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978-1-107-01367-4 - Judges on Trial: The Independence and Accountability of the
English Judiciary: Second Edition

Shimon Shetreet and Sophie Turenne

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Introduction

1.1 Judicial independence is an essential pillar of liberty and the rule of law; ‘without a judiciary which can and will administer law fairly and fearlessly between the parties, no other guarantee given to the litigants by the law is likely to be of value’.¹ The many requirements of judicial independence can be found in international and domestic foundational texts.² Yet its modern meaning and practice is as unique as the character of each judiciary is, fashioned by checks and balances generated through history by various stakeholders in the judiciary. The protagonists in the story of judicial independence most noticeably comprise the executive

¹ J.A. Jolowicz, ‘Angleterre’, in M. Cappelletti and D. Tallon (eds.), *Fundamental Guarantees of the Parties in Civil Litigation* (Milan: Giuffrè, 1973), p. 121; Montreal Universal Declaration on the Independence of Justice, Preamble.

² Art. 10 Universal Declaration of Human Rights; Art. 14 International Covenant on Civil and Political Rights; the Montreal Universal Declaration on the Independence of Justice, 1983; Basic Principles on the Independence of the Judiciary, adopted by the United Nations General Assembly, GA Res. 40/32 of 29 November 1985, para 5, UN GAOR, 40th Session, Supp. No. 53, at 205 (UN Doc A/40/53 (1985)) and GA Res. 40/146 of 13 December 1985, para. 2, UN GAOR 40th Session, Supp. No 53, at 254, UN Doc A/40/53 (1985); International Commission of Jurists, ‘The Rule of Law and Human Rights: The Judiciary and the Rule of Law’ 1959–62. The Montreal Universal Declaration on the Independence of Justice builds upon The Syracuse Draft Principles on the Independence of the Judiciary 1981 (‘the Syracuse Principles’), the Independence of the Judiciary in the LAWASIA Region: Principles and Conclusion, 1982 (‘the Tokyo Principles’) and The International Bar Association Code of Minimum Standards of Judicial Independence, 1982 (‘the New Delhi Standards’); the Bangalore Principles; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995. See also Committee of Ministers, Council of Europe, ‘On the Independence, Efficiency and Role of Judges’ (1994) Recommendation No R (94) 12, adopted by the Committee of Ministers on 13 October 1994, 518th meeting of the Ministers’ Deputies, Principle I, s2(d); Consultative Council of European Judges, Council of Europe, ‘On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges’, (2001) CCJE, OP. No 1, (23 November 2001) and ‘On the Principles and Rules Governing Judges’ Professional Conduct, in Particular Ethics, Incompatible Behaviour and Impartiality’ (2002) CCJE, OP. No 3 (19 November 2002); Council of Europe, European Charter on the Statute of Judges (1998).

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and the legislature. In England and Wales,³ they also include a number of autonomous bodies with statutory powers, such as the Judicial Appointments Commission. Judicial independence depends thus to a significant extent on the constitutional relations external to the judiciary, such as the relationship between Parliament and the government.⁴ It is also a significant component of government culture to the extent that it must be supported by the political climate and social consensus.⁵ The political leadership and the legal elite must work together to develop a culture of judicial independence underlined by some significant guidelines. This process is of necessity gradual and ongoing.

The checks and balances regarding the judiciary create, however, a continuous tension between judicial independence and the public accountability of judges in a democracy.⁶ This tension, in turn, reflects a line of demarcation for the judicial power of the state, according to the principles of parliamentary sovereignty and separation of powers.⁷ This means that the model of judicial accountability adopted in a given society determines, to a large extent, the independence of the judiciary.⁸

In this book, we examine the requirements of judicial independence and accountability in England, in the light of the process of constitutional

³ The United Kingdom has three separate legal jurisdictions: England and Wales; Northern Ireland, and Scotland. While references to Northern Ireland and Scotland may occasionally be made, the judiciary of England is the primary subject of our study. England and Wales currently share a single legal jurisdiction, but note the debate on whether Wales should be a separate legal jurisdiction, Welsh Government, 'Consultation Document. A Separate Legal Jurisdiction for Wales', WG-15109 (27 March 2012); Welsh Government, 'A Summary of Consultation Responses. A Separate Legal Jurisdiction for Wales', WG-16277 (17 August 2012).

⁴ V. Bogdanor, *The New British Constitution* (Oxford: Hart, 2009), pp. 282–4.

⁵ For this reason, other important political, legal events or controversies are occasionally referred to in this book, but we do not consider the whole legal system; topics such as legal aid and the legal profession are only incidentally considered.

⁶ Lord Hailsham, 'The Independence of the Judicial Process' (1978) 13 *Israel LRev* 1, 8–9; J. Beatson, 'Judicial Independence and Accountability: Pressures and Opportunities' (2008) *Judicial Review* 1, G. Canivet, M. Andenas and D. Fairgrieve (eds), *Judicial Independence and Accountability* (London: BIICL, 2006); S.B. Burbanks and B. Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, California: Sage Publications, 2002).

⁷ W. Blackstone, *Commentaries on the Laws of England* (1765), vol. I, ch. 7, p. 258; R. Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press, 2010).

⁸ M. Cappelletti, 'Who Watches the Watchmen? A Comparative Study on Judicial Responsibility' (1983) 31 *AJCL* 1; S. Shetreet and J. Deschenes (eds.), *Judicial Independence: The Contemporary Debate* (Boston: M. Nijhoff, 1985), pp. 570–5.

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INTRODUCTION

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reform which started with the Human Rights Act 1998. The conceptual requirements of judicial independence and the necessary elements for maintaining a culture of judicial independence are closely related.⁹ Our analysis develops through a series of studies of the judiciary as an institution and as a collective:¹⁰ thus we look at judicial governance, judicial appointments, the mechanisms for monitoring judges and the standards of conduct on and off the bench, as well as the relationship between freedom of expression, judges and public confidence in the courts. These topics constitute case studies of the interactions between judges and a range of actors, such as the Lord Chancellor/Secretary of State for Justice or the Judicial Appointments Commission for England and Wales and Parliament. We consider the judiciary as a social organisation within a context of expectations set by legal norms and by other institutions. Our premise is that the historical political context is a major determinant in the interpretation of the principle of judicial independence within a legal system.¹¹

In keeping with the first edition of the book, our approach combines a theoretical with a practical analysis buttressed by interviews with judicial office holders and ‘stakeholders’ in the judiciary. We interviewed more than twenty-five judicial office holders and a similar number of stakeholders in the judiciary, including legal practitioners, scholars, retired judges and others involved in the appointment or monitoring of judges.

⁹ This is the approach adopted by the International Association of Judicial Independence and its International Project of Judicial Independence conducted by a research group of international jurists – to which the authors belong, which approved the *Mt. Scopus Approved Revised International Standards of Judicial Independence*, 2008 (hereafter *Mt. Scopus*) available at www.jiwp.org.

¹⁰ J. Bell, *Judiciaries within Europe, A Comparative Review* (Cambridge University Press, 2006), p. 4; Thomas LJ, ‘The Position of the Judiciaries of the United Kingdom in the Constitutional Changes’, Address to the Scottish Sheriffs’ Association (Peebles, 8 March 2008); Lord Phillips, ‘Judicial Independence’ – Commonwealth Law Conference (Nairobi, Kenya, 12 September 2007); for other perspectives, see C. Guarnieri and P. Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford University Press, 2002); P. Derbyshire, *Sitting in Judgment. The Working Lives of Judges* (Oxford: Hart, 2011).

¹¹ Bell, *Judiciaries within Europe*, 355, R.A. Macdonald and H. Kong, ‘Judicial Independence as a Constitutional Virtue’, in A. Sajo and M. Rosenfeld (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), p. 831; P.H. Russell, ‘Towards a General Theory of Judicial Independence’, in P.H. Russell and D.M. O’Brien (eds), *Judicial Independence in the Age of Democracy* (Charlottesville/London: University of Georgia, 2001), p. 1; C.M. Larkins, ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis’ (1996) 44 *American Journal of Comparative Law* 605.

The judges interviewed included judges from all benches and other judicial office holders, such as tribunal judges. The questions addressed selected general issues with some additional questions specific to the role and knowledge of the interviewees. The interviews were used to support and shape the analysis of the literature considered, from judicial statistics to the existing academic discussions on judicial independence, including judicial writings.¹²

Individual and collective or institutional independence

1.2 Judicial independence must be secured both at the institutional level and at the individual level for judges to be protected from threats to their personal or professional security that may influence their official duties.¹³ The collective and individual aspects of judicial independence are embedded in the English judicial oath to do justice – ‘I will do right by all manner of people, after the law and usages of this realm, without fear or favour, affection or ill will’.¹⁴ Institutional or collective independence may be undermined by fear or favour, when ‘affection or ill-will’ jeopardises the independence of the individual judge. Either way, impartiality is central to the independence of the individual judge. ‘Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: “The judge was biased”’.¹⁵ It is *the* fundamental principle of justice both at common law and under Article 6 of the European Convention on Human Rights (ECHR):¹⁶ accordingly, impartiality is a fundamental guarantee of justice at common law and is enshrined in Article 6 of the European Convention on Human Rights.

¹² Publicly available but internal documents to the judiciary, contacts and personal recommendations helped us define a varied list of interviewees, with some narrowly involved in judicial governance and others familiar with judges but external to them. Interviews were conducted under the Chatham House Rule, ensuring that any statement made in an interview would not be attributed to the interviewee in the book; for that reason, even though we make a judicious use of non-attributed quotations, a list of interviewees is not included in this publication. Approximately half of the interviews lasted one hour, with the other half lasting significantly longer; in practice the discussion of the topics considered in Chapters 3, 4 and 8 took most of the interview time.

¹³ Mt. Scopus, ss. 2.2, 2.12 and 2.13.

¹⁴ Senior Courts Act 1981, s. 10(4); Promissory Oaths Act 1868.

¹⁵ *Metropolitan Properties Ltd v. Lannon* [1969] 1 QB 577. See also Arts. 41 and 47 Charter of Fundamental Rights of the European Union.

¹⁶ *AWG Group v. Morrison Ltd* [2006] EWCA Civ 6, para. 6 [Mummery LJ].

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But the independence of the individual judge rests upon two concepts. It first entails a substantive independence, independence in the conduct of the judicial business – the judge’s core activity being to decide cases and, in the case of higher courts, to give judgments that may constitute precedents. Individual judges are subject to no other authority for their decisions than the appeal courts. A basic requirement for maintaining public confidence in the legal system is the court’s duty to provide a reasoned judgment for its decisions.¹⁷ Once a judge has decided what the applicable legal principle is, he may not discard it through personal dislike or belief that the principle might soon be changed by Parliament or overruled by the higher courts, or through a sense that the judgment might cause popular outrage. Instead he must apply the law as it is understood to be and leave it to the higher courts or the legislature to decide to effect any change.¹⁸ It is to some extent a myth that judges do not change the common law; instead they find more accurate ways of expressing it, so that some previous cases are not overruled but rather distinguished or ‘better explained’.¹⁹

Further guarantees of individual and substantive independence include relieving judges of personal civil liability for acts performed in the course of their judicial duties. Since the seventeenth century, judges of the High Court and above have enjoyed exemption from civil liability for anything done or said by them in the exercise of their judicial function, and provided that they acted in good faith. Circuit and district judges, in certain circumstances, may be liable in tort for actions beyond their jurisdiction. The exclusion of civil liability for judicial acts is granted as a matter of public policy, ‘not so much for [the judges’] own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who administer justice ought to be’.²⁰ A fear of being

¹⁷ *English v. Emery Reimbold and Strick Ltd* [2002] 1 WLR 2409 (CA), para. 12.

¹⁸ See Lord Lowry’s statement in *C v. DPP* [1996] AC 1. In that case, the House of Lords refused to abolish a long-established common law defence in criminal law for very young defendants on the ground that it had become obsolete, and Parliament duly did so instead in Crime and Disorder Act 1998, s. 34.

¹⁹ Bell, *Judiciaries within Europe*, 337; T. Etherton, ‘Liberty, the Archetype and Diversity: A Philosophy of Judging’ [2010] PL 727; Lord Reid, ‘The Judge as Law Maker’ (1972) 12 J Pub Teach Law 22.

²⁰ *Garnett v. Ferrand* (1827) 6 B & C 611, 625 [Lord Tenterden CJ], adopted by the Court of Appeal in *Sirros v. Moore* [1975] QB 118, 132 [Lord Denning MR]; *Arthur JS Hall and Co v. Simons* [2002] 1 AC 615.

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sued could influence a judge's decision; the judicial immunity thus protects the independence of the judiciary and the integrity of the judicial process. The only 'fear' a judge has in making a decision is rather that of being overruled on appeal.²¹

Second, the independence of the individual judge involves some personal independence in the sense that the terms and tenure of the judicial office are adequately secured. Thus the Act of Settlement 1701 established judicial tenure during good behaviour to senior judges and gave them protection from unilateral removal by the Crown. Personal independence is characterised by judicial appointment during good behaviour terminated at retirement age, and by safeguarding an adequate judicial remuneration and pension against the executive's discretion. Thus, executive control over the judges' terms of service, such as remuneration or pensions, is inconsistent with the concept of judicial independence. Rules of judicial conduct at the same time pursue the similar aim of excluding the judge from financial or business entanglements which are likely to affect (or rather to seem to affect) him in the exercise of his judicial functions.

A further dimension of judicial independence transcends the distinction between substantive and individual independence of judges. Internal independence of judges demands that individual judges be free from unjustified influences, not only from entities external to the judiciary, but also from within. Judges need safeguards for their independence from peers or more senior judges in the discharge of their official duties.²² But a judge cannot rely on internal independence as a shield against guidance from other judges who are responsible for court administration. It may be argued that internal independence only applies to the substantive and procedural aspects of adjudication, however the distinction between an

²¹ However, the possible impact of this concern on decision making should not be underestimated, especially in areas where the law is overly complex, as is the case with sentencing. One recorder has freely told members of his Inn that when he started to sentence criminals, he would try to avoid sentencing them to prison for fear of being corrected on appeal. He only changed his practice when he actually did find himself forced to sentence a defendant to prison for supplying prohibited drugs, upon which he noticed that the defendant and his family seemed remarkably pleased at the sentence, and he later gingerly inquired of his clerk whether he thought that they might have been expecting a longer prison sentence.

²² Cappelletti, 'Who Watches the Watchmen?', 7–9; J. Beatson, 'Reforming an Unwritten Constitution' (2010) 126 LQR 48; *R v. UK* [1997] 24 EHRR 221 and *R v. Spear* [2003] 1 AC 734; Mt. Scopos, s. 9.

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administrative action and a purely adjudicative action which is a form of dispute resolution may not be straightforward.²³

Until the Constitutional Reform Act 2005 (CRA), judges were appointed by and managed within the Lord Chancellor's Department. For as long as the judiciary was under the leadership of the Lord Chancellor, independence from political authorities was the main defining factor for judicial independence, and the independence of the English judiciary would appear mostly a characteristic of individual judges.²⁴ Judicial independence has been a matter of legal culture, solidly resting upon conventions developed over times. Yet England, where the first phase of judicial independence began over 300 years ago, also provides a vivid illustration of the mutual impacts of domestic and international law and jurisprudence. Cultures of judicial independence are built on both the domestic and international fronts, and in their more advanced stages reinforce each other. Article 6(1) of the ECHR provides the right to be tried by an impartial and independent tribunal established by law. This, in the case law of the European Court of Human Rights, placed an emphasis on a formal separation of powers between the judiciary and the executive.²⁵ In combination with personal tensions within the Cabinet in England and Wales, it led to the abolition of the Lord Chancellor's position as head of the judiciary. Parliament enshrined in the CRA the obligation for government ministers to 'uphold the continued independence of the judiciary'.²⁶ A wider duty is placed upon the Lord Chancellor and Secretary of State (two distinct government offices to which one

²³ Cappelletti, 'Who Watches the Watchmen', 7–9.

²⁴ R. Stevens, *The English Judges: Their Role in the Changing Constitution*, rev. edn (Oxford: Hart, 2005); Lord Irvine, *Human Rights, Constitutional Law and the Development of the English System* (Oxford: Hart, 2003), p. 205.

²⁵ Human Rights Act 1998, s. 1(3) sch. 1 incorporates the European Convention on Human Rights into UK law; *Procola v. Luxembourg* (1995) 22 EHRR 193; *McGonnell v. UK* (2000) 30 EHRR 289; *Findlay v. UK* (1997) 24 EHRR 221, para. 52; *R (Brooke) v. Parole Board* [2008] EWCA Civ 29, paras. 78–80.

²⁶ CRA, s. 3 provides: (1) the Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary ... (5) the Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary; (6) the Lord Chancellor must have regard to (a) the need to defend that independence; (b) the need for the judiciary to have the support necessary to enable them to exercise their functions; (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.

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person is appointed) to ‘have regard’ to both ‘the need to defend’ the independence of the judiciary and ‘the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters’.²⁷

The impact of the formal separation of powers on judicial independence, under the CRA, is substantial. The Lord Chief Justice has become head of the judiciary but he is not a politician, nor a member of the Cabinet or a Speaker in the House of Lords as had been the Lord Chancellor before. Instead the Lord Chief Justice is chosen by a specially appointed committee, convened by the Judicial Appointments Commission. The creation of a new Judicial Appointments Commission also greatly reduced the role of ministers in judicial appointments. Full-time members of the judiciary are excluded from the House of Commons and from the House of Lords. Equally, by statute, no Member of Parliament can be appointed to the Judicial Appointments Commission. Yet, while the formal recognition of the principle of separation can only support the culture of judicial independence, the continuation of judicial independence is not a matter of course; it is subject to continuous challenges.

Judicial governance

1.3 The type of judicial governance and leadership over the organisation of the judiciary will influence its susceptibility to external influence. In England and Wales, judicial independence is not understood as self-government in the sense of judges having control of and managing judicial appointments, career progress or termination of office, in addition to running the administration of justice.²⁸ Indeed, Lord Bingham observed that ‘many judges resented what they perceived as an administration breathing down their necks treating them as pawns on a bureaucratic chess board’.²⁹ This can otherwise be described as greater scrutiny of public services in light of the new public management values of effectiveness, efficiency and economy, which developed in the 1980s

²⁷ CRA, s. 3(6).

²⁸ Lord Woolf, ‘The Rule of Law and a Change in the Constitution’ (2004) CLJ 317. Compare with the experience in the United States regarding executive control over court administration: until 1939 the central responsibility for court administration at the federal level was vested in the Attorney General; in 1939 the responsibility went to the judiciary, see 28 USCA § 605.

²⁹ T. Bingham, *The Business of Judging* (Oxford University Press, 2000), p. 67.

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and coincided with the growth in size (and budget) of the judicial system. The tensions were formally resolved in the 2004 Concordat, a soft law agreement of constitutional importance between the Lord Chancellor and the Lord Chief Justice. The Concordat set out the principles and practices supporting the transfer of functions to the Lord Chief Justice in relation to the administration of justice.³⁰

The senior judiciary thereby negotiated a shared leadership structure in the administration of justice, through the executive agency of the Ministry of Justice, today known as Her Majesty's Courts and Tribunals Service. The Concordat emphasises both the need for cooperation and the dividing lines between the judicial business and the responsibilities of the Lord Chancellor for the provision of financial, material or human resources:³¹ the judiciary and the executive have distinct functions but they must work together in a proper relationship as a part of the overall government of the country. A system of consultation and joint decision making between the Lord Chief Justice and Lord Chancellor characterises their 'close working relationship'.³² The judicial system is thus defined by the association of an independent judiciary with the Courts and Tribunals Service, which provides for the administrative infrastructure supporting the conduct of the courts' and tribunals' business.

The Lord Chief Justice now exercises some considerable responsibilities in respect of the judiciary and of the business of the courts of England and Wales. This is done with the assistance of the Judicial Executive Board, a small cabinet with the general responsibility for judicial administration, and through a number of delegations to senior judges. The Senior Presiding Judge, in particular, acts as a point of liaison between the judiciary, the courts and government departments, and oversees the work of Presiding Judges of the circuits. The Senior President of Tribunals is at present a separate judicial office with similar responsibilities to the Lord Chief Justice. More than 200 full-time equivalent civil servants now report directly to the Lord Chief Justice;³³ senior

³⁰ HL Committee on the Constitution, 'Relations between the executive, the judiciary and Parliament' (2006–07, 151) para. 13; HL Committee on the Constitution, 'Meetings with the Lord Chief Justice and Lord Chancellor' (2010–11, 89) Q. 11. On 'concordats' as soft-law instruments, see R. Rawlings, 'Concordats of the Constitution' (2000) 116 LQR 257.

³¹ Concordat, para. 19; see the text reproduced in Appendix 6, Report from the Select Committee on the Constitutional Bill, Volume I, HL Paper No. 125-I (24 June 2004).

³² Lord Woolf's response to the Lord Chancellor's statement to the House of Lords on 26 January 2004 announcing his agreement on the Concordat with the judiciary.

³³ Judicial Office Business Plan 2012–2013, p. 20.

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judges have private offices and jurisdictional teams; the Judicial College and the Office of Judicial Complaints fall within the remit of the Lord Chief Justice's responsibilities. The new governance arrangements under the CRA therefore map out a new regime of accountability, with the exact terms of this regime left open.

Although the CRA puts on a statutory footing most of the Concordat, the principle of separation of powers enshrined in the CRA did cast a light on the 'politically-charged process' of obtaining resources.³⁴ The judicial system has been reconceived as a public service which must meet reasonable public expectations within necessarily finite resources.³⁵ The approach adopted to adjust demand and supply for judicial services has been to request courts to do more with less, and such efficient judicial management has relied upon the development of the organisation of justice. The drive for efficiency and economy in the conduct of judicial business entails greatly increased managerial responsibilities upon judges, relating to caseload, deployment and the allocation of particular cases.

However, the organisation of justice also determines the way in which judges relate to each other and achieve a sense of collective independence.³⁶ The traditional sense of social responsibility that the judiciary imparts to individual judges is a strong instrument for ensuring its independence, and interference with the judiciary as a whole is likely to have a negative impact on the sense of independence of individual judges. The wider range of tasks now allocated to the judiciary requires that the concept of judicial independence is not confined to the personal and substantive independence of the individual judge, but also extends to the independence of the judiciary as a whole. The concept of institutional or collective independence of the judiciary calls for scrutiny of the range of activities which support the judicial role of decision making.³⁷ It requires greater judicial involvement in the administration of justice, including the preparation of budgets for the judicial system. The degree of judicial engagement ranges from consultation, sharing responsibility with the executive (or the legislature) to exclusive judicial responsibility. Though it is generally accepted that judges cannot claim independence from

³⁴ J. Mackay, 'The Role of the Lord Chancellor in the Administration of Justice', Earl Grey Lecture, University of Newcastle, 24 February 1990.

³⁵ A. Zuckerman, 'Civil Litigation: a Public Service for the Enforcement of Civil Rights' (2007) 26 CQJ 1.

³⁶ Mt. Scopus, ss. 2.12 and 2.13.

³⁷ S. Shetreet, 'The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts' (1979) 13 UBC Law Rev 52, 57–62.