

Judicial independence and the UK Supreme Court

By Patrick O'Brien

The UK Supreme Court (UKSC) will be two years old on 1st October. It replaced the judicial committee of the House of Lords which had, in various forms, been the court of final appeal in Britain for 600 years. Chief amongst the arguments for replacing the House of Lords with a Supreme Court was the idea that Britain required a proper separation of powers; a legal system in which judges were completely independent of Parliament and the executive. The UKSC has (with other reforms) delivered a formal separation of powers but has it had any effect on judicial independence?



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independence – up to a point. In the Lords funding for the court came out of the budget for Parliament and was rarely a matter of controversy. The move across Parliament Square has given the UKSC a separate staff, separate systems and a separate estate from Parliament. All of this requires a separate budget, one which is now significantly higher than that required by the Law Lords when they occupied a small set of rooms in Parliament. The budget has been the subject of disagreement between the UKSC and the Ministry of Justice. In a recent lecture Lord Phillips, the court President, complained that UKSC funding arrangements do not satisfactorily guarantee the institutional independence of the court and that the court was, in reality, dependent on whatever it could persuade the Ministry to contribute to its budget each year (8 February 2011; this lecture was the launch event for the Judicial Independence Project). Speaking on the *Today Programme* the next morning Ken Clarke, the Minister for Justice and Lord Chancellor, responded that he supported the independence of the UKSC, but that this did not extend to the pay and conditions of administrative staff and related non-judicial costs.

From 1399 to 2009, the most senior court in Britain was constituted by Law Lords seated in the House of Lords. In October 2009, they moved to an independent building to form the UK Supreme Court. The reform marks a significant step to a clearer separation between the legislative and judicial branches of government.

than informal ones. If judicial independence is not valued by politicians and by citizens judges cannot hope to remain independent. Britain has always scored very well in respect of the independence of individual judges. The idea that a judge would be bribed or punished for her decisions, or that a minister would tell a judge what to decide, has for at least two centuries been regarded as absurd. We should not,

therefore, expect the UKSC to make much difference to judicial independence. Indeed, a more significant (although subtler) increase in judicial independence could be detected in the late 1980s and early 1990s, when changes in personnel at the highest levels led to a more activist judiciary that was a little more sympathetic to litigants and little less willing to accord government the benefit of the doubt, particular in relation to core civil liberties.

The UKSC has gained symbolic independence. It now resides in a grand building on Parliament Square which, chosen with wonderfully British historical sensibility, is both new (having been renovated extensively) and 100 years old at the same time and is a significant improvement on the cramped rooms the judicial committee had occupied in Parliament since the Second World War. The Law Lords are now Justices of the Supreme Court, and so share professional titles with their powerful brethren on the American Supreme Court rather than with members of the House of Lords across the square from the new court (although the Justices will still be referred to as 'Lord/Lady X'). It seems reasonable to assume that with this new-found symbolic power the Justices of the UKSC will feel more confident in their role.

Allied to this symbolic independence is functional independence. UKSC Justices and members of the Houses of Parliament are no longer colleagues. Although there was a loose convention that the Law Lords did not speak in debates in the Lords this was not uniformly observed; in particular when it came to debates that touched on legal matters. Judges and parliamentarians no longer share facilities and so are less likely to encounter each other informally in the course of their working day. The separation may not be entirely positive. Attacks on judicial decisions, and occasionally on the personal integrity of judges, have become an increasing feature of political discourse in recent times. Both judges and politicians may have to work a little harder than they did to ensure that they fully understand one another.

Does the UKSC have increased decisional independence? Are the Justices of the UKSC more willing to engage in judicial review than were the Law Lords? This is the nub of any discussion of judicial independence. A cautious answer: it would appear not – at least *not yet* – if only because the Law Lords had already demonstrated remarkable independence of spirit long before the move to the UKSC (e.g. the *Belmarsh* case in 2004 in which the UK's derogation from the ECHR in respect of terrorist detention orders was ruled invalid). This is not surprising. Empirical studies suggest that formal protections of judicial independence are of less importance

What about the future? As Lord Phillips' exchange with Ken Clarke demonstrated, the cost of the UKSC is likely to continue to be a source of friction, at least so long as the financial crisis continues. And severe criticism of judges by politicians and the media has become a prominent aspect of public discourse in recent times, most worryingly from the Scottish Justice Secretary, who threatened to withdraw Scottish contributions from the UKSC because of its decision in the *Nat Fraser* case, commenting that "he who pays the piper calls the tune" (*The Scotsman*, 2 June 2011). There is nothing wrong with criticism of judges as such, but there are some indications that politicians and commentators are less legally literate and less sympathetic to the role of the judge as an independent arbiter, leading to personal criticism of judges simply for doing their jobs. If this continues, it is possible that over time judges may become a little more cautious: expressing criticisms of government a little more softly, or hesitating to act when they have discretion to do so.



Authority. Interior of the UK Supreme Court, located in the Middlesex Guildhall, on the south-west corner of Parliament Square in London. Photograph: © The Supreme Court of the United Kingdom

Nonetheless, in connection with the controversy over journalistic ethics and phone-hacking (current as I write) all parties have been anxious to implement a "judge-led" inquiry. This suggests that the expertise and the independence of a judge is still highly valued in Britain. While this remains the case the core of judicial independence will not be threatened: judges will continue, as they have for centuries, to decide cases without fear or favour. The creation of the UKSC has added a layer of formal and symbolic independence to this tradition, but its substance remains the same.

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