male bias within the judiciary and prior to appointment she noted that such matters were 'trivial but . . . annoying manifestations of the assumption that this is a male profession which women are allowed to join provided that they pretend to be men' (Hale (2001) 497).

When thinking about this whole area, one commentator asks quite a pertinent question: '*Why* [*Sic*] should we want a more representative judiciary? Is it simply that there *ought* to be more women judges . . . ?' (Rackley (2002) 609). Presumably this could be extended further, ie to ask why should we want more female judges and members of the ethnic minorities. It could be argued that we expect our judiciary to be

representative of society but is that really what is desired? It is unlikely that in terms of socio-economic factors there would be a desire or expectation for representation and surely the public would wish the best members of the legal profession to become its judges so why diversity? It has to be something more than just 'to make up the numbers' (Rackley (2002) 610) but Hale, speaking extra-judicially, argues that it is about 'individuals and their rights' (Hale (2001) 489), ie the right to progress within a profession and not to be discriminated against.

QUESTION FOR REFLECTION

Do you think the judiciary should be diverse? What about representative? What does judicial representation actually mean? Think about *why* you want a more representative judiciary; what are the advantages that this would bring to the justice system?

It could be suggested that it is a matter of public confidence. How can a whitemale bastion inspire confidence in the justice system? Whilst one should be wary of looking to the media where attacks are often intemperate, inappropriate and frequently completely wrong, it is not difficult to think that the judiciary currently make themselves difficult to defend against accusations that they do not know the 'real world'. If they cannot even recognize a multicultural society how can they possibly adjudicate on such matters?

Appointment on merit

One commentator notes that the current system of diversity and appointment has been summarized accurately by Lord Lloyd of Berwick, a Lord of Appeal in Ordinary:

> I would like, obviously, the judiciary to be as diverse as we can get it. But that must not interfere with the fundamental principle that we have got to choose the best man for the job (Malleson (2006) 126).

One cannot help but focus on the last words of this quote. Although, as has been noted, the convention within law is to refer to the masculine and indeed this book follows the convention because to use 'he or she' or the even worse '(s)he' is awkward prose, one cannot help but think that there are times when the inclusion of the words 'or woman' or the substitution of 'person' would be appropriate. Arguably the quote of Lord Lloyd is such an example.

The justification for the slow progress of diversity is that only the best are appointed to be judges and that any move towards positive assistance would be contrary to this rule and could even dilute the quality of judges. Deciding who the 'best' candidate is can always be difficult because if one gets the best schooling and education it can be easy to be the 'best' especially if those choosing you meet the same profile, but what does that mean here?

In a review of the appointments system, it was noted that whilst there is almost unanimity in accepting that judges should be appointed on merit but interestingly there was no clear consensus on what 'merit' actually means (Legg (2004) 49). However the report differentiated between two types of merit, namely 'maximal merit' where only one candidate is judged suitable for appointment as he is the best person available (p 50) or 'minimal merit' where the selected panel identifies a number of people who are qualified for the appointment and then a person is chosen from that pool on the basis of policy decisions (p 51). The implication of this argument is that the latter approach is an inferior way

of appointing members of the judiciary even though it can be justified on policy grounds, not least the fact that a more diverse judiciary may assist in securing public confidence.

However is it this simple? Part of the difficulty of locating the maximal best candidate is the advantages that arise from the status quo. During the early 2000s considerable debate ensued as to whether those educated in the public schools were being overrepresented at the very best universities, particularly Oxbridge. Those who qualified at Oxbridge were certainly well represented in the major law firms and at the Bar. Did it mean that those who were educated at public schools were more intelligent than those at state schools or did it reflect the fact that public schools, because of their teaching patterns and staff : student ratios, are better able to devote more time and attention to their students thus allowing students to demonstrate their full potential? If it is the latter, as many believe, then simply selecting the maximal merit candidate each time will mean that the cycle could become self-sustaining with those who had the best opportunities becoming the best candidates. The minimal merit scheme (although I dislike the term) has the advantage of setting out the competencies of the judges allowing a broad analysis to be made of their qualities and then deciding how someone fits into the wider considerations. This is not the same as positive discrimination and is no different to many companies who will state that they 'particularly welcome applicants from the ethnic minorities'. This is not watering down quality but ensuring that all applicants have the same opportunities.

Malleson, probably the most authoritative commentator on the area, argues that there need not be a binary system where it is either the maximal or minimal system but rather that the maximal system could be altered through the provision of a 'tie-breaker' system (Malleson (2006) 129). The basis of this argument is that there will not necessarily be 'one' candidate that appears best but there may be a number of applicants who are equally qualified. In those circumstances it is suggested that there should be 'tie-break' feature whereby those who come from an underrepresented group should be given the position (ibid). This is arguably distinct from the 'minimal' system in that the minimal system looks solely at the criteria and ranks the person thereafter whereas the 'tie-break' system is a derivative of the maximal system because it looks at persons but where there is difficulty in deciding between two or more persons, the 'tie-break' is underrepresentation.

Malleson notes that the 'tie-break' situation was not supported particularly widely even when the then Lord Chief Justice, Lord Taylor, attempted to introduce the system on a limited scale (Malleson (2006) 132). The argument appeared to be that any interference with a strict application of the 'merit' system is unwelcome. Yet this stance ignores the reality that this means that those who have come from a privileged background can continue to claim that they are the 'better' candidates as a result of their education and career. The link between the Bar and the judiciary is perhaps a handicap in this context in that there are certain chambers which have a 'well-worn path' between Bar and Bench in part because of the inevitable contacts that is propagated (see Hale (2001) 490 for a useful criticism of this).

QUESTION FOR REFLECTION

What do you think of the 'tie-break' proposal? Is this a sufficient compromise between the need to appoint judges by merit but also to create a 'level playing field' upon which underrepresented groups of society can compete for judicial appointments?

Family–friendly policies

It will be seen that it is extremely unusual for a circuit judge to be promoted to the High Court bench or beyond (*** X-REF ***) and therefore if women are to become members of the senior judiciary they will ordinarily begin their full-time career as a puisne judge. The difficulty with the role of a puisne judge is that judges in the Queen's Bench and Family Divisions (and to a lesser extent the Chancery Division) will spend a considerable time 'on circuit', ie sitting away from their home. Life on circuit is not, as the media sometimes present it, a luxurious exercise since QBD judges will normally act as the 'single judge' during that time and thus work on papers. High Court judges also hold an important social rank and thus there is a considerable amount of entertaining that must be done in the evening, together with work on papers etc.

Until recently a judge 'on circuit' was *required* to stay in judge's lodgings even if his home was within commutable distance. Other circuits will (not infrequently) be a significant distance away from their home so that the judge will spent four to six weeks away from home three, and possibly four, times a year (Auld (2001) 238). This can hardly be described as 'family friendly' and is undoubtedly a disincentive to both male and female judges but, arguably, a greater disincentive to female judges who do not wish to be away from what might be young members of a family (Malleson (2006) 131). McGlynn, citing Sandra O'Connor – the first woman to be appointed to the US Supreme Court – noted that a significant issue may be that a woman may wish to have a child and that the judicial structure should be able to take this into account (McGlynn (1999b) 97–99). This should not just be in respect of a 'pregnant judge' but should also take account of the fact that if a female lawyer takes time out to raise a family this should not prejudice an application for a judgeship later.

Family–friendly policies are commonplace in society and it should not be difficult to identify ways that such policies could be adopted to the judicial system. This is as big an issue as the diversity of the professions since a more diverse application system will only be achieved if people apply for judicial appointments. If they believe the conditions of the post are not suited to their lifestyle they will simply not apply for them regardless of how open the system becomes.

QUESTION FOR REFLECTION

Is it realistic to suggest that the legal system can adopt 'family–friendly' policies for puisne judges? The nature of High Court work is that it can be long and complex. How does one provide for 'family time' around such (serious) commitments?

6.3.4.3 The Bar's grip

A particular difficulty in diversification is the fact that there is an undisputed link between the Bar and the Bench and arguably this creates a situation whereby significant numbers of persons are not considered. The reforms of the *Courts and Legal Services Act 1990* (CSLA 1990) (see s 71) altered the Bar's exclusive privilege of putting forward candidates for the senior judiciary but doubts continue to exist as to whether the gap has truly narrowed. The first solicitor to be appointed to the High Court bench was Mr Justice Sachs although he was appointed via the circuit bench (to which solicitors had been appointed for some time). The first solicitor to be appointed direct from practice was (Sir) Lawrence

Collins (now Mr Justice Collins) followed by (Sir) Henry Hodge (now Mr Justice Hodge) but no solicitor has proceeded beyond the High Court bench.

One reason why the grip has not yet been broken is that the primary criterion for a judgeship was 'visibility' meaning appearing or at least interacting with senior members of the judiciary frequently (Hale (2001) 492). The Bar, as will be seen in the next chapter, traditionally had exclusive rights of audience in the higher courts and even barristers continue to undertake the bulk of the work there. In addition to this, the Inns of Court are extremely vital (*** X-REF ***) and again this lends assistance to the Bar. The Inns are governed by Masters of the Bench (*** X-REF ***) who are ordinarily either senior members of the judiciary or Queen's Counsel. A prospective judge who is also a barrister will almost certainly be trying to ingratiate himself to his Inn by undertaking extra work etc which brings him to the attention to the senior members of the profession, an advantage that solicitors simply do not have.

Whether the Judicial Appointments Commission will break this has yet to be discovered, in part because it is believed that 'references' will continue to play an important part in any judicial appointments process.

Other professions

The government suggested that restricting the judiciary to the two principal professions is not appropriate and in 2005 suggested that Legal executives should be eligible to become members of the judiciary,[13] albeit in the more junior positions, eg Deputy or full District Judges. However such a system would potentially provide access to other benches since appointment as a District Judge can act as a 'threshold' for appointment for the Circuit Bench (see 6.3.1 above).

The reaction from the judiciary to the proposal has not been terribly welcoming with it being reported that Lord Woolf, the head of the judiciary, commented there 'were concerns' with the proposal and reinforcing the point that nothing should detract from the approach of adopting judges on the basis of merit.[14] Fennell, a legal correspondent for *The Times*, argues that the concerns may be misplaced stating, 'I imagine that the proposal to allow legal executives to become judges should do a lot to enhance the quality of common sense on the bench'[15] although his point then becomes confused as the basis of his premise is that ILEX provides the opportunity to become qualified as a solicitor. This, as we shall see, is perfectly true (Section 7.1.1) but theoretically such persons are not disqualified from judicial appointments since when they are made solicitors they will have a general qualification (and thus the most junior positions will be available after a number of years) and if the higher advocacy examinations were taken then all appointments would be open. That this is true can be seen from the fact that Michael Sachs, a solicitor, was promoted to the High Court bench after serving as a circuit judge. His original status was irrelevant and similarly the fact that someone started as an ILEX member would not act as a statutory bar.

The proposal, however, is that legal executives could be entitled to appointment in the junior judicial posts without having to qualify as a solicitor. The principal difficulty however is that (as will be seen in the next chapter) an ILEX member is not entitled to practise as a sole practitioner and must act under the supervision of a solicitor

13. '*Judges to Come from Wider Pool of Applicants*' DCA Press Release 181/05.
14. 'Falconer's Plans for Judges Bring Out Fire in Lord Woolf's Belly', *Daily Telegraph*, 14 July 2005.
15. 'Wider Bench', *The Times*, 19 July 2005, Law Supplement.

(*** X-REF ***). Whilst the supervision of a senior Fellow may be somewhat 'light touch' it is still present but members of the judiciary are expected to act independently and to adjudicate results. It would appear somewhat anomalous that a person who is not, by law, entitled to work without supervision would suddenly be permitted to make decisions without reference to anyone.

The government argues that allowing ILEX members to access judicial appointments will bring more diversity to the bench but there are significant numbers of solicitors and barristers who are from diverse social, ethnic and sexual backgrounds and it is difficult to see why the judicial members could not be drawn from these ranks. Also is the quest for diversity or representation? The Law Society and Bar Council have both argued that judicial appointments should reflect society rather than represent it; by this they mean that class, gender, ethnicity, religion and sexual orientation should not be a bar to any appointment and that a diverse bench would enhance merit and the judiciary but that appointments should not be made on a quota basis (Baksi (2005)). It is likely that the changes introduced in the CRA 2005 will meet this requirement without the need to widen access to other professions.

QUESTION FOR REFLECTION

Read CJA (2004) para 3.4 where it is argued that lay members should form a majority of the panel and contrast this with Legg (2004) p 53 who suggests the opposite and is of the opinion that a judge should be a chair. Why do you think there need to be lay members on a panel that is deciding whether to appoint (or promote) members of the judiciary? Will lay members understand the subtleties of the judicial office? Who should chair the panels?

6.4 Judicial training

When judges are appointed should they be trained? It may seem a peculiar question to ask yet traditionally training was not offered and that a lack of experience was certainly no barrier to appointment:

> Lord Devlin recalled that when he was appointed to the High Court in 1948, 'I had never exercised any criminal jurisdiction and not since my early days at the Bar had I appeared in a criminal court . . . Two days after I had been sworn in, I was trying crime at Newcastle Assizes' (Pannick (1987) 69).

Dunn notes that when he was appointed it was a case of speaking to other members of the judiciary to understand the principles of giving judgment and discovering the usual awards for compensation etc (Dunn (1993) 181–183). The Lord Chief Justice began to operate 'sentencing conferences' for members of the circuit judiciary and this was eventually extended by the President of the Family Division to include training on family work.

The ad hoc approach of judicial training needed reform however and in 1979 the *Judicial Studies Board* (JSB) was created to have an oversight of judicial training, and it has been suggested that the board 'discharges an ever more important function' and that as it is operated by the judges it contributes to judicial independence (Bingham (2000) 67;

and see below). The JSB was originally restricted to criminal law but it now operates a comprehensive service to all members of the judiciary. It is headed by a Lord Justice of Appeal and has six committees, each headed by a puisne judge. The day-to-day work of establishing the curriculum etc is in the hands of the Director of Studies who is a circuit judge seconded to the JSB, ie he acts for the JSB full-time and during his tenure as Director does not sit judicially. The committees are:

- Civil Committee.
- Criminal Committee.
- Equal Treatment Advisory Committee.
- Family Committee.
- Magisterial Committee.
- Tribunal Committee.

The latter two committees are relatively new committees and demonstrate that the JSB now has a responsibility across all levels of the judiciary, including the lay magistracy and tribunals.

The JSB has oversight over all judicial training and operates annual conferences for circuits and also for designated judges when new legislation is produced. The circuit training seminars are normally organized in conjunction with the Presiding Judge for the circuit and are run locally to facilitate attendance.

Until recently the training requirements were limited to newly qualified members of the judiciary and circuit judges. The senior judiciary were not considered to need training and indeed it was almost thought that requiring them to attend continual training undermined their status and position. However recently this state of mind has been overturned and the JSB's Annual Report for 2004/5 notes how members of the High Court were brought into the training regime, although strictly on the basis of invitation rather than requirement (see JSB (2005) 4) and the training requirements of Lords Justice of Appeal and the other senior judiciary are currently being assessed with the intention of it being introduced in subsequent years.

Even with the new JSB programme the training is still relatively limited. One commentator has suggested that judges should attend a 'judicial college' for a period of up to two months, with lectures and seminars being supplemented with mock trials (Pannick (1987) 71). He rejects the idea that because a judge comes from practice there is an inherent ability to cope with the work of a judge, pointing out that the difference between practice and the bench are significant. The JSB has not gone this far and, realistically, it is unlikely they would ever do so, with judicial training being extremely controversial. In modern times the link between practice and the bench has been strengthened through the office of Recorder. It is the current policy of the DCA that a person will not be considered for a full-time judicial post unless they have first sat as a Recorder (see DCA (2005) section 3.3). A person cannot sit as a Recorder until they have completed the training programme which includes a four-day residential JSB course, shadowing a circuit judge and meetings with various criminal justice agencies (see JSB (2005) 12). Continuing training exists for Recorders and judges and this means that a judge should, by the time they are appointed, be capable of acting as a judge but there are differences between Recorders and judges, not least in the type and duration of cases that are heard, and so whether this is sufficient is more questionable.

QUESTION FOR REFLECTION

Pannick has suggested that those wishing to be judges should be 'trained' before becoming full members of the judiciary. Do you think this is now unnecessary since full-time judicial appointments will ordinarily come from the part-time judiciary?

6.5 Judicial independence

Judicial independence is an important concept that is often discussed and yet there is very little literature that attempts to provide a definition (Stevens (1993) 3). It is frequently suggested that the classic definition is meaning that judges should be independent from the executive but this is not possible in the most literal sense:

> Judges sit in courts provided by the state, they have offices provided, heated and lighted by the state, they have clerks paid by the state, they use books and computers mostly provided by the state, they are themselves paid by the state (Bingham (2000) 57–58).

This is an astute point and demonstrates that full independence is neither practicable nor particularly desirable but what does independence mean and why should judges be independent?

6.5.1 Independent from whom?

The first issue to examine is who judges should be independent from. The law dictionary defines judicial independence as:

> The practice in the UK whereby judges are freed from outside pressure . . . (Curzon (2002))

The notion of 'outside pressure' is significantly wider than simple independence from the executive although the definition continues by stating:

> [It is] secured by, eg the charging of judges' salaries on the Consolidated Fund, separation of judiciary from Parliament, security of tenure of office, judicial immunity.

This demonstrates that independence will ordinarily mean independence from the other arms of the state (executive and legislature) but that it need not be restricted to this, and the opening sentence of the definition – 'outside pressure' – does suggest that it could be wider than this.

6.5.1.1 Independence from the state

It has already been noted above that complete independence from the state would be extremely difficult because the operation of the judiciary is a state responsibility, hence the reason it is considered to be one of the three arms.

Legislature

It will be recalled that all full-time members of the judiciary are automatically excluded from the House of Commons (s 1 and sch 1 *House of Commons Disqualification Act 1975*) and the CRA 2005 will eventually extend this bar to the House of Lords

(see 6.2.2 above), and thus it can be suggested that from that time the judiciary will be independent from the legislature.

Judicial independence from the legislature is also provided for in parliamentary rules. A good example of this is *Erskine May* (which sets out the rules and protocols of Parliament), which states that a Member of Parliament should not criticize a judge by name in Parliament (McKay (2004) 439). Interestingly, of course, this does not stop a Member from criticizing a judge *outside* Parliament and it will be seen that this has happened on a number of occasions. However if it is outside Parliament then it would be suggested that this was not the *legislature* but merely someone who is a member of the legislature criticizing a judge.

Executive

The principal challenge for judicial independence is normally its relationship with the executive. Lord Bingham has already noted that pragmatically there will always be a degree of interrelationship between the executive and the judiciary but the nature of the interaction is crucial to independence. The position of the Lord Chancellor has been discussed already (see 6.1.1 above) and to an extent it can be suggested that this is a step towards independence but it will be remembered that some commentators have argued that the Lord Chancellor acted as a constitutional safeguard. Independence will also involve the appointment, promotion and discipline of judges but it has been noted elsewhere in this chapter that the executive now takes little part in these issues following the reforms of the CRA 2005.

Independence from the executive will include reference to their work. Lord MacKay, a former Lord Chancellor, noted that judges required administrative freedom and control, most notably in the selection of cases and listing of matters (Bingham (2000) 56). In essence this protects against the 'Judge Deed' type situation where there is a perception that the government 'picks' the judge that will sit on a case. Although much of the listing is dealt with by court administrative staff, who are employed for HM Court Service (part of the executive), they may only do so in conjunction with the judiciary since the Resident Judge and Presiding Judge can provide guidance in relation to how cases are assigned to judges. There is also the ultimate sanction in that a judge (usually the Resident or Presiding Judge as senior judge in a particular court) can transfer a matter from one list to another, reserving the case for himself. In this way it would suggest that it is possible to demonstrate independence over cases.

What of attacks from the executive? It was noted above that Members of Parliament may not criticize a judge by name in Parliament, and in the United Kingdom ministers are drawn from members of either House. The executive should not ordinarily criticize the personal decisions of a judge and yet this has happened on a few occasions. One judge has argued that the relationship between executive and the judiciary is 'fraught and imbalanced' (Wilson (1994) 1454) although when Lord Chief Justice, Lord Woolf argued that the relationship was 'based on a satisfactory working relationship . . . probably, it is much better than ever before' (Woolf (2001) 5). That is not to say there have not been tensions, however, in part demonstrated by the fact that Lord Woolf had postponed his retirement because he believed there was a danger that judicial independence might be undermined (see 6.2.1.2 above).

Occasionally highly personalized attacks are made in contravention of the principles enshrined above. Perhaps the most notable of these in recent years was the campaign by

David Blunkett when he was Home Secretary. In interviews he suggested 'it was time for judges to learn their place' (Bradley (2003) 402). This comment followed the judgment of Collins J in respect of the treatment of asylum seekers (*R (on behalf of Q) v Secretary of State for the Home Department* [2003] EWHC 195) which the Home Secretary saw as undermining his campaign to regulate illegal immigration. In an interview with the BBC he named Mr Justice Collins as being responsible for undermining Parliament and suggested that he would continue with the process (Bradley (2003) 400). In fact, despite the highly personalized comments and briefings by the government against the judge, the Court of Appeal largely upheld the ruling ([2003] EWCA Civ 364) and yet this latter ruling did not meet with any criticism (Bradley (2003) 405).

Did the criticisms of the Home Secretary undermine judicial independence? It could be argued that they did in that they could be viewed as an attempt to put pressure on the judiciary to rule a particular way. However the counter-argument is that the Home Secretary was a litigant and was, in effect, suggesting unease at a particular decision, albeit in intemperate terms. When the appellate courts ruled (in effect terminating further legal resolution) the government accepted the matter.

QUESTION FOR REFLECTION

Should the government be able to criticize members of the judiciary? Does it matter which member of the government it is? For example, if the Lord Chancellor or Prime Minister was to criticize a judge *by name* would that be more serious than a Secretary of State doing so?

6.5.1.2 Independence from the media

Judicial independence need not necessarily be restricted to the state and it has been noted that:

> One of the most dramatic changes that has taken place over the past thirty years or so has been the increasing freedom felt by newspapers, in particular, to attack judges with a vigour . . . that was formerly quite unknown (Oulton (1994) 569).

In the decade since this was written the position has arguably become even vociferous especially by the tabloids with The *Sun*, supposedly the most popular newspaper in the country, consistently referring to Lord Woolf, the Lord Chief Justice, in derogatory terms and in September 2004 asking readers to sign a petition requiring him to be sacked[16] and even sending 'removal men' to the Royal Courts of Justice and his private residence.[17] This was followed in 2006 with a campaign to 'out' judges that the *Sun* believed had imposed unduly lenient sentences. The names of the judges were given together with derogatory comments made about the sentences that they had passed.

What should the position be in respect of this? Some judges have, when the media comment has been particularly unpleasant, resorted to the laws relating to defamation and some judges have even suggested that derogatory press comments could amount to contempt of court (Dunn (1993) 182). This argument would only work with superior

16. 'The *Sun* Calls on Lord Chief Justice to Quit', *Sun*, September 22 2004.
17. *Sun*, September 23 2004.

courts but even then it would be a complete overreaction and Lord Bingham has stated that the contempt laws should ordinarily have no place in such battles (Bingham (2000) 61). Indeed His Lordship suggests that judges should be 'thick-skinned' enough to ignore press comments.

QUESTION FOR REFLECTION

Do you believe that judges should have a remedy against the media if they make unjustified personal attacks? Should the press not have the right to comment on the administration of justice? Read Article 10 of the ECHR (*** X-REF ***). Does this have any impact on your answer?

The recent constitutional changes may have an impact on independence in this area. It has been noted that it is common place for the full-time judiciary to be drawn from the part-time judicial ranks. Where there was (at least) the appearance of a political decision over the appointment system (in that it was ultimately for the Lord Chancellor to decide who to appoint) there might have been concern as to whether bad press coverage would have prevented appointment since it might have been 'bad politics' to do so (although it should be stressed that there is no evidence to suggest that this did happen but there was undoubtedly the appearance that decisions could be made politically) whereas now an independent body appoints judges it is likely that press comments would not be taken into account. Accordingly part-time judges may be less afraid of making controversial decisions (if they ever were).

6.5.1.3 Independence from each other

Perhaps one of the most unusual examples of judicial independence relates to the judges themselves. The courts in England and Wales adopt a hierarchical structure and it has been noted already in this chapter that there are different ranks within the judiciary and this means that, potentially, there may be situations where a judge tries to interfere with another. The DCA, when discussing judicial independence, notes this possibility:

> Judicial independence does not just mean independence from outside influence, but also that of one judge from another . . . [N]o judge, however eminent, is entitled to tell another judge how to exercise his or her judgment in any individual cases (DCA website, August 2005).

Obviously judicial independence from each other does not extend to ignoring the principles of *stare decisis* as this would cause confusion and end certainty within the English Legal System. It will also be seen that the hierarchical structure has led to quasi-disciplinary measures being adopted by the higher courts, but the principle is just and important. Traditionally this approach has led to judges adopting an extremely independent system whereby they act in isolation and rarely look at each other's work (although they may discuss cases during lunch or after sitting with other judges as any visitor to the judge's dining room can attest) but Lord Woolf, the Lord Chief Justice, suggested that perhaps judges should look at each other's performance on the bench (Woolf (2001) 7) although he rejects the idea of it becoming even a peer-reviewed appraisal system (p 8) and expressly states the principle of annual reflections would not compromise the independence of the judiciary (ibid).

6.5.2 Securing independence

If judicial independence exists how is it secured? The CRA 2005 attempts to encapsulate the protection in statute but other factors are equally important. Some forms have already been discussed but the key issues of securing independence would include salary, tenure (including promotion and discipline) and immunity.

6.5.2.1 Statutory independence

It has been noted that the judiciary were keen to ensure that with the abolition of the Lord Chancellor there would be provision to guarantee the independence of the judiciary. It was seen above that one of the principal responsibilities of the Lord Chancellor was to act as a 'buffer' between the executive and the judiciary (see 6.2.1.2 above and see Elwyn-Jones (1983) 267). Arguably the Lord Chancellor may still have this responsibility since his oath says, inter alia, 'I will . . . defend the independence of the judiciary . . . ' In addition to this the CRA 2005 (s 3(1)) places a statutory duty on the government.

> 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.

This includes (s3(6)):

(a) the need to defend that independence;

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

(c) the need for the 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.

These duties are imposed primarily on the Lord Chancellor. Yet how will this be achieved?

One commentator has suggested that Lord Irvine, whilst Lord Chancellor, did not have the confidence of the judiciary or professions in his ability to uphold the independence of the judiciary (Malleson (2004) 126), yet another commentator suggests that the judiciary appeared to have more confidence in Lord Irvine than Lord Falconer (Dyer (2005) 6). It could be inferred that neither presumably inspired confidence in safeguarding judicial independence and this may, in part, be as a result of them being considered two of the more 'political' Lord Chancellors. It is notable that when the media launched their attack on the Lord Chief Justice (6.5.1.2 above) nothing was heard from the Lord Chancellor and it was left to the Attorney-General to intercede.[18] The Attorney-General is a legal officer and titular head of the Bar, it is not his primary responsibility to safeguard the independence of the judiciary: this should be the responsibility of the Lord Chancellor.

However recent criticism has shown that the Lord Chancellor may be able to intercede. In 2006 there was considerable controversy over the sentence imposed in relation to Craig Sweeney, a convicted paedophile who abducted and sexually abused a very

18. 'Plea for End to Attacks on Woolf', *Guardian*, 13 November 2004.

young girl. The media were extremely critical of what they saw as an extremely lenient sentence and John Reid, the Home Secretary, was also critical of the sentence making comments that were probably comparable to those of David Blunkett (see Gillespie (2006) 1153). The Lord Chancellor publicly stated that it was not the fault of the judge that the sentence was wrong but the legal framework. However Vera Baird QC, a junior minister in the Department for Constitutional Affairs, criticized the judge by name on BBC Radio 4 suggesting that the judge had personally got the matter wrong (Gillespie (2006) 1154). Interestingly, there was then a public exchange of letters between the Lord Chancellor and the junior minister whereby Vera Baird formally withdrew her remarks. This was followed by further public confirmation by the Lord Chancellor that the judge had not erred, even though this implicitly criticized the Home Secretary for making his comments. The media were very much against this sentence and thus the easy political decision would have been to either stay silent or support the Home Secretary but Lord Falconer did not do this and, in effect, met his statutory obligations.

QUESTION FOR REFLECTION

It was noted above (6.2.1.2) that the Lord Chancellor need not, following the CRA 2005, be legally qualified. Could someone without a background in the law be able to safeguard the independence of the judiciary?

6.5.2.2 Salary

At first sight judges would appear to be very well paid, with the Lord Chief Justice receiving £211,399 and a circuit judge receiving £116,515[19] but this should be placed into context when many practitioners will earn several times this. Yet salary is important, as has been noted by Lord Bingham:

> There is of course, a close connection between judicial salaries and judicial independence . . . if a judge's salary is dependent on the whim of the government, the judge will not have the independence we desire in our judiciary (Bingham (2000) 65).

In recognition of this, in England and Wales where there has been concern about the salary levels of the judiciary it has been suggested that the government has listened to the judges and acted accordingly (Pannick (1987) 13–14) although other commentators points out that in 1991 the government rejected the report of the Top Salaries Review Board (which makes recommendations as to the salaries of civil servants, ministers and senior public figures) and imposed a lesser salary increase (Griffith (1997) xiv–xv).

The current position as regards judicial salaries is that they are undoubtedly less than what an applicant for a judgeship earns in practice, but that there are alternative benefits. The judges are paid out of the consolidated fund (s 12 SCA 1981) which means that there is no parliamentary debate on their salaries. The government continue, however, to influence the salary levels because although the *Senior Salaries Review Body*, an independent body, recommends the salary levels, it is for the government of the day to decide whether they will accept the recommendations or not. The decision as to whether to accept the recommendation is reported to Parliament who are entitled to question the

19. The Online Resource Centre to this book provides the latest salary details.

relevant ministers as to the reasons for this. In 2005 the *SSRB* published a consultation paper on whether the judicial salaries bands were correct and how they should be 'pegged' to comparable posts (SSRB (2005)).

Whilst judicial salaries have not, since 1991, caused much debate, judicial pensions have. In order to safeguard the independence of the judiciary, judicial pensions are dealt with by statute (*Judicial Pensions and Retirement Act 1993*) and the modern position is that a maximum pension of one-half of the final salary of a judge is payable after twenty years as a judge (s 3).[20] The pension is mandatory in that the judges may not opt out of the scheme and place their contributions in private schemes. In the 2004 budget, the Chancellor of the Exchequer announced measures to ensure that those who have pension funds greater than £1.5 million will have to pay an additional 25 per cent tax above income tax (potentially 60–65 per cent). Given that judges normally earn significant money at the Bar, they tend to have established pension funds before they accept a seat on the bench and this, in combination with the judicial pensions board, will likely exceed £1.5 million. Theoretically this meant that some judges (principally members of the senior judiciary) would be liable to high levels of tax, and it was reported that the Lord Chief Justice, representing the judiciary, had warned the government that many judges would resign.[21] The government announced a plan to remove judges from this scheme and this caused significant uproar in the press for a short period of time until it was realized that the intention (put forward in the *Judicial Pensions Bill*) was not to provide a loophole but rather to allow judges to opt out of the statutory scheme, placing them in the same position as other high earners. The new scheme, when implemented, will allow judges to keep their money in non-tax-exempt private schemes which may be more tax efficient. The threat of resignations did, however, demonstrate that salaries and other financial matters continue to be a matter of importance to the judiciary.

6.5.2.3 Tenure, promotion and discipline

Three directly related issues that could conceivably interfere with judicial independence are the tenure of judges, any promotion they receive and how they are disciplined. In order to discuss these issues it is necessary to distinguish once again between superior judges and inferior judges as the manner in which they are treated is significantly different. The position of judges of the Supreme Court, although obviously superior judges, will also be considered separately because of the changes introduced by the CRA 2005.

Superior judges

Superior judges enjoy significantly stronger protections than members of the inferior judiciary. Puisne judges and Lords Justice of Appeal hold office until retirement age (currently seventy (s 11(2) SCA 1981)[22]) 'during good behaviour, subject to a power of removal by Her Majesty on an address presented to her on an address presented by both Houses of Parliament'. In other words, subject to an additional power of removed through disability, a superior judge may only be removed if both Houses of Parliament pass a resolution requiring them to go. Only one judge has ever been removed in this way,

20. Where a judge sits for less than twenty years, the pension payable is calculated as 1/40th of the final salary for every year that the person sat as a full-time judge.

21. See, for example, 'Woolf Says Judges Are Likely to Resign to Avoid Tax on Pension', *The Times*, February 23 2005.

22. Although the Lord Chancellor can extend the judicial appointment to seventy-five (see s 26 *Judicial Pensions and Retirement Act 1993*). Lords Justice of Appeal quite frequently continue to sit in a part-time role until they are seventy-five.

in 1830 (see Pannick (1987) 90) and it would be extremely rare for anyone to achieve this 'distinction', not least because most judges would probably prefer to resign rather than be subjected to such an approach.

Where a superior judge is incapacitated by illness or disability then the SCA 1981 provides that the Lord Chancellor may remove him (s 11(8)). To ensure that this power cannot be abused, sub section (9) requires judicial consent to this procedure. Where the incapacitated judge is a Head of Division then at least two other Heads of Division must agree, where it is a Lord Justice of Appeal the Master of the Rolls must agree and where it is a puisne judge the appropriate Head of Division must agree. Given that all of the judges who must agree with this are all superior judges holding similar security of tenure, it should ensure that the measure can never be used by a Lord Chancellor in an inappropriate manner.

The CRA 2005 has, however, provided additional disciplinary procedures that may be exercised by the Lord Chief Justice, as head of the judiciary. These powers apply to all levels of judges and are considered in further detail below.

Promotion for the superior judge is a controversial area. Lord Denning once wrote that a judge when appointed had nothing to gain from promotion and did not seek it (Denning (1955) 17) and at the time this was probably true because there were so few posts in the Court of Appeal. However this may no longer necessarily be true and he concedes that there may have been a concern that some judges would tailor their judgments in such a way to gain judicial advancement although he states that he cannot think of any examples of this and it would amount to a violation of the judicial oath (Bingham (2000) 60). It is certainly not possible to identify any candidates where it might be thought that their decisions had denied advancement although some may argue that it is possible to identify the opposite where judges who may have appeared controversial have gained advancement.

The constitutional reforms introduced by the CRA 2005 could now lead to a change. Appointment to the Court of Appeal and Supreme Court will now be made by the Judicial Appointments Commission and it could be argued that this ensures that there is no danger of a judge feeling they need to appease the executive in order to get advancement, but it could also lead to the creation of a 'career judiciary' which may lead judges looking more to the future than what they are doing at present. This is something that the Commission will need to consider carefully.

Inferior judges

The security of tenure for a circuit judge is significantly different from that of a superior judge. Circuit judges must retire at the age of seventy but they are also subject to removal by the Lord Chancellor 'on the ground of incapacity or misbehaviour' (s 17(4) CA 1971). Neither incapacity nor misbehaviour as a cause for removal requires the consent of any other judge (in the same way as with superior judges). The CRA 2005 states that where this is to be undertaken then 'prescribed procedures' must be followed which suggests that there will now be a statutory scheme that will lead to dismissal (s 108(1)).

In recent times only one circuit judge has been removed by the Lord Chancellor, and Hailsham, the Lord Chancellor who was responsible for the dismissal, makes it clear in his autobiography that he would have preferred the judge to resign but, at that time, a pension would not be payable to someone who resigns whereas a part pension would be paid to someone who was dismissed (Hailsham (1990) 429).

Interestingly a second case was referred to him for consideration of removal and senior judges again asked for his removal (Hailsham (1990) 430). Lord Hailsham does not mention the judge by name but Judge James Pickles names himself in his own autobiography (Pickles (1992) 175–196). Judge Pickles was perhaps one of the most controversial judges in modern times and, by his own admission, was something of a maverick. Hailsham describes him as:

> [an] obscure and absurd judge whose only real claim to fame was the number of times when his behaviour had been criticized and his judgements [*Sic*] reversed by the Court of Appeal . . . (Hailsham (1990) 430).

Part of the controversy of Pickles was his unconventional views of sex crimes, something that led to him being denied the right to sit on such cases. In his own autobiography he discusses the dress of women and says:

> If [a woman] seems to want sex but does not, a man who tries to grab it from her cannot be excused but she must share the blame (Pickles (1992) 138).

Sadly such pronouncements were also uttered on the bench and he appeared to ignore sentencing precedents passing sentences that were frequently anomalous and led to him being criticized in the Court of Appeal, most notably in *R v Scott* [1990] Crim LR 440. Judge Pickles reacted to these developments by discussing matters with the press and, rather famously, provided an interview on television where he referred to the Lord Chief Justice as 'an ancient dinosaur living in the wrong age' (Pickles (1992) 180). Lord Hailsham declined to dismiss him because he felt it was unfair that he acted as prosecutor, judge, jury and executioner (Hailsham (1990) 430). Later when Lord MacKay informed Judge Pickles that he was contemplating dismissing him, Pickles used this argument as a defence to the charges (Pickles (1992) 185–195). In the end, the position led to a public letter of rebuke by the Lord Chancellor and Pickles eventually retired.

Although Pickles was not dismissed the case does demonstrate that there is a significant difference between the way in which inferior and superior judges can be dismissed. One circuit judge has publicly suggested that it is inappropriate for the distinction to remain, not least because circuit judges spend a not inconsiderable period of their time doing High Court work (Wilson (1994) 1454).[23] The reception to the call has not been unanimous with Lord Bingham suggesting that the risk of inappropriate dismissal is theoretical and with little practical consequence (Bingham (2000) 59).

QUESTION FOR REFLECTION

It has been suggested by Wilson that judges of all ranks should receive the same security of tenure. Is there any justification for allowing more junior judges to be dismissed by the executive, even where it is supported by the senior judiciary? If not, how does one deal with a problem like Judge Pickles? Had His Honour actually been Pickles J could either the judiciary or executive have done anything about him?

23. Some work can be released to a circuit judge and in other cases a circuit judge can sit as a high court judge (s 9 SCA 1981) and whilst doing so he has all the powers of a puisne judge.

Promotion for the circuit bench has traditionally been extremely limited. It has already been noted that some may be eligible to become a senior circuit judge through the assumption of administrative responsibility for which they are remunerated for, but access to the senior judiciary is normally denied to them. Some circuit judges are appointed to the High Court bench but as has been noted already this is quite rare. Given the statutory qualification for a puisne judge is appointment as a circuit judge (s 10(3)(c) SCA 1981)) it may mean that with a fully open and independent appointments commission that there could be more progression.

Extending disciplinary measures

Judge Pickles, in his autobiography, states:

> It is absurd that the Lord Chancellor has no effective control except the power to remove circuit (not High Court) judges for 'misbehaviour' . . . (Pickles (1992) 196).

This, of course, misses the point that the presiding judge and Lord Chief Justice had the power to make directions restricting the types of cases a judge could hear (used against Pickles) but there is some truth to this point, that the only disciplinary measure was dismissal. The CRA 2005 provides a solution to this although the power now rests with the Lord Chief Justice as head of judiciary. The provisions do not differentiate between inferior and superior judges and empower the Lord Chief Justice, after following due process, to issue 'formal advice, a formal warning or reprimand' (s 108(4) CRA 2005). It is not clear what the effects of such measures are but, presumably, they could be used in conjunction with directions to ensure that judges are limited to the types of work that they carry out if this is appropriate.

The Act also gives the Lord Chief Justice the power to suspend someone from being a judge where a judge is subject to criminal proceedings, serving a sentence or where the action that led to the criminal proceedings taken place is being used to begin dismissal proceedings (s 108(4)). The Lord Chief Justice may also suspend someone who has been convicted of an offence but where it has been decided not to dismiss the person if the LCJ believes it is necessary to do so in order to maintain the confidence of the judiciary (s 108(5)) or where a judge is being investigated for misbehaviour other than a criminal offence (s 108(6), (7)).

6.5.2.4 Judicial immunity

In the next chapter it will be noted that advocates have lost their immunity for negligence but the judiciary have traditionally been immune from actions arising out of their judicial actions. Immunity apparently dates back to the seventeenth century and acts as a privilege to any words that a judge utters within a case (Pannick (1987) 95). However there continues to be a distinction between inferior and superior judges in that the latter have immunity from all actions even when acting outside their jurisdiction so long as the words or actions were done in good faith whereas an inferior judge's immunity is restricted to actions within their jurisdiction.

The argument advanced for judicial immunity is that it protects judges from vexatious litigants and an attempt to try and re-litigate each matter, and it has been suggested that in order for the immunity system to work properly the privilege must be absolute: including acts where a judge acts negligently or inappropriately (Pannick (1987) 98). The same reasons were advanced in support of the immunity of advocates (see 7.6.1 below) and

yet this has been ended so why should judges continue to have absolute immunity? At least one commentator believes they should not and that it would not contravene the independence of the judiciary to allow judges to be sued for misconduct in their office (Pannick (1987) 99). However it seems unlikely that the judges themselves would ever end their own immunity (through the appellate courts so ruling), nor is it likely that Parliament would do so either, indeed s 9 of the HRA 1998 expressly preserves judicial immunity.

6.6 Judicial ethics

Sir Thomas Bingham (as he then was) wrote extra-judicially:

> Judicial ethics . . . appears to have been largely neglected in this country in recent years (Bingham (1995) 35).

This is a fair comment but indeed the position is arguably replicated by the whole legal profession, which barely touches upon ethics from education through to practice (see, for example, Boon and Levin (1999) 142). Yet ethics are an essential part of the administration of justice and although a significant amount of attention is placed on the ethics of the legal profession (see *** X-REF ***) and as Lord Bingham implies, this applies equally to judges.

The ethics of judicial office are arguably based on the judicial office which requires the judge to try cases 'without fear or favour, affection or ill-will'. Certain aspects of this will be discussed elsewhere in this book, most notably in relation to the conduct of judges within a trial (*** X-REF ***) but the issue that should be discussed here is the idea implicit within the oath, that a judge should not be biased or compromised.

6.6.1 Financial issues

If judges are to try cases 'without fear or favour . . . ' then their financial interests may well become relevant. It has been noted above that their salary tends to be less than that which they received in practice and accordingly it is likely that they may be in possession of various investments. It is clear, however, that judges must ensure that their investments do not conflict with their role as a judge. It has been suggested that whilst a judge could, theoretically, be a 'name' for Lloyds of London,[24] if they sat in the Commercial Court (which principally deals with high-value commercial transactions such as insurance claims) then they would ordinarily relinquish this (Bingham (1995) 41) to save an appearance of bias (see below). Many Lords Justice of Appeal will similarly relinquish their status since the Court of Appeal (Civil Division) will not infrequently deal with such matters.

Judges, especially members of the senior judiciary, are frequently asked to undertake extra-judicial work. What should the position be in terms of remunerating such work? If, for example, a judge is asked to provide an after-dinner speech, can he ask for money?

24. Lloyds of London is one of the principal insurance markets in the world. It is not an insurance company but rather facilitates its members (known as 'names') to underwrite insurance policies. If nothing happens then the 'names' can achieve significant gains; if there are many disasters they can lose a lot of money. In the early 1990s there was considerable controversy when a number of 'names' faced bankruptcy as a result of many natural disasters.

The rules are not set down but it is implicit within the judicial oath and office that a judge will not bring the office of judge into disrepute. Commanding significant fees for outside work would almost certainly do so. It has been suggested:

> it would [not] be generally regarded as improper for a judge to accept a modest honorarium for a lecture or address which he had given, although most would perhaps decline or ask that the sum be paid to charity: a gift of wine or a book a judge might, properly in my view, accept, but the identity of the donor and the value of the gift would plainly affect his decision (Bingham (1995) 41).

Most members of the judiciary would probably agree with this statement and from the occasions when I have organized a judge to speak at functions this does appear to be the rule, with judges simply accepting the offer of a dinner and specifically rejecting any suggestion of an honorarium.

6.6.2 Politics

By convention judges must be apolitical and the Lords of Appeal in Ordinary and other senior members of the judiciary when appointed to the House of Lords will sit on the cross-benches of the House of Lords, ie they are 'independent' members. Whilst there was a number of judges who were appointed from the ranks of Members of Parliament (Griffith (1997) 16) this 'tradition' appears to have happily faded out in recent years and the establishment of the independent Judicial Appointments Commission should prevent any appearance of political parity. A judge should not become involved in any party political issue once appointed and should ordinarily resign from any political party they may belong to.

Retired Judges

Whilst there is no rule to suggest that retired judges cannot become political it appears customary for retired Law Lords to sit on the cross-benches whereas retired Lord Chancellors (as political appointees) will ordinarily continue to sit with their party. It appears the same rule applies to retired judges who succeed to peerages. A good example of this is Baroness Butler-Sloss who was elevated to a life peerage in 2006 after retiring in 2005 from her position as President of the Family Division. Baroness Butler-Sloss sits on the cross-benches.

6.6.3 Appearance of bias

Perhaps the most important aspect of judicial ethics is in respect of bias or, perhaps more correctly, the appearance of bias (as it is difficult to know whether a judge has truly been biased: see *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 472). The issue of bias is undoubtedly central to the judicial oath and it is also one of the areas where there has, in recent years, been considerable debate.

It has been suggested that bias can be divided into two forms: automatic disqualification and disqualification for apprehended bias (Olowofoyeku (2000) 456). Automatic disqualification will normally follow when a judge has an interest in the case that creates a situation where the judge appears to be sitting in his own cause. Apprehended bias

exists where there is some other reason to believe that there is a 'real danger' that the judge will not consider the matter independently.

6.6.3.1 Automatic disqualification

A judge should never judge his own cause, in other words if the judge has an interest in a case then he should not sit as judge. In *Locabail* it was held that a *de minimis* principle existed within this rule meaning that minor or inconsequential interests could be ignored (p 473).

Example Rental Income

The case of *Locabail* was actually a series of conjoined appeals and one of the appeals was known as *R v Bristol Betting and Gaming Licensing Committee, ex p O'Callaghan*. The facts of this case are not strictly relevant and can be summarized as the appellant had attempted to judicially review the Committee's decision to grant an extended gaming licence to a branch of *Corals*, a national bookmakers' firm. The judge in the case was Mr Justice Dyson. It transpired that the family of Dyson J owned a property investment company and that some of their property was rented to branches of *Corals*. The actual amount disputed was calculated at £5,000 and the Court of Appeal dismissed the suggestion that if a national company the size of *Corals* was ordered to pay £5,000 it might jeopardize its ability to pay rent on one of its shops – in effect the only interest that Dyson J could have had. This was clearly within the *de minimis* principle and the appeal was dismissed (see pp 498–500).

Precisely what is significant would depend on each individual case but the benchmark is ensuring that the law is not brought into disrepute. *De minimis*, when translated, means 'minimal things' and thus it is not 'small' or 'reasonable' but 'minimal', meaning, in effect, that anything not trivial would lead to automatic disqualification.

The concept of 'cause' had been restricted in effect to pecuniary or propriety interests (Jones (1999) 385) but this was to change in the most dramatic way.

Pinochet (No 2)

In the late 1990s significant controversy existed over the case of Senator Pinochet, the former dictator of Chile. Senator Pinochet had been visiting the United Kingdom for many years for treatment but he was considered a 'war criminal' by many and a Spanish judge had issued an extradition warrant for his arrest. As a result of bilateral EU extradition treaties, extradition had to be contemplated and a stipendiary magistrate issued two provisional arrest warrants, both of which were executed.

Senator Pinochet claimed diplomatic immunity and sought to judicially review the decisions claiming both warrants should be quashed. The Divisional Court held that both warrants should be quashed but stayed this until an appeal was heard by the House of Lords (the quashing order needed to be stayed otherwise Senator Pinochet could have left the country which would have rendered any appeal moot). Before the matter reached the House of Lords the campaigning group *Amnesty International* sought, and received, leave to intervene in the proceedings (meaning they could make representations as an 'interested party'). The House of Lords ruled by a majority of 3:2 that the appeal should be granted ([2001] 1 AC 61) and thus the arrest warrant was upheld.

However shortly after the hearing, Senator Pinochet's solicitors were contacted with the allegation that Lord Hoffman, one of the Law Lords who heard the case and who had voted with the majority, was a director of the charitable arm of Amnesty International. The legal team for Senator Pinochet petitioned the House of Lords to overturn the decision arguing that it was procedurally flawed since Lord Hoffman was party to the proceedings and therefore was automatically excluded from the case.

The House of Lords had never been asked to overturn one of its previous decisions in this way before, but held unanimously that it did have jurisdiction to do so (*R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex p Pinochet (No 2)* [2000] 1 AC 119). Further, the House held that the decision did have to be set aside because Lord Hoffman was automatically disqualified from sitting in judgment on the case because one of the parties to the case (albeit simply as an intervener) was Amnesty International. There was no suggestion that there was any financial or propriety interest in this case, Lord Hoffman was not paid for his role as director and chair of the charity but it was stated that he did have an interest. The organization Amnesty International is unincorporated but the activities of its headquarters are divided into two companies; the first is an ordinary limited company which deals with the non-charitable aims of the organization, and the second was the charitable company that Lord Hoffman chaired.

The charitable arm of Amnesty International had provided funding for a report into the activies of the Chilean government which had concluded that breaches of human rights had occurred and that nobody had ever been held to account for these. Whilst it was Amnesty International that intervened (and Lord Hoffman was not a member of Amnesty International) the House of Lords held that whilst it was not possible to say that Lord Hoffman was a party to the proceedings – in that Amnesty International and the charitable organization were theoretically separate entities – the charitable arm did have an interest in the outcome because its founding documents stated it was, inter alia, incorporated to 'procure the abolition of torture . . . .' (p 135). Given that it had an interest in the proceedings it then followed that Lord Hoffman, as one of its directors, also had an interest in the matter and so should have been automatically qualified.

The decision was unanimous and there were some concerns as to its effect. Lord Hutton had said that the links between Lord Hoffman and Amnesty International were 'so strong that public confidence in the integrity of the administration of justice would be shaken if his decision was allowed to stand' (p 146) which is a damning indictment of the position. Lord Irvine, the then Lord Chancellor, reportedly argued that it had undermined justice (Jones (1999) 398) and it was reported that some members of the judiciary believed Lord Hoffman should have resigned.

The decision of the House of Lords was largely welcomed but at least one commentator has noted that the decision has led to a 'growth industry' of lawyers attempting to find interests that debar a judge from sitting (Philips (2004) 113). The vast majority of these challenges are doomed to fail however since the House of Lords was quite clear as to why Lord Hoffman should have disclosed his interest. The facts of that case were unusual in that Amnesty International had intervened in the case: had the charity not intervened then the issue would not have arisen.

6.6.3.2 Apprehended bias

The other significant manner in which a judge can be asked to stand down is in respect of apprehended bias. This remains an ethical issue not least because it is apprehended

bias – ie there is some factor that makes people believe that there could be the appearance of bias rather than the fact that the judge is *actually* biased.

Precisely what would meet this criteria will differ according to different sets of facts but in *Locabail* the Court of Appeal was quite clear about what would *not* ordinarily give the appearance of bias, including 'religion, ethnic or national origin, gender, age, class means or sexual orientation' (p 480) and this has to be right. Perhaps more controversially they stated: 'the judge's social or educational or service or employment background or history . . . membership of sporting or charitable bodies' would not lead to the appearance of bias. This may, at first sight, appear to be surprising because it would be relatively easy to think of situations when these factors could lead to the suggestion of bias. But these comments must be put into context in that in the vast majority of times where they would be relevant it would not be through the appearance of bias but because of an automatic disqualification. If a judge had worked for a considerable period of time in a firm that was party to the proceedings then it is likely that this would be covered by automatic qualification and not appearance.

The test for disqualification under these circumstances is whether there is a 'real danger of bias' (p 475) and this should be considered through the eyes of the reasonable man (p 477). In essence this means questioning whether the average person would perceive the risk of bias. If they do then the judge should step down.

Case box *AWG Group Ltd v Morrison*

A good example of this test can be seen from the case of *AWG Group Ltd v Morrison* [2006] EWCA Civ 6. The judge assigned to the case was looking through the papers when he saw that he recognized one of the directors to be called as a witness. This was someone well known to him and the judge would not have wanted to preside over a case which necessitated him deciding whether the witness was telling the truth or not. The response of the respondents to this dilemma was to remove the director from the list of witnesses and replace him with another director.

The Court of Appeal held that this was not an appropriate response. If there was the appearance of bias then the judge was disqualified from trying the case; a discretionary case-management decision could not remedy this appearance of bias. The director the judge knew was involved in the case even if he was not (now) giving evidence and a reasonable person would perceive a real risk of bias in such a situation.

Solicitors

Where life becomes slightly more interesting is in respect of part-time judges. The rule as to automatic disqualification applies to all judges. Barristers are, as will be seen, technically self-employed and thus are, or should be, aware of those who they are currently acting for. It is irrelevant whether another barrister within a particular set is appearing before the judge because as self-employed persons they are not in partnership so the judge is not acting as one of the parties. In *Locabail* it was noted that the position for solicitors is different. A partner in a solicitor's firm is legally responsible for the professional acts of all other partners and employees (p 478). Accordingly it would, in the opinion of the Court of Appeal, be inappropriate for a part-time judge to sit on a case

where his firm has an interest. This will be relatively easy when the representative of one of the parties is the judge's firm but what about the position whereby the firm used to act for a party? The solution, according to the Court of Appeal, is for the solicitor who is sitting part-time as a member of the judiciary should, when invited to sit on a case, undertake a careful conflict check to ensure that the firm has never acted for either party in the past (p 479).

QUESTION FOR REFLECTION

The House of Lords were undoubtedly correct to state that apparent bias can undermine the integrity of the justice system but is it realistic to expect a solicitor to check all clients in order to decide whether they can sit on a case? To take an example, Allen & Overy are one of the largest legal firms to be based in the United Kingdom. They operate worldwide and have over 4,900 staff including in excess of 450 partners. How easy would it be for a solicitor to check that no work had been undertaken? Or should firms who allow their staff to sit as judges have sufficient systems in place to ensure that there can be no conflict of interest?

6.7 Restrictions on practice

Where a person is elevated to a full-time judicial position then they must cease to practice (s 75 CLSA 1990) something that is quite reasonable as it ensures that there is no conflict of interest. Is the decision to become a judge irrevocable however? Those who are elevated to the bench will normally consider it to be their last employment with the intention of serving until retirement. However this need not be the case and in 1970 a puisne judge, Mr Justice Fisher, decided to resign from the bench and work in the city instead. This decision was greeted by outrage (Pannick (1987) 7) as the expectation of the public was that judges would accept a judgeship and sit for the duration of their appointment.

Fisher J did not return to practice but is it possible? It has always been assumed that it is not possible (see Pannick (1987) 7) but very recently this assumption has been challenged by the resignation of a puisne judge (Laddie J) and the retirement of a circuit judge (HHJ Cook).[25] Both have indicated that they wish to be involved with practice, with HHJ Cook joining a solicitors' firm as a partner and Laddie J joining a senior solicitors' firm as a senior consultant. HHJ Cook was reported to have commented that whilst the Bar traditionally refused to allow a former judge to return to practice, the Law Society had no such ethic[26] which demonstrates an interesting division between the professions.

Should judges be permitted to return to practice? It is widely reported that the senior judiciary do not believe that it should be possible, with the suggestion that it undermines the appearance of judicial impartiality and, potentially, their independence. However one argument is that the previous rules have never been more than conventions (Pannick (2005)) and questions whether some practitioners may be more ready to join the bench

25. *The Times*, June 28 2005, Law Supplement.
26. 'Lord Chancellor Reviews Ban on Judges Returning to Practice Law', *The Times*, 23 June 2005.

if they believe it is possible to eventually return, but this misses the point that they could accept a part-time judicial appointment such as Recorder or Deputy High Court Judge.

Summary

This chapter has introduced the judiciary and the concept of the judicial office. It has also discussed the independence of the judiciary. In particular it has:

- Identified that there are different levels of judges, with the senior judiciary comprising the Lord Chief Justice and Heads of Division.
- Noted that the Lord Chief Justice is now the Head of the Judiciary.
- Noted that there are part-time members of the judiciary known either as District Judges, Recorders or Deputy High Court Judges depending on which court they sit in.
- Identified that superior judges (puisne judges and above) have unlimited authority whereas the inferior judiciary (circuit and district judges) are limited to the jurisdiction provided by statute.
- Discussed how the Constitutional Reform Act 2005 has amended the role of the judiciary.
- Considered how appointments to the judiciary are made and discussed how to make the judiciary more diverse.
- Noted that a fundamental constitutional principle is that judges are independent. Securing the independence of the judiciary is not easy and involves not only separation from the legislature and executive but also from each other and the media.
- Discussed the tenure of the judiciary and identified that inferior judges can be more readily dismissed than superior judges.

End of chapter questions

1. It has been seen in this chapter that there remains a significant difference between the superior judiciary and the inferior judiciary. In a modern legal system is there any need for such a distinction to remain?
2. Read Windlesham (2005). It can be seen from this reading that removing the Lord Chancellor from his judicial duties has necessitated a constitutional concordant between the executive and judiciary supplemented by a statutory duty to uphold judicial independence. Would it not have been better to simply leave the Lord Chancellor alone? If Lord Bingham, an ardent supporter of constitutional change, agrees that there was no real bias by the Lord Chancellor has this not just been change for change's sake rather than a significant shift in responsibilities?
3. The new independent appointments scheme could lead to an increase in the number of circuit judges being raised to the High Court bench. Is this desirable? Is there not a danger that this could undermine the circuit bench by making it a 'training ground'? Yet the circuit bench is important in its own right.

4. Read Pannick (2005) and compare and contrast Bingham (1995) pp 50–51. Given the importance of judicial independence (above) is there not a danger that by allowing judges to move between practice and the bench a judge may be influenced by an advocate appearing before him who he may wish to later apply for a job?

The Online Resource Centre also lists a series of shorter self-assessed questions that will help test your knowledge of the judiciary.

Further reading

Bingham T (2000) 'Judicial Independence' in *The Business of Judging* (Oxford: OUP).

This is an essay written by Lord Bingham who discusses the concept of judicial independence and places it in the context of the modern judiciary.

Masterman R (2005) 'Determinative in the Abstract? Article 6(1) and the Separation of Powers' 6 *European Human Rights Law Review* 628–648.

This article discusses the doctrine of the separation of powers and considers how the ECHR impacts upon it.

Stevens R (2002) *The English Judges: Their Role in The Changing Constitution* (Oxford: Hart Publishing) 129–136.

Wilson H (1994) 'The County Court Judge in Limbo' 144 *New Law Journal* 1453.

This article discusses the different ways that superior and inferior judges can be dismissed and questions whether this means that the independence of inferior judges is not secured.

You should also familiarize yourself with the consultation papers on the *Supreme Court* and the *Judicial Appointments Commission*.

For multiple choice questions, updates to this chapter and links to useful web sites, please visit the **online resource centre** at

www.oxfordtextbooks.co.uk/orc/gilespie_els/