

Judicial Independence and Accountability in the UK

This article presents the main findings and conclusions from an AHRC funded three year research project on the Politics of Judicial Independence, focusing on England and Wales.¹ The research explored the impact of the greater separation of powers introduced by the Constitutional Reform Act 2005, which replaced the Lord Chancellor as head of the judiciary by the Lord Chief Justice, created the new Supreme Court, and established the Judicial Appointments Commission. Our research methods included analysing all the primary and secondary literature; conducting over 150 interviews with judges, ministers, parliamentarians, and senior officials; and holding ten private seminars with judges, policy makers and practitioners. Our principal general conclusion is that judicial independence and judicial accountability have both emerged stronger, not weaker; and paradoxically, that greater separation of powers requires more, not less engagement by the judiciary with the other branches of government.²

The changes made by the Constitutional Reform Act 2005

Until 2005 the head of the judiciary was a Cabinet minister, the Lord Chancellor. He was responsible for the judicial appointments system, and appointed the judiciary; he determined their pay and pensions; he was responsible for investigating complaints against judges, and imposing discipline; he could dismiss junior judges; he was responsible for providing and running the Courts Service. In an extraordinary breach of separation of powers, he could also sit as a judge in the highest court.

The Constitutional Reform Act 2005 removed the roles of the Lord Chancellor as head of the judiciary, but otherwise left the office in being. It set out the functions to be transferred to the Lord Chief Justice as head of the judiciary, implementing the agreement struck in the Concordat of 2004. The division of powers between the Executive and Judiciary was further refined in 2008 in a Framework Document for the management of the Courts Service (revised and updated in 2011 to incorporate the Tribunals Service).

The new politics of judicial independence are more formal, fragmented, and politicised

By the “politics of judicial independence” we mean the institutional relationships necessary to uphold judicial independence, and in particular the relations between the judiciary and the political branches of government. We focus on the political branches as a corrective to the tendency amongst lawyers to look primarily to the law and legal remedies, recognising that judicial independence is itself a political achievement.

So how would we characterise the new politics of judicial independence, following the great changes of the Constitutional Reform Act? The old politics under the ‘old’ Lord Chancellor were informal, depending on regular meetings between the Lord Chancellor and the senior judges; closed, in that these were virtually the only contacts between the judiciary and the government; and secretive,

¹ AHRC grant reference AH/H039554/1. The research also included Scotland and Northern Ireland, excluded here for space reasons. I owe a great debt to my co-investigators Prof Kate Maleson (Queen Mary, University of London), Graham Gee (University of Birmingham) and Patrick O’Brien (UCL). Any errors and omissions are my own.

² G Gee, R Hazell, K Maleson, P O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press, 2015).

with both sides preserving each other's confidences. They were also consensual and conservative, in that neither side wanted to change the system.

The 'new' politics, by contrast, are much more formal. The Constitutional Reform Act 2005 required more formal structures and processes to handle the relationships between more separate branches of government. We now have the Judicial Appointments Commission, Judicial Appointments and Conduct Ombudsman, and Judicial Conduct Investigations Office: all products of the Constitutional Reform Act.³

In terms of more formal processes, the most obvious are the detailed procedures laid down in the 2004 Concordat between the Lord Chief Justice and Lord Chancellor, and the later Framework Documents 2008 and 2011, in which they agreed to manage the Courts Service as a partnership between them. Another example is the formal recruitment processes to the judiciary: now organised by open competition for all judicial office, from the lowest to the highest positions. The new formal processes also include regular meetings between the judiciary and the other branches of government, with the innovation of six monthly meetings between the LCJ and Prime Minister, the introduction of regular meetings with senior officials in Parliament, and annual appearances by the Lord Chief Justice and President of the Supreme Court before the House of Lords Constitution Committee.

The second difference is that the new politics are more fragmented. There is less reliance on the single channel of the Lord Chancellor as the buckle between the judiciary and the government, and greater reliance on multiple channels. On the government side these include the Attorney General, Treasury Solicitor, Crown Prosecution Service, Parliamentary Counsel, and specialist bodies such as the Senior Salaries Review Body. On the judicial side there are now important leadership roles played by all members of the Judicial Executive Board, in particular the Senior Presiding Judge and Senior President of Tribunals.

These multiple channels now include Parliament. The judiciary frequently appear before parliamentary committees, as expert witnesses on different areas of the law and how it works in practice. Parliament occasionally provides a forum for helping to resolve major conflicts between the judiciary and executive: examples would be the (most unusual) Select Committee established by the House of Lords in 2004 to hear evidence on the Constitutional Reform Bill,⁴ and the urgent inquiry by the Lords Constitution Committee in 2007 into the implications for the judiciary of the creation of the new Ministry of Justice.⁵

A third difference of the new politics is that they can be more highly charged politically, with more overt conflict, often played out in the media. All governments will experience tensions with the

³ Until 2013 the JCIO was named the Office for Judicial Complaints (OJC). The OJC was not formally created by the Constitutional Reform Act, but was established by the Lord Chancellor and Lord Chief Justice in April 2006 to handle complaints and discipline under Part 4 of the Act.

⁴ House of Lords Select Committee on Constitutional Reform Bill, *Constitutional Reform Bill: First Report*, Session 2003–04, HL Paper 125-I (London: TSO, 2004). See also House of Commons Constitutional Affairs Committee, *Constitutional Reform Bill [Lords] – the Government's Proposals*, Session 2004-05, HC Paper 275-I (London: TSO, 2005).

⁵ House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament*, Session 2006-07, HL Paper 151 (London: TSO, 2007).

judiciary; the difference now is that they are more likely to come out into the open. Lord Phillips made no secret of his frustration at the failure of the Department for Constitutional Affairs to discuss the budget of the Courts Service, in breach of the 2004 Concordat;⁶ and in 2011 he fell into a public row with the Lord Chancellor Ken Clarke about the budget of the Supreme Court.⁷ Chris Grayling as the new Lord Chancellor signalled his wish to “draw blood” in negotiating changes to the judges’ pensions.⁸

A fourth difference, flowing from all these factors, is that the judges are more visible and more exposed. They appear frequently before parliamentary committees; they give press conferences and issue press releases, supported by the new Judicial Communications Office; the Lord Chief Justice issues a periodic report, and holds annual press conferences for the media.⁹ The LCJ and senior judges are more media-wise than their predecessors, and since they can no longer rely on the Lord Chancellor to speak for them, they must be more ready to speak for themselves.

Having enumerated the differences, there remain some similarities between the old politics and the new. Like the old, the new politics also depend on informal channels and contacts between government and judiciary, which help cement good relations. And like the old, the new politics depend heavily on personalities to help smooth out conflicts and to negotiate compromises. One senior judicial interviewee said that he would have found a way for the judges to talk to Charles Clarke (Home Secretary 2004-06) when he wanted to discuss a successful court challenge to his anti-terrorism legislation, at a time when Lord Bingham declined to do so.¹⁰

Have the 2005 changes strengthened or weakened judicial independence?

The judiciary feel strongly that the 2005 changes have weakened judicial independence. Many of our judicial interviewees were still in mourning for the old Lord Chancellor, a respected figure who had been their voice in Cabinet. Typical was Lord Judge, who lamented that “There is nobody in the Cabinet who is responsible for representing to members of the Cabinet how a particular proposal may affect the judiciary”.¹¹

But the judiciary may have slightly selective memories about the vigilance of the old Lord Chancellor. Lord Sankey did not prevent the cuts to judicial salaries in 1931; Lord Elwyn Jones refused to

⁶ Lord Phillips, *Further Evidence from the Lord Chief Justice* in House of Commons Constitutional Affairs Committee, *The Creation of the Ministry of Justice*, Session 2006-07, HC Paper 466 (London:TSO, 2006), <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/466/466we03.htm>. Last accessed 1 April 2015.

⁷ “Judicial Independence and Accountability: A View from the Supreme Court” Lecture to the UCL Constitution Unit, 8 February, 2011 at pp. 11-12. The Lord Chancellor retorted that the Supreme Court “cannot be in some unique position where the court decides on its own budget and tells the Ministry of Justice and the government what it should be”: <http://news.bbc.co.uk/1/hi/9391000/9391865.stm>.

⁸ Frances Gibb, “Grayling seeks ‘to draw blood’ in changes to judges’ pensions”, *The Times*, 26 September 2012.

⁹ See the Lord Chief Justice’s annual press conference on 5 November 2013, at <http://www.judiciary.gov.uk/media/media-releases/2013/lcj-press-conference-2013>. Last accessed 1 April 2014.

¹⁰ The case was about the Belmarsh detainees, *A(FC) and others v Home Secretary* [2004] UKHL 56. Lord Phillips showed some sympathy for Charles Clarke’s frustration in his speech to the Cardiff Business Club, 26 February, 2007, at pp. 6-7.

¹¹ In evidence to the Lords Constitution Committee, 30 January, 2013.

promote Sir John Donaldson in the 1970s because of his role in the Industrial Relations Court; Lord Mackay incurred the judges' wrath because of his changes to judicial pensions in 1993, and his dismantling of some of the Bar's restrictive practices.

Our own conclusion is that judicial independence is stronger, in a whole range of different ways, than in 2005. The judiciary have become institutionally more independent of the executive, and of the legislature; they have greater autonomy and responsibility for running the judicial system and the courts; and there are now multiple guardians of judicial independence as a value, instead of the single Lord Chancellor.

The biggest change, not sufficiently acknowledged by the judiciary, has been the expansion of the judiciary and the courts service to embrace the whole of the Tribunals system, following the implementation of the Leggatt review in the Tribunals Courts and Enforcement Act 2007. That has been a huge change, and great leap forward for the independence of Tribunals and the judiciary who run them. Tribunals used to be wholly dependent on their sponsoring government departments for their funding, and for the appointment of Tribunal members. Now the appointments are all made by the Judicial Appointments Commission and the Senior President of Tribunals, independent from government; and the funding of Tribunals comes from HM Courts and Tribunals Service. The incorporation of Tribunals has seen the judiciary grow by more than half, from around 3,600 to 5,600 judges; with the inclusion of magistrates, the total size of the judiciary is now some 30,000.

Judicial appointments are the next biggest change, responsibility for which has shifted from the executive in the form of the Lord Chancellor, to the judiciary. Formally the process is managed by the independent Judicial Appointments Commission (JAC), but in practice the process is heavily influenced by the judiciary at every stage. The Lord Chief Justice is consulted at the start of each competition. Judges prepare case studies and qualifying tests. Judges write references. A judge sits on the panels that interview candidates; and judges are consulted in statutory consultation. On the JAC, 7 of the 15 commissioners are judges. Once the JAC has completed its selection, at lower levels (Circuit judges and below) all judicial appointments are now formally made by the LCJ, and Tribunal appointments are made by the Senior President of Tribunals. The LCJ and SPT are now responsible for 97 per cent of all judicial appointments. At more senior levels appointments are still formally decided by the Lord Chancellor; but in practice it has proved impossible for the Lord Chancellor to go against the wishes of the judiciary.¹²

The third big advance for judicial independence has been the creation of the new Supreme Court. It is no longer hidden away in the House of Lords, but has its own building, its own budget and its own staff, with greater institutional freedom to run its own affairs.¹³ The difference is most clearly marked in the greater visibility of the court. The Supreme Court's new website is completely different from the minimalist website of the old law lords; the proceedings are now televised on Sky

¹² In 2010 the Lord Chancellor did not wish to appoint Sir Nicholas Wall as President of the Family Division, but reluctantly did so: J Straw, *Aspects of Law Reform: An Insider's Perspective (The Hamlyn Lectures)* (Cambridge University Press, 2013), pp. 58–59. Sir Nicholas Wall subsequently resigned on grounds of ill health. Straw had reportedly wanted to appoint Lady Justice Heather Hallett: see Joshua Rozenberg, "Jack Straw on Judicial Appointments: 'Labour Went Too Far'" *The Guardian*, 4 December, 2012.

¹³ There were tensions in the early years, especially over the budget. See Lord Phillips, "Judicial Independence and Accountability: a View from the Supreme Court" UCL Lecture, 8 February, 2011.

TV; the Justices have more room; and have greater capacity to sit in panels of seven or nine. Even opponents to the move acknowledge that the new court has been a great improvement.¹⁴

The fourth respect in which judicial independence has been strengthened is in their institutional autonomy. The judiciary have become a more independent and self-governing branch of government. The Lord Chief Justice as head of the judiciary now makes decisions which previously were made by the Lord Chancellor, namely appointing to the lower levels of the judiciary, strongly influencing senior appointments, and jointly overseeing judicial discipline with the LCJ. The courts service, which used to be run by the executive, is now managed as a partnership jointly between the executive and the judiciary. So are the Tribunals, with the Senior President of Tribunals one of the three judges on the board of the Courts and Tribunals Service.

So why are the judiciary so reluctant to acknowledge these gains for judicial independence? One possible reason why judges may feel that matters have grown worse since the loss of the old Lord Chancellor is that the constitutional changes of 2005 were swiftly followed by the economic crisis of 2007. This has led to severe reductions in funding for the courts, a freeze on judicial salaries and adverse changes to judicial pensions. These cuts have been difficult to bear, but have not threatened judicial independence in the sense of the judiciary's ability to decide cases impartially, and free from undue influence. Judges who maintain that judicial independence has become weaker need to be more specific in stating in what ways it has been weakened, and how.

Have the changes strengthened or weakened judicial accountability?

Our research looked at the impact of the changes of 2005 on the accountability of the judiciary, as well as their independence. They are often two sides of the same coin: the judiciary need a high degree of independence, but if they are allowed to be too independent, they may become insufficiently accountable. Accountability involves two main forms: giving an account (narrative or explanatory accountability); and being held to account (culpable or sacrificial accountability).¹⁵ What we have found is that accountability has become stronger in both senses.

Much judicial business which was previously conducted behind closed doors in the old Lord Chancellor's Department is now out in the open. This is not just a result of the 2005 changes, but results from wider initiatives in Whitehall and Westminster to make government departments and agencies more open and accountable, primarily by publishing more information about their activities. We now have annual reports from the Ministry of Justice;¹⁶ the Courts and Tribunals Service; the Judicial Appointments Commission; the Office for Judicial Complaints; and the Judicial Appointments and Conduct Ombudsman, plus the annual Judicial and Court Statistics.

¹⁴ Lord Hope, "Life on the Law Lords' corridor – the last 40 years" Stair Society Lecture, 2013, final para.

¹⁵ V Bogdanor, "Parliament and the Judiciary: the Problem of Accountability" Third Sunningdale Accountability Lecture, 2006.

¹⁶ Annual reports for the JAC, OJC and JACO all date from 2006. The first document resembling a departmental annual report was a memorandum to the Commons Home Affairs Committee submitted by the Lord Chancellor's Department covering its work in 1991-92. The LCD first produced an annual report for the Courts Service in 1990.

From the judiciary itself, the reporting is more patchy and episodic. Annual reports are produced where there is a statutory requirement, such as the annual reports from the Supreme Court, and the Senior President of Tribunals.¹⁷ But where there is no such requirement the reporting is more haphazard. Important parts of the court system, such as the Family courts, or the Chancery Division, appear not to produce annual reports. Most notably, the periodic reviews issued by the Lord Chief Justice as head of the judiciary have not been produced on a systematic or annual basis.¹⁸

The Lord Chief Justice has, however, started to give a regular account to Parliament, appearing in an annual evidence session before the Lords Constitution Committee.¹⁹ He is not alone. Our research records the growing accountability of the judiciary to Parliament, with 148 appearances by 72 judges before 16 different committees in the years 2003 to 2013.²⁰ This is mainly explanatory accountability: it involves judges giving an account of different parts of the justice system, appearing as expert witnesses to explain how the system works in practice. They are rarely held to account in the sense of being subject to sharp or critical questioning about its failings, and never in the sense of being censured by the committee, either orally or in committee reports. But the judges will respond occasionally to suggestions for improvement.²¹

Explanatory accountability is also fulfilled through parliamentarians asking parliamentary questions about the operation of the justice system; and (since 2005) individuals making FOI requests. Of 1,617 questions to the MoJ asked in the House of Commons between January and July 2013, 116 (7 per cent) related to the courts and judges. Questions tend to concern current issues such as sentencing policy, or local issues such as court closures; and questions about judges focus mainly on the lower ranks – coroners, magistrates and Circuit judges. The Courts and Tribunals Service received some 1500 FOI and data protection requests in 2012. The OJC (now the Judicial Conduct Investigations Office) is the main vehicle for litigants to complain about judges, and for judges to be held accountable for poor conduct. It is more visible than its predecessor, the Judicial Correspondence Section of the Lord Chancellor's Department. On average it has received some

¹⁷ Under s. 54 of the Constitutional Reform Act 2005, and s. 43 of the Tribunals, Courts and Enforcement Act 2007 respectively.

¹⁸ There have been four such reviews in six years. The first was published in March 2008, covering the two year period from April 2006; the second in February 2010, covering the previous legal year October 2008 to September 2009; the third in 2012, covering the two and a half year period January 2010 to June 2012; the fourth in 2013, covering an unspecified period. It would be helpful in terms of planning and accountability if they appeared on a regular, annual basis. Lord Thomas LCJ appeared to accept the need for improvement in his first appearance before the Commons Justice Committee on 2 April 2014.

¹⁹ This has been an annual fixture since at least 2006. The LCJ has appeared occasionally before the Commons Justice Committee (eg in 2010), but this is not such a regular fixture.

²⁰ If international judges, retired judges, deputy High Court judges and magistrates are included, the number of judges who gave evidence rises to 185 individuals.

²¹ Examples include finding ways of speeding up immigration appeals, Commons Constitutional Affairs Committee, *Asylum and Immigration Tribunal: The Appeals Process, Oral Evidence*, Session 2005-06,, HC Paper 1006-1 (2006); the LCJ holding regular press conferences, and strengthening the Judicial Communications Office, Lords Constitution Committee, *Relations between the Executive, Judiciary and Parliament*, Session 2006-07, HL Paper 151 (London: TSO, 2007), paras 146-171; introducing a pool of specially trained judges to preside over trials involving vulnerable witnesses, Lord Judge, letter to Keith Vaz MP 26 July, 2013.

1500 complaints a year since 2006, resulting in a dozen judges and 50 or so magistrates each year being sanctioned in some way, ranging from dismissal to a formal warning.²²

Accountability can also be enforced through judicial review. There have been a couple of legal challenges to court closures, and half a dozen unsuccessful challenges to appointments decisions by the JAC.²³ In the case of judicial appointments or judicial discipline, the Judicial Appointments and Conduct Ombudsman provides an alternative avenue for complainants who feel that their application for judicial office, or their complaint against a judicial office holder has not been dealt with fairly.²⁴

To sum up: the judiciary have become more accountable, both in giving an account of their activities, and in being held to account for their individual conduct. But there is one small, and one potentially larger accountability gap. The small gap is the LCJ's failure to produce an annual report on a regular basis. The larger gap lies in Parliament's reluctance to take the judiciary to task if they perceive failings in the justice system which are the judiciary's responsibility. This is a failing of Parliament, and not of the judiciary. But if the judiciary come to assume the lead role in running the Courts Service, Parliament will need to modify its deferential approach, and scrutinise the senior judiciary just as keenly as they would the leaders of any other major public service. And the judiciary will need to be willing to give a full account of their stewardship, and to be held to account for any failings.

Greater judicialisation of politics requires greater political awareness in the judiciary

The judicialisation of politics is widely accepted as a growing phenomenon in all advanced democracies, as well as the UK.²⁵ It refers to the growing influence of the courts on public policy and political decision making, fuelled by the growth of international and European as well as domestic law.

Now that the judiciary are formally more separate, and more exposed, senior judges have become political actors in their own right, with increased public exposure of the judiciary, to the media and to Parliament. Senior judges appear regularly before parliamentary committees; the Lord Chief Justice holds press conferences and issues press releases, as does the Supreme Court; the judiciary have developed an impressive website, and are regular users of Twitter.²⁶ Much of the time they are

²² For the most recent annual report, see http://judicialconduct.judiciary.gov.uk/documents/OJC_Annual_Report_2012_-_2013.pdf. Last accessed 1 April 2014.

²³ For the court closure challenges (also unsuccessful), see *Robin Murray & Co v. Lord Chancellor* <http://www.bailii.org/ew/cases/EWHC/Admin/2011/1528.html>, and *Vale of Glamorgan Council v. Lord Chancellor* <http://www.bailii.org/ew/cases/EWHC/Admin/2011/1532.html>.

²⁴ JACO has received an average of 350 complaints a year. The number has doubled, from 222 in 2006-07 to 466 in 2011-12. Most complaints are about judicial conduct, with less than 10 per cent about appointments. For sample cases handled by JACO see <http://www.justice.gov.uk/about/jaco/types-of-investigation>.

²⁵ Alec Stone Sweet, *On Law, Politics and Judicialisation* (Oxford University Press, 2003).

²⁶ At <http://www.judiciary.gov.uk/> and <https://twitter.com/JudiciaryUK>. The confusingly named UK Supreme Court blog is an independent venture, written by lawyers from Olswang and Matrix.

simply explaining the judicial role, or the significance of particular judgements. But sometimes they will use a public occasion to take issue with the government if they feel the government is not listening to them behind the scenes. Examples might include Lord Woolf's lecture in 2004 criticising the proposed ouster clause in the Asylum and Immigration Bill; or Lord Judge's parting shot about judicial salaries in his 2013 Report, when he warned "the terms on which the Senior Salaries Review Body has spoken are clear and unequivocal. It would be unwise for it to be ignored".²⁷

In deciding when to tackle the government, the judiciary need to be politically aware, and astute about which issues to fight and which to drop.²⁸ This may not be easy for judges whose only professional experience is the world of the law and life on the bench. The worlds of the law and politics have become much more separate than they used to be. Until the mid twentieth century a lot of judges had been in Parliament, so that the bench contained plenty of political experience. Between the 1830s and 1960s, more than a hundred MPs were appointed to the bench directly from Parliament.²⁹ They included such distinguished judicial figures as Lord Jessel, Lord Russell of Killowen, Lord Reid, Lord Donovan, Lord Wheatley and Lord Simon.

With the greater separation between the worlds of law and politics, there is a risk of a growing gulf in understanding. With their horror of "politicisation", the natural instinct of the judiciary is to insulate themselves more and more from the world of politics. The Judicial Appointments Commission is a good example of the result of that kind of thinking. But the judiciary depend on politicians, not just for the resources to support the justice system, but for wider support, to uphold the rule of law and judicial independence. And so we come back to the central conclusion from our research, that judicial independence is a political achievement, which requires continuing support from politicians and from Parliament. As the judiciary become a more separate branch of government, the judges need not to isolate themselves, but to redouble their efforts to engage with the political branches. And politicians need to renew their engagement with the law and the courts, so that they respect and understand the constitutional role of the judiciary.

²⁷ Lord Chief Justice 2013 Report, Introduction p 6.

²⁸ In 2013 Lord Judge held 17 meetings with judges up and down the country to persuade them to accept defeat over the government's decision to reduce judicial pensions. The judges felt extremely bitter, but Lord Judge was aware they would command little public support.

²⁹ D Howarth, 'Lawyers in the House of Commons', in D. Feldman (ed.), *Law in Politics, Politics in Law* (Oxford: Hart, 2013), pp. 41-63.