

THE FOUNDATIONS OF JUSTICE

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Summary

Everybody agrees that the constitutional principle of judicial independence is important. In relation to the core judicial functions of hearing cases and writing judgments, the meaning and application of the principle is fairly straightforward: politicians, parliamentarians, and officials must refrain from interfering with judicial decision-making in individual cases. But hearing and judgments do not “just happen”; they have to be facilitated by a wide array of institutions and processes (the justice infrastructure), covering matters as diverse as court buildings, litigation procedures, judicial careers, and legal aid. The day-to-day running of this infrastructure, along with its periodic reshaping, presents numerous and complex challenges for a legal system intent on respecting judicial independence and facilitating access to justice.

THE JUSTICE INFRASTRUCTURE

“All rise”. Every day, with words like this, thousands of court and tribunal sittings start across the United Kingdom.¹ In the minutes, hours, or days that follow, judges adjudicate on disputes of fact, decide what the common law is, and interpret and apply legislation to the situations before them. In the higher courts and some tribunals, writing judgments is also part of this core judicial function. Judges, and the courts and tribunals they sit in, are the embodiment of the state’s judicial power, authorised to impose criminal sanctions, order compensation and other remedies, and adjudicate on the legality of governmental action. These core functions are constitutionally important activities that give practical implementation of the rule of

1. There are separate justice infrastructures in England and Wales, in Scotland, and in Northern Ireland; each is a distinct legal system; and, under the devolution settlement, justice is a policy field devolved to

law. In most countries round the world, there is a strong consensus that judges must be insulated from instructions or influences from government or other illegitimate pressures on the outcome of the particular case. Sometimes this understanding is presented as an aspect of the rule of law; sometimes as a strand of the concept of separation of powers; and sometimes as a freestanding principle of judicial independence.

Court and tribunal hearings and judgment writing do not, however, “just happen”. Behind every sitting and judgment there is complex array of institutions and processes that facilitate the delivery of justice by the legal system’s 35,000 judges. To facilitate the delivery of justice, courts and tribunals must be created and funded. Jurisdiction (the legal power to decide types of cases) is created, transferred, modified, and sometimes “ousted” by the legislature. There need to be rules of procedure guiding the steps to be taken in litigation. Entitlement, if any, to legal aid, must also be defined. Rules on rights of audience before courts, which in turn may depend on rules about regulation of the legal profession, are required. The practical work of listing hearings, allocating cases to judges, and ensuring parties, lawyers, witness and documents are where they are needed is vital (and in many legal systems increasingly dependent on information technology).² Buildings for courts and court staff need to be provided and managed. Judges must be selected and appointed (perhaps thousands each year)³, disciplined (occasionally), dismissed (very rarely) and eventually allowed to retire with a pension. This “justice infrastructure” is the focus of this essay.

It is easy to see what an adverse impact a weak justice infrastructure could have on the quality of court sittings and judgments in particular cases. Imagine a system in which politicians make dramatic changes to the structure of courts without consultation, lawyers without adequate professional expertise are appointed as judges, and chronic underfunding delays litigants obtaining judgments and prevents many

2. In England and Wales, a £375 million investment programme started in 2014, designed to use information technology, online services and video links to reduce delays and costs.

3. For example, in 2013-14, more than 800 individual judicial appointments had to be made in England and Wales, which involved processing over 5,000 applications

people from affording access to the courts. Worse, a justice infrastructure could be affected by endemic corruption. As Lord Phillips of Worth Matravers (Lord Chief Justice of England and Wales) said, repeating the sentiments of Lord Browne-Wilkinson (a former Senior Law Lord): “Judicial independence cannot exist on its own – judges must have the loyal staff, buildings and equipment to support the exercise of the independent judicial function”.⁴

The justice infrastructure in England and Wales has in recent years been buffeted by some poorly considered reform attempts and (like almost every other part of the public sector) has been reeling from financial cuts introduced by government in the wake of the 2008 Financial Crisis. The Ministry of Justice (the government department responsible for the courts and judiciary) had an “extremely challenging” settlement in the 2010 Comprehensive Spending Review, requiring it to reduce expenditure by over £2 billion pounds a year during the four-year period 2011-15; and it was required to find a further 10 per cent savings in 2015-16.⁵ Pay freezes, job cuts, and court closures are affecting the morale of judges and court staff.⁶ Many judges and practitioners are deeply concerned about recent radical changes to the legal aid system.⁷

This essay explores the justice infrastructure in England and Wales, which has undergone significant reforms in recent years. It does this on two levels – “running” and “shaping”. The first level (running) is the routine operation of the system, where decisions are taken within the framework of the existing infrastructure. This encompasses day-to-day matters (for example listing of cases for hearing, making individual judicial appointments, granting or refusing legal aid) and annual planning cycles (such as the allocation of resources to HM Courts and Tribunals Service, the

4. House of Commons Select Constitutional Affairs Committee, *The Creation of the Ministry of Justice*, 6th Report of 2006-07, HC 466, Ev 27.

5. Senior Salaries Review Body, *Thirty-sixth Annual Report* (Report No.84), Cm 8822, para.5.6.

6. See p 000.

7. See p 000 below; and F. Wilmot-Smith, “Necessity or Ideology? (2014) 36(21) *London Review of Books* 15.

organisation that runs many aspects of the infrastructure). The second level (shaping) is strategic, concerned with changing the infrastructure, which typically involves the addition or abolition of a major new process or institution or significant new rules. Recent examples of shaping are the institutional changes introduced by the Constitutional Reform Act 2005 (reforming the office of Lord Chancellor, creating the UK Supreme Court, and a new process for appointing judges in England and Wales).

Both levels of the infrastructure – running and shaping – are of constitutional significance. They generate direct and indirect risks of damaging or enriching judicial independence for the core functions of hearing cases and writing judgments.⁸ It may be tempting to think that a neat solution would be to hand over the running and shaping of the justice infrastructure – lock, stock, and barrel – to the judiciary. But, as we will see, a solution along these lines needs to be rejected as being too difficult to square with other constitutional values, especially accountability and the need to reflect the broad public interest.⁹ Running and shaping of the justice infrastructure also has direct and indirect implications for the constitutional principle of access to justice.

THE BLUEPRINT FOR THE INFRASTRUCTURE

Where do we find the blueprint – the instruction manual – for the justice infrastructure? In countries with codified written constitutions, the Constitution is a source. In the United Kingdom, primary and secondary legislation and specific pieces of “soft law” provide the detailed rules and requirements that keep the system ticking over.

8. For a detailed statement of the specific norms grouped under the umbrella term “judicial independence”, see *The Mount Scopus Approved Revised International Standards of Judicial Independence* (2008, as amended) www.jwp.org (accessed 10 November 2014).

9. On accountability, see further A Le Sueur, “Parliamentary Accountability and the Justice System” ch 9 in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (OUP, Oxford, 2013).

CONSTITUTIONS

In countries with codified constitutions, the major elements of their justice infrastructure are laid down in part of the constitutional code.¹⁰ It should not surprise us to find that the justice infrastructure contrasts across different constitutional, political and legal cultures. What is normal in one system (for example, selecting judges through highly politicised elections in some states of the USA) is anathema in others (where professional merit is the criterion for appointment). There is, however, broad consensus about some general abstract principles that in the mid-20th century came to be included in international human rights treaties. The judicial infrastructure must enable hearings that are “independent and impartial”, in public (unless there is an overriding public interest in closed hearings), and within a reasonable time.¹¹

LEGISLATION

As we muddle through without a codified constitution in the United Kingdom, it is Acts of Parliament that do the work of creating the institutions, rules, procedures, and conferring executive power for the most important elements of the national judicial infrastructure.¹² The Acts are amended quite frequently through the normal parliamentary legislative process in the House of Commons and the House of Lords.

10. See e.g. the Australian Constitution, Part III (Judicature); Spanish Constitution, Part VI (Judicial Power); Constitution of Ireland, arts 34-37; and so on.

11. Universal Declaration of Human Rights, art 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”); European Convention on Human Rights, art 6.

12. These include: the Courts Act 1971 (creating the Crown Court); the Magistrates’ Courts Act 1980; the Senior Courts Act 1981 (regulating the High Court and Court of Appeal); the County Courts Act 1984; the Legal Aid Act 1988 (replaced by the Access to Justice Act 1999 and subsequently by the Legal Aid, Sentencing and Punishment of Offenders Act 2012); the Courts Act 2003 (creating HM Courts Service, the agency to administer courts, expanded in 2007 to include tribunals); the Constitutional Reform Act 2005 (reforming the office of Lord Chancellor; setting up the UK Supreme Court; and creating a new judicial appointments system); the Legal Services Act 2007 (regulating the legal profession, in conjunction with the Courts and Legal Services Act 1990); and the Tribunals, Courts and Enforcement

Beneath these Acts of Parliament lies a conglomeration of delegated legislation. As with delegated legislation on other topics, most of this comes into force with little parliamentary scrutiny or public controversy. It fills in detail. Occasionally, however, changes sought to be made in this way do receive high profile scrutiny, such as when the blandly named Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 prompted an outcry, with Lord Pannick leading a “motion of regret” debate in the House of Lords critical of government proposals to restrict legal aid in judicial review claims.¹³ Only one member of the House of Lords – the junior minister representing the government’s views – defended the new rules; he assured the House that he “would take back the observations that were made during the course of the debate” to the Ministry of Justice.¹⁴ Lord Pannick did not press the debate to a vote and the new rules came into force.

THE CONCORDAT

Beyond the statute book is a variety of “soft law” documents, one of which is of special general significance. “The Concordat” reflects the outcome of an intense period of negotiations in the second half of 2003 between Lord Woolf (the then Lord Chief Justice) and Lord Falconer (the minister in Tony Blair’s Labour government responsible for judiciary-related matters).¹⁵ The impetus for the negotiations was the unexpected announcement made by the Prime Minister’s office in June 2003 of several far-reaching changes to the justice infrastructure, including abolition of the ancient office of Lord Chancellor, a new top-level court of the United Kingdom (by creating a

Act 2007 (creating the First-tier Tribunal and Upper Tribunal in place of the previous maze of separate tribunals).

¹³. BBC, “Grayling accused of not understanding the legal system”, <http://www.bbc.co.uk/democracylive/house-of-lords-27319557> (accessed 10 November 2014).

¹⁴ HL Hansard, vol 753, col 1567 (7 May 2014), Lord Faulks.

¹⁵. *Constitutional Reform: The Lord Chancellor’s judiciary-related functions: Proposals, since referred to as “the agreement” and also “the concordat”*

<<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/lcoffice/judiciary.htm>> (accessed 10 November 2014).

UK Supreme Court to replace the Law Lords sitting as the Appellate Committee of the House of Lords), a new judicial appointments system for England and Wales, and disqualification of all senior judges from membership of Parliament. This was dramatic stuff and prompted political opposition in Parliament (primarily from the Conservatives) and criticism from some senior members of the judiciary (though others supported the gist of the proposals).¹⁶ A negotiating team was formed by Lord Woolf to discuss with the government how responsibility for running the infrastructure would be divided between the proposed new Secretary of State (who would, under the Blair plan, have replaced the Lord Chancellor) and the judiciary. In January 2004, after six months of behind-closed-doors brokering, the Concordat was published: it was a relatively short document of 47 paragraphs setting out the principles that would govern the transfer of functions in England and Wales and providing details of the application of those principles to the proposed arrangements.¹⁷ Lord Woolf told the House of Lords “In agreeing the proposals, the judiciary has regarded as its primary responsibility, not the protection of its own interests but the protection of the independence of the justice system for the benefit of the public”.¹⁸ Major elements of the Concordat were incorporated into the Constitutional Reform Act 2005 (“CRA 2005”); but one central aspect was not. Following sustained opposition from Conservative MPs and peers (and some others) in Parliament, the office of Lord Chancellor was retained though in a much-altered form: the office-holder was a government minister, but no longer the constitutional head of the judiciary nor necessarily in the House of Lords or a professionally qualified lawyer.

After the enactment of the CRA 2005, the question arose as to the continuing status of the Concordat. On one view, the document had done its job: it was a statement of outcome of a negotiation and, once implemented, could be filed away as

16. For a detailed analysis, see A. Le Sueur, “From Appellate Committee to Supreme Court: a Narrative”, ch. 9 in L. Blom-Cooper, G. Drewry and B. Dickson (eds), *The Judicial House of Lords 1876-2009* (OUP, Oxford 2009).

17. Hansard HL, vol 756, col 13 (26 January 2004).

18. Hansard HL, vol 756, col 25 (26 January 2004)

a mere footnote to the policy-making process. Some, however, take a different view, seeing the Concordat as either “constitutional convention” or a “living document”, which remains a reference point and in future be developed. In 2005, Lady Justice Arden, giving evidence on behalf of the Judges’ Council (the official non-statutory body set up by the judiciary to develop collective policy) to a House of Lords select committee scrutinising the bill that became the CRA 2005, called for the bill or the bill’s explanatory notes to make express reference to the Concordat, arguing “there is a role for the Concordat even after the bill has been enacted”, adding “not every iota of the Concordat can be reflected in statutory language. There are some matters which have to, as it were, survive within the Concordat and one way in which the Concordat may be relevant in future is when the court is construing what will then be the Constitutional Reform Act, it may be necessary for it to look at the Concordat”.¹⁹ The committee was not convinced, reporting “We do not consider it possible, beyond the provisions made by the bill, to accord the Concordat a quasi-statutory status”.²⁰ Two years later, a different House of Lords committee carrying out an inquiry into the relations between the judiciary, government and Parliament heard evidence from one academic (Professor Robert Hazell) describing the Concordat as “a constitutional convention” and the committee went on to recommend:²¹

We believe that the Concordat is a document of constitutional importance. We are concerned that the Concordat has not been updated to reflect the new arrangements for Her Majesty’s Courts Service, and we call on the Government and the judiciary to establish a practice of amending the Concordat whenever necessary to ensure that it remains a living document reflecting current arrangements rather than being merely a historic document recording the outcome of negotiations in 2005. Consideration should be given to introducing

19. House of Lords Select Committee on the Constitutional Reform Bill, *Report*, Session 2003-04, HL Paper 125-I, para 75.

20. House of Lords Select Committee on the Constitutional Reform Bill, *Report*, Session 2003-04 (HL Paper 125-1) para 85.

21. House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament*, 6th Report of 2006-07 (HL Paper 151) para 14.

a formal mechanism for laying revised versions of the Concordat before Parliament.

No such formal mechanism for change has been put in place and no revisions have been made to the Concordat since it was agreed in 2003.

OTHER SOFT LAW

In addition to the Concordat (whatever its status), there are other documents of key importance in the justice infrastructure. Of general importance is HM Court and Tribunals Service Framework Document, which was laid before the UK Parliament in July 2014.²² The document describes itself as reflecting “an agreement reached by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals on a partnership between them in relation to the effective governance, financing and operation of HM Courts & Tribunals Service”.

RUNNING THE INFRASTRUCTURE

Running the justice infrastructure covers routine decision-making of various kinds: making decisions about individuals (should applicant W be selected for appointment as a judge; should claimant X receive legal aid), about managing work flow (which judges should form the panel of the Court of Appeal hearing case Y next week, should court building Z be closed to save money; are more circuit judges needed in the South West), about supervision of the system (how effectively is the tribunal system operating), and so on. The general characteristic of “running” is that it takes place within the existing infrastructure.

Who runs the national infrastructure on a day-to-day basis? Who ought to run it? In trying to answer these descriptive and normative questions, it soon becomes clear that there are no straightforward answers for England and Wales. Mapping out the intricacies of the system is a colossal task; although some of this detail is needed, we concentrate on the broad constitutional questions about the allocation of decision-making power. A standard approach is to use the framework of separation of powers

22. HM Court and Tribunals Service Framework Document, Cm 8882.

theory. An elementary and rather 18th century account of this principle is that there are three types of state power, each of which ought to be wielded by different state institutions: executive power (exercised by government, in other words ministers and civil servants); legislative power (the law-making powers of Parliament) and judicial power (exercised by judges).²³ This framework is, however, too broad-brush to provide solutions as to who should run the justice infrastructure. A better approach is to focus on the four main models in use in the infrastructure of England and Wales that can be discerned: (i) functions run by judges; (ii) functions run by politicians and their officials; (iii) functions which are shared between judges and politicians; and (iv) functions which have been allocated to arm's length bodies, independent of both judges and politicians.

FUNCTIONS RUN BY JUDGES

The CRA 2005 made the Lord Chief Justice of England and Wales (LCJ) “head of the judiciary”. Where infrastructure functions are led by the judiciary, in practice it is the LCJ (or his nominee) who makes decisions. The LCJ is assisted by the Judicial Executive Board (consisting of ten senior members of the judiciary and two senior administrators), which meets monthly. The LCJ has a staff of 186 FTE officials in the Judicial Office, which supports his work, including “professional trainers, legal advisers, HR and communication experts, policy makers and administrators”.²⁴ The Judicial Office, which has an annual budget of £18m, is funded by the Ministry of Justice but staff are answerable to the LCJ – not to government ministers – for their day-to-day work.

The Concordat lists six aspects of the infrastructure as ones to be primarily carried out by judges: oath taking – judges take oaths of office in the presence of the LCJ (not a government minister); deployment – the LCJ is responsible for the posting and roles of individual judges, within a framework set by the government; nomination of judges to fill posts that provide judicial leadership (such as senior presiding judges,

23. For a more sophisticated account, see N. Barber, “Prelude to the Separation of Powers” [2001] CLJ 59.

24. See www.judiciary.gov.uk (accessed 10 November 2014)

the deputy Chief Justice, the Vice-Presidents of the Court of Appeal) “should fall to the Lord Chief Justice either with the concurrence of or in consultation with” the government; the LCJ determines which individual judges are appointed to various committees, boards and similar bodies; the LCJ makes “practice directions”, with the concurrence of the government, providing guidance to judges on relative minor procedural matters; judicial training is led by the LCJ, within the resources provided by the government.

After reforms to the judicial appointments process in 2013, the LCJ now has a final say in approving selections of candidates made by the independent Judicial Appointments Commission to judicial posts below the High Court in the hierarchy, with a similar role in relation to tribunal judges carried out by the Senior President of Tribunals.²⁵ Previously this function was carried out by government (through the Lord Chancellor); but in practice, only in a tiny number of cases did the government reject the recommendation made by the JAC.

Another major component of the infrastructure led by judges is the operation of the UK Supreme Court (which as well as England and Wales, serves as the highest level appeal court for civil cases from Scotland and civil and criminal cases from Northern Ireland). Before the CRA 2005, the top court was the Appellate Committee of the House of Lords, consisting of 12 professional judges (colloquially called the Law Lords) who on appointment to the court were granted peerages enabling them to take part in non-judicial as well as judicial work of the upper house of the UK Parliament. Cases were heard in a committee room in Parliament and judgments (or “speeches”) were delivered in the House of Lords chamber at times when politicians were absent. Some of the Law Lords integrated themselves into the political work of the House of Lords, for example by listening and speaking in debates on legislation in the chamber and chairing non-judicial committees (such as one on scrutiny of EU legislation). Other Law Lords sought to distance themselves from non-judicial work as much as possible, uneasy about the blurring of lines between judicial and political roles. The CRA 2005 ended the role of the Appellate Committee, transferring the Law Lords to a

25. Courts and Crime Act 2013, Sch 13, amending the CRA 2005.

new UK Supreme Court physically and institutionally separated from Parliament (though it was not until October 2009 that the new court was ready to start work).

Three infrastructure questions relating to the UK Supreme Court were considered in detail during the debates in 2004-05. The first was who should make the rules of court? Initially, the government proposed that it should have a controlling influence, with power to disallow rules proposed by the President of the court. Responding to criticisms, the government backed down and agreed that the President should have sole rule-making power, with a duty to consult the legal profession and government. The government's only role is to lay the rules before Parliament for formal approval as delegated legislation.

A second issue was how the administration of the court should be organised. Initially, the bill provided "The Minister may appoint such officers and staff as he thinks appropriate for the purpose of discharging his general duty in relation to the Supreme Court". Critics, including the Law Lords, argued that this would give the government too much influence over the court's day-to-day operations. Under pressure, the government agreed to amend the bill so that the CRA 2005 now provides "The President of the Supreme Court may appoint officers and staff of the Court" (s 49). Until 2013, the government remained responsible for appointing the court's chief executive, after consulting the President of the Court; but the Crime and Courts Act 2013 amended the CRA 2005 so that s 48 now reads "It is for the President of the Court to appoint the chief executive".

A third issue was funding. During the passage of the bill, the government gave the reassurance that "the Minister will simply be a conduit for the Supreme Court bid and will not be able to alter it before passing it on to the Treasury". The CRA provides that the government (i.e. the Lord Chancellor) "must ensure that the Supreme Court is provided" with "such other resources as the Lord Chancellor thinks are appropriate for the Court to carry on its business". This arrangement is difficult to square with the reassurance and has caused misunderstanding and some ill will between the court and the government in the ensuing years. Giving a public lecture in 2011, Lord Phillips (President of the court) told his audience about government pressure to make

dramatic cost reductions, a “peremptory” letter he had received from the minister and his conclusion:

that our present funding arrangements do not satisfactorily guarantee our institutional independence. We are, in reality, dependant each year upon what we can persuade the Ministry of Justice of England and Wales to give us by way of ‘contribution’. This is not a satisfactory situation for the Supreme Court of the United Kingdom. It is already leading a tendency on the part of the Ministry of Justice to try to gain the Supreme Court as an outlying part of its empire.

The following morning, the government responded in the news media. Kenneth Clarke, the Lord Chancellor, was reported as saying “judicial independence was at the heart of the country’s freedom but that Phillips could not be in the ‘unique position’ of telling the government what its budget should be”.²⁶

FUNCTIONS RUN BY GOVERNMENT

Most of government’s powers to run the justice infrastructure are legally and constitutionally speaking in the hands of the Lord Chancellor. Before the CRA 2005, Prime Ministers selected senior, experienced lawyers for the role; the Lord Chancellor and senior judges therefore knew each other professionally and moved in the same social circles. On taking up the post, the office holder became the constitutional head of the judiciary and with that came the right to sit as the presiding judge in the top-level courts (even though, prior to appoint, many Lord Chancellors had little experience of sitting judicially).

The 2003 Blair government proposal was to abolish the Lord Chancellor and transfer government responsibilities for judiciary and court-related functions to a new post of Secretary of State.²⁷ Once the announcement had been made, a broad

26. H. Mulholland, “Kenneth Clarke rejects claim of threat to supreme court independence”, *The Guardian*, 9 February 2011.

27. In law, all Secretaries of State hold a single office. Acts of Parliament confer powers and impose duties on ‘the Secretary of State’ without further elaboration as to which minister will in practice exercise those powers or carry out those duties. The Interpretation Act 1978 provides that a reference to

consensus quickly emerged that it was no longer appropriate for a government minister to be the constitutional head of the judiciary or to sit as a judge. But the Conservatives (then in opposition), supported by many cross-bencher peers in the House of Lords, were vehemently opposed to the outright abolition of the office of Lord Chancellor: they wanted the government minister responsible for judiciary-related matters and the courts to retain some of the characteristics of previous Lord Chancellors. The minister should, they argued, continue to be called “the Lord Chancellor”, and should be a professionally qualified lawyer, sit in Parliament in the House of Lords (not in the Commons), and be somebody at the end of their political career (rather than being an ambitious mid-career politician keen to please, and therefore be under the patronage of, the Prime Minister). The protracted political wrangling was brought to an end by the need for the bill to become the CRA 2005 before the general election that year. The outcome in relation to the Lord Chancellor was that the name was retained, but there would be no requirement for the office holder to be lawyer, or to sit in the House of Lords. The new “Lord Chancellor” was in most respects a mainstream government minister. There were, however, some special features of the new ministerial office.

Although the CRA 2005 is completely silent on this, the role of Lord Chancellor is in practice combined with that of Secretary of State, so that one person holds two ministerial posts. Between 2005 and 2006, the Secretary of State was called “Secretary of State for Constitutional Affairs”, heading the Department for Constitutional Affairs (DCA). After May 2006, he became “Secretary of State for Justice”, heading a new department – the Ministry of Justice – that combined some of the DCA’s responsibilities with areas previously under the remit of the Home Office. In this

“Secretary of State” is a reference to “one of Her Majesty’s Principal Secretaries of State for the time being”. The previous practice of creating statutory ministerial posts responsible for particular areas of policy (for example, the Minister of Transport or the Minister of Agriculture, Fisheries and Food) has fallen into disuse. The Prime Minister has considerable scope for making what are often called “machinery of government” changes, creating new Secretaries of State and departments and transferring work between Secretaries of State and departments. These are normally done with little parliamentary scrutiny. Changes are given legal effect by secondary legislation made under the Ministers of the Crown Act 1975.

conjoined-roles ministerial office, the Lord Chancellor is responsible for judiciary and court-related functions (along with a few other areas, such as the Law Commission) – in other words, the justice infrastructure – and the Secretary of State deals with everything else in the Department. Since the CRA 2005 was enacted, the “everything else” element of the job has grown significantly, to include now the large and inevitably controversial areas of prisons and offender management (moved to the Ministry of Justice from the Home Office).

The distinctive nature of the office of Lord Chancellor – distinguishing it from that of Secretary of State – is achieved by several different means. First, the CRA 2005 and numerous other statutes confer powers and duties on the Lord Chancellor (rather than the Secretary of State). It is difficult to quantify the precise number of these functions: many pre-date the CRA 2005; between January 2006 and June 2014, Parliament enacted 73 Acts of Parliament referring to the Lord Chancellor, many of which will contain multiple specific statutory powers and duties. Second, CRA 2005 s 20 prevents many powers of the Lord Chancellor (those listed in Schd 7 to the CRA 2005) from being transferred by the Prime Minister to other ministers under the general machinery of government provisions of the Ministers of the Crown Act 1975. These Lord Chancellor powers are in effect ring-fenced and require primary legislation to allocate them elsewhere (so giving Parliament the final say on whether such changes are made); but the Lord Chancellor also has statutory functions that are not ring-fenced in this way, for example those under the Legal Services Act 2007 (to do with regulation of the legal profession). Third, the CRA 2005 s 17 makes the oath of office taken by the Lord Chancellor different from that sworn by a Secretary of State: “I,[name], do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God.” Fourth, the CRA 2005 s 2 sets out factors that the Prime Minister “may take into account” in selecting a colleague to be Lord Chancellor: (a) experience as a Minister of the Crown; (b) experience as a member of either House of Parliament; (c) experience as a qualifying practitioner; (d) experience as a teacher of law in a university; (e) other experience that the Prime

Minister considers relevant”. In reality, these words – described as “vacuous” during the debate on the bill – provide almost no political or legal constraints on the Prime Minister’s discretion.

This model of conjoined ministerial offices is complex and probably understood by few people outside the Ministry of Justice and the handful of academics specialising in this backwater of public law. What do Lord Chancellors think about it? In February 2010, Jack Straw MP (Lord Chancellor in the Labour government 2007-2010) told the Constitution Committee:²⁸

I am perfectly comfortable about exercising both roles. They are distinct. Many of your Lordships will remember the great debate that took place following the original proposals in the Constitutional Reform Bill, which led to the continuation of the position of Lord Chancellor. I happen to think that was the right decision, for all sorts of reasons. The distinction in practice – I believe in theory but actually in practice – is a very important one, because on the one hand you have the Justice Secretary functions, which in terms of their operation and how they are moderated by other colleagues in Government are no different from any other secretary of state functions. The functions may differ but how they are operated is no different. On the other hand, the functions of Lord Chancellor are principally related to the judiciary and the maintenance of the independence of the judiciary. On those, in turn, I act independently of other colleagues in Government.

Giving evidence to the same committee in September 2014, Chris Grayling MP (Lord Chancellor in the Coalition government from 2012 and not a lawyer) spoke strongly in favour of the conjoined-ministers model:²⁹

I think now, given the constitutional changes that took place a decade ago, the role of the Lord Chancellor would be massively devalued if the roles were

28. <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/80/10022402.htm>

29.

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/the-office-of-lord-chancellor/oral/14379.html>

separated. It is not something I had fully understood until I took the job. But now I have truly understood in carrying out the role myself, I think it would be just the opposite. The danger would be that you would end up with the Secretary of State for Justice holding the Cabinet position. The Lord Chancellor's role is not what it used to be.

The risk, Mr Grayling said, was that if the roles were split the Lord Chancellor would become a junior minister outside the Cabinet whereas "You want the Lord Chancellor, in a role that is not what it used to be, to be at the top table heading a substantial department with weight around the Cabinet table. I think it would be a big mistake to move away from that".

So what parts of the justice infrastructure does the government – through the Lord Chancellor – run? The Courts Act 2003, s. 1 provides "The Lord Chancellor is under a duty to ensure that there is an efficient and effective system to support the carrying on of the business of [the courts], and that appropriate services are provided for those courts". To ensure accountability, the Lord Chancellor must "prepare and lay before both Houses of Parliament a report as to the way in which he has discharged his general duty in relation to the courts". A comparable duty in relation to UK Supreme Court, is created by the CRA 2005: the Lord Chancellor "must ensure that the Supreme Court is provided" with "such other resources as the Lord Chancellor thinks are appropriate for the Court to carry on its business". Appearing before a parliamentary committee in 2010, Lord Judge (the then Lord Chief Justice) provided insight into the behind-the-scenes discussions that go on between the judiciary and the government in setting annual budgets for the courts. He said there were three possibilities:³⁰

... the first is that when the figures are examined, I come to the conclusion that the arrangement is a reasonable one that I can sign up to—that is called a concordat agreement. The second is that he offers a figure that I do not think is necessarily going to enable me to fulfil my responsibilities, and I write to him

30. House of Lords Constitution Committee, *Meetings with the Lord Chief Justice and the Lord Chancellor*, 9th Report of Session 2010-11, HL Paper 89, Evidence from 15 December 2010, Q9.

and say, “Well, that’s all you’ve got. I understand the difficulty you’re in. I have reservations about it, but let’s do the best we can”. I do not sign the concordat agreement, but we all get on as best we can and see what events turn out. The third would be a disaster and a crisis of great magnitude and is that the Lord Chancellor of the day offers the Lord Chief Justice money that the Lord Chief Justice is completely satisfied is derisory for the purposes of running the administration of justice, in which case the option available to the Lord Chief Justice is to bring the concordat to an end.

Lord Judge envisaged that if the third eventuality were ever to come about, a new concordat would have to be negotiated between the judiciary and the government, with the Lord Chancellor “very anxious to exercise such power as is left to him in the context of the parliamentary process” by involving relevant House of Commons and House of Lords Committees and making a written statement to Parliament under CRA 2005 s 5.

The Concordat also recognised that the government “is responsible for the pay, pensions and terms and conditions of the judiciary” (para 21). A key aspect of judicial independence recognised internationally is that judicial salaries should never be reduced (as this would enable government to place pressure on judges); in the United Kingdom this is secured by the Senior Courts Act 1981, s 12 (“Any salary payable under this section may be increased, but not reduced”). There is no legal impediment to government imposing pay freezes, which is what happened for three years from 2010, followed by a one per cent increase. The LJC (Lord Thomas) recently told the Review Body on Senior Salaries (SSRB), an independent body advisory body, that it was “deeply regrettable” that SSRB recommendations to government on pay increases and a major review of salaries were not being implemented by government and said “there was a justifiable sense of real grievance among the judiciary”.³¹

31. Senior Salaries Review Body, *Thirty-sixth Annual Report* (Report No.84), Cm 8822, para.5.6.

Changes to judicial pensions have, similarly, been a source of tension between judges and government. Announcing the new scheme to the House of Commons in 2013, the Lord Chancellor said:³²

The Government recognise that although there is a longstanding practice that the total remuneration package offered to the judiciary, including pension provision, should not be reduced for serving judges, this forms part of a broader constitutional principle that an independent judiciary must be safeguarded. However, in the particular context of difficult economic circumstances and changes to pension provision across the public sector, we do not consider that the proposed reforms infringe the broader constitutional principle of judicial independence. Nonetheless we have listened to the concerns of the judges and we have modified our proposals.

FUNCTIONS SHARED BETWEEN JUDGES AND GOVERNMENT

The major area for joint-working is HM Courts and Tribunals Service (an agency of the Ministry of Justice), which “uniquely operates as a partnership between the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals as set out in our Framework Document”.³³ Leadership is provided by a 10-person board, which includes non-executive directors, Ministry of Justice officials, and three senior judges. Over 20,000 staff working at 650 different locations provide administrative support to courts and tribunals. The aims and objectives of the agency are set by the government (Lord Chancellor) and the judiciary (the LCJ and the Senior President of Tribunals).

Another area of shared functions are the numerous specific responsibilities where, following the agreement reached in the Concordat, the CRA 2005 and other legislation requires there to be “concurrence” between the judiciary (the LCJ) and the government (the Lord Chancellor). One such area is the system for considering and determining complaints against the personal conduct of the judiciary. A body known

32. Chris Grayling MP, HC Hansard, vol. 000, col.7WS, 5 February 2013.

33. HM Courts and Tribunals Service www.justice.gov.uk/about/hmcts.

as the Judicial Conduct and Investigations Office (JCIO) “supports the Lord Chancellor and the Lord Chief Justice in their joint responsibility for judicial discipline”.

FUNCTIONS GIVEN TO ARM’S LENGTH INDEPENDENT BODIES

Several aspects of the justice infrastructure have been entrusted to “arm’s length” bodies, independent of both government and the judiciary. These bodies may have an executive function (deciding things) or an advisory function. The degree of independence from government and the judiciary varies according the body.

A body with a high degree of independence is the Judicial Appointments and Conduct Ombudsman office (a team of eight), the remit of which is to resolve grievances about how complaints about judicial conduct have been handled and complaints about the judicial appointments process. It is “a Corporation Sole who acts independently of Government, the Ministry of Justice (MoJ) and the Judiciary”.³⁴ Another specialist ombudsmen service working in the justice infrastructure is the Legal Ombudsman for England and Wales, set up by the Office for Legal Complaints (the Board) under the Legal Services Act 2007, to deal with grievances against legal practitioners.

The Judicial Appointments Commission for England and Wales, another arm’s length body, was set up by the CRA 2005, with the aim “to maintain and strengthen judicial independence by taking responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and making the appointments process clearer and more accountable”.³⁵ The body consists of 15 commissioners, including judges, legal practitioners and lay people (one of whom is the chair). The JAC runs competitions for appointment to tribunals and courts across England and Wales (except for magistrates nor for the UK Supreme Court). A variety of modern human resources processes are used, including application forms, written assessments, and selection days at which applicants role-play. The JAC makes recommendations either

34. Judicial Appointments and Conduct Ombudsman, Annual Report 2013-14, p 4.

35. Judicial Appointments Commission www.jac.judiciary.gov.uk (visited 9 November 2014).

to the Lord Chief Justice (for positions below the level of the High Court) or the Lord Chancellor (for the High Court and Court of Appeal): in almost all cases the LCJ or Lord Chancellor accept the recommendation though they have a residual power to ask the JAC to reconsider the recommendation or to reject it.

The routine updating of procedural rules are carried by out the Criminal Procedure Rules Committee, the Civil Procedure Rules Committee, and the Family Procedure Rules Committee established by the Courts Act 2003; these are judge-led expert groups, each described as an “advisory non-departmental public body, sponsored by the Ministry of Justice”. Their membership categories, defined by statute, are mostly judicial, with legal practitioners and lay members (for example, the Civil Procedure Rules Committee includes “two persons with experience in and knowledge of the lay advice sector or consumer affairs”). The Rules Committees consult, submit rules to the Lord Chancellor, who “may allow, disallow or alter rules so made” but “before altering rules so made the Lord Chancellor must consult the Committee”. The Rules are made law through the statutory instrument procedure in Parliament, which is usually a formality.³⁶

Some arm’s length bodies have been abolished recently as part of the Coalition Government’s “bonfire of the quangos”, implemented under the Public Bodies Act 2011, which sought to cut public spending, increase accountability, and “simplify the quango landscape”. For a body to survive the cull, it needed to be shown that it performed a technical function, or that its activities require political impartiality, or that it needed to act independently to establish facts. One important body that did not survive was the Administrative Justice and Tribunals Commission (an “advisory non-departmental public body or NDPB)), created by the Tribunals, Courts and Enforcement Act 2007 and abolished in August 2013, with the government moving some of its functions in-house to the Ministry of Justice. The AJTC’s purpose was “to help make administrative justice and tribunals increasingly accessible, fair and effective by: playing a pivotal role in the development of coherent principles and good practice; promoting understanding, learning and continuous improvement; ensuring

36. Courts Act 2003, Pt 7, as amended, and other legislation.

that the needs of users are central”. There was strong opposition to the AJTC’s demise in the Parliament. The chair of the House of Commons Justice Committee argued “because the administrative justice and tribunal system deals with disputes between the citizen and the executive, moving the process closer to Ministers has serious disadvantages. It is vital that oversight is seen to be independent”.³⁷ In the House of Lords, peers debating the motion that “this House regrets the proposed abolition of the AJTC, which will remove independent oversight of the justice and tribunal system at a time when it is undergoing major change” called for the AJTC to be retained but the government narrowly won the vote.³⁸

DISCUSSION

The previous sections have illustrated which bodies run the different parts of the justice infrastructure. Working inductively, it is possible to detect some general principles of constitutional design in the current network of institutions and processes.

First, independent, arm’s length bodies are favoured where decisions relate to individuals – such as in relation handling of grievances against judges, the JAC and lawyers; and in relation to individual decisions on appointments to judicial office. One of the reasons that Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was controversial is because it transferred decision-making about individual legal aid applications from a body that had substantial operational independence from government to a body closely integrated into the Ministry of Justice.³⁹

Second, the more closely intertwined with the core judicial function (hearing cases and writing judgments) a function is, the more control or influences judges should have in the running of that function. It has been recognised for many years

37. <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/ajtc-report/>

38. See further, C. Skelcher, “Reforming the oversight of administrative justice 2010-2014: does the UK need a new Leggatt Report?” [2014] PL 000.

39. Discussed below.

that (as Lord Mackay of Clashfern, a Lord Chancellor in Conservative governments in the 1990s put it) “in order to preserve their independence the judges must have some control or influence over the administrative penumbra immediately surrounding the judicial process”, for example the listing of cases.⁴⁰

Third, the more a function involves decisions about allocation of scarce public resources to the justice infrastructure, the greater the control or influence of government. As John Bell argues⁴¹

“ ... when it comes to managing the judicial service and setting its budgets, then we are not dealing with potential interference with individual cases, but with the setting of priorities between categories of legal activity, and this involves giving a direction to society, which is an inherently political activity. The suggestion that the judiciary should be given untrammelled authority in this area is seriously problematic.

Not everybody agrees with this principle. Sir Francis Purchas (a Court of Appeal judge) made the bold argument in 1994 that:⁴²

Constitutional independence [of the judiciary] will not be achieved if the funding of the administration of justice remains subject to the influences of the political market place. Subject to the ultimate supervision of Parliament, the Judiciary should be allowed to advise what is and what is not a necessary expense to ensure that adequate justice is available to the citizen and to protect him from unwarranted intrusion into his liberty by the executive.

Lord Bingham (who during his long judicial career held office as Master of the Rolls, Lord Chief Justice of England and Wales, and Senior Law Lord) recognised that such a call lacked democratic legitimacy. Even the judges, he acknowledged:⁴³

40. Lord MacKay, lecture 6 March 1991 quoted in Lord Bingham “Judicial Independence” (a lecture to the Judicial Studies Board on 5 November 1996) published in T. Bingham, *The Business of Judging: Selected Essays and Speeches, 1985-1999* (OUP, Oxford, 2011), 55.

41. “Sweden’s Contribution to Governance of the Judiciary” in M. Andenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (OUP, Oxford, 2009).

42. F. Purchas, “What is Happening to Judicial Independence” (1994) 00 *New Law Journal* 1306, 1324.

... cannot overlook the existence of other pressing claims on finite national resources. We would all recognize the defence of the realm as a vital national priority, but I suspect that we would shrink from giving the chiefs of staff carte blanche to demand all the resources which they judged necessary for that end. We would all, probably, recognize the provision of good educational opportunities at all levels as a pressing social necessity, but might even so hesitate to give educational institutions all the money which they sought. We would all regard the health of the people as a vital national concern, but could scarcely contemplate the demands of health service professionals being met in full, without rigorous democratic control. I do not myself find these choices, even in theory, offensive; but in any event they must surely, in the real world, be inevitable.

SHAPING THE INFRASTRUCTURE

The justice infrastructure is always a work in progress: rarely a fortnight goes by without a reform proposal. This flux can be illustrated, for example, by the changing responsibility for legal aid, which was started by the Labour government in 1949 introducing a national system for public funding of civil litigation for people unable to afford legal fees; the United Kingdom was the first country in the world to recognise legal aid as a component of a welfare state. At first, the scheme was administered by committees of local lawyers organised by the Law Society (the solicitors' regulatory body), rather than by government or the courts; the government's role (through the Lord Chancellor) was one of general supervision. In 1989, the Law Society was replaced by the Legal Aid Board (a government agency) as the main administrator. The Legal Aid Board was, in turn, replaced by the Legal Services Commission in 2000 (a non-departmental public body working at arm's length from government). The Legal Aid, Sentencing and Punishment of Offenders Act 2012 remodelled the system again, replacing the Legal Services Commission with the Legal Aid Agency (an

43. T. Bingham, "Judicial independence", in T. Bingham, *The Business of Judging: Selected Essays and Speeches*, 1985-1999 (OUP, Oxford, 2011), 57.

executive agency tightly integrated within the Ministry of Justice). The current set-up gives government more direct control than at any time since 1949 (though the newly-created post of “director of legal aid casework”, and a large team of caseworkers, is not subject to the direction of the Lord Chancellor in relation to individual legal aid applications).

Shaping the justice infrastructure is a constitutionally significant activity. It facilitates – or restricts – access to justice and may affect the independence of the core judicial function (hearing cases and writing judgments). An important question is therefore who controls and influences the process of change and what methods they use for developing ideas about change. As with running the system (discussed in the previous section), shaping is not susceptible to analysis based on a basic separation of powers theory. Almost all shaping involves government action, input from the judiciary, and scrutiny and law-making by Parliament. What matters is the balance of influence among these institutions, the techniques they and other participants use to develop and discuss ideas for change. A model of what this looks like can be postulated, which emphasises a spectrum of decision-making environments. Towards one end, the environment is highly politicised (“political environment”) and at the opposite end the environment is based on expert knowledge (“expert environment”); in the middle the environment is mixed (“blended environment”). Each environment of change has advantages and disadvantages. The challenge for the constitutional system is to find optimal points at which good quality decisions are likely to be made; this point may differ according to the area of the infrastructure under review and the types of issues under consideration.

POLITICAL ENVIRONMENT

In this environment, proposals for reforming the justice infrastructure are typically led by government ministers. The House of Commons and House of Lords are the fora in which change is debated. The infrastructure is assumed to be an inherently party political artefact, in which opposing viewpoints rest on different values and conflicts capable of being resolved through the cut-and-thrust of the political argumentation. The justice system tends to be seen as a public service to be reformed according to

party political preferences.⁴⁴ In the political environment, judges and lawyers have no guaranteed or preferential status at the formative stages of the process; they are merely consultees. Facts about the infrastructure are often asserted as true rather than being demonstrated to be true through use of empirical research. The government may have limited (or no) appreciation that its proposals have constitutional implications. The style of presentation of the changes may be confrontational and populist.

An example of change through the political mode is the events that eventually resulted in the CRA 2005. The package of reforms (on the office of Lord Chancellor, creating a supreme court, radical changes to how judges were appointed, and disqualifying all serving judges from membership of Parliament) was announced inauspiciously in a press briefing by officials at 10 Downing Street during one of Tony Blair's annual Cabinet reshuffles. These complex policies had not been subject to detailed legal or constitutional analysis. The senior judges had not been consulted before the announcement; many heard about the proposals through the news media. The changes were the subject to protracted, sometimes poor quality, and often highly partisan debates in Parliament over two years. The end result was shaped by behind-the-scenes party political negotiations in Parliament under pressure of time because of the impending 2005 general election. Tony Blair candidly admitted that "I think we could have in retrospect – this is entirely my responsibility – done it better".⁴⁵ The Conservatives were implacably opposed the Lord Chancellor ceasing to a lawyer yet in 2012 Conservative Prime Minister David Cameron became the first Prime Minister to select a non-lawyer for the role (Chris Grayling MP, an ambitious mid-career politician of the type held up as a spectre by Conservatives nine years earlier) – evidence, perhaps, that short-termism and hypocrisy are endemic in the political environment.

44. See D. Oliver, "Does treating the system of justice as a public service have implications for the rule of law and judicial independence?" UK Constitutional Law Association Blog, 19 March 2014, www.ukcla.org (accessed 10 November 2014).

45. Tony Blair, Minutes of Evidence, Liaison Committee, 3 February 2004 (HC 310-I, 2003-04).

The government seemed not to learn many lessons from the debacle of the 2003-2005 reform saga over the Lord Chancellorship. In 2007, there was new failure to consult the judiciary about developments to the justice infrastructure that had constitutional ramifications. The government decided to create a Ministry of Justice, combining responsibility for judiciary and court-related matters (dealt with by the Department for Constitutional Affairs) with responsibility for the weighty and always politically emotive area of prisons and offender management (previously in the Home Office). The senior judiciary first learnt of these plans through a report in the Sunday newspapers; they were concerned the justice infrastructure would, as part of a new huge department, become devalued as resources and political energy were diverted to prisons; moreover, they saw risks of conflicts of interests within a department that was simultaneously responsible for prisons and defending judicial independence (when many of the most controversial and politically unpalatable cases involve prisoners and sentencing). A parliamentary committee lamented that⁴⁶

The creation of the Ministry of Justice clearly has important implications for the judiciary. The new dispensation created by the Constitutional Reform Act and the Concordat requires the Government to treat the judiciary as partners, not merely as subjects of change. By omitting to consult the judiciary at a sufficiently early stage, by drawing the parameters of the negotiations too tightly and by proceeding with the creation of the new Ministry before important aspects had been resolved, the Government failed to do this. Furthermore, the subsequent request made by the judiciary for a fundamental review of the position in the light of the creation of the Ministry of Justice was in our view a reasonable one to which the Government should have acceded in a spirit of partnership.

Another illustration of change through the political mode are reforms to the judicial review procedure initiated by the Coalition government in 2012. Judicial review is a process for challenging the legality of decisions taken by public bodies in the

46. House of Lords Constitution Committee, Relations between the executive, Parliament and the judiciary, 6th Report of 2006-07, HL Paper 151, para.67.

Administrative Court (part of the High Court); it is a vital way in which the rule of law is protected. Using the opportunity of a speech to the Confederation of British Industry conference in November 2012, the Prime Minister described judicial review as “a massive growth industry in Britain today” and said⁴⁷

“We urgently needed to get a grip on this. So here’s what we’re going to do. Reduce the time limit when people can bring cases. Charge more for reviews so people think twice about time-wasting. And instead of giving hopeless cases up to four bites of the cherry to appeal a decision, we will halve that to two”.

The Lord Chancellor, Chris Grayling, later wrote an opinion piece in the *Daily Mail* in which he warned that judicial review should not be “not a promotional tool for countless Left-wing campaigners” and “Britain cannot afford to allow a culture of Left-wing-dominated, single-issue activism to hold back our country from investing in infrastructure and new sources of energy and from bringing down the cost of our welfare state”.⁴⁸ Specific proposals were published piecemeal in two consultations several months apart; academics and practitioners criticised them as unsupported by empirical evidence (the Joint Committee on Human Rights concurred) and damaging to the rule of law.⁴⁹ Several elements of the proposals contained in the Criminal Justice and Courts Bill were savaged in parliamentary debates in the House of Lords;⁵⁰ at the time of writing, the Bill is going back to the Commons where the Lords amendments may be reversed.

47. Available at www.gov.uk/government/news/prime-ministers-cbi-speech (accessed 9 November 2014)

48. Available at www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html#ixzz3lUbXriTU (accessed 9 November 2014).

49. See e.g. V. Bondy and M. Sunkin, “Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse”, UK Const. L. Blog, January 10, 2013’); M. Fordham, M. Chamberlain, I. Steele and Z. Al-Rikabi, Streamlining Judicial Review in a Manner Consistent with the Rule of Law (Bingham Centre Report 2014/01), Bingham Centre for the Rule of Law, BIICL, London, February 2014).

50. HL Hansard, vol 756, col 952, 27 October 2014.

Standing back from these illustrations, what are the advantages and disadvantages of changing the justice infrastructure through a political environment? One advantage is that it can provide real impetus to decisive change: if the government decides to do something, it may be done speedily. It is also well suited to dealing with issues of distributive justice and reaching judgements about how, on a national scale, scarce resources are allocated to different areas of government activity. The political environment may also score highly for its democratic credentials: initiatives are typically led by ministers who are accountable to Parliament, where their proposals can be scrutinised.

The political environment has potential disadvantages. Ideas may be formulated by people without detailed knowledge or broad understanding of the implications of their proposals; the range of knowledge and research drawn on may therefore be limited. Of particular concern, is that inadequate regard is had to constitutional principles – notably judicial independence, access to justice, and the rule of law, in developing reform proposals. Expert views are typically sought only after key preferences have been formed; when experts contribute through a consultation process, this may have little or no influence on a government already determined to carry out its plans. Furthermore, proposals are prone to being announced before sufficient research and policy development work has been done undertaken. Some forms of communication (for example, political speeches) do not provide good opportunities for points of detail to be refined or complexities to be explored.

EXPERT ENVIRONMENT

A different way of steering change to the justice infrastructure is in an expert environment. Experts and expertise come in various forms. Research may be commissioned or used by the Ministry of Justice, parliamentary select committees, the Law Commission, and other institutions. Academics specialising in the legal system can make expert contributions, carrying out empirical socio-legal research (through the collection and evaluation of data), analytical and normative studies (for example, of the competing constitutional values in the system) and comparative work. Expertise

may also be found in the practical knowledge of people deeply immersed within the justice infrastructure, especially judges and legal practitioners, able to reflect on many years of experience of how the system runs to offer insights into how it could be improved. The style of deliberation in expert mode is generally apolitical and predisposed towards searching for consensus.

An example of an expert environment can be seen in how the Law Commission works. Many of its law reform projects relate to the justice infrastructure. For example, after 10 years detailed work and consultation, in 1976 the Law Commission published recommendations that previously disparate High Court procedures be unified into a single “application for judicial review procedure”; further recommendations were made in 1994, including on which types of applicant should have standing to use the judicial review procedure. Expert working can also take place within the court system. In 1999-2000, a small committee as commissioned by the Lord Chancellor to address the pressures on judicial review thought likely to result from the Human Rights Act; chaired by Sir Jeffery Bowman (an accountant with expertise in managing change), it consisted of civil servants, court administrators, an academic and the director of a NGO.⁵¹ More recently, a judge-led committee developed proposals for the “regionalisation” of judicial review, making it available at High Court centres outside London.⁵²

On a larger scale, a paradigm example of shaping through an expert environment was the complete overhaul of thinking about civil procedure rules that took place between 1994 and 1999.⁵³ Although the reform process was initiated by government, the development work was left to Lord Woolf (the Master of the Rolls). In a two-stage inquiry, Lord Woolf worked with a team of five “assessors” (members of

51. See T. Cornford and M. Sunkin, “The Bowman Report, access and the recent reforms of the judicial review procedure” [2001] *Public Law* 11.

52. S. Nason and M. Sunkin, “The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Legal Services in Public Law” (2013) 76(2) *Modern Law Review* 223.

53. For a critical account, see J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A critical analysis* (Cambridge University Press, Cambridge, 2014).

the judiciary and the legal profession), an academic consultant and a consultant on information technology. Several academics were commissioned to undertake original research. The inquiry team visited four overseas jurisdictions for comparative studies. The procedural reforms were implemented by the Civil Procedure Act 1997 and the Civil Procedure Rules, neither of which caused any significant party political controversy in Parliament.

Another notable illustration of large-scale change through an expert environment was the comprehensive restructuring of the tribunal system. In 2000, the government appointed Sir Andrew Leggatt (a Court of Appeal judge) “to review the delivery of justice through tribunals other than ordinary courts of law”; he worked with a retired civil servant to produce a detailed analysis and far-reaching recommendations on the changes that needed to be made. These included reducing the number of tribunals from over 70 to two (the First-tier Tribunal and the Upper Tribunal). The government followed best-practice in publishing a draft bill to implement the recommendations but this had so little political resonance that no parliamentary committee was interested in scrutinising it. The Tribunals, Courts and Enforcement Act 2007 reached the statute book generating no notable party political controversy.

In some contexts, the power of experts has been criticised and the limits of their role debated. Writing about the dominance of experts (a “technocracy”) in how the European Union develops policy ideas, it has been suggested⁵⁴

“The technocrat believes that rational analysis and scientific examination of the facts will bring about unanimous consensus on policy solutions. By contrast the technocrat feels uneasy under conditions of political conflict, ideological debates, and controversies on distributive issues of social justice.

So, some questions about the shaping of justice infrastructure cannot satisfactorily be solved by experts and expert knowledge alone. These include, for example, whether it would be beneficial for the UK to withdraw from the European Union and European

54. C. Radaelli, “The public policy the European Union whither politics of expertise” (1999) 6(5) *Journal of European Public Policy* 757.

Convention on Human Rights (points of deep political conflict) or what proportion of GDP should be allocated to fund legal aid (a distribute issue). There are other possible limitations and disadvantages of an expert environment. Expert working may be regarded as undemocratic: ideas may emerge from people who are unelected and unaccountable. Moreover, if there is a disconnection between the priorities of government and those of experts, proposals developed through expert working (for example, by the Law Commission) may lie on the shelf, unimplemented. In some situations, it may be difficult to disentangle expertise from self-interest, an accusation levelled at the legal profession when it seeks to influence justice infrastructure reforms. For example, in June 2013 a government minister was reported as saying: “Let’s not kid ourselves. We are in a wage negotiation,’ Lord McNally warned lawyers this week at the Bar Council’s Legal Aid Question Time event at Westminster. ‘You have a vested interest in this outcome. To deny that, I think, is absurd’⁵⁵”

BLENDING ENVIRONMENT

The political and expert environments for bringing about reform of the justice infrastructure represent points at the extreme ends of a spectrum of styles of decision-making. Between these points, there are ways of working that blend politicisation and expertise.

Blended environments may be located within institutions. The government department responsible for judiciary-related and court matters, was in the past, led by people who were experts in the sense that they had insider-knowledge of law and the legal system. The department was known successively as the “Lord Chancellor’s Department” (1885-2003), “the Department for Constitutional Affairs” (2003-2007), and latterly “the Ministry of Justice”. A government department is led by a politically neutral civil servant – the permanent secretary – who remains in post even if the political party in government changes after a general election. From the 19th century until 1997, it was a requirement that the permanent secretary in the Lord Chancellor’s

55. J. Robins, “Cuts Will “Destroy” Legal Aid System”, (2013) 177(26) Criminal Law and Justice Weekly, online at <http://www.criminallawandjustice.co.uk/> (accessed 10 November 2014).

Department was a qualified legal professional. As one commentator wrote in the late 19th century:⁵⁶

“It probably owes its statutory existence to a wise reform initiated by Lord Selborne, who made the office of Principal Secretary to the Lord Chancellor a permanent one. The obvious object of this reform was to give some chance of continuity to the legal policy of successive Lord Chancellors, and to create what might be the nucleus of a department of Law and Justice. Any one acquainted with the working of a public office must be aware of the wholesale confusion which would result if the staff was changed with every change of government. The hitherto backward state of all non-contentious law reform in this country has probably been due in no small degree to the absence of any body of permanent officials charged with its supervision.

The end of the lawyer-as-permanent-secretary requirement in 1997 came about in consequence of the growth of the department; legal expertise was no longer regarded as the most important – or even particularly relevant – attribute of the most senior official. Legal advice – and sensitivity to constitutional values closely associated with the legal system – were, it was thought, available from other lawyers within the department. There is a perception that, in recently years, the quality of legal advice and sensitivity in the department has diminished. This view is, however, contested by officials. In evidence to a House of Lords committee in October 2014, Rosemary Davies, Legal Director, Ministry of Justice, said⁵⁷

It does slightly worry me that there is a perception that the Lord Chancellor is not getting the quality of legal advice that he used to get and perhaps there is an issue about visibility that we should think about. There are 60 lawyers in the in-house public law advisory team, two legal directors and seven other senior Civil Service lawyers. For example, the lawyer responsible for the team advising on the judiciary and courts is about to retire, but he has been in the

56. M Chalmers, “County Courts Consolidation Act 1888” (1898) 5 LQR 1.

57. Revised transcript of evidence taken before the Select Committee on the Constitution, Inquiry on the Office of Lord Chancellor, Evidence Session No. 4, Q53, 15 October 2014.

department and its predecessors for I think 38 years. Likewise, the lawyer responsible for the judicial review reforms has been in the department for something like 27 years. I am not quite sure where this perception has come from that everybody has gone. Obviously, there are lots of new people and people do move around—and generally that is a good thing – but there is no shortage of continuity.

As discussed above, the professional background of Lord Chancellors has also changed. Since the CRA 2005 it has been possible for the Prime Minister to appoint somebody with no legal background as the minister responsible for judiciary and court-related matters; this possibility was made real with David Cameron’s appointment of Chris Grayling MP to the role in September 2012. A history graduate, Grayling worked as a television producer and management consultant before becoming an MP. As an opposition MP, he developed a reputation for strongly confrontational questioning of the government (described by some journalists as “an attack dog” style). The reason given by the Labour government in 2005 for abandoning the requirement that Lord Chancellors be lawyers was that the nature of the role had changed and enlarged so that skills at political leadership to “deliver” policies had become much more important than in the past; such skills were not necessarily best found among politicians with legal backgrounds; and the Prime Minister should therefore have a broad discretion to select the best person for the job. At the time, Conservatives in Parliament argued that a lawyer (preferably a senior one in the House of Lords, rather than the House of Commons) would always be better equipped to carry out the Lord Chancellor’s functions as the link-pin between government and the judiciary, to defend judicial independence within government, and to act as a guardian of the rule of law across government. Ten years later, the (Conservative) Lord Chancellor Chris Grayling MP told a parliamentary committee

My view is that it is a positive benefit for the Lord Chancellor not to be a lawyer. The reason I say that is, certainly at this moment in time, when we are having to take and would be taking difficult decisions [about reducing public spending] regardless of the situation, if we had a distinguished member of the House of Lords occupying the traditional role of Lord Chancellor overseeing

the courts today, there would still be the same financial pressures that my department and my team are currently facing. I think that not being a lawyer gives you the ability to take a dispassionate view: not from one side of the legal profession or the other, not from the perspective of the Bar, not from the perspective of the solicitors' profession and not from the perspective of the legal executives. As long as you take very seriously the duty to uphold the principles I talked about earlier – uphold the independence of the judiciary, uphold the independence of our courts – I think there are benefits in not having a lawyer. It does not mean a lawyer cannot do the job, but it is really important to say I think there are benefits to having a non-lawyer in the job as well.

Whatever the merits of moving from a requirement for both the permanent secretary and the government minister to be lawyers to a situation where neither is a lawyer, it is clear that the government department responsible for the justice infrastructure has become in important respects a less blended environment than previously.

Blending of political and expert environments can, however, be seen to be thriving elsewhere in the system. In Parliament, the House of Lords Constitution Committee has grown into a significant institution connecting politics, law, and the judiciary. The committee has produced several reports on aspects of the justice infrastructure and holds annual meetings with the Lord Chancellor and LCJ. Since its creation in 2001, the committee (whose membership is broadly reflective of the political composition of the House of Lords as a whole) has included retired judges (Lord Woolf), a former Lord Chancellor (Lord Irvine), former Attorney Generals, and senior members of the legal profession. Expertise is also brought into its work through a legal adviser (all have been senior academics), specialist advisers appointed to assist with particular inquiries, and experts who contribute written and oral evidence to the committee's inquiries.⁵⁸

58. See further A. Le Sueur and J. Simson Caird, "The House of Lords Select Committee on the Constitution", ch.11 in A. Horne, G. Drewry, and D. Oliver (eds), *Parliament and the Law* (Oxford, Hart Publishing, 2013).

Blended working may also take place more informally outside institutions where there is a predisposition by politicians to involve people with expertise at a formative stage of their thinking. An illustration of this is an initiative of the shadow Lord Chancellor Sadiq Khan MP to invite Sir Geoffrey Bindman (a leading solicitor with expertise in public law) and Karon Monaghan QC (a barrister and author on equality law) to lead a review of how to improve diversity in the judiciary. They were encouraged to consider more radical measures such as positive discrimination and gender quotas; academics contributed to a private seminar on the legality and feasibility of gender quotas.⁵⁹

DISCUSSION

The illustrations outlined above show how policies to change the justice infrastructure are developed in a variety of different environments. A blended environment which captures the strengths of political and expert methods of working, and minimizes their weakness, is likely to be the best way of reaching considered, evidence-based and (so far as possible) consensus on many types of reform question. A predisposition to blended environments can be encouraged if the Lord Chancellor were required to apply three presumptions when contemplating change.

First, the more directly a proposed infrastructure change affects the constitutional principles of judicial independence and access to justice, the stronger the presumption that detailed analysis of the problem and recommendations are developed by an expert body – an ad hoc one (Woolf, Leggett, Bowman), the Law Commission, or (for truly landmark change) a Royal Commission. A decision to develop policy “in house” within the Ministry of Justice (such as the recent judicial review reforms) or other part of government (10 Downing Street in relation to decisions that led to the CRA 2005) should be carefully justified. Second, there should be a strong presumption that infrastructure change should be based on sound evidence and analysis. Academic and other expert research should be commissioned, evaluated fairly, and used at formative stages of thinking about all significant reform

59. See N. Watt, “Labour prepared to introduce judge quotas to achieve balanced judiciary”, *The Guardian*, 21 April 2004, p.4; UCL Constitution Unit, *Monitor* 58, p.7.

proposals. Third, where reforms require legislative backing to be implemented, the government should publish bills and secondary legislation in draft. This will enable parliamentary and other expert scrutiny of detailed proposals.

CONCLUSIONS

The British constitution provides high levels of judicial independence in relation to the core functions of judges (hearing cases and writing judgments). This essay has explored the constitutional implications of the “running” and “shaping” of the justice infrastructure. It has been argued that both of these activities are constitutionally significant. They create opportunities to enhance or risk of undermining the principles of judicial independence, access to the courts, and the rule of law.