

Independence

Independence from whom and what?

It is vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law. When carrying out their judicial function they must be free of any improper influence. Such influence could come from any number of sources. It could arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.

Why is independence important?

It is vital that each judge is able to decide cases solely on the evidence presented in court by the parties and in accordance with the law. Only relevant facts and law should form the basis of a judge's decision. Only in this way can judges discharge their constitutional responsibility to provide fair and impartial justice; to do justice as Lord Brougham, a 19th Century Lord Chancellor, put it 'between man and man' or as Lord Clarke, former Master of the Rolls put it more recently in 2005, 'between citizen and citizen or between citizen and the state'.

The responsibilities of judges in disputes between the citizen and the state have increased together with the growth in governmental functions over the last century. The responsibility of the judiciary to protect citizens against unlawful acts of government has thus increased, and with it the need for the judiciary to be independent of government.

Independence and the appearance of independence

As well as in fact being independent in this way, it is of vital importance that judges are seen to be both independent and impartial. Justice must not only be done - it must be seen to be done. It was for this reason that the House of Lords in the Pinochet case in 1999 held that a decision it had given had to be set aside and the appeal before it heard again by a panel of different Law Lords. It had come to light after the original decision that one of the Law Lords might have given an appearance that he was not independent and impartial because of a connection with a campaigning organisation which was involved in the case. In those circumstances, and even though there was no suggestion that the Law Lord was not in fact independent or impartial, the decision could not stand. Justice demanded that the appeal be heard again before a panel of Law Lords who had and gave the appearance to reasonable well-informed observers that they were independent and impartial.

The ways in which independence is protected and its limits

Whilst an independent and impartial judiciary is one of the cornerstones of a democracy, the practical ways in which this is given effect are often treated with suspicion. For example, judges are given immunity from prosecution for any acts they carry out in performance of their judicial function. They also benefit from immunity from being sued for defamation for the things they say about parties or witnesses in the course of hearing cases. These principles have led some people to suggest that Judges are somehow 'above the law'.

However, it is not right to say that Judges are above the law. Judges are subject to the law in the same way as any other citizen. The Lord Chief Justice or Lord Chancellor may refer a judge to the Judicial Complaints Investigations Office in order to establish whether it would be appropriate to remove them from office in circumstances where they have been found to have committed a criminal offence.

Judicial independence does, however, mean that judges must be free to exercise their judicial powers without interference from litigants, the State, the media or powerful individuals or entities, such as large companies. This is an important principle because judges often decide matters between the citizen and the state and between citizens and powerful entities. For example, it is clearly inappropriate for the judge in charge of a criminal trial against an individual citizen to be influenced by the state. It would be unacceptable for the judge to come under pressure to admit or not admit certain evidence, how to direct the jury, or to pass a particular sentence. Decisions must be made on the basis of the facts of the case and the law alone.

Judicial independence is important whether the judge is dealing with a civil or a criminal case. Individuals involved in any kind of case before the courts need to be sure that the judge dealing with their case cannot be influenced by an outside party or by the judge's own personal interests, such as a fear of being sued for defamation by litigants about whom the judge is required in the course of proceedings or judgment to make adverse comment. This requirement that judges be free from any improper influence also underpins the duty placed on them to declare personal interests in any case before it starts, to ensure that there is neither any bias or partiality, or any appearance of such.

A practical example of the importance of judicial independence is where a high profile matter, which has generated a great deal of media interest comes before the court. Such matters range from the criminal trial of a person accused of a shocking murder, the divorce of celebrities, and challenges to the legality of government policy, for example the availability of a new and expensive drug to NHS patients. In the 24 hour media age in which we live, it stands to reason that the judge hearing the case will often be under intense scrutiny, with decisions open to intense debate. It is right that this is so. But it is important that decisions in the courts are made in accordance with the law and are not influenced by such external factors. It is also important however to observe one or two points which will have an impact on the outcome of the trial and our understanding of it:

1. In a Crown Court criminal trial in England and Wales:
 - The judge does not decide guilt or innocence. That decision is made by the jury, which is made up of resident citizens and registered electors selected at random.
 - If the jury decides that the defendant is guilty, it is then the task of the judge to pass sentence. In doing so the judge will have to take into account the sentencing scheme which has been enacted in legislation by Parliament, and the various sentencing guidelines which have been agreed and published by the Sentencing Guidelines Council. The Guidelines and the decisions of the Court of Appeal (Criminal Division) set out key considerations which must be taken into account by the judge when determining any sentence and provide a framework of appropriate sentences for the judge to apply. The judge is entitled to depart from the guidelines or a decision of the Court of Appeal (Criminal Division) only when the interests of justice require such a departure.
 - Any sentence that is unduly harsh or in the case of more serious offences is unduly lenient may be corrected by the Court of Appeal, on an appeal by the convicted person or a reference to the Court of Appeal by the Attorney General.
2. In civil cases any errors by the trial judge may also be corrected by the Court of Appeal and
3. In cases raising important points of law, the decisions of the Court of Appeal may be appealed to the Supreme Court
4. It is important to recognise that, in both civil and criminal cases, what we read in the papers and see on the news will often only cover a fraction of what has been heard in court. This is not a criticism of journalists. They only have a certain amount of space or time to cover a particular story. It is worth bearing in mind that, for instance, in a criminal case there are often many mitigating or aggravating circumstances surrounding the offence and the offender. These will have had a direct bearing on the sentence handed down and are often difficult for the media to report in full. A good example of this is where a defendant pleads guilty to a crime. In such circumstances Parliament has directed that judges must significantly reduce the sentence.

The purpose of the above examples is not to suggest that judges never get it wrong, or that in criminal cases they have no say in the sentence handed down, but to give an idea of the factors they must consider when making decisions.

Further reading:

International resolutions

The protection of judicial independence has been the focus of international resolutions, the most prominent of which are:

1. The '[United Nations Basic Principles on the Independence of the Judiciary and the role of lawyers](#)'. These were endorsed by the UN General Assembly in 1985 and 1990
2. The 'Bangalore Principles of Judicial Conduct'. They were endorsed in 2003 and set out a code of judicial conduct. They are intended to complement the UN's Basic Principles on the Independence of the Judiciary and the role of lawyers. The first of its principles states that "Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects

Other bodies have endorsed judicial independence. For instance, in 1995, the group of Asian - Pacific Chief Justices adopted a common set of standards for the promotion and protection of their judicial institutions, which included judicial independence. These are known as the '[Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region](#)'

In 1998, a similar statement of principle ("the Latimer House Principles") was also agreed by representatives from over 20 Commonwealth countries at a conference held at Latimer House, Buckinghamshire, UK.

The essence of the commitment to judicial independence can be found in the oath that all judges in England and Wales have to swear when they take up their office.

Historical background:

The fundamental concept of judicial independence came into being in England and Wales in 1701 with the enactment of the Act of Settlement. This statute formally recognised the principles of security of judicial tenure by establishing that High Court Judges and Lords Justice of Appeal hold office during good behaviour. Appropriate and formal mechanisms had to be in place before a judge could be removed.

Before 1701 senior judges held office at the sovereign's pleasure and there are many examples of judges being removed from office for failing to decide cases in accordance with the wishes of the King or Queen. Since the Act of Settlement it has only been possible to remove a senior judge from office through an Address to the Queen agreed by both Houses of Parliament.

Selected lectures, articles and books on judicial independence:

1. Judicial Independence - the 1996 Judicial Studies Board Lecture given by Lord Bingham, Lord Chief Justice
2. Judicial Independence - a lecture given by Lord Phillips, Lord Chief Justice at the Commonwealth Law Conference, Kenya, September 2007
[Judicial Independence](#)
3. The Position of the Judiciaries of the United Kingdom in the Constitutional Changes - Lord Justice Thomas, Address to the Scottish Sheriff's Association, 8 March 2008: Peebles
[The Position of the Judiciaries of the United Kingdom in the Constitutional Changes](#)
4. Judicial Independence and Accountability: Pressures and Opportunities - a lecture given by Sir Jack Beatson FBA at Nottingham Trent University, April 2008
[Judicial Independence and Accountability: Pressures and Opportunities](#)
5. Judicial Independence - Its History in England and Wales, a lecture given by Sir Henry Brooke (former Lord Justice of Appeal and Vice - President of the Court of Appeal (Civil Division))
Judicial Independence - Its History in England and Wales
6. The Constitutional Position of the Judiciary - a monograph by John Sorabji, Legal Secretary to the

Master of the Rolls

7. Chapter 9 of *The Politics of the Judiciary*, a book by John Griffith (Fontana 1981)
8. *The Independence of the Judiciary - the view from the Lord Chancellor's Office*, a book by Robert Stevens (OUP, 1993)
9. *The English Judges - Their Role in the Changing Constitution*, a book by Robert Stevens, (Hart Publishing, 2002).
10. *Independence, Accountability and the Judiciary*, a collection of essays edited by Canivet, Andeanas and Fairgrieve (BIICL, 2006)
11. *Judicial Independence and Parliaments*, Dame Mary Arden DBE, in Ziegler, Baranger & Bradley, *Constitutionalism and the Role of Parliaments* (Hart Publishing, 2007)