
Conclusion

The central argument of this book is that judicial independence is necessarily a political achievement. Because the principle of judicial independence is contextual and contested, we can only understand its place in the constitutional arrangements of the UK today by examining the ways in which politicians, judges and officials negotiate and renegotiate its precise meaning and its limits. In the early years of the twenty-first century, the context in which these politics were played out involved radical reforms to the institutional and constitutional landscape. Some change had started to happen; but those reforms brought about a big shift in the politics of judicial independence, in all three jurisdictions of the UK. This final chapter focuses mainly on England and Wales, with comparisons with Scotland and Northern Ireland where appropriate. It begins by summarising the main characteristics of the new politics of judicial independence, before considering the challenges ahead for the judiciary and the politicians responsible for the justice system.

The old politics were largely informal, closed and consensual. The relationship between judges and politicians was built on very similar understandings of what judicial independence required in practice and relations were highly collaborative, with neither side keen to change the system. They were also stable, until the removal of Lord Irvine in 2003 abruptly ended the old system, and ended it forever. Some of these features are still evident. The new politics still depend on informal contacts between judges and politicians to cement good relations. Like the old, the new politics rely on personalities to help smooth over tensions; while the particular approach of individual office-holders is still instrumental in shaping the relationships and developing the reform agenda itself. But there are important differences. Today, the new politics of judicial independence are more formalised, and fragmented. There has also been a retreat by politicians from running the judicial system,

paralleled by greater involvement by judges and a consequent increase in judicial self-governance.

The new politics: formalised and fragmented

A defining feature of the old politics of judicial independence was that the judicial and political worlds were interconnected and governed substantially by tradition and convention. Today, the two operate in increasingly distinct spheres. The greater separation of powers introduced by the Constitutional Reform Act 2005 required more formal structures and processes to handle the relationships between more separate branches of government, most notably in the area of judicial appointments and conduct, the management of the courts and the judicial governance structure. Some of these processes were created by the Constitutional Reform Act itself, while others have emerged subsequently. More formal processes are also evident in the detailed procedures laid down in the 2004 Concordat between the Lord Chief Justice and the Lord Chancellor, and in the later Framework Documents 2008 and 2011 which covered the management of the Courts Service. Although the smaller size of the jurisdictions of Northern Ireland and Scotland have allowed informal arrangements to continue in both systems to a greater degree than in England and Wales, there too new bodies and new rules have been created in relation to the judicial appointments process, judicial discipline and the courts services.

The system of communications between the judiciary in England and Wales and the outside world has also been formalised with the creation of the Judicial Communications Office and the willingness of judges to be guided and supported in managing their communications in a faster and less deferential world. Similarly, while many of the informal meetings and communications through which the politics of judicial independence were traditionally conducted still take place, the judiciary's channels of communications with politicians have become more formalised with meetings at regular and fixed intervals between the senior judges and politicians. Parliament has also been a focus for the development of more formal relations through the regular appearances by senior judges before Parliamentary Select Committees and *ad hoc* inquiries by committees into particular aspects of the justice system.

This more formalised politics of judicial independence has also become more fragmented. Because there is less reliance on the Lord

Chancellor alone as the buckle between the judiciary and the government, a wider range of actors are involved in negotiations and interactions which shape the politics of judicial independence. Some have long played important roles, albeit out of sight, hidden behind the Whitehall and Westminster curtains. These have been joined by new actors, in particular lay members appointed to bodies such as HMCTS and the Judicial Appointments Commission. Involving laypeople in decisions previously taken by civil servants and politicians is not unique to the judicial sphere, but it has further dispersed responsibility for safeguarding judicial independence and for negotiating its meaning and boundaries.

The internal governance of the judiciary has undergone a similar process of formalisation, again most notably in England and Wales, where the expansion of the judiciary and the courts service to embrace the whole of the tribunals system has been a radical, if relatively neglected, change. The stronger leadership role of the Lord Chief Justice as the new head of the judiciary has been accompanied by the formal delegation of important administrative and managerial tasks to dozens of other judges. This senior management team now operates through the Judicial Executive Board as a form of judicial Cabinet, supported by the revitalised Judges' Council, which provides a stronger 'voice' for the whole judiciary.

Political retreat and judicial advance

The main consequence of the formalisation and fragmentation of the politics of judicial independence has been the increasing disengagement of ministers from judiciary-related matters and the growing importance of the judicial leadership in filling this vacuum. The very purpose of the Constitutional Reform Act 2005 (CRA) was to increase the formal separation of powers between the political and judicial branches of government and to reduce the role of the executive in judicial matters. The flip side of political retreat has been judicial advance. In response to the changing role of the Lord Chancellor, the first three Lord Chief Justices to be head of the judiciary in England and Wales – Lord Woolf, Lord Phillips and Lord Judge – worked hard to strengthen the institutional autonomy of the judiciary and heightened their influence in the running of the judicial system. Political retreat and judicial advance have taken different forms. In some areas, such as judicial discipline, which used to be a matter exclusively for the Lord Chancellor,

responsibility is now formally shared between the Lord Chancellor and the LCJ. Likewise, the Courts Service was reconfigured as a partnership to be run jointly between the executive and the judiciary. The transformation of the Judicial Office into a *de facto* judicial civil service was an important factor in allowing the judiciary to share much of the day-to-day management of the judiciary with the Ministry of Justice.

The marginalisation of the executive has also shaped judicial appointments, where a highly informal system built around largely unfettered ministerial discretion has been replaced by a closely regulated statutory system managed by an independent body, in which the Lord Chancellor plays only a limited role. The transfer of the final say over lower-level appointments from the Lord Chancellor to the Lord Chief Justice and the Senior President of Tribunals is symbolic of the shift in power from ministers to senior judges in respect of individual appointment decisions. The Lord Chancellor is now formally responsible for making just 3 per cent of judicial appointments. Though still having a veto power over appointments to the High Court and above, Lord Chancellors in practice almost always accept the recommendations made to them, and instead input earlier in the selection processes. Over and above this, judges are involved at all stages of the selection processes. In the JAC-run processes, judicial influence is present through all aspects of a complex process. This is not to deny that lay members play an important role, especially in injecting fresh insights from their different backgrounds in the public sector, private sector, human resources and so on. It is simply to recognise that the CRA has engineered considerable judicial influence throughout the selection processes. As repeat players in the process, senior judges are adept at using additional selection criteria and statutory consultation to ensure that weight is attached to their viewpoints. The Crime and Courts Act 2013 increased lay involvement in the most senior appointments in England and Wales, but judicial influence remains particularly high at the top levels.

This broad pattern can be seen in all three jurisdictions: highly formal processes are run by arm's-length bodies, with limited ministerial involvement. The Northern Ireland Judicial Appointments Commission (NIJAC) is the most strongly judge-led, being chaired by the Chief Justice, with only five lay members out of thirteen commissioners. Because of the reluctance in Northern Ireland to allow politicians near judicial appointments, NIJAC is *de facto* the appointing body – a system depicted by the Northern Ireland Attorney General as

'judges appointing judges'. In Scotland, the Judicial Appointments Board (JABS) has equal numbers of lay and legal/judicial members; but with only one recommendation ever queried, it too is *de facto* an appointing body.

The transfer of appointments from the Lord Chancellor to judges and laypeople was explicit and has been the subject of considerable debate, including in Parliament. In contrast, the decision to merge the courts and tribunals judiciaries has attracted almost no attention outside the legal world, although it may prove to be the most important driver in this process of political retreat. Tribunals are a large and increasingly important part of the judicial system. They 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 JAC and the Senior President of Tribunals, independently of government, and the funding of Tribunals comes from HMCTS.

At the other end of the court hierarchy, a related but different shift in power has taken place. The creation of the new Supreme Court detached the highest-profile element of the court system from the legislature. Having been constitutionally, financially and administratively embedded in the House of Lords, its successor has its own building, its own budget and its own staff, with extensive institutional freedom to run its own affairs headed by the President, Deputy President and Chief Executive. Yet, paradoxically, a consequence of this detachment from Parliament has been to require the Supreme Court Justices to engage more closely with the executive on issues such as budgets and administration. Separation from Westminster has led to closer connections to Whitehall than was ever the case for the Law Lords.

In Scotland and Northern Ireland there has been a similar political retreat and judicial advance. We have already noted how in both countries judicial appointments have been transferred to an independent appointing body, with politicians effectively being removed from the process. Scotland has seen a similar shift in the running of the Court Service. The Scottish Court Service (SCS) was an executive-run body, but since 2010 has been judge-led, with the Lord President chairing the board and appointing the other board members, including six other judges. This judge-led model has given the judges much greater ownership of planning and running the courts. The Northern Ireland judiciary seems likely to go down the same road after 2016. As for complaints and discipline, here too there has been political retreat and judicial advance, which has gone even further in Scotland and

Northern Ireland. With no equivalent to the involvement of the Lord Chancellor, the judiciary in Scotland and Northern Ireland sets the disciplinary rules and exercises greater control over the process.

The challenges ahead

In this more formalised and fragmented politics of judicial independence, in which power has shifted from politicians to judges, new boundaries and ground rules are being constructed. The following issues are likely to be particularly important in the years ahead.

Accountability

Throughout the book we have traced the changes in accountability in tandem with independence, arguing that an independent judiciary presupposes a degree of democratic accountability. The changes summarised above have as much significance for the day-to-day politics of judicial accountability as they do for judicial independence. Our findings show that judicial accountability has increased in many areas, sometimes quite dramatically. The senior judiciary has shown itself to be far less conservative than might be expected in its willingness to embrace greater transparency. A wide array of information on the functioning of the courts is now published by the judiciary through websites and reports. Much judicial business which was previously conducted behind closed doors in the old Lord Chancellor's Department is now out in the open; annual reports and statistics are produced by the Ministry of Justice and the judiciary-related bodies. This is not just a consequence of the constitutional changes, but results from wider initiatives in Whitehall and Westminster to make government more open and accountable.

The increasing trend for the senior judiciary to give evidence to select committees has also been facilitated by the creation of two new specialist select committees: the Lords Constitution Committee and the Commons Justice Committee, both of which have produced several reports on judicial matters. The administrative and operational side of the justice system is also accountable through investigations by the National Audit Office (NAO) and the Ombudsman. These are some of the formal channels through which accountability has been developed. Equally important are the 'soft' accountability processes by which the courts and judiciary engage more generally with the media and the public.

Here, very significant changes are also evident, most strikingly in the Supreme Court, which has pursued an outward-facing and user-friendly approach unprecedented in the UK courts, with a new building, website, television coverage and public outreach work.

These examples are all evidence of narrative or explanatory accountability, whereby those responsible for the judicial system offer an account of its different parts and explain how they function. On a day-to-day basis it is this explanatory accountability that forms the bedrock of accountability in a democratic system. The counterpart is accountability in the classic 'sacrificial' sense of a decision-maker taking ultimate responsibility for their decisions or conduct. Individual judges are now more accountable for their behaviour beyond their judicial decision-making. The complaints and disciplinary system has become more visible and is much more frequently used. Judges are more often reprimanded for poor conduct, not because standards have fallen, but because there is now a more effective and responsive system for identifying conduct which falls short.

But our findings also reveal some potential problems as clear lines of responsibility have become more blurred as a result of greater fragmentation. For example, it would no longer be possible to argue that a Lord Chancellor should resign if it was discovered that a judge was appointed as a result of a serious mistake in the judicial appointments process, given how little responsibility the Lord Chancellor now has for that process. Similarly, since judicial independence has traditionally and rightly required a high threshold before judges can be removed from office, it is equally hard to imagine that Parliament would call for the resignation or dismissal of the LCJ as head of the judiciary should serious mismanagement be discovered in the Judicial Office, or a serious error of judgement made in the appointment of a Circuit Judge. In short, it is hard to determine where, in relation to decision-making in areas such as judicial appointments and the management of the judiciary and of the Courts Service, the accountability buck now stops. The greater fragmentation described above may have the advantage that judicial independence is safeguarded by more individuals in more places, and it may also increase the scope for effective mechanisms of explanatory accountability when things run smoothly, but it runs the risk that no one individual office-holder is ultimately responsible when things go wrong.

There are also weaknesses in the degree and quality of accountability provided by Parliament. Select committees can be fickle and patchy in their coverage: they have shown much initial interest in judicial appointments,

but ignored the running of the Courts Service. They do, at times, criticise the courts, and judges in turn have sought to address these concerns. But the boundaries of this process of accountability are not yet clear and to date there have been no examples of serious or sustained pressure on a senior judge in relation to management decisions. This may be because no senior judge has ever made any serious management mistakes, or, more likely, because they are dealt with internally and out of sight.

An example of the potential dangers of this accountability gap is in the area of judicial diversity. Many senior judges explicitly and genuinely wish to see greater diversity in the composition of the judiciary, not just in relation to gender and ethnicity but also in terms of the balance between former barristers and solicitors and the range of legal expertise which appointees bring to the bench. But they have found it hard to recognise the implicit self-replication that can inform assessments of what constitutes merit in the appointments process, and, in turn, the role that this plays in inhibiting significant change. In the absence of a politician who is responsible to the electorate to take forward the diversity agenda, the expectation has been that the lay members of the appointments bodies will fulfil this role. Our evidence suggests that even when individual lay members are committed to the need for change, they do not have the authority that comes with elected office which they would need to push back hard enough against judicial preferences. Laypeople lack that electoral mandate, but are expected to substitute for politicians in being a check on ‘judges appointing judges’. The inclusion of laypeople further reduces accountability: they bring different expertise, but cannot begin to provide the accountability which only politicians can supply.

Finding a new equilibrium

Lawyers tend to conceive of judicial independence as a fixed principle. But as we demonstrated in Chapter 2, attitudes to and definitions of judicial independence have changed down the ages – and they are still changing. The expansion of training and the introduction of performance appraisal for judges, both once viewed by the judiciary as a fundamental breach of judicial independence, are now enthusiastically supported by many in the senior judiciary. It is through debate, discussion, negotiation and renegotiation between judges, politicians, officials, laypeople and the public (via the media) that new understandings of how the principle of judicial independence should play out in practice are forged.

New understandings of judicial independence traditionally emerged slowly, in the evolutionary manner which characterises change to the UK's constitutional arrangements. In contrast, the research which underpins this book was carried out at an unusually dynamic and unstable moment in the politics of judicial independence. Some of our findings are inevitably specific to that time. It is still too early to say whether we are now entering a new period of stability in which institutional changes will be allowed to bed down. In the short term, the stability of the old arrangements has been lost. But in the longer term, several institutions now exist on a surer and more independent footing, the most obvious being the Supreme Court. After initial tensions with the Ministry of Justice over its funding and administration, and despite occasional criticism from ministers north and south of the border, the Supreme Court has established itself as a confident and well-respected body. Similarly, after a bumpy first few years marked by fraught tensions with the Ministry of Justice, culminating in its 'near-death experience', the Judicial Appointments Commission's position in the institutional landscape now seems settled.

Another positive indicator of the emergence of a new equilibrium and a more stable foundation underpinning the new politics of judicial independence is the effect of the painful funding cuts to the justice system in the wake of the 2007 economic crisis. Despite severe reductions in court funding, a freeze on judicial salaries and adverse changes to judicial pensions, senior judges and the executive managed to negotiate a budget which each side could live with. This is not to suggest that negotiating these issues was easy. But it does perhaps indicate that the working relationship has been stress-tested and found to be strong enough to survive.

It also indicates that, at least amongst the senior judiciary, there is a growing acceptance that judicial independence does not protect the judiciary from its share of public spending cuts and that there is a distinction between the public interest and judicial self-interest. The cuts have been hard for the judiciary to bear, but no senior judge has yet come out and said that they threaten the independence of the courts. It is unlikely that if Lord Mackay was Lord Chancellor today, and sought to end lawyers' restrictive practices, he would be attacked by the judges, as he was in the 1990s, as posing a fundamental threat to judicial independence and the rule of law.

But while stability might be emerging in some areas, in at least one respect the signs are that further major change may lie ahead. In England

and Wales, the judiciary and the government spent most of 2013 negotiating the possibility of a much more autonomous court system. If this is implemented, the knock-on effects of this change for the politics of judicial independence will be significant. For one thing the accountability deficit will become more glaring and less acceptable. If the judiciary comes to assume the lead in running the new courts service, Parliament will need to eschew its deferential approach and scrutinise the senior judiciary as keenly as it would the leaders of any other major public service. The judiciary, for its part, would have to supply a full account of its stewardship of public resources and be willing to be held to account for any failings. At the same time, the proportion of the work of the Ministry of Justice which relates to the courts would shrink further and the Lord Chancellor would have even less reason to prioritise the needs of the judiciary. This raises the question of what role the office of Lord Chancellor will play in safeguarding judicial independence in the years ahead.

Filling the vacuum of the Lord Chancellor

The judges have sometimes been guilty of having selective memories in cherishing the unqualified vigilance of the old Lord Chancellors as guardians of judicial independence. Nevertheless, they are right to worry about the potential implications of the reform of that office. New Lord Chancellors are no longer expected to be senior lawyers and politicians towards the end of their careers, but are ministers of justice, no different in status from any other politician in Cabinet, and with one eye on the next job. At the same time, the Ministry of Justice has grown into a large department where the judiciary and courts account for less than a fifth of its budget. The faster turnover of staff also means that officials have less opportunity to develop a sophisticated appreciation of the culture of judicial independence and judicial accountability.

The judges view all these changes as for the worse. They fear that under the new system they do not have such a strong voice at the Cabinet table. Our findings do not reveal any evidence to show that the changes to the office of Lord Chancellor have – as yet – weakened support for judicial independence. Assessing whether or not this is likely to happen in the future requires a distinction to be drawn between judicial interests and judicial independence. Future Lord Chancellors may fail to defend the interests of the judges over issues like judicial salaries and pensions, while at the same time being effective guardians of judicial independence. Only

when an issue arises which has clear implications for judicial independence will we know whether the new Lord Chancellors will step up to the plate. As ever, much is likely to depend on the individual personality of the person in post at the time.

Although the judiciary may have overstated the threat to judicial independence from the reform of the office of Lord Chancellor, any further disconnection between the Lord Chancellor and the judges risks further reducing the personal responsibility of Lord Chancellors for the administration of justice. Given the uncertainties, judges are right to continue to assume that they, and the LCJ in particular, will be required to take a more central role in the politics of judicial independence. However, as Lord Judge noted, the LCJ is a 'poor substitute' for the Lord Chancellor and cannot carry that role alone. The fragmentation described above means that a wider range of politicians and officials must be ready to engage. In the short term, the retreat of the politicians and the reduced role of the Lord Chancellor could appear to work to the advantage of the judges, since they will become the 'repeat players' who remain in post while Lord Chancellors come and go. This will allow them to cement their influence and interests over the running of the courts as they have done for judicial appointments and discipline. In the longer term, however, if Lord Chancellors and their officials retreat from judiciary-related matters, and if more limited contact between judges and politicians makes it more difficult to nurture positive personal relationships, the political understanding of why judicial independence matters might atrophy. Over time, Lord Chancellors might not take seriously their personal responsibility for the efficient and effective working of the judicial system and might take less care when exercising their residual discretion over judiciary-related issues. Without good examples set by the Lord Chancellor, there is a danger that other politicians will in turn become less mindful of constitutional proprieties. Arguably, the primary challenge of the future is, paradoxically, to strengthen the ministerial side of the judicial-political partnership, to find ways of reminding politicians of the stake that they share in a system of independent courts.

Separation, not divorce

A key finding of this work is that, counterintuitively, the greater constitutional separation between judges and politicians since 2005 requires more day-to-day contact between them in order to negotiate and maintain the terms of that separation. A healthy politics of judicial

independence requires that politicians do not regard judicial independence simply as an inconvenience, or seek to hive off responsibility for those parts of the justice system which have little political purchase. At the same time, judges must continue to develop their political acumen, showing the same skill with which they have navigated the constitutional changes of recent years. A series of successful rearguard actions has seen them retain, and indeed enhance, their role in crucial decision-making in areas such as judicial appointments, complaints and discipline, court management and budgetary negotiations. In deciding when to tackle the government in the future, the judges need to be astute about which issues to fight and which to drop. They must choose battles which they are likely to win, on issues which are likely to command parliamentary and public support. 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 politics and the law have become much more separate than they used to be, with the result that there is a risk of a growing gulf in understanding. As the judiciary becomes a more separate branch of government, the judges must be careful not to isolate themselves, but must rather redouble their efforts to engage with the political branches. The danger is not that they have been marginalised, as they first feared, but instead that they may get all they wished for. If they find that the executive has retreated from the running of the courts and the judicial appointments process, leaving the field to them, the partnership will exist in name alone. The Constitutional Reform Act was designed to produce greater separation, but not divorce. It sought to create a new form of partnership, very different from the traditional relationship, but one which had the potential to form the basis of a new culture in which judicial independence is valued as a political achievement.

The rules, structures and processes must help politicians to grasp that an independent judiciary is an indispensable part of a democratic system, even if from time to time courts render politically unpopular decisions. Those same arrangements must also help judges to see that an effective partnership between the political and judicial branches requires that ministers are interested in and concerned about the financial and administrative health of the judicial system. Judges should never forget that judicial independence is not shorthand for saying that politicians must defer to the judges on questions relating to the running of the judicial system, and they cannot expect to exercise a veto on issues such as the budgets of the courts. Related to this, judges must recognise the need for heightened judicial accountability at the same time as they exercise increased power over the management and funding of the

judicial system. The reason why all of this matters is because, no matter how formalised the politics of judicial independence become, the boundaries between the political and judicial branches are not and never can be fixed. They will always be contested. Politicians and judges can and do legitimately hold different opinions about where the boundaries ought to lie. What matters is not that politicians or judges know the right answer, or that the former always defer to the views of the latter, but that both negotiate in good faith as informed and respectful participants in the politics of judicial independence.