

Is Judicial Independence Changing in a Changing World?

10th – 11th January 2014

A St George's House Consultation in partnership with the
Constitution Unit, University College London



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The views expressed in this report should not be regarded as the views of all participants.



INTRODUCTION

In conclusion of a three-year research project on judicial independence at the Constitution Unit of University College, London, researchers convened experts to test ideas including their conclusion that judicial independence is a political achievement requiring continuing support from politicians and Parliament and that, as the judiciary becomes more separate following 2005's changes, judges and politicians need to redouble efforts to engage with each other.¹ Topics presented for discussion fell, broadly into: **judicial appointments, court management, and judicial input into policy.**

Participants concluded largely that the judicial system in England and Wales works well, but maintaining its success will require both good systems and excellent people. Judiciary, executive and others must act now so that the future judiciary will continue to work well and independently.

The consultation comprised panel presentations followed by discussion. A breakout session at the end of Friday offered participants an opportunity to shape the topics on the second day. Viewpoints from different legislatures in the UK, Ireland, Canada and other countries helped contextualise the English model. Several themes were reiterated:

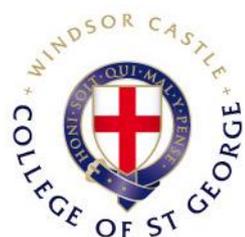
- The appointments process
- Lay membership of judicial appointments commissions
- Merit-based appointment: finding and defining 'merit'
- Judge-led courts management
- Budget cuts and constraints
- New pressures and responsibilities for the judiciary
- Tensions and boundaries between judiciary and executive
- Communications between judiciary and executive
- Openness, transparency, and trust
- Accountability
- In conclusion: maintaining today's good into the future

1 The appointments process

In England and Wales, appointments should be (a) recommended by an independent statutory body, not the executive; (b) open and transparent; (c) made on merit. The new Judicial Appointments Commission (JAC) has performed well on these counts and is not overly influenced by the judiciary. The Chair of the JAC is a lay member. Its judges and lay members work together to make appointments. The JAC does not vote – either a consensus is reached, or more information is sought.

Participants explored various relationships between judicial appointments, models for maintaining independence and constituting lay membership of appointments

¹ Outlined generally in the backing paper for the consultation and summarised on pp. 14-15.



commissions, and differing political circumstances in Northern Ireland, Scotland, and Canada.

Politics are different in Northern Ireland from the rest of the UK, and these differences affect how the independence of the judiciary is maintained. The role for ministers regarding appointments is minimised. Although lay chairs are a good thing, the arrangement that the Northern Ireland Judicial Appointments Commission (NIJAC) currently has for its chair (who is the LCJ of NI) seems to work well. Possibly, now, the political parties *could* agree on a new appointing authority, with a chair other than the LCJ.

In Scotland, the Judicial Appointments Board, Scotland (JABS) is a statutory body, with half judiciary and legal members and half lay members under a lay chair. Keeping the list of candidates private is an important issue. There are challenges in diversity, tribunals (currently excluded), the new class of sheriff, remote areas, and attracting excellent candidates with good process. JABS is accountable to the candidates selected, to the legal profession and to their own credibility as well as to parliament.

In Canada, numbers of federal and provincial judges are roughly equal. At a local level it is hard to make generalisations, but the provinces may on the whole be more independent than the federal system, which is driven largely by the executive.

The process by which appointments are made in England and Wales could be more transparent. At the same time, there are good reasons (including protection of candidate privacy, and discussion of merits which are hard to quantify) why some elements in the appointment of senior members of the judiciary should remain private. However, this raised new questions about executive influence on appointments, accountability and transparency. Are appointments of senior judiciary necessarily more politically driven? To what extent do political aspects of the process influence the JAC in England and Wales? Can a politically uninfluenced appointment really embody vision and change?

The Data Protection Act makes a special exception for judicial appointments, the lists for which are not disclosed widely. Making a senior appointment is an emerging story, which may involve important executive engagement as well as panel decision. The Lord Chief Justice is a statutory consultee. In the recent selection of the new LCJ, other consultees included the Attorney General, the Lord Chancellor, the MoJ Permanent Secretary. It would do no harm to broadcast more publicly some of these new consultation processes.

Yet efforts to increase transparency and accountability might have unintended consequences, too. For example, in response to the suggestion that potential appointees to the Supreme Court could appear before the Justice Committee, as Monetary Policy Committee candidates appear before the Treasury Committee, it was indicated that the value added by introducing post-appointment hearings might be very little, and unlikely to outweigh the risk of introducing politicised pressures.

A UCL study of pre-appointments scrutiny hearings for senior public appointments found that most candidates for appointment said they would not take up the appointment, if the select committee recommended against them



Lay membership of judicial appointments commissions

What is the role of lay members in an appointments commission? They help judges (for example) to articulate an evidence-based rationale as to why a candidate is suitable (or not), rather than citing experience or instinct, and so contribute to maintaining proper process. They question authority. They also evaluate competencies of a potential judge from backgrounds outside the law: communication skills, fortitude, courage, compassion – a 'good temperament'. Perhaps lay members help maintain independence and democratic accountability by directly representing the demos; and a lay chair can help make sure that non-experts in law are not intimidated by legal experts.

However, the line between 'lay' and 'judiciary' is blurry: academics may be learned in law; judges and legal professionals do not lack for discernment of non-legal qualities; and magistrates may judge without being part of the judiciary *per se*.

Has an appointment ever been swung on the basis of broader, 'human' skills rather than legal expertise? Are lay members of the committee an adequate check against 'judges appointing judges'? Are the lay members meant to compensate for the lack of any effective political involvement?

Merit-based appointment: defining and finding 'merit'

The judiciary requires good candidates, and can only select from the willing; why do so many good candidates not apply? The process may be off-putting; and encouragement may be lacking near the beginning of a career.

Different views of what constitutes 'merit', or criteria desirable for appointees, result eventually in different appointments. Two questions required consideration of how the appointments process might be altered: how (and whether) to introduce more political vision into judiciary appointments, and how to prevent the mere self-replication of an existing judiciary.

Consultations *can* be problematic: consultees do not know candidates equally well, and candidates from unusual backgrounds won't have met them as regularly as others. No branch of government should be self-replicating in the sense of recruiting successors on the basis of similarity. Asking consultees for the reasons why an appointment should not be made, in order to let the candidate know, helps against blackballing.

Overall in the UK, diversity of the judiciary has increased, with more female and minority-group members, and more variety of backgrounds, but more needs to be done to improve upon this. Where changes were desired, at a local level a judge may be able to make a difference by tweaking selection criteria.

More flexible ideas of merit could include diversity as one component of merit. Could more applications be solicited proactively by advisory committees, as in Canada?



Judge-led courts management

Overall, participants agreed that it is beneficial for the judiciary to take the lead in managing the courts. Again, it was useful to examine England and Wales in the context of other experiences from Ireland, Canada (and the US), Scotland and Northern Ireland.

Ireland inherited a system in which judges played a small role in managing courts. The government, through the Department of Justice, was responsible for the material, staff and technical support. Since the Court Services Act in 1998, a board is responsible, made up of a majority of judges, and chaired by the Chief Justice. Experience indicates that judge-led courts systems work, and an independent statutory body reporting to Parliament can manage courts effectively. The change has decreased the functional dependence of the judges on the executive, giving them a bigger role in courts management, and shifting the courts away from appearing to the public as 'another arm of the same establishment'. Political considerations still play a part in appointments in Ireland, and progress is needed on a system for handling misconduct by judges. Funding is still under executive control; the budget was adequate, before the financial crisis; the courts could be more self-funding if higher fees were charged, but that is unwanted. Streamlining and electronic systems can be implemented to help economise. Legal aid is affected by budgetary constraints. A government ally, such as the Lord Chancellor, is desirable.

In Canada and the US, different court management models obtain. In Canada, there are various administrative differences between federal and provincial courts, and the technicalities of funding incentivise the provinces to set up their courts and court staff well. A shift towards greater independence in recent years is represented by memoranda of understanding granting courts more autonomy, a shift that began in the provincial courts. In the US, by contrast, the separation of powers places court funding and administration elsewhere in government than the executive, but this separation is recent, dating from Roosevelt's efforts in the late 1930s to dilute court power, during which his offer of separate court administration was taken up by reformers.

The Scots courts administration has emerged out of policy changes during the last decade, to complement which a judiciary-led administration was seen to be needed, based on the Irish model. The courts service is managed by a board of thirteen of whom the Lord President is the chair. Six members hold judicial office, two are legal practitioners and there are five lay members; the combination offers a useful variety of opinion and background, and they have managed the budget responsibly. The economic crisis has reduced the budget, however, and some courts (the distribution of which in Scotland is outdated and needs rationalisation) have had to be closed. (Budgetary constraints can be good in that they force examination of the system and so help trim waste.) It is critical that the courts be supported by high-quality civil servants with seniority as well as skill, not least in competing for budget allocation. Therefore, it is important to build links with government and cultivate better understanding between judiciary and politicians.



Northern Ireland has employed two models in the recent past, and may use another soon. For thirty years, court administration was set apart from policing and prisons, and was managed under the Lord Chancellor (the Secretary of State being deemed too political). In 2010, administration of the courts was moved into the Department of Justice, along with police and prisons. The NI Assembly reviewed and accepted this arrangement but recommended consideration of an appropriate new model, for which the next opportunity will be in 2016. Today, the Courts Agency works under the Chief Executive with oversight from the Justice Committee and the Assembly. What can England and Wales learn from such various historical models? More flexible budgets would be helpful; direct accountability for spending; perhaps user committees (as in the hospitals system); openness and consultation. Judicial self-administration is a logical complement to the independence of the judiciary, not because it is constitutionally mandated but simply because of the value added by judges not being passive recipients but active administrators of justice.

Could a truly radical model of courts management be imagined in which the court service becomes an independent public-interest body (like the BBC, or Welsh Water)? The problem is that without connection to an existing body, it is harder to connect responsibility, and function becomes driven by metrics which, if they are wrongly chosen, can send a free-floating system badly awry.

Budget cuts and constraints

The changes in 2005 were followed not by a calm period in which to bed in the new system but by dramatic global economic crises necessitating budget cuts. How do budgetary constraints affect judicial independence as expressed through judge-led administration? Experience would indicate that when resources are abundant, nearly any model of courts management can work, but in hard times, courts come second to police and prisons, and pressures mount on the administration – in this case, judges and their staff.

With a carefully prepared case, a supportive minister, and an offer of certain economies, budgets *can* be won, but there is no guarantee. Cross-party support on an issue is helpful for facilitating finance. There is a definite role for the executive in courts management in helping secure funding!

One area of potential difficulty flows from the duty of Parliament to follow public money to see that value is delivered. Judges running a courts system will be viewed by politicians as managers of taxpayers' money, which could lead to disputes over questions about the extent to which such management falls under judicial rather than executive powers.

Budget cuts do encourage efficiency. There is a need for rationalisation of court closures, and for better ICT, both of which are encouraged by fewer funds. But such improvements require long-term investment, while the reduction of public expenditure has led in fact to slower, more expensive justice. This will improve when better case management, led by judges, has been instituted. However, there remain significant concerns about access to the justice system, and legal aid. The Supreme Court may comment regarding a case that reaches them on court fees. One helpful action courts could arrange would be to retain underemployed solicitors to inform incoming public on how to prepare for court and understand its process.



New pressures and responsibilities for the judiciary

In part as a result of smaller budgets, significant new burdens will be placed on judges who occupy expanded roles as leaders, and they will require more administrative support (the Lord President's office has grown from three to twenty people). Problems arise when judges find their time disproportionately devoted to administering rather than judging.

Could the operational autonomy of a judge-led system require the establishment of its own (specialised) Civil Service to administer it? If a separate administrative structure is needed, it should not become a closed citadel, which would lead to stagnation and isolated thinking (an example from Northern Ireland was instructive). Loans of suitably experienced administrators from the existing Civil Service would be best.

When things go wrong in a model led by judges, to what extent are the judges exposed because they are accountable? Though nothing may have gone wrong yet, it will, and someone must account for it, to a body that can take appropriate action.

Tensions and boundaries between judiciary and executive

Separation of powers, in the UK, is a matter of rules and also of respect that extends somewhat beyond the rules. Notwithstanding occasional rude ministerial reactions to judges' decisions which they don't like, it is remarkable to visitors from some other countries that a politician will not, for example, put pressure on a judge to reach a particular decision. Egregious disrespect is rare; the 1890s were much worse in terms of ministerial rule-breaking regarding respect for judicial independence! The Lord Chancellor and Attorney-General share a public-interest responsibility to uphold the standing of the judiciary and rein in too-noisy MPs, where possible by means of a discreet word.

Judicial and political points of view on judicial independence will always differ. For the judiciary, independence underpins principles of fair and open trial and, importantly, access to justice, along with other questions regarding the rule of law. Nevertheless, 'independence of the judiciary', though it is crucial with respect to rule of law and human rights, is not an issue which MPs are likely to feel commands much public concern, compared with topics such as jobs, education and health. For MPs, the system of justice could resemble 'just another public service' – except that MPs may be very interested in the outcome of a case. Politicians are capable of influencing the rule of law, through, for example, interference in judicial review, shortening time limits, limiting the rules on standing, limiting access to representation for 'unpopular' classes of claimants, deterring lawyers from becoming judges, lowering fees, or politicising appointments by making the process unpleasant.

In some cases, the executive may blur lines in relation to judge-led public inquiries. Such inquiries ought to comply with the 2005 Act governing them. The Lord Chief Justice's permission is not required for a judge to lead an inquiry. Where an inquiry proposes to put forward public policy, rather than simply identify fault, this blurs



constitutional rules of separation. Perhaps it is worth asking why and to whom it is of benefit for judges to lead an inquiry.

Judges, too, in England and Wales, may overstep ordinary boundaries. The statutory intention of a bill is to be taken into account when it is clear; but sometimes judges may interpret against the executive's current intention. Equally, judges ought not to, but sometimes do, take actions such as publicly attending rallies or going on marches which amount to directly expressing an opinion on policy. Similarly, judges should not advise opposition, i.e., not-yet-government, on policies (though they might do well to ascertain their views; and Shadow ministers in turn might use opportunities to communicate through the Civil Service).

Other difficult examples included a campaign by some senior judges in the 1990s for incorporation of the ECHR; or Lord Bingham's recommendation in a public lecture for a Supreme Court, against the government's policy at the time; or interventions on sentencing policy while government/opposition are playing tit-for-tat with increased sentence lengths. Such examples show that the edges between policy development and implementation are blurred in practice. If a future government wants to repeal (for example) the Human Rights Act or the existence of the Supreme Court, would public judicial resistance constitute a breach of the conventions?

In England and Wales, magistrates are judges and also members of the community; if a magistrate, in his or her role as a magistrate, advises or lobbies an MP, does this pull judging into politics? Their role is historical and ambiguous but presently they are judicial holders, and must exercise restraint regarding views on policy.

Government and parliamentary lack of comprehension of the judiciary can originate from unfamiliarity and not knowing the rules (rather than wilful misunderstanding). The judiciary, equally, may not understand the workings of government. After-court seminars or other means are valuable for exchanging knowledge in how law is *applied* and how courts work, for better understanding on both sides.

Communications between judiciary and executive

It is an old convention, that judges may offer input on policy that directly affects operation of the courts. However, 'judicial input to policy' has always existed in that judges communicate with the executive, are involved in the administration of justice, and comment on policy that affects the rule of law.

In Canada, for example, hypothetical questions can be put to the Supreme Court under its reference jurisdiction. Also in Canada, a judge sentenced an offender to a drugs treatment programme in a province in which no such programme existed, thereby obliging the provincial government to create the programme. Looking at the way the courts work in Ireland, for example, it is easy to imagine 'theoretical' cases in which a wider agenda would intrude: it would not be possible, for example, to reach appropriate, purely legal judgments on a bill pertaining to abortion.

Practically, however, judicial predictions will always need to be made as to the consequences of particular regulatory details, to try to avoid problems that will later have to be repaired. Policy is not always worked out following rigorous research. Judges are crucial in working out implementation.



In circumstances in which judges feel that a policy is not playing out well in court – e.g., legal aid cuts leading to denial of justice to litigants in person – what forum is available in which the judges might discuss ways forward? They can indicate that change may be needed, but could not (for example) go so far as to say how much advocates should be paid. And, as judges are individuals, not represented by a group and not cleaving to one officially expressed corporate view, are they at a disadvantage in conversation with other branches of government?

High-level communications between the Lord Chief Justice and the Lord Chancellor take place in a safe space. The Judicial Executive Board deals with policy regarding the justice system as a whole; the Judges' Council presents its own somewhat different views. The Resident Judges' Conference offers another opportunity for judges to voice concerns from the 'sharp end' of delivery. The Law Commission can enable judicial input to government thinking through an academic framework. More opportunities should be arranged for MPs to spend time in courts, and for judges to meet senior civil servants, under the Chatham House rule

The main worry regarding legislation is not maverick amendments, but underprepared legislation drafted 'on the hoof'. The Civil Service working in tandem with the judiciary can be good for policy and for legislative outcomes, with minimal threat of damage to the independence of the judiciary.

For reforms to the justice system, procedural rule committees bring together judges, lawyers, government departments and interested parties. Writing policy to address the issue of defendants not turning up in court involved judiciary in shaping and refining policy that was then put into action, leading to fewer ineffective trials. In another example, a judicially led review looking at civil costs in litigation (with substantially united views between government and judiciary) made recommendations both to the judiciary and to government to lower costs in certain cases. In Scotland, similarly, the judiciary made direct recommendations about courts procedure which the executive took up.

Good communications are vital, and build the trust necessary to keep the balance between independence and helpful input. At the moment, communications are fairly good. There are ways of communicating about (for example) draft bills and legislation without jeopardising independence or separation of powers.

Openness, transparency, and trust

Trust is essential, but delicate. It is easier if people understand their roles and contributions clearly. Usually, judges find ways to communicate advice and interest in a way that preserves independence. Good communication heads off problems but participants recalled that, in 2003, there was a breakdown of trust.

Under the Freedom of Information Act, minutes of private meetings could become publicly available, along with views expressed. The public are interested in the independence of the judiciary, and support the idea of maintaining some private communications space at some levels.

Even for appointments, the transparency appropriate to a democracy suggests that more could be published. Disclosure of the justifications for appointment or decisions, and of the criteria and merits considered, will help enlarge public



confidence. There is no reason why the website of the appointments commission need not disclose the groups or individuals from whom views will be sought. Explanatory accountability would help to lessen criticism, and help with policy development.

Accountability

Is 'accountability' accountability between arms of government, or to the public? There are interesting issues to discuss around accountability, devolution and the UK constitution, for which judicial independence is a key question.

'Accountability of courts to parliament' should not be understood as direct operational accountability, but narrative accountability to explain how things work. When Parliament wishes judges to appear before committees, it is the Lord Chief Justice who decides whom to ask.

(In Canada, judges appear before committee for questioning not at all; in the USA, very frequently – on matters such as improving the administration of justice. In Canada, an annual ceremony for the start of court offers an opportunity for ministers of the Crown to explain budgets, with media coverage; it demonstrates engagement with the public.)

Judicial accountability has not perhaps kept pace with judicial power. Judicial independence can embrace accountability not as a threat but as a characteristic whose goals reinforce those of independence. What measure of outcome or performance could ensure that the two are mutually self-reinforcing for the future? Given lack of trust in authority, perhaps co-regulation or an ombudsman model is better than self-regulation. Does transparency require a register of interests to be kept? What about judicial appraisals and judicial review?

Judges are required to give the reasons behind a judgment and it is standard practice for this to happen at the time the decision is announced. They should not give further explanation after that point. Someone else, from outside – perhaps academia or the Bar – can less riskily undertake to explain it. This prevents judges becoming entangled in 'putting things right' or creating ambiguities with 'What I really meant was ...' (This does not preclude a lead judge in the Supreme Court, for example, presenting a summary of the issue and how the decision was reached to make it more accessible.)



CONCLUSION

Maintaining today's good into the future

In response to the UCL research team's proposed ideas, participants seemed largely to feel that judicial independence may not entirely be a political achievement but it does require continuing support from politicians and Parliament. It was certainly agreed that judges and politicians need to make and sustain sincere efforts to engage with each other in order to uphold an effective and independent judiciary.

- Questions about the role of the judiciary need thinking about in a thirty-year range.
- Judicial independence should not degenerate into a rigid taboo. We must apply it as a principle in a common-sense way.
- Institutional autonomy is a necessary foundation for independence, but not sufficient in itself. The core of judicial independence is freedom from pressure from outside groups.
- Appointment of the judiciary flows from independence, rather than judges becoming 'independent only once they're appointed'. Examining how appointments influences independence opens up various important issues including questions about how to avoid a homogeneous elite and implement a political vision, how to balance judicial with lay and political influences, and how to find the right people as well as build the right model.
- Channels of communication must be kept open between judiciary and executive, and mutual respect nourished. Regular exchanges including informal conversations are beneficial and necessary, along with high-level meetings, and open meetings with Parliament.
- Good legislation stems from good consultation. Judges have a continuing role as consultees in the legislative process. If legislation is not working, regular meetings and communication are even more indicated. Back-and-forth communication to develop good policy is healthy.
- Candidates for senior judicial office do need to be able to demonstrate evidence of how they handle policy and leadership. We must consolidate accountability with succession planning, but without inculcating a 'golden boys and girls' model, and bearing in mind the pressure of mandatory retirement ages.
- We live in an open age, in which information regarding how judicial appointments are made can be expected by the public.
- Measuring outcomes requires performance objectives to be set, but not necessarily or best by government.
- Adequate funding is necessary so that the judiciary retains its power to balance the other arms of government.



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ABOUT ST GEORGE'S HOUSE

St George's House was founded in 1966 by H.R.H The Duke of Edinburgh and the then Dean, Robin Woods. Their intention was to establish a safe physical and intellectual space where people of influence from right across society could come together to debate and discuss issues of national and international importance. Then, as now, it was hoped that the Wisdom nurtured through dialogue could be put to use for the good of our society. The House is a constituent part of the College of St George together with St George's Chapel and St George's School.

The physical House, located on Denton's Commons forms part of the fourteenth century foundations of the College of St George. It has been through many refurbishments since then and now provides accommodation for our guests, offices for our staff, breakout rooms for Consultation work, and of course dining facilities. If you eat in the House you will do so under the watchful gaze of our two founders whose portraits adorn the walls of the Dining Room.

The heart of the College of St George is St George's Chapel, where three times a day, every day, prayer is offered for the Sovereign and the nation, a tradition established in 1348 by King Edward III. It is precisely this tradition that gives the House its impetus and its wider theological context. The offering of prayer in the Chapel finds a practical expression in Consultations, where the House offers space for nurturing Wisdom.

Our Consultation programme has three distinct strands: social and ethical work on topics of national and international importance; Clergy Courses; and Consultations brought to us by external groups who understand and are in sympathy with the ethos of the House. Taken together our annual programme is varied, rich, and intellectually challenging.

We welcome people who are prepared to speak cogently and listen carefully, people prepared to persuade and be persuaded. The essence of a good Consultation is not necessarily consensus, welcome though that is but equally valuable is high quality disagreement, an open, honest interrogation of the issue to hand.

Our hope is that all our visitors will leave a St George's House Consultation thoughtful, questioning, refreshed and optimistic about their part in enhancing the world they inhabit and influence.

To this end the values of the House are openness, honesty, trust and respect. People from all areas of society, holding diverse views, opinions and beliefs come here to debate freely. The art of Consultation seeks to nurture Wisdom and open up the possibility of a different and better world.



ST GEORGE'S HOUSE



For more information about
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