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https://doi.org/10.26881/gsp.2025.4.01

Judicial Independence in General and in England and Wales[1]

I have been asked to write about judicial independence. This topic is a central element of the rule of law. The first paragraph of the EU's *2023 Rule of Law Report*[2] reflects a current, international problem.

> The rule of law stands alongside democracy and fundamental rights as founding values of the Union. It is common to all Member States and a bedrock of the Union's identity. It is a core factor in Europe's political stability and economic prosperity. In recent years, these founding values have come under attack around the world, testing the resilience of the EU and its Member States. The Russian war of aggression against Ukraine serves as a tragic reminder that these values can never be taken for granted. Constant proactive action is needed to safeguard these values and protect European society in the face of evolving challenges.

Poland was in trouble with the European Commission since 2017 because of its disregard for judicial independence. At last, the *2024 Rule of Law Report* announced that "The Commission concluded that there is no longer a clear risk of a serious breach of the rule of law by Poland and withdrew its reasoned proposal of December 2017, thereby closing the Article 7(1) TEU procedure for Poland."[3]

As requested, I will explain, in outline:

- important points about the English legal system, especially the criminal courts;
- the radical reforms under the Constitutional Reform Act 2005, remedying defects in the separation of powers and strengthening *collective* judicial independence;
- the Act's role in further professionalising judicial recruitment, selection, and appointment and in enhancing the safeguarding of *individual* judicial independence. I will also explain what is generally required, internationally, in terms of judicial independence;
- the relationship between the three organs of government since the 2005 Act;
- the modernised judicial appointment system and the current diversity statistics.

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[1] The article was written in January 2025.

[2] European Commission COM (2023) 800 final, Brussels, July 2023, eur-lex.europa.eu [accessed: 2025.01.12].

[3] European Commission, Country Chapter on the rule of law situation in Poland, Brussels, 24.7.2024 SWD (2024) 821 final, p. 1.

At the end is a brief section, describing the methods of my own empirical, wide and deep research project on the working lives of judges (2002–2014), which remains unique worldwide.[4]

1. The English legal system – main, relevant points

The English legal system is very old.[5] A unified "common law" was under development in England prior to the Norman invasion of 1066. England is the mother of all common law legal systems, the globe's biggest family. Daughter systems, English speaking countries, apply their own law alongside their interpretations of common law. The United Kingdom state contains two other domestic legal systems, in Scotland and Northern Ireland. Scottish law is a hybrid between the common law and the civil (Romano-Germanic) law, which applies throughout Europe.

UK judges are highly outward looking and proactive in understanding and absorbing foreign legal concepts and in developing the common law, international law, and European human rights law. They are very influential, internationally. Furthermore, it is no accident that London is one of the world's pre-eminent centres of international law, legal services, and dispute resolution. Thanks to the stability of the common law and the reputation for incorruptibility of English judges and their respect for the rule of law, the UK has the largest legal services market in Europe, and second largest in the world, after the USA.[6] There are 200 foreign law firms with UK offices. Parties from 78 countries used the commercial courts in 2022–2023.

Uniquely in the world, over 80 per cent of defendants to criminal charges are dealt with in magistrates' courts, where most cases are determined by almost 15,000 unpaid lay magistrates, non-lawyers who sit in twos and threes, or alone in some minor matters, always advised by a professional legal adviser. Almost anyone may apply to be a magistrate. You do not need to be a citizen but to have lived here for five years. There are 194 professionally legally qualified magistrates called district judges (magistrates' courts) and 90 part-time deputies. They sit alone, also advised by a professional adviser. Magistrates are very powerful. They are arbiters of fact and law and they do the sentencing and control procedure. Magistrates are not confined to trivial cases, especially in the youth court. Only grave youth crimes may be sent up to the Crown Court, or those where a child is charged with an adult, so the youth court will hear such cases as multi-handed gang robberies and gang rapes. Lengthy cases are heard

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[4] Reported in: P. Darbyshire, *Sitting in Judgment – the working lives of judges*, Oxford 2011.

[5] This basic information is taken from P. Darbyshire, *Darbyshire on the English Legal System*, 15th ed., London 2025.

[6] The City UK, *Legal excellence, internationally renowned: UK legal services 2023*, https://www.thecityuk.com/media/0didtzlm/legal-excellence-internationally-renowned-uk-legal-services-2023.pdf [accessed: 2025.01.12] and The City UK, *Legal excellence, internationally renowned: UK legal services 2024*, https://www.thecityuk.com/our-work/uk-legal-services-2024/?utm_source=chatgpt.com [accessed: 2025.01.12].

by district judges. Like all youth courts, it sits privately. Its work is seldom reported so I have always called it "out of sight and out of mind."

Serious cases are heard in the Crown Court, by a recorder (part-timer) or circuit judge, or a High Court judge travelling on circuit from the Kings Bench Division. In contested cases, guilt must be determined by a jury of 12. A defendant may not request a trial by judge alone, which is permitted in some of England's common law daughter jurisdictions, such as North America. I have argued that defendants should be able to request a judge alone trial.[7]

There are three main categories of criminal case: indictable, triable either way, and summary. Indictable cases must be heard in the Crown Court. Summary offences must be heard in the magistrates' courts. The large middle category of either-way cases includes some very serious offences, such as theft and most offences against the person. In this group, the defendant may opt for a Crown Court trial. Most defendants choose a summary trial in the magistrates' court but the magistrates may send the case up to the Crown Court if they consider it too complex and/or serious for their bench. It is much cheaper to hear a case in the magistrates' court and for decades now, magistrates have been continually reminded that they should keep either-way cases in their court. They are reminded of their power to send a case up to the Crown Court if, having heard it, they consider their sentencing power of six months for a single offence to be too limited. They are also reminded that many of the cases they send up to the Crown Court for trial are ultimately sentenced within the powers open to the magistrates. Criminal appeals lie, as of right, from the magistrates' court to the Crown Court and from the Crown Court, with leave, to the Court of Appeal (Criminal Division), staffed by High Court judges and CA judges. The High Court can judicially review proceedings of the lower courts and hear some appeals from magistrates' courts. The UK Supreme Court, staffed by 12 judges, serves the three UK legal systems, determining appeals on points of law of general public importance. From England and Wales, these include criminal appeals.

2. The Constitutional Reform Act 2005, in force 2006[8]

I have spent my student years and career, since 1971, trying to draw attention to defects in the English legal system, because I was brought up on the mantra "British justice is the finest in the world." The same supercilious complacency has supported the ancient, unwritten UK constitution. The Act dismantled the controversial office of

[7] For instance, in *An essay on the importance and neglect of the magistracy*, "Criminal Law Review" September 1997, pp. 627–643.

[8] The Act, its background and outcomes and the information here are explained in depth in *Darbyshire on the English Legal System*…, chapter 6 part 5 on the UK Supreme Court and chapter 14 on judges. Like all modern UK legislation, it can be found at legislation.gov.uk and in annotated form on the UK versions of *Westlaw* and *Lexis.*

Lord Chancellor, created a new UK Supreme Court, and changed the judicial selection and appointment system.

3. The Lord Chancellor, the UK Supreme Court, and collective judicial independence

Prior to this Act, the UK had little to brag about in terms of formal separation of powers and independence of the judiciary as a separate organ of Government, even though the independence of *individual* judges had been safeguarded by the Act of Settlement 2001. Constitutional lawyers had long criticised the lack of separation of powers. The main problems in this context were the lack of a physically separate UK Supreme Court and the blatant breach of the separation of powers in the 1,400-year-old office of the Lord Chancellor. The law lords (top court) were members of the House of Lords, the upper House of Parliament, even though they were apolitical career judges and seldom spoke in Parliament. Their courtroom was in the Parliament building. Just as bad, the Lord Chancellor played a powerful part in all three organs of government. He was the very *head* of the judiciary, with power to sit as top judge in the top court and had a very important role in selecting judges; he was the *speaker* of the House of Lords and he was a member of the *Cabinet* Government and a member of multiple Cabinet committees and the chair of some.

Strident public speeches urging reform were made in 2002 by South African law lord, Lord Steyn, and Senior Law Lord, Lord Bingham, an intellectual giant, internationally renowned and respected and the most brilliant UK judge of the twentieth century. Lord Steyn said the LC's job was "not consistent with even the weakest principle of separation of powers […] or rule of law […] in no other democracy does the judiciary have a 'representative' in cabinet […]." Most of Prime Minister Tony Blair's New Labour government were already intent on reform but the last straw was an attack by the Parliamentary Assembly of the Council of Europe, the watchdog for the European Convention on Human Rights (not an EU institution). In April 2003, they reported "continuation of the current system creates real problems of lack of transparency and thus a lack of respect for the rule of law." The report's author, the Council's rapporteur Eric Jurgens, had just appeared before the UK Parliament and expressed his exasperation:

> Every day […] I am in in confrontation with new democracies from central and Eastern Europe, who I tell they should not do certain things and they say "What about the British?"

Tony Blair was left with no option but to announce proposed legislation to create a UK Supreme Court and abolish the job of Lord Chancellor. New Labour had introduced the Human Rights Act 1998 and "brought Convention rights home", as they said, by making them enforceable in domestic law and the UK courts, so they could hardly ignore the blatant breach of Art. 6 in the Lord Chancellor's job. Thanks to fierce opposition, his

job was kept, in the shape of a new Minister of Justice, but other parts of his job were dismantled and redistributed. The Bill, now Act, also further reformed the selection and appointment system for judges.

The Government said the new top court would not be like the US Supreme Court, with a power to strike down legislation, because Parliament is supreme in the UK constitution. They did, however, set out questions for consultation. The announcement caused years of powerful debate but at last, in October 2009, the UK Supreme Court opened in its own elegant building, in a converted courthouse and former council chamber, facing the Parliament building across Parliament Square. The twelve judges have a President, who makes its rules, "simple and simply expressed" with a view to securing that the court is "accessible, fair and efficient." The Justices devise their own practice rules and these were originally drafted after a series of private seminars with academics (including me), judges, and practising lawyers. The most striking outcome reflects the aim that the court should be accessible to the public and it is probably the most transparent and user-friendly court in the world. They actively welcome drop-in visitors and they value their 4.5 star Trip Advisor rating. The court attracts thousands of visitors a year, including school groups. Guided tours can be booked, as can online sessions with a Justice. Children can watch from behind a glass wall at the back of one of the courtrooms. There is an attractive public café in the basement, next to informative displays about law and the Court, for children and adults. Students and visitors can dip in and out of the courtrooms or watch proceedings on the TV in the basement. They have an informative website, with details of upcoming cases, and excellent press releases summarising their judgments, as well as a large selection of educational resources. They have a dedicated YouTube channel and any media in the world can make free use of the continuous online TV feed. A UKSC blog is run by lawyers.

The 2005 Act places great emphasis on judicial independence. The Lord Chancellor ceased to be head of the judiciary. The Lady Chief Justice is now head. Judiciary related functions are divided between her and the reformed Lord Chancellor, now also called the Minister of Justice. The LC is not required to be a judge or even a lawyer, which is very controversial. Crucially, the LC and all ministers are now under a statutory duty to uphold judicial independence. They must not seek to influence judicial decisions. The LC must "have regard to" the support judges need and for the public interest to be represented in matters relating to the judiciary or administration of justice. (Under the Courts Act 2003, the LC has a duty to ensure an efficient and effective system to support court business). The LC is responsible for the framework of the courts, including jurisdictional and geographical boundaries, and the allocation of court business; for providing and allocating money and resources for the administration of justice; for judges' pay, terms, conditions and training resources and for determining the number of judges.

The Lady Chief Justice has responsibility for representing judges' views to Parliament and Government; for judicial welfare and guidance; for deployment of judges and for allocation of work within the courts. She is responsible for allocating jobs for individual

judges; authorising them to do particular work; making rules for deploying magistrates; allocating work within courts of one level and appointing judges to specific posts, such as managing and training roles. This work was all transferred by the Act from the LCJ so 60 civil servants were installed in the Royal Courts of Justice to run the Judicial Office and the Judicial Communications Office. The Lady Chief Justice runs the judiciary with the help of the Heads of Division, such as the President of the Family Division and Head of Civil Justice.[9] She can delegate to them the power to make practice directions.

4. The separation of powers and judicial review

Constitutional theorists, notably the Englishman Locke in the seventeenth century and the Frenchmen Montesquieu in the eighteenth praised the separation of powers as a guarantee of democracy. The concentration of governmental power of more than one type – legislative, executive, and judicial – in the hands of one person or body is considered dangerous. In the unwritten UK constitution there is no point in looking for a pure separation of powers. All we can hope for is a balance of power, a system of checks and balances. All the Act of Settlement 1701 did was to guarantee *individual* judicial independence, not the *collective* independence of the judicial bench. Thanks to Parliamentary supremacy, judges' job is to carry out the will of Parliament. The Supreme Court does not have the power to review primary legislation and declare it to be unconstitutional, like the US Supreme Court. Nevertheless, when the UK was in the EU, they did have a power to declare a UK Act, or part of an Act, to be incompatible with EU law. Furthermore, the Human Rights Act 1998 says that "so far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." UK top court judges are all brilliant, however. History shows them to have been ingenious in interpreting statutes and the will of Parliament so that it accords with their own versions of ancient, immutable common law concepts which would elsewhere be entrenched in a written constitution. Also, using their power to judicially review the legality of executive action, judicial boldness has grown out of recognition since 1960, escalated by simplifying the procedure from 1981.[10] The Human Rights Act simply added to judges' toolkit of review. Whenever governments have tried to oust the power of the courts by legislation, the judges have circumvented it.

[9] Judicial roles are explained on the judiciary website and in the judges chapter of my textbook.

[10] In The Judicial Review and Courts Act 2022, the Conservative Government sought to curtail review powers but lawyers campaigned for two years to remove some of the worst restrictions. The Law Society claimed a victory for the Rule of Law; lawsociety.org.uk [accessed: 2025.01.12].

5. Individual judicial independence

This has been protected in the UK since the Act of Settlement 1701, so for instance a High Court or Court of Appeal judge can only be removed by the monarch, following a petition by both houses of Parliament. This is now embodied in the Senior Courts Act 1981.

Independence and impartiality are fundamental principles of the UN Basic Principles on the Independence of the Judiciary and the European Convention on Human Rights, art. 6. Judicial independence in the UK seems to contain or have contained these elements, some of which are conventions or lapsed conventions.

1. Security of tenure: under the 2005 Act, discipline for the lower judiciary was transferred to the Lady Chief Justice and a scheme was established. The Judicial Conduct Investigations Office[11] was established by regulations, to assist the LCJ in handling complaints. With the agreement of the LC (Minister of Justice), she may advise, warn or reprimand any judge and she can informally speak to any judge on a matter of concern. Under the Courts Act 1971, the LC may remove a circuit judge on the grounds of incapacity or misbehaviour, subject to the LCJ's consent. The Judicial Appointments and Conduct Ombudsman, a lawyer, considers complaints about the handling of disciplinary cases. The Judges' Council has published a *Guide to Judicial Conduct*.[12] It was established in 2003, applying the principles of judicial independence, impartiality and integrity, modelled on the six fundamental values set out in the Bangalore Principles of Judicial Conduct,[13] endorsed by the UN. It was revised in 2023 to reflect changes in judicial and public life.
2. High Salaries: in 1825, when judicial salaries were fixed at £5,500 (the equivalent of over £644,000 in 2025), it was thought this would discourage corruption but this principle seems to have been forgotten. Since September 2024, the Lady Chief Justice is paid £312,510. Even in 2016, the highest paid primary school head teacher was paid £330,000. A High Court judge is paid £225, as of September 2024. Most are recruited from the Bar and many take a drop in income, on appointment as a judge. Indeed, most senior judges (High Court and above) are King's Counsel, some of whom earned millions of pounds as lawyers. Thanks to this and to poor pension levels, recruitment of judges has been a struggle in recent years, with many High Court and circuit positions remaining unfilled.
3. Judges cannot be MPs (a statutory prohibition) and should not engage in politics. It was common before 1950 for judges in England and Wales to have been MPs. A political career was seen as a good background for life on the bench. Even in 1960, one third of judges had been Parliamentary candidates or MPs.[14] Nowadays,

[11] Judicial Conduct Investigations Office, complaints.judicialconduct.gov.uk [accessed: 2025.01.12].
[12] On the Courts and Tribunals Judiciary website: judiciary.uk [accessed: 2025.01.12].
[13] United Nations Office on Drugs and Crime, unodoc.org [accessed: 2025.01.12].
[14] R. Stevens, *Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World*, "Legal Studies" 2004, vol. 24, no. 1–2, pp. 1–35.

serving judges are scrupulously apolitical, in a party political sense, the absolute opposite of the USA. In doing my research with judges (2002–2014), the one question I was not permitted to ask judges was what their party politics were and in my years of spending hundreds of days with judges all round England and Wales, I never heard a party political remark.[15]

4. Judges cannot be sued for remarks in court. This is the same protection as parliamentary privilege. Parties do complain about judges of course. Court buildings are festooned with notices about how to complain about a judge. In 2022–2023 there were 1,620 complaints. 41 per cent were rejected because they were outside the JCIO's remit, such as "I lost my case." 46 per cent were rejected for a range of reasons.[16]
5. Parliamentarians do not criticise judicial decisions. This occurs occasionally. Judges were criticised in Parliament in 2011 for granting super-injunctions to protect public figures such as footballers.
6. Politicians should refrain from criticising judges out of court. To my disappointment, Government ministers[17] sometimes have to be reminded that they have a *duty* to defend judicial independence under the 2005 Act, s. 3(1).

   > The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.

   For five years beforehand, and during and immediately after the passing of the 2005 Act, judges were repeatedly and vociferously criticised by two top cabinet ministers, who were Home Secretaries, and then Prime Minister Tony Blair himself. Judges had indeed lobbied for this duty to be included in the Act.
7. The media should refrain from criticising judges out of court. Examining media coverage over the centuries, I doubt that this was ever a Convention and in recent years newspaper campaigns by *The Sun* and *The Daily Mail* against groups of judges have reached a scandalous level, with the *Daily Mail* screaming ENEMIES OF THE PEOPLE, as its front-page headline, attacking the three judges sitting in the High Court, who ruled against the Government in a 2016 case about Brexit. J.K. Rowling made fun of the idiocy of the attack on Twitter. Appearing in Parliament in front of the House of Lords Constitution Committee in 2017, The Lord Chief Justice was highly critical of the then Lord Chancellor, Liz Truss, for refusing to defend the judges and the following week, the President of the UK Supreme Court reminded the Committee of the Lord Chancellor's duty to correct and criticise the newspapers.
8. Freedom from interference with decision making. It is a hallmark of undemocratic regimes that the government tells judges how to judge. A lengthy spat went on

[15] P. Darbyshire, *Sitting in Judgment…*

[16] Judicial Conduct Investigations Office, *JCIO Annual Report 2021–2022*, https://www.complaints.judicialconduct.gov.uk/JCIOAnnual%20Report21-22?utm_source=chatgpt.com [accessed: 2025.01.12].

[17] Currently 111, of whom 23 are in the Cabinet.

in 2003–2004 between Lord Chief Justice Woolf and Home Secretary David Blunkett, over sentencing and whether the executive or the judiciary should decide on the minimum sentence for murder, for example, and who should decide when to release prisoners. Blunkett suffered a series of defeats in the European Court of Human Rights and the UK's top court, under art. 6 of the Convention.

9. The rule against bias. At English common law, the rules of natural justice are meant to guarantee a fair trial and they apply to anyone acting in a judicial capacity, including lay magistrates and lay members of tribunals. They comprise *nemo judex in causa sua* (no person a judge in their own cause) and *audi alterem partem* (hear the other side). They were confirmed in Magna Carta 1215 and are reflected in Article 6 of the European Convention, which was drafted by UK lawyers. Anyone acting in a judicial role must act fairly. The *Guide to Judicial Conduct* says:

   > judicial office holders should, so far as is reasonable, avoid extra-judicial activities that are likely to cause them to have to refrain from sitting because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.

   The rule against bias is not confined to actual bias but, as the guide explains,

   > Judicial office holders must recuse themselves from any case where a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that they would be biased. This hypothetical observer is taken to know that judges take an oath to administer justice without fear or favour, but also to know that the taking of the oath, by itself, is not sufficient guarantee to exclude all legitimate doubt.

   This is a summary of the common law, as developed over the years and set out in case law, in cases such as *Locabail* (2000). In my textbook, I give two embarrassing modern examples of bias.

10. A politically independent appointments system. This was provided for by the 2005 Act, as described below. In the nineteenth and early twentieth centuries, political appointments by the Lord Chancellor were fairly unusual and criticised by the newspapers, lawyers, and opposing political parties. By 2005, they were heavily frowned on, but I gave famous examples of governments appointing judges whose political notoriety, as lawyers, was diametrically opposed to the government.
11. Impartiality. The *Guide* treats the rule against bias as "impartiality." The 26-page *Guide* spells out judges' obligations in respect to "integrity", as required by the Bangalore principles, and sets out guidance on specific issues in their non-judicial activities, such as contact with the legal profession. Importantly, judges also receive equal treatment training and are directed to read the 352-page *Equal Treatment Bench Book*, which has been continually updated over many decades now. It is on the Judiciary website.[18] It was last revised in July 2024.

[18] Court and Tribunals Judiciary, judiciary.uk [accessed: 2025.01.12].

6. The relationship between the executive government, the legislature and the judiciary since the Constitutional Reform Act 2005

The 2005 Act struggled slowly through Parliament because it was so controversial and it was heavily debated outside Parliament in 2003–2005. Some top judges were concerned that as the Lord Chancellor would lose the job as top judge, and no judges would be allowed to speak in the two parliamentary chambers, there would be no-one in the Cabinet government or Parliament to protect judicial interests. I never thought that this argument could or should trump the dire need for a strict separation of powers, as required by the Council of Europe. In any event, the judges have a stronger Judges' Council now to represent their views and they, especially the Lady Chief Justice, regularly appear before parliamentary select committees, the all-party watchdogs over executive action, to represent the judiciary and lawyers and to criticise the underfunding of the chaotic courts. Furthermore, retired judges can be appointed to the upper parliamentary chamber, the House of Lords, and they regularly speak on legal issues in that chamber. Lawyers and retired judges were indeed "the largest single professional group in the Lords" by 2010, as pointed out by Gee et al, below. There has been an ongoing fight since before the 2005 Act between the judiciary and governments about judicial salaries and pensions and it is argued that this puts lawyers off from applying to be judges. Nevertheless, as the authors of *The Politics of Judicial Independence in the UK's Changing Constitution*[19] argue, judges' protests about the loss of relative value in their pensions is never going to attract sympathy because they are in the top one percentile of earners. Executive power will always trump judges' complaints because the executive holds the purse strings. There is an independent body, The Senior Salaries Review Board, whose duty it is to advise Government on judges' salaries but not their pensions. In 2024, they remarked on the worsening shortage of judges, caused by a salary freeze: "In the last District (Civil) Judge recruitment campaign only 49 out of 100 vacancies were filled"[20] and they recommended a 6 per cent pay rise, implemented in September. One thing that does bother me nowadays, is that ministers have to be reminded of their statutory duty to defend judicial independence, as described above. My second serious worry is the lack of stability and informed intelligence in the occupants of the job of Minister of Justice. It used to be the case that Lord Chancellors, all lawyers, served for years, sometimes repeatedly. Nowadays, especially during the Conservative administration that was at last voted out in 2024, anyone could have a go at being the Minister of Justice for a few months, even the ridiculed Liz Truss, whose Prime Ministership lasted for less time than a Tesco lettuce. This applied to all Conservative ministerial appointments, which have

[19] G. Gee, R. Hazell, K. Malleson, P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge 2015. This book is a must read for anyone interested in judicial independence.

[20] Review Body on Senior Salaries, *Forty-Sixth Annual Report on Senior Salaries 2024. Report No. 97*, p. 61, https://assets.publishing.service.gov.uk/media/66a7a3c849b9c0597fdb066e/SSRB_Annual_Report_2024_Accessible.pdf [accessed: 2025.01.12].

been allocated in the fashion of an ever-faster game of musical chairs. I am hoping for more stability under the current Labour administration.

7. The judicial appointments system[21]

The selection and appointments system and the composition of the judiciary has been widely criticised since at least the early 1970s. It has been progressively reformed and professionalised since the 1990s and was significantly enhanced by the 2005 Act. Judges from UKSC Justices down to district judges are appointed by the King. Lay magistrates are appointed by the Senior Presiding Judge.

UKSC Justices have to be selected from persons who have held high judicial office for two years or who have been a qualifying legal practitioner for 15 years. When a Justice is needed, a selection commission is appointed. It consists of a lay chairperson, the Deputy President of the Court, and one member from each of the three Judicial Appointment Commissions, for Scotland, Northern Ireland, and England and Wales. At least one must be a non-lawyer. Vacancies are advertised on the UKSC website and elsewhere. Once selected, the Lord Chancellor (Minister of Justice) can accept the selection, or ask the Commission to reconsider or reject it, but the Act severely curtails his/her discretion and limits the acceptable grounds for rejection. (Most appointees have been members of the Court of Appeal or its equivalent in Northern Ireland or Scotland). The Commission is then dissolved. Unsurprisingly, there have been calls for American-style public selection hearings, but usually these have provoked horror. In my experience, UK television viewers, judges, and lawyers have a morbid fascination with the hilarious and sad spectacle of US Supreme Court selection hearings.[22] The more comedic and sinister party politics becomes in the USA, the more UK lawyers and judges become fixated that *all* judges should be strictly aloof from and unconnected with politics.

Other court and tribunal judges, up to and including the High Court but excluding lay magistrates, are *selected* by the Judicial Appointments Commission, which was provided for by the 2005 Act.[23] It consists of a lay chairperson and 14 commissioners (six judicial members, two lawyers of different types, five lay people, and one non-legally qualified judicial member, such as a lay magistrate). They have a statutory duty to select candidates on merit, who are of good character. They must "have regard to the need to encourage diversity in the range of persons available for selection for appointments." They hold selection competitions, which are widely advertised and explained in detail on their website. They publish annual reports and statistical data on

[21] Facts, analysis and critique are explained in much greater depth in my textbook.

[22] See for example, my story in my 2011 book (*Sitting in Judgment*…), of the hilarity such hearings caused among the law lords (in the chapter on the law lords/UK Supreme Court).

[23] Everything is explained in plain English on its website, judicialappointments.gov.uk [accessed: 2025.01.12].

appointments, and equality and diversity information. Their website includes a lot of guidance and help in preparing applicants. Individual selection panels are convened for members of the Court of Appeal. Selection competitions for recorders (part-time circuit judges), and district and circuit judges, have been held since before 1994, but their job specifications and competition details have been placed online since 1994. High Court competitions have been online since 1998. Now all positions are online and advertised widely online and elsewhere, including those of the UKSC. Every judicial job has to be applied for, in open competition, even the position of trainer judge, for example. All details and competitions are on the JAC website.

The UK does not have a career judiciary, unlike European "Civil Law" systems, which are a different family of legal systems. By statute, judges can only be selected from among those qualified lawyers who have statutory rights of audience (rights to argue a case in court) at the level of court in which they are applying to sit as a judge.

8. Who can apply to be a judge?

The answer to the question is: lawyers with rights of audience in court and with post qualification experience (usually five years). My criticism is this: because most solicitors do not have rights of audience above the County Court and the magistrates' courts, this means that they are excluded from applying to be a judge in the Crown Court and above unless they have passed the examination to gain rights of audience and/or are already a judge. Consequently, barristers dominate the middle and top of the judicial pyramid. When a High Court judge is needed, it is common for there to be only six or so appropriately qualified barristers. Circuit judges can be appointed to the High Court but most are recruited direct from the Bar. There are ten times as many solicitors as barristers, and they come from a more diverse demographic pool. They dominate the numbers of district judges and tribunal judges. Naturally, if they could apply for senior appointments the available pool would be much bigger and more diverse. Similarly, academics are excluded, unless they are professionally legally qualified.

It is normal practice, not law, that judges must sit part time, as fee-paid judges, before applying, usually for five years. I think this is invaluable because it enables the judicial candidate to practise her skills and for her and those around her to assess whether judging is the right job for her.

9. Diversity

The main critique of the judiciary is its lack of diversity, in terms of class, gender, and ethnicity. Although Lord Chancellors and now the JAC have bent over backwards since 1990 to try and attract more candidates and make it easier for underrepresented groups such as solicitors and women to apply, progress has been hopelessly slow and

bears no relation to the typical pattern of diversity in a country with a career judiciary, as can be seen.

Only 37 per cent of all court judges in England and Wales are women (see the diversity statistics tables, the 2023 Excel spreadsheet, on the judiciary website). Men outnumber women at every rank. Women comprise:

- 2 of 12 UKSC Justices;
- 12 of 38 Court of Appeal judges;
- 30 of 99 High Court judges;
- 240 of 664 circuit judges;
- 196 of 437 County Court district judges;
- 52 of 138 District Judges (Magistrates' Courts).

But, 54 per cent of new entrants to the courts judiciary were women and of 1809 lawyer-judges in tribunals, 52 per cent are women.

10 per cent of all court judges are minority ethnic. 13 per cent of lawyer-judges in tribunals are minority. This reflects the demographic spread of the population much more closely than it did a few years ago. Judges do not reflect the population at large of course. This can never happen because they have to be lawyers.

10. What causes lack of diversity?

Causes are:

- the statutory exclusion of most solicitors from eligibility for most judicial jobs;
- the difficulties in recruiting solicitors;
- the hopeless historic and current lack of gender diversity in the legal profession, especially at the Bar.

Why does diversity matter? Because it is an international embarrassment, as I have called it, *not* because women judges would reach different decisions. That would be wrong and it is not supported by empirical research evidence.

11. Finally: a very brief synopsis of the methods of my research into the working lives of judges, reported in my 2011 book (I was asked to include this)

My aims were to find out what judges were like and what they did in their working day, and this is what the book reported. It has been likened to a wide and deep anthropology of judges. With the help and backing of the judiciary, especially the Lord Chief Justice, and funding by The Nuffield Foundation, I was able to spend my non-teaching time in 2002–2010 work-shadowing 40 judges at every level of court, in criminal, family and civil proceedings, throughout at least four working days each, in as broad a range of their work as possible. I travelled throughout the country, on all six circuits of England

and Wales, to a wide variety of courts. On my travels, I interviewed 37 further judges and met hundreds more. When travelling on circuit with High Court judges, I was able to stay in their lodgings. Throughout the working day, I was in and out of the courtroom with each judge, sitting next to her on the bench, and I would encourage her to describe and comment on her work, workload and facilities, all day. I was given unlimited access to case papers. All courts and judges were anonymised. Judges were able to read and comment on drafts of the book sections in which they appeared. The LCJ read multiple drafts of the chapters. No judge sought to censor my work. As well as describing their working lives, I also described the judges' characteristics, as I observed them, their backgrounds, motivation in applying, their selection process, training and attitudes towards their work and the relationships between judges. The book has sold in 34 countries and has been translated into Chinese. In 2011–2012, I went back into 10 more Crown Courts to report on judicial management of serious criminal cases.[24]

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[24] The *Criminal Law Review* 2014, no. 1, is on the database *Westlaw* and most of my career articles are there or in the *Cambridge Law Journal*. My textbook, *Darbyshire on the English Legal System* (15th ed., London 2025), is also on *Westlaw*.

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Summary

Penny Darbyshire

Judicial Independence in General and in England and Wales

The article concerns judicial independence. It is a fundamental element of the rule of law. A recent disregard for these ancient requirements of democracy in some countries, including some EU Member States, has caused international concern. This chapter explains the following issues:
– important points about the English legal system, especially the criminal courts;
– the radical reforms to the UK's ancient, unwritten constitution, under the Constitutional Reform Act 2005, remedying defects in the separation of powers and strengthening collective judicial independence;
– the Act's role in further professionalising judicial recruitment, selection and appointment and enhancing the safeguarding of individual judicial independence. I also explain the international standards for judicial independence;
– the relationship between the three organs of government since the 2005 Act;
– the modernised judicial appointment system and the current diversity statistics.
At the end is a very brief section, describing the methods of my own empirical, wide and deep research project on the working lives of judges (2002–2014), which remains unique worldwide.

Keywords: rule of law, separation of powers, judicial independence, UK constitutional reform, judicial appointments.

Streszczenie

Penny Darbyshire

Niezawisłość sądów w ujęciu ogólnym oraz na przykładzie Anglii i Walii

Artykuł dotyczy niezawisłości sądów, będącej fundamentalnym elementem rządów prawa. Niedawne lekceważenie tych odwiecznych wymagań demokracji w niektórych krajach, w tym

w wybranych państwach członkowskich UE, wywołało międzynarodowe zaniepokojenie. Opracowanie przedstawia:
– najważniejsze zagadnienia dotyczące angielskiego systemu prawnego, w szczególności sądów karnych;
– radykalne reformy starodawnej, niepisanej konstytucji Wielkiej Brytanii wprowadzone ustawą o reformie konstytucyjnej z 2005 r., naprawiającą wady podziału władzy i wzmacniającą zbiorową niezależność sądownictwa.
– rolę ustawy w dalszej profesjonalizacji procesu rekrutacji, selekcji i powoływania sędziów oraz we wzmocnieniu ochrony niezależności poszczególnych sędziów, a także międzynarodowe standardy niezawisłości sędziowskiej;
– relacje między trzema organami rządowymi od czasu wejścia w życie ustawy z 2005 r.;
– aktualny system mianowania sędziów oraz bieżące statystyki dotyczące parametrów różnorodności w sądownictwie.
W końcowej części artykułu zaprezentowano metody autorskiego empirycznego, szerokiego i dogłębnego projektu badawczego na temat życia zawodowego sędziów (2002–2014), który pozostaje unikalny w skali światowej.

Słowa kluczowe: praworządność, podział władzy, niezawisłość sędziowska, reforma konstytucyjna Zjednoczonego Królestwa, nominacje sędziowskie.