

The Politics of Judicial Independence in Britain's Changing Constitution

Strengths of this proposal

- High profile project
- On an important policy question
- Engaging the judges, parliament and government
- Led by an experienced multi-disciplinary research team.

Introduction

Britain's constitution is changing. It is evolving from a *political constitution* (where those who exercise power are held to account mainly through political processes and in political institutions) towards a *legal constitution* (where they are increasingly held to account by courts through judicial review). One consequence has been to heighten tensions between politicians and judges. This, in turn, has enlivened debate about judicial independence in Britain; and greater judicial power has triggered a debate about judicial accountability.

In keeping with its traditionally political constitution, Britain has relied on the political system to supply protections for judicial independence (Stevens, 1999), and on the Lord Chancellor in particular (Woodhouse, 2001). The government's sudden plans in 2003 to abolish the office of Lord Chancellor antagonised the judiciary and led them to seek formal guarantees of judicial independence. Although the plans were modified, and there is now a statutory duty to uphold judicial independence, not all judges are satisfied. One senior judge has suggested greater judicial protection (Arden, 2007). Others have argued for new, more radical approaches to judicial accountability (Ewing, 2000 and 2009). Judicial anxieties may be further heightened by possible cuts in funding for the courts; and by proposals to repeal the Human Rights Act and replace it with a British bill of rights (Cameron, 2009; JCHR, 2008). There is, in short, a debate about judicial independence—and, increasingly, about judicial accountability—within the British polity.

This project aims to make a strong contribution to the debate on judicial independence:

- By engaging all the main legal and political actors through a series of seminars and interviews
- By developing a better understanding of the respective roles and requirements of government, parliament and the judiciary
- by developing a body of theory which explains the rationale for judicial independence in the UK, its proper limits, and its practical requirements.

It is strongly supported by the Ministry of Justice, and by the senior judiciary.

RESEARCH QUESTIONS

Our main research questions are as follows:

- How do different political and legal actors understand judicial independence and judicial accountability?

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- What are the day to day contexts in which judicial independence and accountability arise as issues?
- Who are the guardians of judicial independence, and accountability? How much coordination is there between them?
- What do the new arrangements for protecting judicial independence tell us about changing relations between the judiciary, parliament and government?

RESEARCH CONTEXT

The puzzle of judicial independence and accountability

To date, most assessments of the attitudes and behaviour of political actors towards independent judges have been one-sided, focusing largely on the *negative*—i.e. on the rare occasions where political actors appear to encroach upon judicial independence. Little attention has been paid to the *positive*—the willingness of most political actors to act in ways which promote and protect judicial independence.

This project addresses both. In doing so, the project responds to the ‘puzzle’ that lies at the very heart of judicial independence in Britain. The puzzle is this: some political actors might be tempted to undermine judicial independence, but most will act in ways that promote and protect it. Little is known about what political actors understand by judicial independence or what, in practice, motivates them to protect it. Similarly, little is known about what political and legal actors understand by judicial accountability.

Recent constitutional changes have raised issues of judicial independence and accountability right up the political agenda. The Constitutional Reform Act 2005 has removed the Lord Chancellor as head of the judiciary in England and Wales and, at the insistence of the senior judiciary, imposed a statutory duty on all Ministers to uphold judicial independence. The Judiciary and Courts (Scotland) Act 2008 has imposed a similar duty on Scottish Ministers. Judicial independence has therefore become an explicit constitutional principle recognized in statute. But it remains undefined: if it is to be upheld, it must be clearly understood by all the political actors who are required to protect it.

Our interest in judicial independence lies more in its institutional (rather than its individual) sense. Most accept that judicial independence is not absolute. However, there are many academic (Shetreet and Deschênes 1985, Russell and O’Brien 2001, Stevens 2005) and official (UN 1985, Council of Europe 1998, 2009, Commonwealth 2003) definitions, leading some to characterize judicial independence as an elusive concept (Webber, 2004). That said, the main requirements of judicial independence are well settled: judges must be personally and professionally equipped to resolve legal disputes impartially. The key questions about judicial accountability are accountability for what, and to whom? In Britain, judicial accountability is mainly ‘explanatory’ accountability (Bogdanor 2008), in which the judiciary give an account of those matters for which they are responsible: an effective judicial system, training and appraisal of judges, complaints and discipline and, increasingly, the efficient use of resources. Judicial accountability is also not an absolute concept, but subject to necessary limits, in order to protect institutional and individual independence.

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Britain's 'quiet constitutional revolution' (Bogdanor, 2006)

A decade of constitutional reform has transformed the constitutional landscape, with new relationships and arrangements which will impact on judicial independence. The Human Rights Act, the reduced role of the Lord Chancellor, the new Supreme Court, the new Judicial Offices and Judicial Appointments Commission herald much greater separation of powers. A Concordat has divided responsibilities for judicial management, complaints and discipline between the Lord Chancellor and Lord Chief Justice; the Ministry of Justice has created a new division to handle the constitutional relationship with the judiciary; the new UK Supreme Court has, uniquely, been granted an independent budget and management structure.

Against this background, all the actors--politicians, judges, parliamentarians and officials—are questioning different aspects of the arrangements and developing new sets of rules as they strive to make them work. It is therefore timely for this project to examine the formal and informal conventions which are being developed; to explore emerging differences of view and the reasons behind them; and to suggest how some of those differences might be resolved.

'Hidden guardians' and their everyday decisions

We are particularly interested in 'hidden guardians' of judicial independence, in all three branches of government. Parliament tends to be overlooked, but performs a central role. It scrutinises and amends legislation affecting judicial independence. It provides a forum for judicial accountability, and one where the judges can express their interests and concerns, with judges increasingly willing to give evidence before parliamentary committees. We will look at the role of both Houses, their Speakers and select committees. We will also look at the role of officials; for example, parliamentary clerks in the Table Office perform a crucial role in policing the *sub judice* rule.

We also examine whether there are 'hidden guardians' within the Executive. Judicial independence is defined and interpreted by a range of officials, in the Office of Parliamentary Counsel, the Law Officers' Department, Treasury Solicitors, the Ministry of Justice, the Cabinet Office, Treasury and No 10. Within the Supreme Court, the Chief Executive will play a critical role as accounting officer in accounting to Parliament for the Court's budgetary decisions. An autonomous court administration has been established in Scotland, and a new Framework Agreement between the judiciary and Executive in England and Wales has given greater budgetary independence to the Court Service; both changes will increase the influence of court service officials.

In casting our net so widely, we seek to examine not only those occasional, high profile clashes between ministers and judges, but equally the day-to-day decisions that help to define judicial independence and accountability. These include decisions about judicial appointments, pay and pensions, complaints and discipline, appraisal and training; the management and funding of the court services and the Supreme Court; the planning and drafting of legislation; the use of judges to chair inquiries.

The sort of questions we seek to address are: How do different actors define judicial independence and judicial accountability? What do they regard as their proper limits? How robust are the new institutional arrangements? How is the Concordat partnership working in practice? Is it too dependent on personal relationships? Should judges give evidence to parliamentary committees whenever they are invited? Should the Lord Chancellor clear his speeches with the Lord Chief Justice, and *vice versa*? etc,

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In seeking to answer these sorts of questions, this project will contribute both to academic knowledge and policy development. It will provide an empirical foundation for scholars to develop and test theoretical frameworks of judicial independence and accountability. And through the seminars outlined below, it will facilitate dialogue amongst the judges, parliamentarians and policy-makers about judicial independence and accountability, and their different roles in upholding them. The high level seminars will run from the start of the project and help to maximise its impact.

Theoretical Importance

The project is original and distinctive because:

1. It takes a close interest in judicial accountability as well as judicial independence. Policy makers in the Ministry of Justice and Council of Europe have an interest in both. But whereas there is some overseas literature about judicial accountability (Anderson 1980, Cappelletti 1983, Gavan Griffith 1998), there is very little in Britain (for exceptions see le Sueur 2004, Judiciary 2007).
2. It takes a close interest in politics and political actors, whereas most accounts of judicial independence in Britain have focused on the attitudes and behaviour of judges (Stevens, 2005).
3. It focuses on the day-to-day contexts in which judicial independence and accountability are at issue, as well as the rare but high profile clashes between ministers and judges.
4. It draws on the theories of economists and political scientists as well as lawyers. These include arguments that judicial independence makes legislative policy more durable (Landes and Posner, 1975) and promotes economic growth (Field and Voigt, 2003), or that there is advantage to politicians of delegating unpopular decisions to independent institutions (Whittington, 2003). But little work has been done to test these hypotheses by scrutinizing empirically the understandings and behaviour of political actors in Britain towards independent judges. This project begins this work.
5. The project will produce a book-length analysis of judicial independence and accountability in Britain, based on a sustained three year study. Most writing on judicial independence in Britain tends to take the form of discrete article-length analyses of some facet of judicial independence.
6. Most book-length discussions of judicial independence are edited collections collating different perspectives from around the world (e.g. Russell and O'Brien, 2001; Shetreet and Deschênes, 1985). These comparative collections are very useful, but the key to understanding judicial independence in any real depth is to focus on how it obtains within a specific polity. This is contingent upon the distinct social, political and legal histories of that polity (Bell, 2001).
7. By examining the effectiveness of the political system in upholding judicial independence and accountability, this project seeks to contribute to the larger debate about the appropriate relationship between political and legal 'checks' in the changing British constitution—and, indeed, about whether the

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constitution is more of a political or legal constitution. It may be that there are distinctively political and legal models of judicial independence.

8. They might also offer different models of judicial accountability: whereas the legal model might place more emphasis on matters internal to the judiciary (e.g. training, appraisal, complaints and discipline), the political model might emphasize external and political mechanisms of accountability (e.g. scrutiny hearings before select committees).

RESEARCH METHODS

We will use three main research methods.

(1) Literature analysis

To understand the policy background, we will analyse official literature from all branches of government (Concordat, annual reports of Judicial Offices, reports of parliamentary committees, etc).

To understand different theoretical perspectives and derive models from them, we will examine academic literature in law and political science from the UK, as well as relevant research from Canadian, America, the Commonwealth and Europe.

To understand how the judges define the legal requirements, we will analyse case law on judicial independence from UK and elsewhere. This will include the leading judicial review and human rights cases (especially on Article 6); and EU and ECHR decisions which touch on judicial independence.

(2) Interviews

To understand how different actors define judicial independence and accountability, and the day to day contexts in which they arise, we will conduct approximately 70 interviews with senior actors in the executive, parliament and judiciary. We will interview past and present post holders going back 20 years. Most are well known to us. The Lord Chief Justice has said he will help to facilitate access to judges.

Interviewees will include

Executive

Lord Chancellors. Attorneys General. Parliamentary Counsel. Cabinet Office, No 10. Ministry of Justice. Law Officers' Department. Treasury Solicitors and senior colleagues.

Home Office. Treasury. Judicial Appointments Commission.

Judiciary Lord Chief Justice. Heads of judiciary in Scotland and Northern Ireland. President of Supreme Court. Judicial Offices. Council of Judges. Judicial Studies Board. Judicial Complaints Office. Lower tier judges, President of Tribunals.

Parliament

Lords Constitution Committee. Joint Committee on Human Rights. Commons Justice Committee. Home Affairs Committee. Speaker's Counsel. Counsel to Committees in Lords.

Expert commentators and practitioners

Academic experts. Legal correspondents in the media. Public law practitioners.

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We will include the judiciary and governments in Scotland and Northern Ireland to see whether different issues are raised there, particularly in light of the Judiciary and Courts (Scotland) Act 2008, and the special tensions in Northern Ireland.

Interviews will be in-depth and semi-structured. A list of interview questions and interviewees is at Annex A of the Technical Appendix. Interviews will be recorded and transcribed. We have arranged to deposit the interviews at the end of the project with the Institute of Historical Research, but with restricted access where requested (we will propose no more than 10 years restriction).

(3) Lectures, seminars and debates

To stimulate debate about issues around judicial independence, we will organise a series of invitation-only seminars. This raises the profile of the project, engages key actors and enables us to test developing ideas and hypotheses with a wider audience. Possible topics and speakers are:

Topic	Speakers
Judicial independence and the rule of law	Lord Bingham
Judicial independence and separation of powers	Jack Straw Michael Howard Sir Stephen Sedley
Judicial independence and accountability	Sir Jack Beatson
Judicial independence and the media	Joshua Rozenberg, Telegraph Spokesman for Judicial Offices
Judicial independence and Parliament	Lord Woolf Sir Alan Beith
Judicial independence and the executive	Lord Goldsmith Paul Jenkins, Treasury Solicitor
Judicial Independence and the Supreme Court	Lady Hale Jenny Rowe
Judicial Independence in Scotland	Lord McCluskey
Judicial independence and legislation	Christopher Jenkins David Seymour
Judicial independence and appointments	Baroness Prashar Jonathan Sumption QC

PROJECT MANAGEMENT AND TIMETABLE

This will be a three-year project, running from September 2010 to August 2013. A detailed timetable is at Annex B of the Technical Appendix.

The team is multi-disciplinary, with lawyers and political scientists, who have experience of working closely with government, Parliament and the judiciary.

Robert Hazell will lead the project, ensure production of all outputs and activities, supervise the Research Associate, and write book chapters and an article.

Kate Malleson will conduct 10-20 interviews, plan and chair seminars, write book chapters and articles.

Graham Gee will conduct 30-40 interviews, direct the literature search, write book chapters and articles, and help supervise the Research Associate.

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The **Research Associate** will conduct the literature search, arrange interviews, conduct 20-30 interviews, organize seminars, manage the website and project 'blog', and copy edit the book.

Brian Walker will advise on maximising coverage in the media.

There will be a meeting of the project team every three months, lasting half a day. The meeting will receive reports from each member of the team, and plan activities and outputs over the next six months. Graham Gee and the Research Associate will meet at least monthly. The team will be in regular email and telephone contact throughout the project.

Website

The project will have its own web pages, like other Constitution Unit projects, listing all our outputs and activities; and shared intranet to enable communication within the team.

Advisory Committee

There will be an Advisory Committee with representatives drawn from Parliament, the executive and judiciary. The Committee will meet three times: after three months, one year and two years. It will comprise:

Nicholas Bamforth
Sir Jack Beatson
Professor Vernon Bogdanor
Professor Anthony Bradley
Ross Cranston QC MP
Rowena Collins-Rice
Professor Terry Daintith
Professor Brice Dickson
Professor Gavin Drewry
Frances Gibb
Lord Goodhart QC
Baroness Hale
Professor Andrew Le Sueur
Sir Thomas Legg QC
Lord Pannick QC
Professor Alan Paterson
Joshua Rozenberg
Anne Sharp
Roger Smith
Sir Stephen Sedley
Robert Rogers
Dame Juliet Wheldon.

Over half have been approached; all so far have agreed to serve.

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DISSEMINATION

Detailed outputs are listed on the JES form. The main **academic outputs** are:

- A book by all the principal researchers
- Four academic articles
- Five conference papers.

Practitioner outputs

- Two Constitution Unit reports
- Five presentations to practitioner groups.

IMPACT

This will be a high profile project which will engage with its target audiences from the start. The President of the Supreme Court has agreed to give a lecture. The practitioner seminars will engage high level practitioners throughout the project. There will also be press releases on topical issues; briefing of legal correspondents; articles in the press; pieces for radio and TV programmes; and briefings for senior officials in the Ministry of Justice, Parliament and the Judicial Offices.

The applicants have a strong track record in effective public engagement. In 2009 Robert Hazell was given the Political Studies Communication Award for his 'consistent work to develop the constitutional reform agenda, to communicate these ideas to government, and ... to inject academic rigour and principle into public debate'. See the Impact Summary and Plan, and CVs of the applicants, including Brian Walker (ex BBC) who will advise on media coverage.

Judicial Independence Project: Select Bibliography

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