

## JUDICIAL RE-ORGANISATION IN ENGLAND AND WALES (II): CONSTITUTIONAL CHANGE ENACTED

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### SUMMARY

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### ABSTRACT

This article follows and supplements an earlier article (Volume 8 of this Review, p. 289) to take account of the passage into law in the U.K. of the Constitutional Reform Act 2005. It deals with a number of aspects of the new law, including the Lord Chancellor, the Supreme Court, Judicial Selection and Judicial Discipline. It concludes with a short expression of the author's personal view of the reform.

*Key words:* United Kingdom, Judicial Reorganisation, Constitutional Reform, Legislation of 2005.

### RESUMEN

Este artículo continúa y desarrolla otro anterior (número 8 de esta Revista, p. 289), con objeto de tratar la Ley de Reforma Constitucional de 2005 en el Reino Unido. Se consideran diversos aspectos de la misma, entre los que se incluye la figura del Lord

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Canciller, el Tribunal Supremo, el proceso de Selección de los Jueces y la regulación de la Disciplina Judicial. Concluye con una breve reflexión sobre dicha reforma desde la perspectiva personal del autor.

*Palabras clave:* Reino Unido, Reorganización Judicial, Reforma Constitucional, Legislación de 2005.

The timing of my previous article on the subject of Judicial Reorganisation in England and Wales<sup>1</sup> required that the narrative of events came to an end with the appointment of a Select Committee of the House of Lords and, as announced on 21 May 2004, a scrutiny by the Select Committee of the House of Commons of the proposed legislation on the Supreme Court. The Bill<sup>2</sup> has now completed its passage through Parliament and has received the Royal Assent. It became law on 24 March 2005, but it will be some considerable time before all of its provisions are brought into force and given effect. Nevertheless, it is hoped that a brief account of the salient features of the Act will be of interest to the readers of the *Anuario*<sup>3</sup>.

## 1. THE LORD CHANCELLOR

It was predicted in the previous article that the determination of the Government to abolish the ancient office of Lord Chancellor would lead to its ultimate disappearance<sup>4</sup>. This prediction was mistaken; the title and the office survive, but the new Lord Chancellor will be very different from his predecessors. In the first place, he will not be Head of the Judiciary, and will not sit in any judicial capacity: he will not be a judge<sup>5</sup>; he is replaced as head of the judiciary by the Lord Chief Justice. Secondly, though only after a disagreement between the two Houses of Parliament on which the House of Lords ultimately yielded, the Lord Chancellor need no longer be a member of the House of Lords, and need no longer have any legal qualification. On the contrary, a person may be recommended for appointment by the Queen provided only that the Prime Minister considers him or her to be «qualified by experience»<sup>6</sup>. «Experience» means experience as a

<sup>1</sup> (2004) 8 *Anuario Iberoamericano de Justicia Constitucional* 289.

<sup>2</sup> Prior to its final enactment, proposed legislation is known as a «Bill». On enactment it becomes an «Act». A Bill is subdivided into «clauses», an Act into «sections».

<sup>3</sup> In what follows, unattributed references to pages and notes are references to the article mentioned to above; unattributed references to «sections» and «schedules» are references to the Constitutional Reform Act 2005.

<sup>4</sup> P. 297.

<sup>5</sup> The office of Lord Chancellor ceases to be a «high judicial office»: section 60(2)(a).

<sup>6</sup> Section 2.

Minister, as a Member of Parliament, as a legal practitioner, as a teacher of law in a University or «other experience that the Prime Minister considers relevant»<sup>7</sup>. It remains to be seen, once the Act is in force, whether the office of Lord Chancellor will be held by a person who holds simultaneously another ministry — as it has been since the reform process began<sup>8</sup> — or whether it comes to be, as it was before, a full time appointment.

The Act begins with a statement confirming the «constitutional» principle of the rule of law and the Lord Chancellor's «constitutional» role in relation to that principle. In addition, the independence of the judiciary is formally upheld by a section, which is similar in form to that contained in the Bill<sup>9</sup>, save that the duty is imposed on the Lord Chancellor himself as well as on other Ministers. It is also the duty of the Lord Chancellor to have regard to the need to defend the independence of the judiciary and to the need for the judiciary to have the support necessary to enable judges to exercise their functions. He must also have regard to the need for the public interest in matters relating to the judiciary and the administration of justice to be properly represented in decisions affecting them. These duties seem to be no more legally enforceable than those contained in the Bill<sup>10</sup>.

Under the Bill, the «Minister» was to play a major part in the process of selection of judges<sup>11</sup>. Now that the office of Lord Chancellor is to survive, that part has been assigned to the Lord Chancellor, and the original position whereby most judges are appointed by the Queen on the recommendation of the Lord Chancellor is retained<sup>12</sup>. The need to amend the mass of earlier legislation that confers specific non-judicial duties on the Lord Chancellor has of course disappeared: the duties continue to be his.

## 2. THE SUPREME COURT OF THE UNITED KINGDOM<sup>13</sup>

It will be recalled that one of the existing obstacles to the abolition of the appellate jurisdiction of the House of Lords (exercised through the

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<sup>7</sup> Section 2(2). In effect, the Prime Minister may appoint whomsoever he chooses. If the person appointed is not a member of either House of Parliament at the time of appointment, it seems likely that he would be granted a peerage and so become a member of the House of Lords. It would be more difficult to secure his election to the House of Commons

<sup>8</sup> See p. 295.

<sup>9</sup> Section 3; pp. 295-6

<sup>10</sup> Pp.295-296.

<sup>11</sup> Pp.302-303

<sup>12</sup> Supreme Court Justices are appointed by the Queen on the recommendation of the Prime Minister. See post, text at n. 25.

<sup>13</sup> Pp. 297-302

Appellate Committee) and the creation of a Supreme Court is the present unavailability of suitable accommodation for that Court<sup>14</sup>. Part 3 of the Act provides for the creation of the Supreme Court<sup>15</sup>, but the Act also provides that that Part will not come into effect until such time as the Lord Chancellor, after consulting the Lords of Appeal in Ordinary in office at the time<sup>16</sup>, is satisfied that the Supreme Court will be provided with accommodation appropriate for the purposes of the Court, in accordance with plans that he has approved<sup>17</sup>. For the time being, therefore, the House of Lords will continue to be the final Court of Appeal for the United Kingdom.

#### A) Appointments to the Court

As appeared to be likely at an earlier stage, the obligation of the Commission to submit a list of two to five names has been removed<sup>18</sup>. The Supreme Court Selection Commission, as it is now known, is required to select one name only<sup>19</sup>. This is a welcome change, and one that is necessarily accompanied by the adoption for the Commission of a procedure similar to that used for judicial selection generally<sup>20</sup>. The membership of the Supreme Court Selection Commission remains much as it was under the Bill<sup>21</sup>, save that the appointment of its members is for the Lord Chancellor, not the «Minister», and that, of the members appointed from the English, Scottish and Northern Ireland Judicial Appointments Commissions, one at least must be a person who has no legal qualification. No one can be nominated to the Commission under this head unless he has been recommended to the Lord Chancellor by the Commission to which he belongs<sup>22</sup>.

The Act specifies the formal qualifications that a person must possess to be appointed to the Court<sup>23</sup>, and lays down that the judges are appointed

<sup>14</sup> Pp. 297-298

<sup>15</sup> Sections 23-60.

<sup>16</sup> The Lords of Appeal will become the first judges of the Supreme Court: section 24; p. 299.

<sup>17</sup> Section 148(4) (5). «A location has now been selected and the new Supreme Court is expected to begin its functions in 2008».

<sup>18</sup> P. 300, n. 29.

<sup>19</sup> Section 27 (10).

<sup>20</sup> P. 303 and post, text at n. 29

<sup>21</sup> P. 299. See Schedule 8.

<sup>22</sup> Schedule 8, para. 6 (3), (4)

<sup>23</sup> Section 25. A person must have held high judicial office for at least two years or have practised before the higher courts for at least 15 years.

by the Queen<sup>24</sup> on the recommendation of the Prime Minister. To preserve the integrity of the statutory procedures of selection, however, the Prime Minister has no choice: he must recommend the person whose name has been notified to him by the Lord Chancellor at the end of the selection process<sup>25</sup>. The Act also requires the Selection Commission to have regard to any guidance from the Lord Chancellor as to matters to be taken into account; to make their selection on merit; and in making their selection, to ensure that between them the judges of the court will have knowledge of, and experience of practice in, the law of each part of the United Kingdom<sup>26</sup>.

Before proceeding to a selection, the Commission must consult a number of people, mainly senior judges, but also the Lord Chancellor and certain high representatives of Government in Scotland, Wales and Northern Ireland<sup>27</sup>. Finally, having made a selection, it reports to the Lord Chancellor, who must then himself consult the people already consulted by the Commission (other than himself)<sup>28</sup>.

Following that consultation, the Lord Chancellor has three possible courses of action. He may accept the selection made, and notify the Prime Minister at once<sup>29</sup>, he may reject the selection or he may call for a reconsideration by the Commission. The Lord Chancellor has similar options in relation to a second selection by the Commission, but he must accept a third selection made by the Commission and notify the Prime Minister of it. The Commission may not select a person already rejected by the Lord Chancellor, but the grounds on which the Lord Chancellor may reject a selection or require a reconsideration are circumscribed and must be given in writing to the Commission. He may only reject a selection if, in his opinion the person selected is not «suitable» for the office for which he has been selected; he may only require a reconsideration if there is in his opinion not enough evidence that the person selected is suitable for appointment, if there is evidence that that person is not the best candidate on merit or if there is not enough evidence that if the person were appointed, the judges of the Court would not between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom<sup>30</sup>.

The judges appointed by the process just described are known as «Justices of the Supreme Court». They are the permanent judges of the court,

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<sup>24</sup> Section 23 (2).

<sup>25</sup> Section 26 (2) (3).

<sup>26</sup> Section 27.

<sup>27</sup> Section 27 (2), (3).

<sup>28</sup> Section 28(5).

<sup>29</sup> Ante, text at n. 25.

<sup>30</sup> Section 30: see post, text at n.37

and it is required that permanent judges shall constitute a majority of the judges sitting on any given occasion<sup>31</sup>. Certain other judges may, however, be requested by the President of the Supreme Court to sit as «acting judges»<sup>32</sup>. He may request a person who holds office as a «senior territorial judge», that is, who is a judge of the English Court of Appeal or its equivalent in another part of the United Kingdom, or who is a member of the «supplementary panel». This consists mainly of former Supreme Court judges and former senior territorial judges. To qualify as a member, the person concerned must be under the age of 75 and not more than five years must have passed since he left office<sup>33</sup>.

#### B) Devolution Issues<sup>34</sup>

The Act makes it clear that a decision of the Supreme Court on appeal from a court in any part of the United Kingdom is to be regarded as a decision of a court of that part of the country. The distinctions between the separate legal systems of the different parts of the country survive unchanged<sup>35</sup>. Devolution issues relate to the entire United Kingdom, however, and the Act confirms that, once it comes into force, those issues will be dealt with, on final appeal, by the Supreme Court — no longer the Judicial Committee of the Privy Council<sup>36</sup>. There is here little if any change from the form of the Bill, and the only comment necessary is that the two provisions referred to above that are designed to secure that the judges of the Supreme Court between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom and the power of the President to bring in acting judges should compensate for the loss of the varied expertise of the members of the Judicial Committee of the Privy Council<sup>37</sup>.

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<sup>31</sup> The Court must always sit with an odd number of judges, which may not be less than three: section 42.

<sup>32</sup> Section 38.

<sup>33</sup> Section 39. Under modern legislation, no one may act as a judge after reaching the age of 75: Judicial Pensions and Retirement Act 1993, section 26.

<sup>34</sup> See pp. 300-302.

<sup>35</sup> Section 41.

<sup>36</sup> Section 40(4)(b) and Schedule 9; p.301

<sup>37</sup> The Supreme Court may also invoke the assistance of one or more specially qualified advisers: section 44.

### 3. JUDICIAL SELECTION: ENGLAND AND WALES<sup>38</sup>

The basic system for judicial selection as set out in the Bill is retained, but there have been some important modifications, in addition, of course, to the replacement of the «Minister» by the Lord Chancellor. Three examples can be mentioned here:

1. Special provisions are made for the constitution of the panels to be used for the selection of the higher judiciary<sup>39</sup>. For the appointment of the Lord Chief Justice or of the Head of a Division of the Senior Courts of England and Wales<sup>40</sup>, the first member of the panel must be the most senior England and Wales judge of the Supreme Court, and the second must be the Lord Chief Justice; for the appointment of a Lord Justice of Appeal<sup>41</sup> the first member must be the Lord Chief Justice, and the second a Lord Justice of Appeal or Head of Division designated by the Lord Chief Justice.

2. In performing its functions, the Commission must take account of the need to encourage diversity in the range of persons available for selection. This requirement is subject, however, to the provision that selection must be solely on merit<sup>42</sup>.

3. Like the Bill, the Act allows the Lord Chancellor to issue guidance for the performance of its duties by the Commission, but there is a most important difference. Not only must the Lord Chancellor consult the Lord Chief Justice, but he must also lay a draft of his proposed guidance before each House of Parliament; the guidance may be issued only if there is Parliamentary approval<sup>43</sup>. This ensures Parliamentary control over such guidance, and, most importantly, it also ensures that any guidance is made public.

### 4. COMPLAINTS<sup>44</sup>

The Act envisages that a disappointed applicant for judicial office, or even a person who has actually been selected or appointed, may have cause

<sup>38</sup> Pp. 302-304

<sup>39</sup> Section 71.

<sup>40</sup> What is now the Supreme Court of England and Wales (the High Court and the Court of Appeal) is so renamed: section 59 (1).

<sup>41</sup> This is the title of a judge of the Court of Appeal of England and Wales.

<sup>42</sup> Sections 63 and 64. The word «solely» does not appear in the corresponding provision for the selection of judges of the Supreme Court (section 27(5)) but it is not thought that that this distinction is significant.

<sup>43</sup> Sections 65, 66.

<sup>44</sup> This and the following Section were omitted from the earlier article. The opportunity is now taken to mention their contents briefly although similar provisions existed in the Bill.

to complain that he was adversely affected by maladministration on the part of the Commission or the Lord Chancellor. If a complaint is made, the Commission or the Lord Chancellor, as the case may be, must then make arrangements for investigating the complaint and must notify the decision to the complainant<sup>45</sup>. A dissatisfied complainant may then complain further to the «Ombudsman»<sup>46</sup>. The Ombudsman is, in effect, entitled to decide for himself what complaints he will investigate, since he need take no action other than that of informing the complainant if he considers that the complaint does not call for investigation<sup>47</sup>, but if he does investigate he must first prepare a draft report, stating whether, in his view, the complaint should be upheld and giving his recommendations; these may include the payment of compensation, but any such payment must relate to a loss resulting from maladministration and not from a failure to appoint the complainant to an office to which the complaint related. The draft report is then sent to the Lord Chancellor and, if the original complaint was to the Commission, also to that body. In preparing his final report, the Ombudsman must have regard to any proposals for change to the draft report made by the Commission or the Lord Chancellor, and must include a statement of such proposals as he decides to disregard<sup>48</sup>.

#### A) The Ombudsman

The word «Ombudsman» is Scandinavian in origin, and the institution was first adopted by English law in 1967 following the lines of the Danish model<sup>49</sup>. Since then the device of the Ombudsman has been introduced to a variety of situations, of which the present is the latest. The general idea is that the Ombudsman may receive and investigate complaints of maladministration, sometimes only those made by a limited class of persons<sup>50</sup>. He is given extensive powers of investigation, but cannot himself alter or annul an official decision; he can only report, and in many cases publish his report<sup>51</sup>.

<sup>45</sup> Sections 99, 100. A complaint made more than 28 days after the matter complained of may, but need not, be investigated.

<sup>46</sup> For the Ombudsman see post A).

<sup>47</sup> Section 101(2).

<sup>48</sup> Sections 101, 102, 103.

<sup>49</sup> Parliamentary Commissioner Act 1967

<sup>50</sup> The original English Ombudsman — the Parliamentary Commissioner for Administration — could only entertain complaints from Members of Parliament, commonly acting in the interests of their constituents

<sup>51</sup> In the present case, the complainant receives a copy of the report, but that copy must contain no information relating to an identifiable individual other than the complainant. Note that the Lord Chancellor may refer a matter relating to the procedures of the Commission for investigation and report: section 104



It is obvious from what has been said that a complaint to the Ombudsman is not and is not intended to be a form of appeal from an adverse decision. It is concerned only with maladministration. Indeed, the Act makes elaborate provision to ensure that the Ombudsman — who is appointed by the Queen on the recommendation of the Lord Chancellor — shall have had no experience in a judicial capacity or in legal practice<sup>52</sup>.

## 5. JUDICIAL DISCIPLINE<sup>53</sup>

The judges of the higher courts are irremovable save on what is called an «Address» by both Houses of Parliament to the Queen. This system was introduced by the Act of Settlement of 1700, after a period of constitutional controversy, to give the judges independence from the Executive. Since then only one judge — a judge of the Irish courts — has ever been removed under it, and that was in 1830. Judges of the lower courts, on the other hand, are less well protected by the law. In most cases they can be removed by the Lord Chancellor for incapacity or misbehaviour. Such removals are extremely rare, but, to take one example, in 1983 a judge was removed for misbehaviour: he had been convicted of smuggling whisky and cigarettes into the country.

The Act makes a number of provisions in connection with the discipline of judges, but they remain to be completed by the making of procedural rules. So, for example, the existing power of the Lord Chancellor to remove a lower court judge from office is made subject to his compliance with «prescribed procedures». Regulations for these procedures are to be made («prescribed») by the Lord Chief Justice with the agreement of the Lord Chancellor<sup>54</sup>. At the time of writing no regulations had been made, but they now exist<sup>54a</sup>.

No new disciplinary powers are conferred on the Lord Chancellor, but, subject to the agreement of the Lord Chancellor and after complying with «prescribed procedures», the Lord Chief Justice may impose any of a number of sanctions on judges. He may formally advise, warn or reprimand a judge; he may suspend from office any judge who is subject to criminal proceedings or who is serving a sentence imposed by a criminal court; in the case of a judge of the higher courts, he may also suspend that judge from office while he is subject to proceedings for an Address<sup>55</sup>.

<sup>52</sup> Schedule 13, para. 1 (2). A member of the civil service is also disqualified from appointment: *ibid.*

<sup>53</sup> Sections 108-110.

<sup>54</sup> Sections 115-117.

<sup>54a</sup> See now Judicial Discipline (Prescribed Procedures) Regulations 2006 (S.I. No. 676).

<sup>55</sup> This list is not exhaustive. See section 108. While a judge is suspended he cannot perform the functions of his office, but his other rights are unaffected

It has always been possible for the Lord Chancellor or the Lord Chief Justice to speak informally to a judge by way of advice, warning or even reprimand, and this remains the case, but the introduction of formalised procedures is probably intended to replace — for the more serious cases — the old, informal, disciplinary procedures, with procedures that are more transparent and in accord with modern ideas.

The introduction of the power to suspend a judge is new and may be controversial even though suspension is only possible after it has been decided, first, that the judge should not actually be removed from office and, secondly, that, even so, suspension is necessary for maintaining confidence in the judiciary<sup>56</sup>. In the case of judges of the lower courts who can be removed by the Lord Chancellor, it seems likely that only a judge who has been charged with a serious criminal offence but not yet convicted could be considered for suspension, but the position of judges of the higher courts presents a problem, since they can only be removed by an Address to the Queen by both Houses of Parliament — a procedure which is both complex and slow, if it ever happens. Is there not here a potential challenge to the independence of the judiciary? Fortunately, at the present time, the question is more theoretical rather than practical.

A more serious question arises from the fact that the Lord Chief Justice can only act with the agreement of the Lord Chancellor. The Bill provided that the Lord Chief Justice could only act with the agreement of the «Minister», and in that form it rightly came under criticism in Parliament. It was argued that there should be no involvement of the Executive in matters of judicial discipline. Had the office of Lord Chancellor retained its earlier characteristics, there might have been no difficulty but is the new-style Lord Chancellor even though not a judge and not even necessarily a lawyer, still primarily the most senior officer and guardian of the law, or is he rather a Government Minister like any other, who happens to have duties relating to the law and its administration? If the latter is correct, his involvement in judicial discipline is as inappropriate as the «Minister's» was considered to be. Only time will tell<sup>57</sup>.

#### A) The Ombudsman

If a judge is subjected to one of the disciplinary measures provided by the Act, he may apply to the Ombudsman for a review of the exercise of the disciplinary power for possible maladministration, including failure to observe the «prescribed procedures». An application may also be made to

<sup>56</sup> Section 108 (4) (5). It is likely that a judge who learns that his suspension is under consideration will resign.

<sup>57</sup> Ante, text at n.8.

the Ombudsman by a person who has made a complaint to the Lord Chancellor or the Lord Chief Justice about the conduct of a judge. In addition the Ombudsman must investigate any matter referred to him by the Lord Chancellor or Lord Chief Justice that relates to a disciplinary function.

The powers and duties of the Ombudsman are broadly similar to those he has in relation to a complaint<sup>58</sup>. In particular, he must submit a draft of his report to the Lord Chancellor and the Lord Chief Justice, and if either proposes a change he must consider whether to incorporate it in his final report; if he decides not to do so, he must set out the proposed change in his report.

## 6. CONCLUDING OBSERVATIONS

The reader who is tempted to study the Constitutional Reform Act 2005 in the hope of obtaining more complete information about the changes that are to come than can be given here, must be warned against any expectation that the text of the Act provides a clear and comprehensible account of the way things will be once the Act is in force. Its drafting is complex and shows signs of haste. It has numerous cross-references from one part to another. It has 18 Schedules to which frequent references are also made. It makes use of a variety of expressions to which special meanings are given by statutory definition. Most of the detailed changes to the existing law are effected by amendments to innumerable other Acts of Parliament and these changes can be understood only if reference is made simultaneously to those Acts.

So far as the substance of the Act is concerned, opinion on its overall merits is likely to remain divided between those who value tradition and who believe in the American adage, «if it ain't broke, don't fix it», on the one hand, and, on the other hand, the modernisers who dislike even harmless historical anomalies and want everything to be transparent and so, in their view, more «democratic».

To a substantial extent, the modernisers have had their way. Once the Act is in force, no one will be able to believe that judges can be members of the legislature; no one will be able to doubt that the Lord Chancellor is a minister, not a judge. There will no longer be secrecy about the way judges are selected, but independent statutory selection committees will nominate judges for appointment; their decisions, though capable of being questioned and perhaps influenced by the Lord Chancellor, must ultimately prevail. Even the fundamental principles of the rule of law and the independence of the judiciary are now enshrined in written law, which is a novelty for a country that has no written constitution.

<sup>58</sup> Ante, text after n. 48.

## A) A personal view

It has already been indicated that the author of these lines is not a moderniser so far as the subject matter of the Constitutional Reform Act 2005 is concerned<sup>59</sup>. The reader must be aware, therefore that the following few remarks represent no more than his own opinion, though he believes that a number of other persons are in general agreement with his sentiments.

a) *The Supreme Court*

Much of the Act — especially the removal of the appellate jurisdiction of the House of Lords and the creation of the Supreme Court of the United Kingdom — is motivated by a felt need to remove any possible residual misunderstanding that might arise from the fact that the most senior judges are technically members of the House of Lords: there has been no suggestion that the Appellate Committee of the House of Lords as it now is has failed to behave as should a fully independent court of final appeal. It is, perhaps, permissible to wonder whether any of those members of the general public who are even aware that the final court of appeal is formally connected to the legislature is troubled by any misunderstanding they may have and whether the disturbance and great expense involved in the change are worthwhile. The advantage that the Supreme Court instead of the Judicial Committee of the Privy Council will have jurisdiction in devolution cases is more a by-product than an important objective of the change.

b) *The Lord Chancellor*

A similar purpose of avoiding misunderstanding lies behind the removal of the Lord Chancellor's membership of the judiciary, but this paradoxically leads to an enhancement instead of a reduction in the ambiguity of his role. He no longer holds judicial office, but is he just a minister like any other and therefore entitled to have party political considerations in mind in all that he does, including his part in the appointment of judges? It is true that he has special duties in relation to the independence of the judiciary, but does that answer the question? The problem is compounded by the facts that a person having no prior involvement with or experience of the law or its practice may be appointed Lord Chancellor and that the

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<sup>59</sup> P. 304.

Prime Minister is apparently free to appoint a person to hold both the office of Lord Chancellor and that of Minister responsible for another Department of State at the same time.

c) *Judicial Selection*

The existing relatively informal system for the selection of judges has itself been the subject of sustained criticism, and some changes have already been introduced<sup>60</sup>. On the other hand there has been no significant criticism of the calibre of the persons appointed to the Bench. The criticism has been directed mainly to the lack of «transparency» in the existing system and to the lack of diversity of background of the persons appointed<sup>61</sup>.

The writer finds neither of these arguments particularly convincing<sup>62</sup>. On the other hand, the informal and secretive system of the past depended for its effectiveness substantially upon the fact that the judiciary and the Bar, from the senior ranks of which, alone, judges could be selected, were both small, so that the Lord Chancellor's consultation process could be effective: he could easily obtain the opinion of other judges on the quality of the senior barristers who appeared before them. Today, the size of the judiciary in England and Wales remains surprisingly small when compared with that in most other countries, but it is much greater than it was, say, 30 years ago. So also is the size of the Bar. What is more, members of the other, much larger, branch of the legal profession — the solicitors — have become eligible for appointment to the higher judiciary. A new and more formalised system has therefore become inevitable. The provisions of the Act of 2005 for judicial selection and appointment are complex — perhaps unnecessarily so — but the resulting system balances appropriately the independence of the selectors and sufficient political involvement (through the Lord Chancellor). No more need be said on the subject here than appears in the body of the article.

<sup>60</sup> Pp. 294-295.

<sup>61</sup> P. 303.

<sup>62</sup> Since no litigant can choose his judge, and the allocation of a particular judge to a particular case is largely a matter of chance, it is not clear what purpose the search for diversity in the judiciary is intended to serve.

