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ARTICLE

Special Issue: Informal Judicial Institutions—Invisible Determinants of Democratic Decay

Informal Judicial Institutions—The Case of the English Judiciary

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Abstract

Informality has long been valued in England, and this is true of the political process as well as the institution of the judiciary. In both cases, it is assumed that the senior figures will have absorbed unwritten conventions and will by osmosis naturally understand their respective role in the UK constitution. Much is now starting to change, at least as far as the English judiciary is concerned. It is, first, argued that informal judicial institutions did not become redundant when the separation of powers was formally introduced with a program of modernization of the judiciary in the Constitutional Reform Act 2005. Selected illustrations of persisting informal judicial institutions are then discussed in relation to the deliberative processes in senior courts; to judicial selection and appointments; and to the disciplinary process. Second, informal judicial institutions are deeply connected with the UK constitutional tradition. The Brexit litigation laid bare the challenges of containing political behavior within certain boundaries, and the unwritten conventions which have bound the judiciary and the executive might now be instinctively understood and shared by only one of these two parties.

Keywords: Informal judicial institutions; Collegiality; Conventions; English judiciary; Constitutional reform

A. Introduction

To say that there is informality regarding the regulation and oversight of judicial business in the UK would hardly be controversial. Its own top judges openly allude to it, as has Lord Reed:

> From the perspective of a lawyer from one of Europe's civilian jurisdictions, the United Kingdom Supreme Court must appear rather curious. No formal rules govern the size of constitutions of the Court or their composition. The deliberative procedure is not laid down anywhere. There is not even any official explanation of how it is decided how many judgments will be written in a particular case, or who will write them. A German lawyer might be unsurprised to learn that there is no equivalent in English of the concept of the *gesetzlicher Richter*. Like much in Britain, the Supreme Court is largely regulated by conventions and established practices rather than rules. It has to be understood in the light of history.[1]

[1]Robert Reed, *Collective Judging in the Supreme Court*, *in* COLLECTIVE JUDGING IN COMPARATIVE PERSPECTIVE 21 (Birke Häcker & Wolfgang Ernst eds., 2020).

Conventions and established practices regarding the English judiciary have filled a regulatory vacuum over time, and they have become socially shared rules. Some of them have become informal judicial institutions (IJI) in the sense defined by Kosař, Šipulová and Urbániková.[2] These informal judicial institutions are borne out of an inherited operational context which is crucial to judicial behavior and approaches to law. Thus, senior judges were first and mostly legal practitioners of some standing, and traditionally their shared experience of appearing before other judges has given them practical sense of which practices or arrangements seem to work best, or at least well enough. The skills and experience acquired as a legal practitioner do contribute to a form of social cohesion. Much less of the aspects of judging outside the trial itself is committed to any kind of rule book. Since appointment to the judiciary is a late career change, rather than a choice made by a young person shortly after university graduation, it follows that there is not the same formality of judicial training. Instead, there is a greater emphasis of learning what is required, and what works well enough, through lived experience.

A question therefore arises: What are the key features of IJI in England and Wales,[3] and, in the context of this special issue [Informal Judicial Institutions: Invisible Determinants of Democratic Decay], what is their relationship to the functioning of democracy in times of constitutional crisis? In order to answer this question, our analysis is structured as follows:

Section B identifies embedded informal judicial institutions, the significant features in their dynamics and the pressures for formalization. In England and Wales, IJI have been historically at the core of the judicial decision–making process, as well as in the structure of governance which the judiciary has been able to develop for itself over time. They persist today, and perhaps their most important manifestations are in the deliberative processes in senior courts (I), the visibility of judicial candidates (II) and a light touch disciplinary process (III).

Informality is in fact ubiquitous in the legal and political system of England and Wales, and it applies to the executive and to the legislature as well as to the judiciary. Much of English constitutional law emphasizes the importance of informal practices known as conventions, and developed over time. As much as the judiciary may prefer to rely on IJIs, so too does the executive. This raises the possibility of irregular action, the adjudication of which puts pressure on the judiciary and threatens to politicize their role or to judicialize politics. Indeed, in the aftermath of the decision to leave the European Union, the United Kingdom Supreme Court proved resistant to the government's attempts to disregard constitutional norms.

Section C then sketches the tension and conflict with the government, which are there for the foreseeable future, or for as long as the post-Brexit constitution is taking shape. In a country which has prided itself on its adherence to the rule of law, including the principle of separation of powers, the recent governmental disregard for constitutional norms has been a matter of considerable concern. As we shall see, informality on the part of politicians in this context highlights the weak or non-existent containment of political behavior within certain boundaries (I). The formalization of the principle of separation of powers under the Constitutional Reform Act 2005 (CRA) has nonetheless rightly curtailed the powers of the Lord Chancellor (also known as the Minister of Justice) (II). It remains that the political sensitivity of the constitutional issues by the United Kingdom Supreme Court has affected the judicial role. This calls for renewed mechanisms to maintain trust in the judiciary as they act as a necessary check on the power of politicians (III).

We then argue first that IJIs did not become redundant when separation of powers was formally introduced with a program of modernization of the judiciary in the CRA. Rather, the CRA built upon a tradition of proudly independent individual judges when it sought to modernize the governance structure of the judiciary, and IJIs have continued regardless of these attempts at formalization. Second, the longer that conflict between the government and the judiciary prevails,

[2]*See* David Kosař, Katarína Šipulová & Marína Urbániková, *Informality and Courts: Uneasy Partnership*, in this Special Issue.

[3]The United Kingdom has three separate legal jurisdictions: England and Wales; Northern Ireland, and Scotland. England and Wales currently share a single legal jurisdiction, and this is the primary subject of this article.

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the more pressure will be exerted on the judiciary to make its own processes absolutely transparent.

B. The Persistence of Informal Judicial Institutions

The internal structure and dynamics described by Lord Reed in this article's introduction reflect some inherited and established informal ways of doing things. As is well known, English judges are recruited from among highly successful legal practitioners. English judges are not in any sense civil servants. Since barristers are typically self–employed, they come to the judiciary with a high sense of both seniority and independence. The average age for entering the court Bench is fifty-one, which reminds us that there is no necessary expectation of promotion nor much room to develop a judicial career in the continental European sense.[4]

Importantly, this organizational setting does not lend itself to a vertical hierarchy where higher-ranking judges control promotions, transfers, or disciplinary proceedings in a way likely to influence the behavior of lower ranking judges. There is no hierarchically integrated professional corps as in European career judiciaries. Rather, the English judiciary today comprises three separate groups of judges: The Tribunal judges; the Circuit and District Benches; and the High Court Bench and above ("senior judges.").[5] Separately, while the UK Supreme Court traditionally draws its members from the Court of Appeal, it does not need to do so and occasionally has not done so, when another candidate has shown appropriate merit.[6] That said, senior judges, sitting in the High Court and the Court of Appeal of England and Wales, traditionally constitute the reference group with leadership positions.[7] The most senior judges with responsibility for judicial administration meet regularly via the Judicial

[4]Ministry of Justice, *Official Statistics. Diversity of the judiciary: Legal professions, new appointments and current post-holders, 9.2 Judicial Appointments: Application and Selections*, GOV.UK (July 15, 2023) https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2023-statistics#age.

[5]Relatively few judges are salaried and full-time judges, and traditionally, the term "judge" in UK usage is restricted to full-time and senior judges. The 2007 Leggatt Reforms led to the merging of the administration of various courts and tribunals into one single administrative entity, Her Majesty's Courts and Tribunals Service, with the main addition of Tribunal judges to the (courts) "judicial family." *See Official Statistics. Diversity of the Judiciary: Legal Professions, New Appointments and Current Post-Holders – 2023 Statistics*, GOV.UK (Sept. 5, 2023), https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2023-statistics#overview-of-the-legal-professions-selection-exercises-and-judiciary, Table 3.1 (stating as of 5th September 2023, there are 5,292 salaried courts and tribunal judges in post, with 3,483 court judges and 1,809 tribunal judges). "Judicial office-holders" is a recent term which includes full-time, fee-paid judges as well as lay judges. In fact, 60% of court judges and 70% of tribunal judges are fee-paid judges (by opposition to salaried judges). *See id.* Fee-paid judges are fee-paid lawyers who sit as judges for a limited number of days a year and who are subject to the same ethical duties as salaried judges. Fee-paid offices, such as that of Recorder, have traditionally constituted a stepping stone into salaried positions because they offer individuals the requisite experience and training to enable them to apply for salaried judicial office, should they later wish to do so. In addition to fee-paid judges, there is a substantial number of lay judges, with 13,340 lay magistrates across England and Wales in 2023, *See Official Statistics. Diversity of the Judiciary: Legal Professions, New Appointments and Current Post-Holders – 2023 Statistics*, GOV.UK (Sept. 5, 2023), overview, para. 4.4, https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2023-statistics#overview-of-the-legal-professions-selection-exercises-and-judiciary. They handle the great bulk of the less serious criminal cases.

[6]Thus in 2012 Lord Sumption was the first Supreme Court Justice appointed directly from the practicing Bar, without having been a full-time judge before. He had however previously served on a fee-paid part-time basis in England and Wales, and as a Court of Appeal judge in Jersey and Guernsey. In 2020, Professor Andrew Burrows KC became the first Supreme Court justice to be appointed directly from academia. Like Lord Sumption, he had served as a part-time judge prior to his appointment.

[7]*See generally* CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY (2001).

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Executive Board[8] (JEB) and this reference group sets the general values and the role orientations of the judiciary. Other senior judges also take administrative duties through delegation from the JEB. Interestingly, the JEB is not recognized in statute as such. It rather became a practical necessity when judicial governance responsibilities were transferred under the CRA from the Lord Chancellor to the Lord Chief Justice.[9] So, the JEB exists as a now well-established informal body to provide assistance and advice to the Lord Chief Justice in the execution of the latter's four hundred or more statutory duties. Those duties are very broad and concern, inter alia, the provision of policy and practice on judicial deployment; the close oversight of the performance of the courts and tribunals and making recommendations on financial priorities regarding the judiciary.[10]

It is within this context that we now examine three abiding types of IJI, namely, the deliberative processes in senior courts, familiarity of judicial candidates, and a light touch disciplinary process.

I. Informal Judicial Institutions: The Judicial Decision-Making Process

The common law organizational setting historically puts informal judicial institutions at the heart of the decision-making process. Lord Reed's emphasis on the informal collaborative practices among twelve UK Supreme Court judges conveys the value of collegiality in relation to case allocation or judgment writing. Although collegiality is not about "getting along" with each other, in the words of Lord Reed, "the collegiality of the Supreme Court enables [the] practice [of a single majority judgment]," so that "the reasoning of the majority is expressed in a unitary way."[11] Although the Supreme Court has been said to be slightly more dissentient than the Appellate Committee of the House of Lords in its early years, this is not a court riven by persistent or widespread legal disagreement.[12] A curiosity is that the Criminal Division of the Court of Appeal does not give dissenting opinions, whereas the Civil Division does.[13] There is no explanation for this other than tradition, but it appears not to be controversial in practice and perhaps avoids the impression among those convicted persons whose appeals are unsuccessful that they might have succeeded if just one of the other judges had been different. In any event, it is an illustration of practice and convention taking the place of a clear rationale.

Legal specialization is the first consideration for selection of judge writing the draft judgment in the senior courts. By comparison with jurisdictions outside the UK where seniority within the supreme court or constitutional court matters in deliberations, all Justices are equally engaged and take collective responsibility for the judgment.[14] Following discussion in reverse order of seniority,

[8]The JEB acts as "a form of advisory Cabinet" to the Lord Chief Justice in the exercise of the latter's statutory functions; *see* Ernest Ryder & Stephen Hardy, Judicial Leadership: A New Strategic Approach (2019), paras. 7.47-7.48, 2.13; *see also R v. Judicial Executive Board* [2018] EWHC 1825 (Admin) para. 17.

[9]*See* Diana Woodhouse, The Office of Lord Chancellor (2001); Robert Stevens, The Independence of the Judiciary: The View from the Lord Chancellor's Office (1993) (stating that until the 2005 CRA, the Lord Chancellor was a speaker in the House of Lords and still theoretically able to sit as a judge).

[10]The Lord Chief Justice is mainly responsible, under Section 7(2) of the Constitutional Reform Act 2005:

> (a) [F]or representing the views of the judiciary of England and Wales to Parliament, to the Lord Chancellor and to Ministers of the Crown generally; (b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor; (c) for the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales and the allocation of work within courts.

[11]Reed, *supra* note 1, at 32.

[12]*See generally* Christopher Hanretty, A Court of Specialists: Judicial Behaviour on the UK Supreme Court (2020).

[13]Section 59 of the Senior Courts Act 1981 states that unless the senior judges decide to the contrary, there shall be a single judgment only in the Criminal Division of the Court of Appeal.

[14]Reed, *supra* note 1 at 33. In some courts, seniority or inverse seniority (with reference to the most junior judge) determines the order of voting and may be relevant in assigning the role of 'reporter judge' ("*juge rapporteur*"). For example, at

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the presiding judge of the UK Supreme Court panel selects a judge to write a leading opinion, but the role played by the presiding judge on UK Supreme Court panels is seemingly not determinative, with discussions to follow.[15] Legal argumentation is a conversation between Court members, testing, disagreeing and refining a legal argument. It is traditionally an open exchange of opinions among judges on thorny legal issues, with numerous drafts and "interchanges" between the members of the Court before the final decision is reached.[16] This, in turn, is thought to lead to fully informed and well considered decisions, and to better quality of judicial decisions. The establishment of the Supreme Court also cleared the way for the judges to write joint judgments or single judgments of the Court. In recent years, single judgments, or at least a single majority judgment, seem to be favored in theory and in practice.[17]

Informality and collegiality similarly go hand in hand at the Court of Appeal of England and Wales. As Sir Jack Beatson, a former member of the Court mentions: "three words which characterize [the] work [of the Court of Appeal]: 'flexibility', 'informality' and 'collegiality.'"[18] The allocation of cases among the thirty-eight judges is "informal and pragmatic."[19] This view seems to be endorsed by the majority, as in 2022 71% of Court of Appeal judges felt that cases were fairly allocated, against 5% who disagreed and 24% who were not sure.[20] Sir Jack Beatson continues: "The modern style is to reach a decision by discussion and consensus, albeit subject to an informal expectation that you will comply with the provisional allocation put forward by the presider unless you have a good reason to question it."[21] The value of collegiality helps to fairly process informal and sometimes conflictual relationships within the courts.[22]

As shown by these quotes, an absence of formal rules would not have been tolerable if the resulting void could not be filled. In the past, that void has been filled by the fact that judges come from legal practitioners of some standing, and as noted in our introduction, their shared experience of appearing before other judges has given them practical sense of which practices or arrangements seem to work best. The skills and experience acquired as a legal practitioner then contribute to a form of social cohesion which enables many decisions—such as who should write which judgments among a panel of three or more judges—to be taken amicably and without reference to formal rules.

The institution need not change for a further pragmatic reason when matters of great constitutional importance are to be decided, such as the aforementioned cases concerning the

the *Conseil d'Etat* and the *Cour de cassation*, the role of the rapporteur judge is often assigned to a junior judge; *see also* Mathilde Cohen, *Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort*, 62 AM. J. COMPAR. L., 401, 413–414 (2014). The law may also provide for voting in order of seniority, for example at the Constitutional Court of Italy or Austria; *see* KATALIN KELEMEN, JUDICIAL DISSENT IN EUROPEAN CONSTITUTIONAL COURTS: A COMPARATIVE AND LEGAL PERSPECTIVE § 2.2 (2018), spec. chapter 2, § 2.2.

[15]HANRETTY, *supra* note 12.

[16]Reed, *supra* note 1, at 33–35.

[17]*See* Lord Reed, Deputy President, U.K. Sup. Ct., Presidential Address at The Bentham Association Lecture: The Supreme Court Ten Years on 13 (Mar. 6, 2019) (transcript available at https://perma.cc/563T-48RA (PDF)). *Compare*, HÉLÈNE TYRRELL, HUMAN RIGHTS IN THE UK AND THE INFLUENCE OF FOREIGN JURISPRUDENCE 111–17 (2018) (discussing the trend towards single judgments, including majority judgments, at the UK Supreme Court), *with* Hanretty, *supra* note 12, at chapters 7–8, *and* ALAN PATERSON, FINAL JUDGMENT. THE LAST LAW LORDS AND THE SUPREME COURT 99–120 (2013).

[18]Jack Beatson, *Collective Judging in the Court of Appeal of England and Wales*, *in* COLLECTIVE JUDGING IN COMPARATIVE PERSPECTIVE 37 (Birke Häcker & Wolfgang Ernst eds., 2020); *see also* David Neuberger, former President, U.K. Sup. Ct., Neill Lecture: Twenty Years a Judge: Reflections and Refractions, (Feb. 10, 2017) (emphasis added on paragraph 17). The Court of Appeal consists of thirty-eight Lord and Lady Justices of Appeal as well as the Lord Chief Justice, the Master of the Rolls, the President of the Queen' s Bench Division, the President of the Family Division, and the Chancellor of the High Court.

[19]Beatson, *supra* note 18, at 39.

[20]CHERYL THOMAS, 2022 UK JUDICIAL ATTITUDE SURVEY: ENGLAND & WALES AND UK TRIBUNALS. SALARIED JUDGES AND FEE-PAID JUDICIAL OFFICE HOLDERS IN ENGLAND & WALES COURTS AND UK TRIBUNALS 116 (2023) (by comparison, 61% of High Court judges think that cases are fairly allocated, 33% are not sure, and 6% disagree, *see id.* at 116).

[21]Beatson, *supra* note 18, at 39–40.

[22]PATERSON, *supra* note 17, at 142–43.

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departure from the European Union, the Supreme Court is able to decide that no fewer than eleven of the twelve Justices may sit. Such a panel avoids arguments that may have arisen had a panel of, for example, just seven Justices found themselves closely split, and had there then been speculation about the likely decisions of the other Justices who did not sit.[23]

Finally, it should be said that while rules have not been formalized, debate has nonetheless continued, prompted by those who suggest that dissenting opinions are a recipe for uncertainty in the law, which might adversely affect those areas of the law which require certainty. To some extent, the recent preference for single judgment, including a majority judgment where all justices agree with the outcome albeit for slightly different reasons may be seen as an implicit acknowledgement of such concerns.

II. Informal Judicial Institutions: Visibility of Judicial Candidates

Until the Constitutional Reform Act 2005 came into force in 2005, a main challenge to the legitimacy of the judiciary, narrowly understood by reference to senior judges, was the selection and appointment process. It consisted in persuading practitioners or existing judges to apply for senior appointments following an informal "tap on the shoulder" from the Lord Chancellor's Department. As the judiciary grew in size over the years, the Lord Chancellor's Department relied upon the information provided by senior judges in private consultations—known as "secret soundings," so secret that candidates would not know about them—in order to find out whose shoulder to tap. Since judges would only know the people who regularly appeared in their courts or were members of their barrister's chambers, this process would tend to lead to the "cloning" of the existing judiciary in terms of skills and experience, albeit perhaps not intentionally.[24] Judicial appointment then heavily depended on the visibility of the individual to the judges through social and work networks. In practice, candidates for the Bench would identify an informal career pathway to judicial appointment at the higher levels, they would take on particular work, and then be appointed to the high (advocate) rank of Queen's (now King's) Counsel. That way, they would maintain high visibility and foster the appropriate connections leading to the "tap on the shoulder." So, when women began to enter the judiciary in 1965—already later than in a number of other European countries—they would rarely become visible enough to be considered.[25]

The CRA enhanced transparency in judicial appointments and put the need for greater diversity of the judiciary firmly on the judicial agenda.[26] It provided for an independent Judicial Appointments Commission and its target to improve diversity has been moderately successful. In 2021, about a third (34%) of court judges and half of tribunal judges were women, compared to 25% of women court judges and 44% of women tribunal judges in 2015.[27] But the proportion of

[23]There must be a minimum of five Justices per panel.

[24]*See generally* Helena Kennedy, Eve was Framed: Women and British Justice 237 (2006); Leonard Peach, Report on Judicial Appointments and QC Selection (1999); Judicial Appointments Commission, Judicial Appointments: Balancing Independence, Accountability and Legitimacy (2010); Lord Mackay, *Selection of Judges Prior to the Establishment of the Judicial Appointments Commission in 2006*, *in* Judicial Appointments: Balancing Independence, Accountability and Legitimacy (2010).

[25]Kate Malleson, *Prospects for Parity: The Position of Women in the Judiciary in England and Wales*, *in* Women in the World's Legal Professions 175–90 (Ulrike Schultz & Gisela Shaw eds., 2003); Clare McGlynn, *The Status of Women Lawyers in the United Kingdom*, *in* Women in the Worlds' Legal Professions, 139–58 (Ulrike Schultz & Gisela Shaw eds., 2003).

[26]Where candidates for judicial office are deemed to be of equal merit, the panel may prefer one candidate for the purpose of increasing diversity at the Court, *see* § 27(5A) CRA 2005, inserted by Sch. 13 of the Crime and Courts Act 2013, § 9, (Eng.).

[27]Ministry of Justice, *Official Statistics. Diversity of the Judiciary: Legal Professions, New Appointments and Current Post-Holders, Judicial Appointments: Application and Selections*, Gov.UK (July 15, 2023), https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2023-statistics#age; *see also* Courts and Tribunals Judiciary, *the Judicial Diversity and Inclusion Strategy 2020-2025* 8-9 (Nov. 5, 2020), https://www.judiciary.uk/wp-content/uploads/2020/11/Judicial-Diversity-and-Inclusion-Strategy-2020-2025-v2.pdf.

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women remains low in senior court appointments, 29% for High Court and above.[28] Diversity is now understood as personal and professional diversity, in line with the expectations of a judiciary fairly reflective of society.[29] Unsurprisingly, a recurrent concern is whether the current selection process still favors "the old boys network" which was said for a long time to replicate mainly white men from socially advantaged backgrounds (typically private schools and Oxbridge).[30] The social homogeneity of the senior judiciary remains today: Two thirds of senior judges in 2019 attended private schools and 71% graduated from Oxbridge.[31] In fact, over half (52%) of them took the same pathway from a private school to Oxbridge and then into the judiciary.[32] But to some extent the figures do also reflect a wider inequality in England and Wales in the education system, and the fact that working conditions are a barrier to both retaining women as legal practitioners and career progression for women within the legal profession.

A variation of the controversy over "secret soundings" returned in 2022 in relation to the statutory requirement to consult judges with leadership responsibilities before making a recommendation for appointment. Statutory consultation was criticized for reproducing in practice the "secret soundings" of senior judges, in the absence of statutory criteria set for such consultations. In particular, it was said to fail to address the fact that the high–earning legal practitioners are more likely to be known by the consultee judges because they appear in court before them. By comparison, applicants from nontraditional backgrounds, often appearing before the lower courts, are disproportionately likely to be unknown to the consultee. A 2022 independent review further noted the variable quality of the comments received during the statutory consultation of the relevant judges.[33] Some comments from senior judges were lacking in evidence, and some comments were simply missing for some candidates. This naturally affected the consistency, reliability and perceived fairness of the whole judicial recruitment exercise. The Judicial Appointments Commission has adopted a new policy,[34] so that statutory consultation can be waived in practice on a case-by-case basis. This would likely be the case for the large fee-paid recruitment exercises, a steppingstone into the judiciary, where consultees are unlikely to have relevant information on a substantial proportion of candidates.

The impression remains that the legal profession informally plays a gatekeeping role; entrenched group-based identity hierarchies from legal practice apply to selection into the judiciary.[35] What is truly needed is a more well-rounded understanding of the judiciary as an ensemble of judicial careers. This understanding has historically been resisted in favor of the judicial role being a calling with which well-regarded practitioners are rewarded. From such a perspective, schemes which involve mentoring and appraisal naturally introduce a level playing field and might encourage more suitable applications from a wider pool to senior posts in the first place. It is a sign of the times that the judiciary is starting to develop its judicial mentoring scheme and its judicial work shadowing scheme to give insights on the judicial work to a broader pool of legal practitioners.

[28]*See* Ministry of Justice, *supra* note 27.

[29]Courts and Tribunals Judiciary, *supra* note 27, at 10 (the senior judiciary defines "personal and professional diversity" by reference to "the protected characteristics within the Equality Act 2010 [age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation] and other differences such as socio-economic background, caring responsibilities and gender identity; and also, professional diversity, such as individual career paths and jurisdictional backgrounds").

[30]Ministry of Justice, The Report of the Advisory Panel on Judicial Diversity (2010) (The Neuberger Report) 14; *see generally* Graham Gee & Erika Rackley, Debating Judicial Appointments in an Age of Diversity (2017).

[31]The Sutton Trust, Elitist Britain 2019: The educational backgrounds of Britain's leading people (2019) (stating in 2014, 74% of these High Court and Court of Appeal judges were Oxbridge graduates); *see* also JUSTICE, Report 2017 Increasing judicial diversity (2017).

[32]*See The Sutton Trust, supra* note 31, at 5.

[33]The Judicial Appointments Regulations 2013, § 30 (UK.), https://www.legislation.gov.uk/uksi/2013/2192/contents/made.

[34]Since September 2022; the 2013 The Judicial Appointments Regulations, which are silent on the consultation criteria, remain in force.

[35]Lizzie Barmes & Kate Malleson, *The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity*, 74 Mod. L. Rev., 245, 249 (2011)

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But it will still be some time before the public perception of the judge as a white male is likely to change.

III. Informal Judicial Institutions: Ethical Standards

The traditional English attitude towards judicial standards of conduct was "that the less definition attempted, the better; that if you pick judges who know how to behave, then all will be well as if you do not, no amount of analysis of ethical problems will help."[36] This explains why, when the Guide to Judicial Conduct was about to be introduced in 2002, some English judges noted the "risk" that "the press and even judges will focus excessively on compliance with the letter of any code, rather than on the underlying principles."[37] Informality constituted an instrument of accumulation of authority to support the identification of legitimate or illegitimate judicial behavior by judges themselves over time. This was largely effective because the judges themselves did have a strong sense of professionalism, and they were of course familiar to the judicial world years before they were called to the Bench. Ethical standards were then formalized in the Guide to Judicial Conduct primarily in response to international and national declarations calling for some appropriate standards of judicial conduct to strengthen public trust in the judiciary.

The Guide to Judicial Conduct (revised in July 2023), drafted by senior judges, covers the three principles of judicial independence, judicial integrity and judicial impartiality. It introduces broad guidance on activities outside court, including personal relationships and perceived bias as well as activities after retirement; it also refers to the Bench Book on Equal Treatment.[38] These are broadly phrased ethical duties which are not legally binding, and the Guide further states that it only contains a set of core principles which will help judges reach their own decisions. This reflects the balance between, on the one hand, the benefits of putting standards of conduct on paper, namely transparency and the encouragement of professionalism, and, on the other hand, the possible resulting rigidity or loss of flexibility in judicial practice. The European Court of Human Rights itself recognizes that broadly phrased ethical duties fall within the scope of 'foreseeable' law on the basis that published and accessible disciplinary decisions make these obligations foreseeable.[39]

In 2021–2022, only thirty-three investigations from the Judicial Conduct and Investigation Office resulted in the Lord Chancellor and Lord Chief Justice (the Head of the Judiciary) taking disciplinary action.[40] This represents 6.45% of the complaints about the personal conduct of a judge accepted for investigation, and the disciplinary action concerns 0.15% of all judicial officeholders.[41] The bulk of the cases concerned magistrates (lay judges) and fee-paid judges, with five cases concerning the salaried and fee-paid court judges.

Some issues have been brought into light. First, some cases highlight one of the particular problems or drawbacks to informality, which is that informal arrangements can become loose

[36]James Thomas, Judicial Ethics in Australia v (3d ed. 1988).

[37]Consultative Council of European Judges, Comments by the delegation of the United Kingdom, Questionnaire on the Conduct, Ethics and Responsibility of Judges (Docs 2002/CCJE (2002) 34, June 18, 2002).

[38]Guide to Judicial Conduct, https://www.judiciary.uk/guidance-and-resources/guide-to-judicial-conduct-revised-july-2023/.

[39]For early cases, *see* Vogt v. Germany, HUDOC A323 (Sept. 26, 1995), https://hudoc.echr.coe.int/?i=001-58012; Müller v. Switzerland, HUDOC A133 (Nov. 5, 2002), https://hudoc.echr.coe.int/?i=001-60715; Ali Koç v. Turquie, HUDOC 39862/02 (July 13, 2021), https://hudoc.echr.coe.int/fre?i=001-211015; N.F. v. Italie, HUDOC 37119/97 (Aug. 2, 2001), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-59622&filename=001-59622.pdf&TID=ihgdqbxnfi; *see also* Oleksander Volkov v. Ukraine, App. No. 21722/11, paras. 169–170 & 173–185 (Jan. 9, 2013), https://hudoc.echr.coe.int/fre?i=001-115871 (explaining the 'quality of law' more recently).

[40]Judicial Conduct Investigations Office, *JCIO Annual Report 2021–2022*, at 13 and 15, available at https://www.complaints.judicialconduct.gov.uk/reportsandpublications/.

[41]In 2021–2022, there were approximately 21,000 judicial officeholders. Complaints can be made by anyone concerned that the personal conduct of a judge may amount to misconduct. In practice, most complaints are considered inadmissible as they relate to the judicial decision and should instead be appealed against.

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with spontaneous interactions undermining the value system in place. One issue with disciplinary complaints lies in their management by senior judges before and after the complaint is addressed by the Judicial Conduct Investigations Office. There is, naturally, a temptation to informally resolve issues since formal action is likely to result in problematical relations between the accused judge and those above him in the judicial hierarchy. It is hard to avoid the impression that senior judges are reluctant to become too critical of their junior colleagues, perhaps recalling their own lack of guidance. However, the informal resolution cannot be done outside the framework of the Disciplinary Rules and the temptations towards informal resolution leading to mixed messages should be resisted.[42]

Second, although the disciplinary rules came into force in 2013, training about the disciplinary rules took some time—two years, at least in some cases—to be provided to the judges involved in handling the complaint, with consequences sometimes in the way the procedure was handled. Third, some cases, as rare they may be, still draw attention to the need for greater monitoring of judicial performance. This brings us to the lack of mentoring and monitoring of judges, which is only beginning to change. It seems likely that besides mentoring, some system of appraisal or review is a likely safeguard against irregular conduct going unchecked. The details of any such scheme will inevitably be controversial. But in most professions it is accepted as also offering a mode of self–reflection and improvement, and it should be possible to promote a scheme with such an ambition.

We now turn to consider how informality affects the judiciary in its relationship with the wider community, and specifically the political community.

C. Constitutional Informality and Judicial Resilience

Informality arguably takes its roots into the characteristics of the English political system. Constitutional conventions, for example, settle on an informal footing practices affecting the three branches of government, with discussion and acceptance by those affected by these practices.[43] In respect of the judiciary specifically, constitutional conventions recognized by parliament include that the independence of the judiciary should not be undermined; the politicization of the judicial appointments process should be avoided and, if a government minister is to be made responsible for judiciary-related matters, then that minister should be the Lord Chancellor.[44] In the words of Feldman, "the values of [the UK constitutional] tradition are generally accepted without conscious thought, and it is this tradition, not law, which is the core and essence of the Constitution."[45] Typically of the U.K. constitution, political safeguards against arbitrary power are "traditional" rather than "legal." Legal and political actors, whether they are ministers, civil servants, members of parliament or the judiciary, are expected to be imbued with respect for propriety encapsulated into conventions, despite their lack of legal underpinnings.

[42]*See*, *e.g.*, Kumrai v. Aitken [2019], ET (Eng.), https://assets.publishing.service.gov.uk/media/5e2701e6e5274a6c40602b37/Mr_N_Kumrai_-v-_John_Aitken___others_-_Case_Number_2500852_2016_-_full.pdf.

[43]Scott Stephenson, *Constitutional Conventions and the Judiciary*, 41 Oxford J. Legal Stud. 750 (2021); Geoffrey Marshall, Constitutional Conventions (1987).

[44]*See* Jack Simson Caird, Robert Hazel, & Dawn Oliver, The Constitutional Standards of the House of Lords Select Committee on the Constitution 10–11 (3rd ed. 2017) (stating that these practices also constitute standards adopted by the House of Lords Select Committee on the Constitution, a key actor whose remit is to keep under review the operation of the constitution).

[45]David Feldman, *Constitutional Conventions*, *in* The British constitution: continuity and change: a festschrift for Vernon Bogdanor 93 (Matt Qvortrup, ed., 2013).

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I. The Blurring of Constitutional Law and Boundless Politics

The tumultuous decision to leave the European Union and the decision of the government to do so regardless of political opposition and legal obstacles, has undoubtedly tested the U.K. tradition of adherence to the rule of law. This has presented unique challenges for the judiciary. There is not, and has never been, any internal political mechanism or special process which has the first opportunity to prevent the government from acting unconstitutionally. The responsibility is entirely that of parliament, and only if any dispute reaches them, of the judiciary; and in the case of Brexit, the pressure from the popular media not to resist the "will of the people," and indeed the experience of being branded an 'enemy of the people' if they do so, was very real. We now consider the tumultuous saga of the United Kingdom Supreme Court decisions in which it was held, respectively, that the government needed to secure a majority in Parliament for leaving the European Union, and later, that the government could not seek to prorogue Parliament in order to avoid a vote which would derail its preferred means for doing so.

In the first "Brexit" decision, the Court considered in 2016 whether the Prime minister could, by virtue of the royal prerogative should be affect the withdrawal of the United Kingdom from the European Union without seeking authorization from Parliament.[46] As parliament was largely opposed to Brexit in principle, although expected to follow the referendum result nonetheless, the Prime Minister was anxious to avoid a vote. The High Court had held that the government could not trigger Article 50 of the Treaty of the European Union without an Act of Parliament. This caused political uproar and prompted the notorious media headline "enemies of the people," applied to the three senior judges who decided in the High Court that the attempted prorogation of Parliament was unlawful. The United Kingdom Supreme Court then upheld the High Court decision in January 2017, in *Miller*: Withdrawal from the EU under Article 50 could not be initiated under prerogative power because to do so would conflict with rights protected by statute.[47]

For almost two days following the tabloid's headline about "enemies of the people," the Lord Chancellor stayed silent before releasing a press statement which failed to offer a direct defense of the judges. There were real concerns for the safety of the judges. In the meantime, prominent politicians had criticized the judgment as frustrating the will of the people, and it was up to the legal profession, the Bar Council in particular, to condemn the attacks against the judiciary. The convention has been that cabinet ministers may comment and disagree with a judgment, but that given the considerable repercussions of executive actions, it is unacceptable for them to criticize the motives or integrity of the judge who made the decision.[48] This implies that the executive should publicly defend the judiciary from attack from other powerful actors such as the media—because a media uproar is liable to prompt political criticism of judges—and vice versa. Although judges are expected to have broad shoulders, the political context of right–wing populism made the judiciary in this case a particular target for resentment. The political and media discourse surrounding *Miller* portrayed senior judges as a member of the establishment, as social elite out of touch with ordinary people; with allegations of "cronyism" in their appointments. This fed into the longstanding British theme of class struggle, a key theme in the anti-establishment and populist Brexit discourse.[49]

[46]R. (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC (Admin.) 2768 (Eng. and Wales).

[47]*See* MARK ELLIOTT, THE UK CONSTITUTION AFTER MILLER: BREXIT AND BEYOND (Jack Williams & Alison L. Young eds. 2018).

[48]*See* Louis Blom-Cooper, *The Judiciary in an Era of Law Reform*, 37 POL. Q. 378 (1966) (stating that a convention against publicly criticizing judges has existed at least since the early 1900s); *see* John A. Dyson, Lord Dyson, Remarks on Criticising Judges: Fair game or Off-limits at the 3rd Annual BAILII Lecture (Nov. 27, 2014) (suggesting that this convention in the wide sense defined by Sir Louis "no longer exists, if it ever did"); *see also* Stephenson, *supra* note 43, at 766–68.

[49]Sara Hobolt, *The Brexit Vote: a Divided Nation, a Divided Continent*, 23 J. OF EUR. PUB. POL'Y 1259 (2016); Richard Bellamy, *Political Constitutionalism and Populism*, J. L. SOC. 1 (2023).

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The Brexit saga continued. In the process of withdrawing Britain from the European Union, the Queen prorogued parliament for a five week period in 2019, as requested to do so by the Prime Minister. When the issue was brought before the courts, in *Cherry/Miller (No. 2)*, the United Kingdom Supreme Court held that

> a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[50]

The Court's constitutional guardianship ensured that the government would not use the power of prorogation unlawfully with the effect of preventing parliament from carrying out its proper functions.[51] In this case, proroguing parliament would deny it from voting, as it seemed likely to do—and eventually did—to ask the European Union for an extension of EU membership past the Brexit deadline of 31 October 2019.

The Court then found limits to the executive's discretion to prorogue, based on the doctrine of parliamentary sovereignty. Lord Sumption, then a former UK Supreme Court Justice, and always a prominent advocate of judicial restraint, notably agreed with the Court and stated that

> some–perhaps most–conventional assumptions about politics do not lend themselves to judicial enforcement, but others are so fundamental to the democratic character of our constitution that their destruction would lead to an intolerable void, and this was such a case.[52]

The Court, although not specifically a constitutional court, emerged as the only actor taking responsibility for the Brexit constitutional affairs. The House of Lords Constitution Committee recently noted that "it is not clear which senior minister, if any, has overall responsibility for constitutional affairs in the Government, including responsibility for upholding the constitution."[53] This contrasts, importantly, with the traditional self–presentation of the unwritten British constitution as being largely effective based on informal political restraint to prevent any abuse of power. The informal practices based on a political sense of propriety and self-restraint have long been said to compensate for the absence of constitutional or legal limitations on parliamentary law making or on the executive. The two UK Supreme Court decisions we have discussed have upheld democracy by defending parliamentary sovereignty, but this has been predictably a difficult point to convey to the general public, who read media stories about judges doing effectively the work of the opposition in parliament.

The Brexit saga catches the eye because it appears to embody a wider disrespect for the rule of law. It shows that the "good chap" mentality, that of someone who instinctively understands and respects the boundaries between law and politics,[54] has fully gone, and there is no guarantee upon the limitation of governmental power. Further, the U.K. government has now twice recently and knowingly introduced legislation in Parliament which would breach the U.K.'s international

[50]R (Miller) v. Prime Minister; Cherry v. Advocate General for Scotland (*Miller II*) [2019] UKSC 41 para. 50.

[51]*Id.* at para. 34.

[52]Jonathan Sumption, *Brexit and the British Constitution: Reflections on the Last Three Years and the Next Fifty Years*, 91 The Pol. Q. 1, 112 (2021).

[53]Constitution Committee, Role of the Lord Chancellor and the Law Officers, 2022–23, HL 118, at 81.

[54]Andrew Blick & Peter Hennessy, Good Chaps No More? Safeguarding the Constitution in Stressful Times: Constitution Society Report (2019) (discussing how in any event, the creation of the *Commission on Standards in Public Life which issued the First Standards in Public Life*, also known as the "Nolan Principles," in 1995 injected a healthy dose of pragmatism into this perception).

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obligations, again to solve foreseeable problems resulting from Brexit.[55] The Attorney-General (legal adviser to the government within cabinet) and Lord Chancellor of the day have supported these moves. The position of the Lord Chancellor is especially fraught because they are charged with the statutory duty of upholding the independence of the judiciary and the rule of law.[56] We now turn to consider the formalization of the Lord Chancellor's role.

II. The Formalization of Separation of Powers

The formal guarantee of separation that came about by virtue of the Constitutional Reform Act 2005 (CRA) and as part of wider reforms to the anomalous role of the Lord Chancellor has not been successful. More needs to be said about this role.

The Lord Chancellor for centuries was a one-man—and he was always a man—exception to the separation of powers, having senior positions within the legislature, the executive and the judiciary all at the same time. Constitutionally, it was as anomalous as could be imagined, and yet controversies were few and far between. The office would go to a senior lawyer with usually few political ambitions of his own to serve. When the combination of roles was revised in the early years of the twenty-first century, it owed more to personal tensions between the then office holder and the Prime Minister than to anything which would be regarded as scandalous by modern eyes. But the potential role of the Lord Chancellor in influencing judicial appointments was thought to be potentially incompatible with the right to a fair trial under Article 6(1) ECHR.[57] Until 2005, when the U.K. Supreme Court was established under the CRA, reasons for selection to the Judicial Committee of the House of Lords have been described as "a soft form of political preferment," with different types of preferences such as that "governments tended to promote judges they had appointed before, to reward judges who tended to rule in favor of the government . . . , and to use political affiliation as a tiebreaking criterion between legally well–qualified candidates."[58] The extent to which this had occurred was the subject of a lively exchange in a meeting of House of Lords Constitution Committee in May 2022.[59]

This was one reason, and indeed a sufficient reason, to create the Judicial Appointments Commission (see Section II) for senior appointments and an independent selection process for the U.K. Supreme Court, with only a veto role for the Lord Chancellor. It created a transparent process based on merit and non-politicization of judicial appointments. The difficulty has been that the regularization of independent appointments, which could have been achieved independently, has come as a tradeoff and with no obvious masterplan or coherent program.[60] The Lord Chancellor is no longer required to be a senior lawyer, nor indeed a lawyer at all, and subsequently Prime Ministers have appointed a number of ministers whose political ambitions have far overshadowed their legal acumen or even their interest in law.

This of course matters when it comes to defending the judges in public when they rule against the government, and when cabinet agrees to legislate to breach international law or take some other action which a heavyweight lawyer might be expected to oppose. It matters even more when it comes to protect the integrity of the independent appointment system, for which purpose the role of the Lord Chancellor was said to be changed.

[55]The United Kingdom Internal Market Bill: 2019, HL Bill [147] pt. 5, *see* also Northern Ireland Protocol Bill 2022, CBP-9569 HoC Research Briefing (2022).

[56]Constitutional Reform Act 2005, c. 4, §§ 1 & 3.

[57]Procola v. Luxembourg, 22 Eur. Ct. H.R. 193 (1995); McGonnell v. UK, 30 Eur. Ct. H.R. 289 (2000); Findlay v. UK 24 Eur. Ct. H.R. 221 (1997).

[58]Hanretty, *supra* note 12, at chap. 1.

[59]Constitution Committee, Role of the Lord Chancellor and the Law Officers, 2022–23, HL 118, at 26.

[60]*See* Dawn Oliver, Constitutional Reform in the UK (2003) (arguing that this is typical of constitutional reform in the UK).

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The current appointment system is considered to strike the right balance between the need to avoid political interference with independent appointments, and the need to provide the Lord Chancellor with political oversight.[61] The Lord Chancellor has no power to appoint anyone who has not been recommended by the selection panel, whether convened for U.K. Supreme Court appointments or for other senior court appointments. At the end of the selection process for the senior judiciary and UK Supreme Court appointments, the Lord Chancellor has the ability to approve, reject the single nomination or request reconsideration of the candidate.[62] The power to depart from a panel recommendation is a veto role only, provided that the Lord Chancellor justifies his or her decision, and this currently insulates the judicial appointments process from political patronage. If the Lord Chancellor rejects the nominee, they only do so on the ground that the person is not suitable for the post, and they must give reasons in writing for doing so.[63] Only once, in 2010, did the Lord Chancellor request the selection body to reconsider its recommendation of a senior judge for President of the Family law Division, and the story leaked to the media. On the one hand, the then Lord Chancellor doubted the senior judge's ability to lead the Family law Division through a major reform. On the other hand, public speculation was that his doubts came from the senior judge's criticisms of the lack of funding of the family courts and the government's approach to family justice. In any event, the selection body submitted the same judge's name upon reconsideration, and this time the Lord Chancellor accepted the recommendation. The Lord Chancellor later explained that "the politics" of rejecting the recommendation were "too difficult," with in particular an imminent general election.[64] This has led some scholars to argue that the Lord Chancellor has no decision-making role in respect of ninety-five percent of selections, concerning lower court judges, "and little more than a nominal role in the remaining [five percent]."[65]

There are other, less formal, ways for a Lord Chancellor to effect opposition to a potential judicial nominee. Alongside this veto power, and in a context where the panels are free to decide their own processes, the Lord Chancellor is entitled to write to the selection panel to express guidance or priorities for the judicial system, and to urge the selection panel to appoint somebody with the ability to address these priorities.[66] A disputed illustration concerns the same Lord Chancellor who failed to defend the *Miller* judges in the media and who met with the selection panel involved in the selection of the Lord Chief Justice.[67] In the absence of formal criteria concerning the scope of her intervention, she told them that the next Lord Chief Justice should be eligible to remain in post for at least four years before retirement. This was said to clarify the established and informal practice that the Lord Chief Justice should be able to stay in post of a "reasonable amount of time." The selection panel agreed. This was nonetheless widely seen as a deliberate move to prevent the selection of Lord Justice Leveson, the senior judge who had presided over the 2012 inquiry into media misconduct, whose recommendations had upset large parts of the right–wing media and who would have been in post less than three years had he been appointed to the post.

[61]Constitution Committee, Role of the Lord Chancellor and the Law Officers, 2022–23, HL 118, at 205; House of Lords Select committee on the constitution, Judicial Appointments, 2010–12, HL 272, at 34.

[62]*See* Constitutional Reform Act 2005, c. 70–71, 73, 90, §§ 26(3) (regarding senior appointments) and The Supreme Court (Judicial Appointments) Regulations, 2013, SI 2013/2193, (Eng.), regs. 20–21, adopted under Constitutional Reform Act 2005, § 27A.

[63]Constitutional Reform Act 2005, § 91(1).

[64]*See* Graham Gee et al., The Politics of Judicial Independence in the UK's Changing Constitution, 185–87 (2015).

[65]Graham Gee, *Judicial Policy and New Labour's Constitutional Project*, *in* The New Labour Constitution: Twenty Years On 98 (Michael Gordon & Adam Tucker eds., 2021).

[66]Constitutional Reform Act 2005, § 27(A) and B).

[67]*See* House of Lords, The Constitution Committee, Oral Evidence Session with Right Honourable Elizabeth Truss MP, Lord Chancellor and Secretary of State for Justice, Evidence Session No. 5 (Mar. 1, 2017), https://www.parliamentlive.tv/Event/Index/8a087e02-a71c-42cd-aad0-8f14cf0693e4 (last visited Aug. 23, 2023).

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III. Alternative Modes of Democratic Accountability

To point to the challenges of informality in defining the boundaries of political power is not to solve them. Whether it is possible to go back to how things used to informally be may be doubted. The tradition of kinship between lawyers and the legislature has faded over the years, with an 11% lawyer-parliamentarian intake from the general election in 2017, against 15% since the 1970s, and a much higher intake of lawyers or judges in previous decades.[68] The current figure likely contributes to a reduced understanding between politicians and judges of their respective roles in the English constitution. It highlights a lack of voices within parliament to speak about the importance of justice and its administration. This matters as the role of parliament is central to the recent tensions. In the case of Brexit, the government's determination to flout established practices concerning the role of parliament before being challenged before the courts, put pressure on the judges to take responsibility for the integrity of the British constitution centered on parliamentary sovereignty.

Some measures may yet be taken or resisted. In the case of the English judiciary, one current threat to the appointment process is the argument that the risk of "judicial inbreeding" calls for a greater role of the Lord Chancellor.[69] This has been rejected over the years. More generally, it has been argued that a gap in the democratic accountability of senior judges might only be achieved by "meaningful ministerial involvement in individual selection decisions for senior posts."[70] A valid and so far successful first way to resist this sort of argument emphasizes that judicial accountability takes many forms, and indeed that judges are more accountable than ever before.[71] Further accountability and transparency in the process of appointments of senior judges should be considered, but with it in mind to gain the trust of the people rather than that of the executive.[72]

The second measure is for the judiciary to develop their own voice. Some steps in this regard have already been taken. This includes the more effective communication of judicial decisions in high profile cases, so that members of the public can readily see for themselves how the judges have decided a case, rather than to rely on media reporting. An informal restraint persists; the tradition has been that a judgement should speak for itself and should not need to be actively defended in any way, save in the case of demonstrable factual error. To some extent the judiciary relies—albeit informally—on its friends in the wider legal profession to come to its rescue in the media, but this may not be enough. As a bulwark against the abuse of executive power more thought needs to be given as to how to engage with the public and communities, to educate the public on the importance of respecting judicial decisions, whether or not one agrees with them.

[68]Polly Botsford, *Law and Politics: Is the Romance Finally Over?* Legal Cheek, (July 29, 2019), https://www.legalcheek.com/2019/07/law-and-politics-is-the-romance-finally-over/; *see also* House of Commons Library, Social background of MPs 1979–2019, at 23–27 (Feb. 15, 2022) (UK).

[69]*See Appointments and Diversity: A Judiciary for the 21st Century* United Kingdom Ministry of Justice (May 11, 2012), https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011/results/response-consultation-appointments-diversity.pdf (stating a recurring proposal is that there should be a shortlist of three candidates per vacancy, from which the Lord Chancellor would select a favored candidate).

[70]Richard Ekins & Graham Gee, *Reforming the Lord Chancellor's Role in Senior Judicial Appointments*, Policy Exchange, 22 (Feb 9, 2021), https://policyexchange.org.uk/wp-content/uploads/2021/02/Reforming-the-Lord-Chancellor%E2%80%99s-Role-in-Senior-Judicial-Appointments.pdf; *Appointments and Diversity: A Judiciary for the 21st Century* United Kingdom Ministry of Justice (May 11, 2012), https://consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011/results/response-consultation-appointments-diversity.pdf.

[71]For example, there is the statutory duty of the JAC to publish an annual report, the practice of requiring the person nominated as the JAC's Chair to attend a pre-appointment hearing before the Justice Committee of the House of Commons, the appearance of the Lord Chief Justice, the UK Supreme Court President and the Lord Chancellor from time to time before parliamentary select committees.

[72]Select Committee on the Constitution, The roles of the Lord Chancellor and the Law Officers, 2022-23, HL 118, at 207.

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D. Conclusions

Informal judicial institutions direct attention to the way in which the judiciary is embedded in a network of practices and organizations. A main focus of this article, in Section A, was the formalization of separation of powers between the executive and the judiciary in the CRA. In the UK, there is a tradition of independent, and sometimes creative judges who have come to the Bench at a much older age than elsewhere and with the experience of senior practitioners. Indeed, many take a pay cut from practice to join the Bench. Against that background, it is not surprising that there is a certain informality in the practice of judicial governance. The sense of cohesion and collegiality from the senior judiciary, as illustrated by the deliberative process of the senior courts, is central to informal practices being the traditional mode of conducting the judicial business.

So, the CRA built upon a tradition of proudly independent individual judges when it sought to modernize the governance structure of the judiciary with, in particular, the new Judicial Appointments Commission, and a separate selection commission for appointments to the UK Supreme Court, and the Judicial Conduct and Investigation Office. The formalization of the selection and appointment process under the CRA brought transparency in the appointment process, and a much needed emphasis on the need for personal and professional diversity in the judiciary. The process is yet ongoing and further improvements in the form of, e.g., mentoring and appraising judges should be sought in order to develop a more inclusive and diverse judiciary. Overall, the pressure to reform and formalize the internal ways of the judiciary, whether in relation to judicial selection or to the disciplinary process, reflects a change in the social expectations of the judiciary.

This, in turn, raises questions about the authority of the English judiciary. In this regard, as discussed in Section B, IJIs are deeply connected with the UK constitutional tradition. The limitations of political power have traditionally been political rather than legal, and they consist of reliance on the unwritten respect for the rule of law and obedience to unwritten but established practices such as constitutional conventions. The Brexit litigation laid bare the challenges of containing political behavior within certain boundaries. It now seems that the English constitutional informality has exacerbated the need for a more effective set of checks and balances of the executive power, beyond the UK Supreme Court's rare opportunities to provide judicial checks.

It is true that the reduction of the power of the Lord Chancellor to a formal veto of a candidate to judicial appointment has been a successful outcome in terms of separation of powers. But the formalization of separation of powers under the CRA has nonetheless facilitated the performance of the role by a non-lawyer often unwilling to take responsibility for constitutional affairs. It is this informal vacuum in taking responsibility for constitutional affairs which creates more tensions in the post–Brexit constitution.

What is truly needed, then, is the "positive" virtue of separation of powers,[73] which involves mutual respect from each institution for each other, as a cooperative engagement between the three branches of power in the joint endeavor of governance. Guardianship of either legal or political constitutions cannot simply rest with one branch of the state and indeed, the need for mutual trust between the judiciary and the government was recently emphasized by the President of the UK Supreme Court—in a context when the UK government, for the second time in a year, has "exceptionally" in the words of Lord Reed, failed to comply with a court order.[74]

There is, finally, no fixed pattern of response, informal or formal, to the constitutional difficulty of making the judiciary even more accountable for its emergent constitutional role. Our answer

[73]Aileen Kavanagh, *The Constitutional Separation of Powers*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221, 234 (David Dyzenhaus & Malcom Thorburn eds., 2016).

[74]*See* Craig v. Her Majesty's Advocate for the Government of the United States of America [2022] UKSC 6, para. 46; Alison Young, *Declaratory Orders and Constitutional Guardrails*, U.K. CONST. L. BLOG (Mar. 10, 2022), https://ukconstitutionallaw.org/2022/03/10/alison-young-declaratory-orders-and-constitutional-guardrails/.

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may change with the democratic quality of the political system and the practices of its component institutions. It is also subject to the caveat that judicial institutions develop in ways which are consistent with their legal traditions, here a strong sense of constitutional informality. For now, there have been certain compromises between the traditional informality of judicial governance and some measures necessary to make the profession more accessible and accountable. If tensions with the executive are to abate, the question is now whether the political classes will be able to amend their own practices.

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