

Who Appoints the Chief Justice?

The Separation Fairytale Revisited: *Should Judicial Independence Now Belong to the People?*

Introduction

Few constitutional principles are more frequently invoked than the doctrine of the separation of powers.

It is presented as one of the cornerstones of democratic government.

- Parliament legislates.
- Government governs.
- The judiciary interprets and applies the law.

The principle appears straightforward. The constitutional reality however, is rather more complex.

Our nation's constitution has never created an absolute institutional separation between those branches of the State. Instead, it has developed a carefully balanced constitutional relationship in which each institution

performs distinct functions whilst remaining connected through statutory and constitutional mechanisms.

One such mechanism concerns the appointment of the Chief Justice.

This paper does not suggest that the present constitutional arrangements are unlawful or improper.

It asks a different question.

If judicial independence is truly fundamental to constitutional democracy, should any branch of government continue to possess constitutional responsibility for appointing or overseeing those whose constitutional function is ultimately to judge the actions of the State itself?

The Constitutional Position Today

The appointment of the Chief Justice is governed by law.

A statutory appointments process identifies a recommended candidate through an independent selection commission.

The recommendation then proceeds through the constitutional appointment mechanism involving the Lord

Chancellor (who is, of course, a member of the Executive), before formal appointment by the Sovereign.

The process contains important safeguards.

It has produced judges of outstanding ability.

Nothing in this paper questions either proposition.

Indeed, the present arrangements are claimed by some to have served us for many years.

The question is not whether they have worked.

The question is whether they now represent the highest constitutional standard to which a mature democracy should aspire.

The Separation Question

Much public discussion proceeds upon the assumption that judicial independence exists because judges remain free from political direction once appointed.

That proposition is undoubtedly important.

Another question naturally follows.

Can institutional independence ever be complete whilst another branch of government continues to participate in the appointment process?

Reasonable people may answer that question differently. Some will argue that statutory safeguards sufficiently protect judicial independence. Others may conclude that constitutional legitimacy increasingly requires something more.

This paper advances the latter proposition.

Not because the existing system is necessarily flawed, but because genuine institutional separation requires more than operational independence - It requires constitutional independence.

A Fourth Constitutional Guardian?

Traditionally, constitutional discussion concerns three branches of the State.

- The legislature.
- The executive.
- The judiciary.

Perhaps the time has come to ask whether judicial independence should ultimately depend upon none of them all.

Suppose responsibility for judicial appointments and constitutional oversight were vested instead in an entirely independent constitutional institution.

- Not an executive body.
- Not a parliamentary committee.
- Not a judicial organisation.

Instead, a constitutional body established by Parliament yet thereafter operating independently of every branch of government.

Its constitutional purpose would be singular - To protect the independence of the judiciary by and on behalf of the people, rather than on behalf of the State.

Such a body might include members drawn from retired judges, the practising legal profession, those no longer practising, constitutional academics and more importantly, in my view, lay citizens selected through transparent and independent constitutional processes.

Its legitimacy would derive not from government. It would derive from the constitutional authority of the people themselves.

Why the People?

The judiciary exists for one fundamental reason.

To determine disputes according to law.

Sometimes those disputes concern private individuals. Increasingly, however, they concern the exercise of State power itself.

Judges may determine whether ministers have acted lawfully.

They may determine whether police have exercised powers properly.

They may determine whether legislation complies with constitutional principles.

In short, they judge the actions of the State.

That observation gives rise to an important constitutional question.

If judges exist to determine disputes involving the State, should the State itself retain any constitutional role in determining who those judges are?

That question is not directed towards any individual office-holder. It is directed towards the constitutional architecture itself.

Independence and Public Confidence

Public confidence depends upon more than constitutional correctness. It depends also upon constitutional appearance.

Justice has long recognised that it must not merely be done. It must be seen to be done.

The same principle may equally apply to constitutional independence.

A judiciary may be entirely independent in practice, but public confidence may still be enhanced if institutional arrangements themselves demonstrate complete constitutional separation from every branch of government.

The issue therefore extends beyond legal theory.

- It concerns constitutional legitimacy.
- It concerns public trust.
- It concerns confidence that the final guardian of the rule of law stands institutionally apart from those whose actions may ultimately come before it.

Constitutional Evolution

Our constitution has never been static. It has evolved continuously.

The Constitutional Reform Act 2005 itself represented one of the most significant constitutional developments in modern history.

- The creation of the Supreme Court.
- The removal of judicial functions from the House of Lords.
- The redefinition of the Lord Chancellor's constitutional role.

Each reflected constitutional evolution rather than constitutional revolution.

This paper suggests that evolution may not yet be complete.

The next logical step may be the completion of judicial independence through the removal of every remaining constitutional connection between judicial appointment and the institutions whose actions judges may ultimately be required to scrutinise.

Conclusion

This paper does not argue that Britain's judiciary lacks independence. That is a different question. Nor does it suggest that those presently exercising constitutional appointment functions have acted improperly. That too would be a different question.

It advances a different proposition.

If judicial independence represents one of the highest constitutional principles within a democratic society, then perhaps its institutional protection should no longer depend, even in part, upon any branch of government.

Perhaps the ultimate constitutional guardian of judicial independence should instead be the people of the nation themselves.

Not through political election, nor through party politics, but through a genuinely independent constitutional appointments and oversight body deriving its authority from the constitutional sovereignty of the people rather than from Parliament, Government or the judiciary itself.

The question is therefore neither political nor personal. It is plainly constitutional.

For centuries we have spoken of the separation of powers.

Perhaps the time has come to ask whether that principle should now be completed.

If the judiciary exists to judge the State, one final constitutional question remains.

Should the State continue to play any constitutional role in selecting those who ultimately judge it?

I know what I believe.

Ian Clayton

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