Judicial Independence and Accountability in the UK

Introduction

This article summarises some of the main findings and conclusions from an AHRC funded three year research project on the Politics of Judicial Independence. The focus is on England and Wales. The research explored the impact of the greater separation of powers introduced by the Constitutional Reform Act 2005, which replaced the Lord Chancellor (a government minister) 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 relevant 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 detailed findings will be reported elsewhere. This article is a “big picture” summary of some of our main conclusions. It begins by describing the new institutional landscape, and identifies what is different about the new politics of judicial independence compared with the old. It then analyses the impact of the changes on judicial independence and on judicial accountability. The conclusions will come as a surprise to many judges, who still mourn the loss of the old Lord Chancellor. We find 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.

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; and equally extraordinarily, he presided over the second chamber of Parliament, the House of Lords. The judiciary accepted this state of affairs because they liked the head of the judiciary being a senior member of the government, who was able to defend their interests in Cabinet.

In 2003 the Lord Chancellor Lord Irvine was dismissed by the Prime Minister Tony Blair, mainly because of his opposition to reforms of the justice system. Blair announced plans to abolish the office of Lord Chancellor, establish an independent Judicial Appointments Commission, and a new Supreme Court. The Lord Chancellor was to be replaced by a Secretary of State for Constitutional Affairs, who need not be a lawyer, and could sit (like most government ministers) in the House of Commons. The sudden announcement of these reforms caused the judges great concern. The Lord

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1 AHRC grant reference AH/H039554/1. The research was conducted from 2011 to 2013. I owe a great debt to my co-investigators Prof Kate Malleson (Queen Mary, University of London), Graham Gee (University of Birmingham) and Patrick O’Brien (UCL). Any errors and omissions are my own.

Chief Justice Lord Woolf postponed his retirement to moderate the proposals and negotiate a new settlement, published in a document known as the Concordat in January 2004.\(^3\)

The Concordat provided the basis for the Constitutional Reform Act 2005. The Act removed the roles of the Lord Chancellor as head of the judiciary and Speaker of the House of Lords, 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. The Act came into force in 2006, together with the independent Judicial Appointments Commission created by the Act. The new Supreme Court (also created by the Act) came into being in 2009, when their new building was ready. 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 (formal and informal) 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. Our central contention is that judicial independence is a political achievement. It depends not just on the judiciary, nor even mainly on them: it depends just as much on the political branches of government, and how they handle their relations with the courts and the judges.

So how would we characterise the new politics of judicial independence, following the great changes of the Constitutional Reform Act: and how do they differ from the “old” politics, under the “old” Lord Chancellor? The old politics 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, with both sides preserving each other’s confidences. They were also consensual and conservative, in that neither side wanted to change the system; and stable, until the removal of Lord Irvine in 2003 abruptly ended the old system, and ended it for ever.

The new politics are different in every respect. The first difference is that they are more formal. 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. Some of these structures and processes were created by the Constitutional Reform Act itself; some have emerged subsequently. In terms of more formal structures, we now have the Judicial Appointments Commission, Judicial Appointments and Conduct Ombudsman, and Judicial Conduct Investigations Office: all products of the Constitutional Reform Act.\(^4\) Other more formal structures include the Judicial Executive Board (introduced by Lord Phillips when Lord Chief Justice) as the cabinet of the judiciary; the Judicial Communications Office, providing media support to the judges; and the strengthened board of HM Courts Service, run since 2008 as a partnership between the Lord Chancellor and Lord Chief Justice.

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\(^3\) *The Lord Chancellor’s judiciary-related functions: Proposals*, commonly referred to as “the Concordat”.

\(^4\) 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.
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 on the management of the Courts Service. The Concordat, the Constitutional Reform Act 2005, and the 2008 Framework Document have all been criticised for being excessively detailed and prescriptive. Another example would be the formal recruitment processes to the judiciary: now organised by open competition for all judicial office, from the lowest to the highest positions, and also criticised for being formulaic and cumbersome. But the formal processes also include the regular meetings between the judiciary and the other branches of government: the monthly meetings of the Lord Chief Justice with the Lord Chancellor, the innovation of six monthly meetings between the LCJ and Prime Minister, the introduction of regular meetings with senior officials in Parliament, and the 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. In Parliament they include the Speakers and Clerks of both Houses. 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; and sometimes using the occasion to argue for a change in the law or its 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, 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.

A third difference of the new politics is that they seem more politicised, in the sense of being more highly charged politically, with more overt conflict, often played out in the media. All governments will experience tensions with the 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; and in 2011 he fell into a public row with the Lord Chancellor Ken Clarke about the budget of the

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Supreme Court.8 Chris Grayling as the new Lord Chancellor made no secret of his wish to “draw blood” in negotiating changes to the judges’ pensions.9 And the Prime Minister David Cameron and his Home Secretary Theresa May have been willing to attack unwelcome Supreme Court judgments.10 Such attacks were also a feature of the old politics, from Prime Minister Blair and from Home Secretaries such as Michael Howard (1993-97) and David Blunkett (2001-04).

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.11 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.

A final difference is that the new politics are less stable, and still evolving. On top of the 2005 reforms came the creation of the Ministry of Justice in 2007, with a big increase in functions and doubling of its budget, in which the courts and judiciary are relatively less important. Then in 2011 came the amalgamation of the courts service with tribunals, and of the courts judiciary with tribunal judges. 2013 saw big adjustments to the system of judicial appointments, in the Crime and Courts Act. Overshadowing all these changes has been the economic crisis, which has greatly exacerbated relations between the judiciary and the government, over salaries, pensions and the budget of the courts service, prompting radical ideas to change the way the courts service is managed.12

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. These include court visits, dinners, and speeches; and all the usual events in the legal calendar. And like the old, the new politics depend heavily on personalities to help smooth out conflicts and to negotiate compromises. Some judges are naturally more emollient than others. 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.13 Informal contacts matter at every level, high and low: relations between the

8 “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/today/hi/today/newsid_9391000/9391865.stm.
10 R( F ) v SSHD [2010] UKSC 17, the sex offenders register case. May and Cameron said they were “appalled” at a decision that seemed “to fly completely in the face of common sense”: HC deb., 16 February, 2011, vol 523, cols 955 and 959.
13 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.
Ministry of Justice and the Judicial Office were better than the equivalent relations with the Supreme Court, partly because they were just more frequent. And lay people make a difference too: the second chair of the Judicial Appointments Commission, Christopher Stephens, has had an easier relationship with the Ministry of Justice than his predecessor Baroness Prashar.

Who are now the guardians of judicial independence?

Under the old system, the main guardian of judicial independence was the Lord Chancellor. He was a lawyer, not normally a high ranking Cabinet minister or one of the ‘big beasts’ in Whitehall, but an elder statesman figure who was listened to with respect on legal and judicial matters. Despite their statutory duty to uphold judicial independence, new Lord Chancellors play a lesser role in this respect. The difference is personified by Chris Grayling, the new Lord Chancellor appointed in September 2012: he is neither a lawyer, nor a Lord, nor a politician with no further ambition. If there is a conflict between his career interests and those of the judiciary, his career may well come first.

One thesis explored in our research was whether this weakness in the new model of Lord Chancellor is compensated for by other guardians of judicial independence, to be found in other parts of the executive, in the legislature, the judiciary, and more widely. The question is whether, instead of the Lord Chancellor being the sole guardian of the flame, judicial independence now has multiple guardians.

Possible guardians in other parts of the executive have already been mentioned. Amongst government lawyers they include the Attorney General, who may play a stronger role as a guardian of the rule of law and legal values, but only when he has a suitable locus; the Government Legal Service, and their professional head the Treasury Solicitor; and Parliamentary Counsel, who seek to ensure that fundamental legal and constitutional values are reflected in the drafting of legislation. Our interviews offered no evidence that government lawyers have moved to fill any gaps left by the Lord Chancellor.

Within Parliament, there are many more guardians than there used to be. The big change has been the creation of two new specialist Select Committees. In the Lords there is now the Constitution Committee, created in 2001; and in the Commons the Justice Committee, first created in 2003 as the Select Committee on the Lord Chancellor’s Department. Both have taken a keen interest in the judiciary, and have produced several reports on judicial matters, including multiple reports on judicial appointments, and a major report on relations between the executive, judiciary and Parliament. Other guardians within Parliament are the Clerks, who guard the sub judice rule by alerting the Speaker to any actual or pending proceedings; and who also seek to ensure that judges are not improperly criticised in Parliament, save on a substantive motion. The new Clerk of the House of Commons, Sir Robert Rogers, has gone out of his way to develop better mutual

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understanding between the judiciary and Parliament, with a series of meetings with senior judges to identify possible points of friction and how to deal with them. These encounters are new.

Within the Judiciary, there are also multiple guardians, now that the Lord Chief Justice delegates so many functions to other senior judges. He is the main guardian, but others include two colleagues with important leadership roles, the Senior Presiding Judge and the Senior President of Tribunals; and further down the chain there are guardians for specific functions. So the judge in charge of parliamentary relations would ensure that parliamentary Committees understand what questions judges can and cannot answer, and brief both sides accordingly. The Judicial Communications Office ensure that the press understand the constitutional role of the judiciary, and seek to correct any unjustified criticisms or misunderstandings. Other guardians within the judiciary are the President of the Supreme Court, who has a higher profile than the senior law lord; and amongst officials, the chief executives of the Supreme Court, and of the Judicial Office serving the LCJ.

Ultimately, judicial independence depends not just on these different official guardians, however numerous they may be. It depends on public support, and that in turn will be heavily influenced by media reports, of political criticism or support for the judiciary, and reporting on the work of courts and tribunals. If the public do not trust or respect the judiciary, they will have less incentive or inclination to support their independence when it comes under attack.

**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 were these two judges. The first, a law lord, described the old Lord Chancellor as: “A powerful advocate and powerful in the government. He was second in seniority to the Prime Minister”. The second, Lord Judge, 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”.

But the judiciary 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 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. Nor did old Lord Chancellors prevent intemperate attacks on judges, whether from Michael Howard or David Blunkett. The judiciary also have a rather insular view about the likelihood of the old Lord Chancellor surviving into the 21st century. The Lord Chancellor’s dual role of being a member of the government and the judiciary was coming under attack from the Council of Europe, judicially and politically, and in academic writing

16 Like much of the mythology about the old Lord Chancellor, this was incorrect. Prime Ministers publish rank orders of their Cabinets. No Lord Chancellor has come near to second in living memory.

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

18 *McGonnell v UK* (App No 28488/95) ECHR 2000-II 107. For the political critique see the evidence of Erik Jurgens, Special Rapporteur to the Council of Europe’s Committee on Legal Affairs and Human Rights, to the Commons Select Committee for the Lord Chancellor’s Department, 5 November, 2003.
within the UK. And other common law systems which had inherited similar traditions about the special role of the minister of justice show that role becoming increasingly strained. The Canadian Judicial Council had this to say in 2006 about the changing role of Attorneys General, in words which echoed several of our judicial interviewees:

“[T]here was once a time when Attorneys General were viewed—and viewed themselves—as advocates for Courts ... [Now] Attorneys General are themselves openly critical of the courts or ... are encountering increasingly critical cabinets. Not only are courts seen as ‘no different’ than hospitals, schools [etc] when it comes to allocating scarce public resources, but they are also more than ever before expected to absorb cuts and where possible, generate revenue.”

So the judiciary may be engaging in wishful thinking in supposing that the old model was sustainable under the harsher realities of modern politics, or the growing pressures from Europe. But whether or not the old Lord Chancellor might have been preserved, the main question being addressed here is whether judicial independence has been better or worse protected since his disappearance. To that question we have an unambiguous answer: judicial independence is stronger, in a whole range of different ways. Some judges are still so blinded by their tears for the old Lord Chancellor that they cannot see how much more independent they have become. 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. They were the sole responsibility of the executive, in the form of the Lord Chancellor. He consulted the judges, but the ultimate decision lay with him. Now responsibility has shifted to the judiciary. Formally the process is managed by the independent Judicial Appointments Commission, 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.21

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.22 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 TV; the Justices have more judicial assistants, because they have more room; they have greater capacity to sit in panels of seven or nine. Although half the law lords were opposed to the move, even the opponents acknowledge that the new court has been a great improvement.23

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 LordChief Justice as head of the judiciary now makes decisions which previously were made by the Lord Chancellor. The LCJ now appoints to all the lower levels of the judiciary (save for tribunals judges, appointed by the SPT, and magistrates, delegated to the SPJ); and he strongly influences all senior appointments. Judicial discipline, which used to be a matter for the Lord Chancellor, has become a joint responsibility 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.

The difference can be seen in the transformation of the role of the Lord Chief Justice. Before 2006 the LCJ had a private office of just half a dozen people. Now to support the LCJ as head of the judiciary, the Judicial Office has a staff of around 200. The difference can be seen in the additional functions performed by the LCJ in 2013, compared with ten years before:

**Main functions of the Lord Chief Justice in 2003, and 2013**

<table>
<thead>
<tr>
<th>Functions of the LCJ in 2003</th>
<th>Additional Functions of the LCJ in 2013</th>
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<tbody>
<tr>
<td>Presiding in Court of Appeal.</td>
<td>Head of Judiciary in England and Wales.</td>
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<tr>
<td>Presiding in Divisional Court.</td>
<td>Responsible for welfare, training and guidance.</td>
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<tr>
<td>Responsible for judicial deployment, through Presiding and other judges.</td>
<td>Chairs the Judicial Executive Board.</td>
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<td></td>
<td>Appoints all Circuit and District judges.</td>
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22 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.

| Being consulted by Lord Chancellor on judicial appointments. |
| Representing views of judiciary to government |
| Decides on judicial discipline (jointly with LC). |
| Responsible for HM Courts and Tribunals Service (jointly with LC). |
| Represents views of judiciary to Parliament, government and public. |

So why are the judiciary so reluctant to acknowledge these gains for judicial independence? One reason why the judges may feel that matters have grown much 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, with more cuts to come. It is no surprise if judges tend to associate the new Lord Chancellor with all the bitter medicine of the age of austerity. But they delude themselves if they think the old Lord Chancellor could have done any better. We asked about this in our Whitehall interviews. Senior civil servants responded that, as a minister in charge of a small Whitehall department, an old style Lord Chancellor in 2010 or 2013 would have faced the same spending cuts as the rest of Whitehall, and could not have argued for special treatment.24

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. They are understandably resentful at the changes to judicial pensions and the freeze on judicial salaries, but those have not threatened their independence, in the sense of their ability to decide cases impartially, and free from undue influence. The changes may deter candidates in future from going on the bench, leading to a possible reduction in the calibre of the judiciary, but again that is not the same as a threat to judicial independence. The cuts to the budget of the courts service have also been hard to bear, but no judge has yet come out and said that they threaten the quality of justice, in the sense of litigants not getting a fair hearing because of pressure of time or resources.25

**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).26 What we have found is that accountability has become stronger in both senses. The judicial system has become more transparent, publishing more information, and with judges frequently appearing

24 The only departments accorded special treatment were Health, and International Development: both had been the subject of prior political commitments by the Conservatives.

25 With one notable exception: see Lord Neuberger, “Justice in an Age of Austerity” JUSTICE annual lecture, 16 October, 2013, especially the sections on legal aid and judicial review. Baroness Hale had also warned about the effect of legal aid cuts in the Henry Hodge memorial lecture, June 2011.

before parliamentary committees. Judges are also more accountable in the disciplinary sense, because the disciplinary system has become more visible and is more frequently used.

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 more open and accountable. These initiatives apply to all government departments and their agencies, so that we now have annual reports from all the main institutions in the judicial system. These include annual reports from the Ministry of Justice; the Courts and Tribunals Service, plus the annual Judicial and Court Statistics; and annual reports from the Judicial Appointments Commission; the Office for Judicial Complaints; and the Judicial Appointments and Conduct Ombudsman.

From the judiciary, 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. 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. Other parts of the system have produced reports in the past but no longer do so. So the annual reports of the Commercial and Admiralty Court seem to have ceased after 2004-05; of the Court of Appeal (Civil Division) after 2005-06; of the Technology and Construction Court after 2010-11; and of the Court of Appeal (Criminal Division) after 2011-12. 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.

The Lord Chief Justice has started to give a regular account to Parliament, appearing in an annual evidence session before the Lords Constitution Committee. 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. 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

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27 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.

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

29 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.

30 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 a regular fixture.

31 If international judges, retired judges, deputy High Court judges and magistrates are included, the number of judges who gave evidence rises to 185 individuals.
censured by the committee, either orally or in committee reports. But the judges will respond occasionally to suggestions for improvement.32

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 majority are from people who have gone through the court system, seeking information from court files. The Judicial Office receives only about 80 FOI requests a year, again mostly from litigants, making requests about the Office for Judicial Complaints, or the work of the judicial HR team.

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, and receives more complaints. On average it has received some 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.33 The administrative and operational side of the justice system is also accountable through investigations by the National Audit Office, and the Parliamentary Ombudsman. In the three years 2010 to 2013 the NAO has produced three reports on the Courts and Tribunals Service, and seven more which refer to its work; and in 2012 the Courts and Tribunals service was the subject of 14 investigations by the Ombudsman.

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.34 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.  

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. 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. The impact on politics and politicians is well known. What is less well understood is the increasing demands falling on judges.

Now that the judiciary are formally more separate, and more exposed, senior judges have become political actors in their own right. Contacts between the judiciary and government have always taken place. The big change is the 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. Much of the time they are 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”.  

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. They need to choose battles which they are likely to

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35 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.  
37 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.  
win, on issues which are likely to command parliamentary and public support.\(^{39}\) 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. There are fewer lawyers in the House of Commons; and it is now very rare for a Member of Parliament to become a judge.\(^{40}\) Until the mid twentieth century a lot of judges had been in Parliament, so that the bench contained plenty of political experience. Not only was there the expectation that the Attorney General would be appointed if the office of Lord Chief Justice fell vacant; between the 1830s and 1960s, more than a hundred MPs were appointed to the bench directly from Parliament.\(^{41}\) 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.

\(^{39}\) 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.

\(^{40}\) The one current exception is Sir Ross Cranston.