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Introduction

This book is about the politics of judicial independence. These two concepts are not usually coupled in accounts of the UK's constitutional arrangements, at least not in any positive way. Rather, they are seen as being in tension. Judicial independence is understood as requiring that judges be insulated from the pressures and temptations of political life, not least so that they can resolve politically sensitive disputes impartially and hold those who exercise political power answerable to the law. Politics tends to be considered relevant to judicial independence only to the extent that judges must remain above the political fray in order to supply an effective check upon it. The premise of this work is that far from standing apart from the political realm, judicial independence is a product of it. It is defined and protected through interactions between judges and politicians. In short, judicial independence is a political achievement.

Our arguments are based on an analysis of empirical data gathered from confidential interviews with over 150 judges, politicians, civil servants, lay officials, practitioners and academics carried out between 2011 and 2013. In addition, we held a series of ten private seminars in London, Edinburgh and Belfast at which these groups discussed the challenges of nurturing judicial independence against the background of a changing constitution. The politicians who are the focus of this study are principally government ministers and their officials. They also include MPs, peers, parliamentary clerks and officials associated with a variety of public bodies (for example, the Courts Service, the Judicial Appointments Commission, the Judicial Conduct and Investigations Office and the Senior Salaries Review Body). More recently, these politicians and officials have been joined by senior laypeople who sit as members of these judiciary-related bodies. We have generally focused on leadership figures, particularly in the senior judiciary, but we have also interviewed judges who sit in courts up and down the judicial hierarchy in order to develop a picture of the system as a whole.[1]

[1] For an account of the daily experiences of judges at all levels of the judicial hierarchy, see P. Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Oxford: Hart Publishing, 2011).

We have also tried to capture the full range of interactions between judges and politicians and officials, from those occurring at the highest levels to the lowest and most ordinary; in high-profile constitutional arguments as well as in everyday negotiations about issues like budgets and judicial complaints. The primary objective of the empirical research was to explore how these negotiations are conducted during a period of rapid constitutional change.

Two main and related constitutional developments underpin this book. First, the expanding role of EU law, the Human Rights Act 1998, devolution and the increasing scope and intensity of judicial review have combined to draw judges into a range of politically sensitive disputes. Second, a raft of legislation has reshaped the institutional terrain throughout the UK by instigating greater formal separation between the judicial and political realms. In Scotland and Northern Ireland this process was triggered by the devolution legislation in the late 1990s. In England and Wales the Constitutional Reform Act 2005 (CRA) was the catalyst for change, leading to the reform of the office of Lord Chancellor, the creation of the Supreme Court and new judicial appointments processes. These changes have increased judicial power in two respects: first, the courts increasingly deliver judgments which encroach into areas of public policy once considered the preserve of elected politicians; second, and less widely acknowledged, the judiciary today enjoys greater power over the justice system in matters such as judicial selection, discipline, deployment and the funding and management of the courts.

Ascendant power in the first respect supplies essential background to this book, but not its focus. It is the increasing judicial power in the second respect that is our main interest. We are concerned with the way that constitutional reforms have changed the 'hidden wiring' governing relationships between judges and politicians, and our objective is to capture and describe these evolving relationships in order to investigate the implications for the independence and accountability of the judiciary.

The nature of the politics of judicial independence

It is these relationships that we have in mind when we speak of the politics of judicial independence. They can be formal, such as when representatives of the judiciary negotiate with officials from the Ministry of Justice about changes to the structure of the Courts Service or the funding of the courts. But they can also be informal, and even indirect, such as when the President of the Supreme Court used a public

lecture to argue that the budget for the Court was insufficient, and the Lord Chancellor responded in a radio interview. Much of the negotiation is routine, mundane, even, with its full significance drowned out by the high-profile tensions between judges and politicians that occur from time to time. But it is the day-to-day processes of negotiation and interaction that form the backbone of the politics of judicial independence in the UK. We seek to explain their significance and to understand the various tools and arguments that politicians, judges and officials use when delineating the constitutional position of the judiciary and the relationships between the political and judicial branches of government.

We elaborate more fully on what we mean by the politics of judicial independence in Chapter 2. We do not address the more familiar concept of 'the politics of the judiciary' which is concerned with possible connections between patterns of judicial decision-making and the ideological dispositions of judges.[2] Others have conducted research into the effects of judges' backgrounds and values, as well as other external influences, on their decision-making.[3] However, our book is not about judicial politics in this sense. Nor do we seek to address the effects on judicial decision-making of public opinion or the media.[4] Our emphasis is instead on the relations between the judiciary and the other branches of government, including new official bodies with judiciary-related functions. We also scrutinise relations within the judiciary itself, a topic largely neglected by public lawyers and political scientists, but which requires the tools of both. By analysing these relationships, we seek to understand how the meaning, content and limits of judicial independence are negotiated now that judges exercise more power in formally more separate, but in some respects less stable, institutional settings.

[2] See, for example, J. Griffith, *The Politics of the Judiciary*, 5th edn (London: Fontana, 1997); S. Lee, *Judging Judges* (London: Faber 1988); D. Robertson, *Judicial Discretion in the House of Lords* (Oxford: Clarendon Press, 1998); A. Paterson, *The Law Lords* (London: Macmillan, 1982).

[3] See the seminal work positing a link between ideological disposition and patterns of decision-making on the United States Supreme Court by Jeffrey Segal and Harold Spaeth: J. Segal and H. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993); J. Segal and H. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002); J. Knight and L. Epstein, 'The Norm of *Stare Decisis*' (1996) 40 *American Journal of Political Science* 1018.

[4] On this see, for example, M. Potter, *Do the Media Influence the Judiciary?* (Oxford: Foundation for Law, Justice and Society, 2011).

We start from the premise that judicial independence in the UK, as elsewhere, is not a fixed point of reference.[5] It is only at a relatively high level of generality that there is a clear consensus about what judicial independence means in practice. Most people agree that it requires that judges should be equipped, personally and professionally, to decide disputes impartially, according to the law and free from any inappropriate pressure.[6] However, the interactions explored in this book disclose competing claims about what is required by judicial independence in the day-to-day reality of running the justice system, such as the way judges are appointed, trained, disciplined and remunerated, as well as in relation to the structure, funding and management of the courts and tribunals. The protection of judicial pay and pensions from cuts which we explore in Chapter 3 is a good example of this disputed territory. From the perspective of many lawyers and judges, the practical bottom line of judicial independence is the protection of judges' remuneration. But tracing the interactions between politicians and judges over judicial pay and pensions shows how the relationship between the principle of judicial independence and its implementation in practice is highly contested. Appeals to the language of judicial independence in negotiations about issues of this sort can be a powerful card to play, but it is a card that cannot be played too often without losing its value.

It is the varied and sometimes rival interpretations of judicial independence in these interactions, including the alternative interpretations adopted by different judges, that are explored in this book. The question 'what is judicial independence in the UK?' can only be answered by offering an account of how the politics of judicial independence are transacted on a daily basis. Judicial independence depends on, amongst many other things, contested negotiations about the accounting lines of the Chief Executive of the Supreme Court, the rules governing the questions that Parliamentary select committees ask of judges, and the criticisms which ministers make of court judgments with which they disagree. This is not as straightforward or convenient as a list of abstract and universal rules but it provides a more accurate and complete account of judicial independence in the UK today.

[5] P. Russell, 'Towards a General Theory of Judicial Independence', in P. Russell and D. O'Brien (eds.), *Judicial Independence in the Age of Democracy* (Charlottesville: University Press of Virginia, 2001).

[6] For example, S. Burbank, 'What Do We Mean by "Judicial Independence"?' (2003) 64 *Ohio State Law Journal* 323; J. Ferejohn and L. Kramer, 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77 *NYU Law Review* 962.

Although the title of the work is *The Politics of Judicial Independence*, we have as much to say about judicial accountability. Throughout the book we highlight areas where judicial accountability has increased or where accountability gaps have opened up. Judicial independence presupposes judicial accountability, so that the politics of judicial independence is as intimately and inevitably concerned with defining the accountability of judges as it is with their independence (as we elucidate in Chapter 2).[7] Just as we argue for a more interconnected approach to the relationship between politics and judicial independence, so we also challenge the view that accountability is necessarily in tension with and distinct from independence. Until recently, work on judicial accountability generally placed weight on the individual independence of the judge in the courtroom, rather than on the collective independence of the judiciary as a branch of government. One effect of a greater formal separation of powers, however, has been to place heightened stress on collective independence and collective accountability and this is reflected throughout the book.[8] Chapters 3 and 4 explore the accountability of the judiciary to the executive, especially in relation to finance and discipline, while Chapter 5 describes their growing accountability to Parliament, with the big increase in judicial appearances before select committees.

The old and the new politics of judicial independence

To provide a framework to help analyse the different interactions between judges and politicians, in Chapter 2 we distinguish between the 'old' and 'new' politics of judicial independence. The old politics were secretive and informal, with a great deal going on behind closed doors, but they were also flexible. The new politics tend to be more formal, institutionalised and open. They are less centred on the Lord Chancellor and offer more prominent roles for senior judges such as the Lord Chief Justice, as well as a wider array of other actors. The old and the new politics are crude distinctions which provide a framework for analysing the changing relationship between judges and politicians, but we do not claim any tidy movement from one to the other or a neat division between them.

[7] S. Burbank, 'The Architecture of Judicial Independence' (1999) 72 *Southern California Law Review* 315; A. Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK' (2004) 24 *Legal Studies* 73.

[8] R. Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: Cambridge University Press, 2011), Part IV.

One example of an important theme which transcends the old and the new politics of judicial independence, and which recurs throughout the book, is the role which personalities play in determining institutional relationships. Despite the greater formality, openness and institutionalisation of the new politics, powerful individuals – whether judges, politicians, officials or lay participants – continue to exert a strong influence in shaping the way in which the politics of judicial independence are played out. Many of the interactions, negotiations and indeed formal reform processes which we trace might have been very different with other individuals at the helm.

This is particularly true of the office of Lord Chancellor. In Chapter 4 we explore how the office of Lord Chancellor changed forever in 2003, but how its historical role still colours how judges, in particular, understand judicial independence and how it should be protected. Traditionally the Lord Chancellor was viewed as the indispensable guardian of judicial independence at the very heart of government. In combining executive, legislative and judicial roles, Lord Chancellors helped to nurture common interpretations of judicial independence in both political and legal spheres. Stripped of their judicial responsibilities, the new-style Lord Chancellors have become conventional ministers like any other. Many of the judges with whom we spoke still mourn the passing of the old-style Lord Chancellors and feel more exposed without this unique voice to represent the judicial view inside government. Our evidence suggests, however, that the individual approach of the person appointed as Lord Chancellor continues to be a significant factor in the day-to-day politics of judicial independence.

One effect of the changes to the office of Lord Chancellor is to prompt important questions about who now serves as the effective guardian of judicial independence, given that this task no longer falls to one pre-eminent minister. We scrutinise the role of a number of different potential guardians of judicial independence, some old and some new, who can be found in a range of institutions such as Parliament, the Judicial Office, the Judicial Appointments Commission, the Judicial Appointments and Conduct Ombudsman, the Courts Service, the Judicial Conduct Investigations Office and the administrative structure of the UK Supreme Court. Out of sight, and largely hidden behind the Whitehall and Westminster curtains, the full significance of these figures in nurturing judicial independence has not generally been recognised. Nor are they the only ones engaged in the politics of judicial independence. Non-state actors, most obviously those in the media and

the legal professions, also perform critical roles. Though touching lightly on these actors in various parts of the book, we concentrate on those in public offices, explaining how and why the responsibility for safeguarding judicial independence has dispersed more widely in light of the recent retreat of successive Lord Chancellors from judiciary-related matters.

While our main focus is on the relationship between judges and external actors, we also chart the increasing burden on senior judges in defending their own independence and the impact this has had on the leadership structure of the judiciary. In Chapter 3 we consider how the formal system of partnership established in 2006 between the judiciary and the executive is working in practice before moving on in Chapter 4 to focus on the way judges have been drawn into the process of negotiating budgets for the courts, particularly in the context of severe public-sector cuts. A consequence of this economic pressure has been the growing interest of judges in England and Wales in pushing for more independent management of the courts, as judges have already done in Scotland.

One effect of moving to a more independent Courts Service could be to expand even further the responsibility borne by the judicial leadership. Chapter 6 explores the ever-expanding role of the Lord Chief Justice since replacing the Lord Chancellor as head of the judiciary and the professionalisation of the judicial senior management team. We review how the leadership of the judiciary has been strengthened and formalised while the commitment to the ideal of the 'judicial family' has been maintained – if at times it has been strained. Whereas the judges of the past defended their independence from each other almost as vigorously as their independence from government and Parliament, the judges of today, influenced in part by the integration of the tribunals judiciary into their ranks, must accept management and training and even performance appraisal by their colleagues as part and parcel of a well-run, modern and independent judiciary. Not all judges agree that these changes are compatible with judicial independence, although attitudes are shifting. In contrast, one area in which the judiciary has stood united was in the need to retain its central role in the new arrangements established for appointing the judges. In Chapters 7, 8 and 9 we analyse the extent to which judges in all three jurisdictions and the UK Supreme Court have retained a strong (and we argue excessive) influence in the independent judicial appointments bodies, based upon our analysis of how the judges interact with the lay members of those bodies and with politicians where they have a residual involvement in the appointments process.

The politics of judicial independence are played out differently in the UK now that the three legal jurisdictions of England and Wales, Scotland and Northern Ireland are located in more separated polities linked by an overarching UK Supreme Court. In Chapters 6 and 8 we chart how this multi-level system adds greater complexity and diversity to the politics of judicial independence. The Supreme Court is new, but the other jurisdictions are of long standing, and until recently the politics of judicial independence played out in similar ways in Scotland, England and Wales, and Northern Ireland. Devolution has changed this. Different approaches can be found in the systems for running the Courts Service, the judicial appointments processes, and judicial complaints and discipline.

The future politics of judicial independence

In mapping out the different locations in which the politics of judicial independence are played out, we do not suggest that the relationship between judges and politicians is on a simple trajectory towards greater tension. Occasional tensions must be understood as just one part of the dynamic rhythm of the politics of judicial independence. Relations ebb and flow. However, whereas this once involved relatively moderate undulations, there are now more erratic patterns emerging. As we consider various challenges to the institutional independence of the judiciary, it is important to keep in mind that the baseline for our discussion is one of a long-standing and vibrant culture of judicial independence in the UK. The challenge is to ensure that this culture endures. A major point that we return to in the conclusion is that the greatest threat to judicial independence in the future may not be from the actions of politicians but rather from their disengagement and disinterest. Political will is required to sustain judicial independence. There are many challenges confronting judges in their day-to-day work, including heavy caseloads, ineffectual IT systems and reduced resources. All of our interviewees agreed, however, that the degree of independence of individual judges in the UK is rightly the subject of both international envy and respect. They remain free to resolve disputes impartially, according to the law and free from improper pressure. This is no small matter and could easily be taken for granted. In the light of the increased instability in the institutional arrangements and the growing formal separation between politicians and judges, it is even more important that there is a sizeable corps of politicians and officials who appreciate the value, over the long haul, of independent judicial decision-making.

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The politics of judicial independence and accountability

Throughout this book we use the term 'the politics of judicial independence' as shorthand for the ways in which politicians, judges and civil servants negotiate the meaning, content and limits of judicial independence and accountability in the UK. Our aim is to investigate how these negotiations operate in the real world to shed light on the practices and relationships generated by them. This chapter differs from later chapters in being conceptually rather than empirically oriented. It has two tasks: to anchor our account of independence and accountability, and to justify the political lens that we use throughout this book. The central claim developed in this chapter is that the content of independence and accountability is largely settled by politics. Politics, like independence and accountability, is a broad and flexible term, and we note various senses of it later in the chapter. However, we primarily mean politics in a transactional sense of negotiations about the day-to-day implementation of judicial independence and accountability undertaken by actors in the political and legal systems.

The chapter opens with a discussion of judicial independence, before turning to judicial accountability. That independence appears before accountability is not a signal that it is more important. On the contrary, across this book we seek to show how the two must be – and in the UK increasingly are – taken together. In practice, when judges, politicians and civil servants are negotiating the fine details of the judicial appointments process or the management of the court system, they are transacting the politics of independence and accountability simultaneously. In other words, the politics of independence defines the limits of accountability, and vice versa.

Judicial independence

Judges should be independent. Some might disagree about whether judges are as independent as is commonly supposed. Others might

dispute whether judges are sufficiently independent. But few would disagree that judges should be equipped, personally and professionally, to resolve disputes impartially, according to law and free from improper pressure – whether from the parties to the dispute, governmental actors, pressure groups or other judges. This core understanding of judicial independence is based on 'the social logic of courts'.[1] If judges are induced to decide disputes and hold the government to account other than through a good-faith adjudication of the facts and determination of the relevant law, then the logic of courts as a method of impartial dispute resolution breaks down. The losing party no longer has a reason to accept the legitimacy of the court's decision. Even the appearance or suspicion of interference or undue influence subverts that legitimacy.[2]

From this starting proposition it is possible to identify a number of generally accepted conditions for judicial independence.[3] But it is not possible to articulate a definitive checklist which guarantees judicial independence since the importance of any particular condition depends on the unique blend of political, social and historical circumstances in any one country at any one time. The following ten conditions are therefore inevitably set at a high level of generality:

(a) Judges should enjoy guaranteed tenure until the expiry of their terms of office or a mandatory retirement age. Judges must only be removed earlier for reasons of incapacity or misconduct that renders them unfit for judicial office.
(b) There should be a merit-based appointment process that ensures that persons selected as judges not only have an appropriate knowledge of and training in the law, but also exhibit a willingness to decide disputes with an open and fair mind and according to law. Promotions must be made only on merit.
(c) There should be arrangements in place to ensure that judges receive fair and secure remuneration. Any changes to, and in particular reductions in, salaries and pensions should not be used as a means of influencing judicial decision-making.

[1] M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: The University of Chicago Press, 1981), p. 1.
[2] 'Justice must not only be done; it must manifestly and undoubtedly be seen to be done,' Lord Hewart, giving judgment in *R.* v. *Sussex Justices ex p. McCarthy* [1924] 1 KB 256, 259.
[3] We avoid speaking of 'principles' of judicial independence, preferring instead to speak of 'conditions' that typically contribute towards judicial independence. This terminology allows us to more readily grasp the contextual and contestable nature of the conditions listed below.