

**United Kingdom Constitutional Reform: recognition
of judicial independence and an opportunity for
institutional autonomy.**

By

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Abstract

Recent UK constitutional reforms disclose an opportunity to recognise institutional autonomy as a means of enhancing the existing principle of judicial independence.

This thesis explores the recent reforms and the impact they are having on the existing principle of judicial independence, with a view to recommending the notion of institutional autonomy as a means of further securing that independence. The rationale for further legislative protection and investigation of this constitutional principle is found within the requisites of the rule of law. The method for achieving a sufficient degree of institutional autonomy is a stricter adherence to the separation of powers doctrine. The notion of institutional autonomy is considered in detail and the various elements are outlined. These are then applied to the United Kingdom Supreme Court to assess the current degree of institutional autonomy and make recommendations for ensuring greater independence in accordance with the intentions of the CRA 2005.

For Nan.

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CHAPTER 1 – AN INTRODUCTION

Rationale

This thesis will primarily consider the meaning and use of the term “institutional autonomy”, within the parameters of the United Kingdom (UK) constitution. The Constitutional Reform Act 2005 (CRA 2005), among other recent reforms outlined below, provides statutory recognition of judicial independence for the first time- and, as will be demonstrated by this thesis, provides an opportunity for institutional autonomy.¹ Recent reforms such as the alterations to the office of Lord Chancellor, the creation of the Judicial Appointments Commission and the new Supreme Court for the UK, are all reflections of how an independent judiciary may be able to strengthen the rule of law. As will be discussed throughout this thesis, many commentators point to the lack of clarity regarding the true meaning of judicial independence and how, in turn, it should be upheld under the Constitutional Reform Act. Now seems to be an opportune time to make suggestions for how this independence may be further enhanced. The term institutional autonomy is an additional perspective from which to view fundamental principles such as judicial independence, the rule of law and the separation of powers. Acknowledgement of this term will lead to a judiciary with increased self-government and the ability to function in a more independent manner. The independence of individual judges, while important, is not a primary concern of this thesis but it is rather the collective independence of the judiciary and judicial institutions that is to be focused upon. From an institutional perspective, the reforms have been particularly significant. When there are such significant alterations to institutions such as the House of

¹ The provisions relating to judicial independence, and of use here, are sections 1, 3 and 23 of the Constitutional Reform Act 2005, ch.4.

Lords, it must be examined why those changes were made. Why was it felt necessary to remove the judicial element, the Law Lords, from the House of Lords? And what benefits were hoped for in creating an entirely separate Supreme Court? Have those hopes been realised? These are all important questions that this thesis will strive to answer. While related principles and details will be discussed where necessary, the Supreme Court for the United Kingdom will provide the focus of this research.

This thesis will argue that the institutional autonomy of the UK's highest court must be enhanced due to the changing nature and role of the Court. This argument is supported by the focus on judicial independence in the drafting of the CRA 2005: demonstrating the need for clearer separation and autonomy to clarify the relationship between the judiciary and the other branches of government. Although there is no substantial research on the subject of institutional autonomy itself, related ideas and principles have been researched extensively for hundreds of years and provide a basis from which institutional autonomy can develop.² Much research has been done discussing the place within the constitution of the main constitutional principles such as judicial independence, the separation of powers and the rule of law within the British constitutional arrangements; and the links and relationships between these principles is a topic for debate.³ For example, the rule of law calls for an independent judiciary, and the CRA 2005 calls for greater independence in order that the rule of law may be strengthened.⁴ Although the value of the rule of law is widely recognised, identifying the ways in which to strengthen it would be beneficial to many constitutional actors and protect

² These main ideas include judicial independence, the rule of law and the separation of powers.

³ S Burbank and B Friedman (eds.), *Judicial Independence at the Crossroads: an interdisciplinary approach* (Sage Publications, California 2002). P.H. Russell and D.M. O'Brien, *Judicial Independence in the Age of Democracy: critical perspectives from around the world* (University Press of Virginia, Virginia 2001). M.J.C. Vile, *Constitutionalism and the Separation of Powers* (OUP, Oxford 1967). NW Barber, 'Prelude to the separation of powers' (2001) CLJ 59, 88 gave further context to the ideas and considers others.

⁴ Part 1, Constitutional Reform Act 2005.

individuals at all levels. Each of these principles, and the research surrounding them, will be considered in some detail below. Due to the ambiguity of our constitution and the lack of a single, constitutional document, there is no clear-cut explanation of each principle and how it should be applied. A critical discussion of the understanding of each will allow conclusions to be drawn as to the role the notion of institutional autonomy may play in fortifying their existence.

Constitutional Reform in the United Kingdom

The process of constitutional reform in the UK is not new, however since 1998 there have been a series of fundamental constitutional changes in the United Kingdom with the process of reform including the CRA 2005. A number of factors have influenced reform agendas, none more so than the consequences of the UK's membership of the European Union and the incorporation of the European Convention on Human Rights in domestic law by way of the Human Rights Act 1998. These changes, along with the growth of judicial power through judicial review, have meant that there has been a renewed focus on the functions of the judiciary and their independence.

In his recent book, *The New British Constitution*, Vernon Bogdanor discusses how the recent constitutional reforms have resulted in significant changes and argues for the creation of a new constitutional order.⁵ The overall aim of constitutional reformers, it is felt by Bogdanor, is to improve the quality of government, done, in part, through increased emphasis on the importance of a clearer separation of powers. As a result of this aim, it became clear that the

⁵ V Bogdanor, *The New British Constitution* (Hart Publishing, Oxford 2009).

position of several judicial elements in the constitution needed addressing: the office and role of Lord Chancellor, the position of the Law Lords in the Upper Chamber and the need to ensure judicial appointments were made on a more transparent and non-partisan basis. Professor Bogdanor also gives an interesting explanation for the reasons why Britain has never codified its constitution, thus reducing the need to reform the constitution with such a piecemeal approach. This, he feels, largely relates to a lack ‘constitutional moments’; such times when a written constitution is needed in order to provide a fresh start for a country and re-establish the role and purpose of constitutional institutions, such as a judiciary.⁶

During the late 1800s a certain degree of depoliticisation of the judiciary had occurred, making appointments based on merits and suitability rather than political allegiances.⁷ However, the Conservative Prime Minister, Salisbury, did not believe in achieving a separation of powers or balancing the power between the executive, the legislature and the judiciary. The judiciary under his leadership consisted of former Conservative MPs in large numbers and he was able to rely on their backing to provide robust, authoritative support for his policies. Such a politicized judiciary highlighted the need for an independent judiciary due to negative implications for the rule of law and changes have been made, in varying degrees, over the last hundred years. The years up until 1970 were described by Robert Stevens as a ‘wasteland’ for Public Law and the courts, as very few cases were heard and little focus was given to judicial issues (namely due to the repercussions within society and the reaction within government to the first and second world wars).⁸ It was after this time that there was a notable change in the dynamics of the constitution; one main reason being an increase in

⁶ *Ibid.*, p11.

⁷ R Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart Publishing, Abingdon 2002) p14.

⁸ *Ibid.*, at page 27.

judicial power. The increase in power came about due to a number of factors, two of which will be discussed here: the UK's membership of the European Union and the significant growth in judicial review.

The European Communities Act 1972 meant that European Community law was now enforceable in British courts. The impact of this was that the courts would be responsible for enforcing European legislation, such as directives thus widening the parameters of the judicial role. If there was a Community law in conflict with a piece of UK legislation, then that Community law was supreme. The role of judges to challenge the legislature in times of conflict between Community and domestic law gave judges a certain degree of power and a new level of stature in the constitutional arrangements. The impact of having this power resulted in the judiciary having a forum and a reason to challenge Parliamentary decision-making.⁹ Several writers have noted how it is during the time before and after the introduction of the European Communities Act 1972 that the judiciary began to involve themselves more in terms of offering opinion and discussing political issues, although still within the parameters of the judicial role.¹⁰ During a period of acknowledged judicial restraint from the late nineteenth century until after the Second World War, there was little opportunity or will for the judiciary to become involved in the political arena. Stevens noted how during this time, although the powers conferred upon the judiciary were limited, their prestige and status as an institution 'flourished' as they were able to avoid scrutiny by not getting involved in politics; something which is now pertinent if analysing the reformed position of the judiciary

⁹ One notable example of this can be seen in the Factortame litigation *R v. Transport Secretary, ex parte Factortame (No 2)* [1990] 1 AC 603.

¹⁰ Two such writers are K Maleson, *The New Judiciary: The effects of expansion and activism* (Dartmouth Publishing Company, Aldershot 1999) and D Nicol, *EC membership and the judicialization of British politics* (OUP, Oxford 2001).

within contemporary constitutional arrangements.¹¹ However, a judiciary withdrawn from political debate would not last and from the 1950s onwards, an increase in judicial power began to emerge. In 1966, the House of Lords acknowledged its law-making role when it held that it would no longer be bound by its own previous decisions and this is felt by some to be a pivotal moment in the history.¹²

As noted above, the dual-aspect change in the judicial role can be seen clearly in one example: the case of *R v. Transport Secretary, ex parte Factortame (No 2)*.¹³ In this case, there was a conflict between Community and domestic law. The House of Lords held that the Queen's Bench Division had acted outside of its powers in granting interim injunction against the Secretary of State who wished to enforce Part 2 of the Merchant Shipping Act 1988 against the Spanish fishermen. It referred the matter to the European Court of Justice asking about the status of domestic and Community law. The European Court of Justice held that if the only rule preventing the granting of interim relief were a national rule, then Community law would override that rule. This was a significant decision in terms of its consequence for domestic law, but also in terms of judicial decision-making and the powers they had in relation to the legislature; to have the power to 'dis-apply' legislation and force a review of its application was a significant power to hold for any court. It would be even more important that the judiciary, as an institution, was seen as independent from political institutions to avoid accusations of partisan decision-making and ultimately protecting the interests of citizens of the State. The *Factortame* litigation, which was ongoing after 1991, is a prominent illustration of the growth of judicial power in the UK.

¹¹ R Stevens, *The Independence of the Judiciary* (Clarendon Press, Oxford 1993) page 163.

¹² K Malleon, *The New Judiciary: The effects of expansion and activism* (Dartmouth Publishing Company, Aldershot 1999) p10, although this statement was rebutted by Lord Reid in '*The Judge as Law Maker*' (1972) Society of Public Teachers of Law, 22.

¹³ [1990] 1 AC 603.

The other explanation of the growth of judicial power, which began prior to the introduction of the European Communities Act 1972, is the increase in judicial review. There is some debate of exactly why judicial review developed as it did, but three possibilities are: the increase in badly-drafted legislation, the number of gaps in the legislation that were left for the judges to fill, and a growing public demand for limiting power of the executive branch of government.¹⁴ The judicial review process is the ability of the courts to question decisions of the State on behalf of the public. As a basis, judicial review is not the procedure for courts to determine the merits of governmental decisions, rather whether or not the actions taken are taken within powers conferred upon them.¹⁵ There have been arguments made by the judiciary and other commentators that the increase in judicial power was not a conscious decision, but a necessity ‘thrust’ upon the judges and occurred as a result of a changing political landscape during the 1980s and 1990s.¹⁶ However, there are also arguments that the increased control of administrative action by the courts is a significant achievement.¹⁷ The importance of judicial independence as a result of this growth in power will be discussed later.

The growth in judicial power, in the ways outlined above, led some people to begin to question position of certain institutions within the constitution, such as the Appellate Committee of the House of Lords and the office of the Lord Chancellor. Since the 1980s, the

¹⁴ *Ibid.*, at page 18. Professor Maleson quotes Lord Wilberforce’s explanation for the rise in judicial review.

¹⁵ V Bogdanor, *The New British Constitution* (Hart Publishing, Oxford 2009) pp 81-83. See also Nicolas Bamforth, ‘Current issues in United Kingdom constitutionalism: an introduction’ (2011) *IJCL* 79.

¹⁶ J Waltman, *Judicial activism in England* (1991), in K Holland (ed), *Judicial Activism in Comparative Perspective* (Macmillan, London 1991).

¹⁷ Lord Diplock expressed such sentiments, claiming that having increased control was one of the greatest achievements he had experienced in his lifetime. He saw it as a beneficial development.

Labour Party had been keen to reform the justice system of England and Wales¹⁸ However, there was not as much focus on the constitution at this time; with more discussion of ministerial responsibility and involvement in the law.¹⁹ The 1995 *Access to Justice* Policy Paper demonstrated the very clear intention by New Labour to bring about significant change to the court service in England and Wales and this came about for a number of reasons The overarching principle that was called into question at the time was judicial independence: independence of individual judges but also of the judiciary as a branch of government. The growth of judicial review in recent years and the introduction of the European Convention on Human Rights into domestic law mark two key reasons why it had become essential for the judiciary to be seen to be as independent as possible.²⁰ The European Convention was enforceable in UK law after in 2000 following the enactment of the Human Rights Act 1998.²¹²²

During this time of reform, a number of problems for judicial institutions and the operation of the separation of powers were. Firstly, the office of Lord Chancellor was scrutinised for its involvement in all three branches of Government. Before 2005, the Lord Chancellor was Head of the Judiciary for England and Wales, a member of the Executive sitting in the Cabinet and also the Speaker in the House of Lords; such an overlap seemed justified by the need to link the judiciary with the other branches of government. It was felt by some that as a

¹⁸ See the controversial policy paper, *Meet the Challenge: Make the Change*, which was accepted at the Party conference in 1989.

¹⁹ See Professor Rodney Brazier, 'The Judiciary' in R Blackburn and R Plant, *Constitutional Reform: The Labour Government's Constitutional Reform Agenda* (Longman, Harlow 1999), Chapter 16, for more information on the specific agenda.

²⁰ Diana Woodhouse, 'The Constitutional Reform Act 2005 – defending judicial independence the English way' (2007) IJCL 154. These will be discussed in detail in later sections of this chapter.

²¹ The impact of judicial review and of the European Convention on Human Rights will be discussed in detail in the following sections: "Judicial Independence" and "The Constitutional Reform Act 2005".

²² For a full list of the main reforms see, V Bogdanor, *The New British Constitution* (Hart Publishing, Oxford 2009), page 4, 5.

result of the overlapping functions, this role lacked constitutional integrity and showed a distinct lack of importance given to the separation of powers doctrine.²³ How this role was to be altered will be examined in the next section. The other constitutional anomaly in relation to the separation of the three main branches of government was the position of the Appellate Committee of the House of Lords. The House of Lords, the second chamber, alongside the House of Commons, plays a fundamental role in the legislative process of the UK.. Although the powers they have currently to delay legislation have been severely restricted, there is still an enormous reliance upon the Lords in terms of revising and amending legislation put forward in the Commons. And it is this involvement in the legislative process by the Lords that called into question the status and independence of the Appellate Committee of the House of Lords. The main concern in relation to the Appellate Committee was the involvement of the judiciary in the legislative process and other Parliamentary matters.²⁴ The perception of the Law Lords' role had to align with the separation of powers and creating a separate institution, such as the Supreme Court, would allow this to start. David Pannick outlines four factors he felt provided the 'impetus' for the removal of the Appellate Committee of the House of Lords and the Supreme Court's creation.²⁵ They were: the existing composition of the House of Lords was unsatisfactory, with unelected members and hereditary peers; the UK's membership of the European Union and subsequent enactment of the Human Rights Act requiring the Law Lords to adjudge decisions made by Parliament and a process in which they were involved; the potential for claims to be made under Article 6 of the European Convention on Human Rights, since the European Court of Human Rights stated that the

²³ Diana Woodhouse, 'The Office of Lord Chancellor' (1998) PL 617, 632.

²⁴ Lord Windlesham spoke on the matter in 2005 and stated that the judges in the Lords had refrained from involving themselves in parliamentary debate for some years, but the perception had to change.

²⁵ D Pannick, "'Better that a horse should have a voice in the House [of Lords] than that a judge should'" (Jeremy Bentham): replacing the Law Lords by a Supreme Court' (2009) PL 723, 736.

judiciary must be independent and be seen to be independent²⁶; and finally, an influential speech made by the late Lord Bingham to the Constitutional Unit in May 2002 in which he stated the need for a supreme court in the UK.²⁷

As Pannick states, the Government did not appear to take any notice of Lord Bingham's proposals until the summer in 2003. One significant event in the reform process was the announcement of a new Supreme Court for the UK and the removal of the Office of Lord Chancellor on the back of a cabinet reshuffle. As it transpired, it was not possible, in practice, to remove an office that had mention in hundreds of statutes and there was widespread outrage amongst politicians and lawyers that the Prime Minister had attempted to make such fundamental changes without, it seemed, much consultation with anyone, most importantly, the judiciary. The reforms were outlined in a Sunday newspaper and did not appear to reflect previous discussions on the topic, reaching back over the last decade.²⁸ The introduction of the Constitutional Reform Bill in the following year provided the Government's response to the events of the previous summer and sought to recognise and formally acknowledge the importance of judicial independence. The judicial focus of the reforms throughout the last two decades may be, as stated by some writers, partly due to an increased public interest in judicial business.²⁹ The reality is that there is little public interest in the workings of the constitution and very little awareness of what it would mean to have a truly independent judiciary. However, a degree of transparency within the justice system is important due to the introduction of the Human Rights Act 1998, the increase in judicial review and also by request of the European Court of Human Rights.

²⁶ The potential impact of Article 6(1) will be discussed in later section.

²⁷ *Ibid.*, at page 730.

²⁸ A Le Sueur, 'New Labour's next (surprisingly quick) steps in constitutional reform' (2003) PL p368.

²⁹ See K Malleon, *The New Judiciary: The effects of expansion and activism* (Dartmouth Publishing Company, Aldershot 1999) p3.

Constitutional Reform Act 2005

The CRA 2005 establishes four significant changes that impact on the judiciary: the changes made to the office of the Lord Chancellor; the creation of the Judicial Appointments Commission; the creation of the United Kingdom Supreme Court (UKSC); and the declaration of a guarantee of continued judicial independence by section 3.

The Government consultation paper, *Constitutional Reform: A Supreme Court for the United Kingdom*, stated the Blair Government's intentions to redress the balance between the judiciary and the other branches of government to "...put it on a modern footing."³⁰ The CRA 2005 came to fruition after a controversial passage through Parliament during 2004.³¹ The Labour Government sought to enact the Bill very quickly, within the year of its introduction, but a House of Lords Select Committee prevented this from happening; noting that it was somewhat rare to find an Act of Parliament declaring its sole aim is to reform the constitution.³²³³ The implications of the Act for judicial institutions relate mainly to their independence: whether through changes to the office of Lord Chancellor; by creating a separate body for judicial appointments; by establishing a separate Supreme Court; or by giving statutory recognition of the constitutional principle of judicial independence.

Previously, the Lord Chancellor has responsibilities in all the areas of government: the judiciary, the legislature and the executive. The role required the Lord Chancellor to be a guardian of judicial independence and represent the judiciary in Government; he was also to

³⁰ Department For Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, July 2003, CP11/03, at para. 1.

³¹ Constitutional Reform Act 2005, c.4.

³² HL Select Committee of the Constitution, *Constitutional Reform Act 2005: 5th report of session 2005-06*. HL paper 83 published 13 December 2005. Available at: accessed 30 September 2010.

³³ *Ibid.* at page 6.

act as a member of the cabinet, being involved in political debate; and finally, as Speaker of the House of Lords he also had legislative commitments. The justification of such a constitutionally anomalous role was, in theory, to link the arms of government together. However, in more recent years the role attracted a great deal of criticism. The Lord Chancellorship under Derry Irvine had become a high profile and increasingly political role and he himself attracted criticism for his relationship to the Prime Minister and also his outspoken opinion on matters of government. The impact of the Human Rights Act 1998 meant there was growing concern over the possibility of claims under Article 6(1), the right to a fair trial.³⁴ A Lord Chancellor who assumed such a prominent role in the business of the Executive could, it was argued, prevent him maintaining his other role of defending judicial independence. There was a contradiction of the objectives of his various commitments and the role was, as a result, deemed unsatisfactory. The Cabinet re-shuffle in June 2003 was to see the attempted abolition of the office but as soon became apparent, it was impossible to abolish a role that was so heavily embedded in statute. The Government response was to create the Department of Constitutional Affairs and appoint a Secretary of State for Constitutional Affairs. The new Secretary of State for Constitutional Affairs, Lord Falconer, had to step in and take on the business of Lord Chancellor.³⁵ An important change was that the Lord Chief Justice became the Head of the Judiciary. However, the Lord Chancellor's links to the judiciary were maintained under the CRA 2005 and other historical legislation. Chapter 3 will consider whether the Lord Chancellor's obligations toward the judiciary under the CRA 2005 have been met and are being met by the current Lord Chancellor.

³⁴ D Woodhouse, 'The Constitutional Reform Act 2005 – defending judicial independence the English way' (2007) *IJCL* 154, 155.

³⁵ This is how the situation remained until 2007 when the Ministry of Justice was created and the Lord Chancellor became Secretary of State for Justice.

The other important aim of the Act is to create a separate body for judicial appointments. Previously, the Lord Chancellor had been heavily involved in the process. Lord Falconer deemed it unacceptable for the appointments to be made entirely by a Government minister; a positive move for judicial independence. Following the enactment of the CRA 2005, the Judicial Appointments Commission was created in April 2006 with the aim of creating a more transparent and depoliticised process. While the Commission must still make appointments recommendations to the Lord Chancellor, the main objective was to increase transparency and reduce scope for partisan political considerations to feature in judicial appointments. The 2005 Act stipulates that the Chairman of the Commission be a lay member. It also sets out the composition of the other members: five must be judicial members; two must be professional members (one barrister and one solicitor); five must be lay members; one must be a tribunal member; and one must be a lay justice member.

By inviting lay members as well as those from the judicial profession, a heightened degree of transparency is created and there is less opportunity for decisions to be made based on political beliefs and agendas. Aside from that, it would now be against the law to appoint on any other basis than is set out by the CRA 2005. The CRA 2005, Part 4 requires appointments to be made based on a number of stipulations: to select candidates based on merit; to select individuals of good character; and to have regard for the need to encourage diversity within the judiciary.³⁶ A discussion of whether the establishment of the Judicial Appointments Commission has resulted in a more diverse judiciary is not for this thesis, but indicates a positive change for the judiciary.

³⁶ See sections 63(2), 63(3) and 65(3) respectively.

The third reform of specific interest is the creation of the new Supreme Court for the UK. The creation of the Supreme Court by Part 3, section 23 of the CRA 2005 has given the UK a final court of appeal that is physically separate from Parliament. The Supreme Court is not a part of Her Majesty's Court Service unlike all other courts in the courts system but rather is largely autonomous, having significant self-determination as to its finance, human resource management and other support; thus reflecting the independent nature of its administration.³⁷ The main objective of its creation was to remove the Appellate Committee from the House of Lords, operating as the final court of appeal in the UK. Lord Bingham, in his speech to the Constitution Unit at University College London in 2002, explained his hopes for the new Court: that it would result in the '...regularisation and rationalisation' of the place of the Appellate Committee within the constitution.³⁸ He was not pushing for the Court to be given more powers but, as stated above, clarify the existing position of its core functions within the constitutional arrangements. The new Supreme Court began its work in October 2009 in its new location at the Middlesex Guildhall. David Pannick noted how Parliament Square will, '...with pleasing symmetry, be devoted to Parliament, the executive (Whitehall and Downing Street), the Church (Westminster Abbey) and now the Supreme Court.'³⁹ There were twelve Supreme Court Justices, existing Lords of Appeal in Ordinary, who moved over from the House of Lords to continue their judicial roles in the new setting. The jurisdiction of the Supreme Court remains as the final appeal court for England and Wales, under the Appellate Jurisdiction Acts 1876 and 1888 but the new Court now also has jurisdiction to discuss

³⁷ Information given by Jenny Rowe, Chief Executive of the Supreme Court in "Speech on the Status of the Supreme Court" 17 November 2008 <http://www.justice.gov.uk/about/supreme-court-conference-rowe-speech.htm> accessed 18 November 2009.

³⁸ Lord Bingham of Cornhill, 'A New Supreme Court for the United Kingdom' *The Constitution Unit Spring Lecture*, 1 May 2002, at page 10.

³⁹ D Pannick, "Better that a horse should have a voice in the House [of Lords] than that a judge should" (Jeremy Bentham): replacing the Law Lords by a Supreme Court' (2009) PL 723, 736.

devolution matters that has moved from the Judicial Committee of the Privy Council.⁴⁰ New appointments to the Supreme Court are made following recommendations from a selection committee, but the CRA 2005 specifically reduced the involvement of the Lord Chancellor in this process.⁴¹ A new selection committee is created for each new appointment and the committee consists of: the President of the Supreme Court, the Court's Deputy, plus a representative from the Judicial Appointments Commission in England and Wales, Scotland and Northern Ireland. The Lord Chancellor has the power to accept or reject the decision of the committee but any accepted decisions are then forwarded to the Prime Minister to gain final approval and royal assent from the Queen.⁴²

The CRA 2005 has made clear its objectives in terms of securing the continued independence of the judiciary of England and Wales. The key section relating to judicial independence is Section 3 'Guarantee of continued judicial independence'. Subsection (1) states,

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.**

This is the first, explicit, statutory recognition of judicial independence in English public law and has, inevitably, had, and will continue to have, many consequences for judicial institutions as will be seen throughout this thesis, more specifically in Chapter 3 when case law based on this section will be considered.⁴³ The Act provides some suggestion on how this

⁴⁰ The specific devolution matters which may be discussed under this jurisdiction can be seen in, Jo Lennan, 'A Supreme Court for the United Kingdom: a note on early days' (2010) CJQ 140.

⁴¹ Specific guidance on the appointment of new Supreme Court justices is given by the Constitutional Reform Act 2005. Section 25 of the Act sets out the statutory qualifications for appointment. But Section 25 has been amended by Sections 50-52 of the Tribunals and Enforcement Act 2007.

⁴² The arguments for parliamentary involvement in this process are considered in Mary L. Clark's article, 'Introducing a Parliamentary confirmation process for the new Supreme Court justices: its pros and cons, and lessons learned from the US experience' (2010) PL 464, 481.

⁴³ The Act of Settlement 1701 gave judges' tenure based on good practice, not Royal will and this, it was felt, helped secure a degree of judicial independence. Therefore, this could be said to be the first statute with a

may be done: section 3, subsection (5) states, ‘The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary’; subsection (6) states that, ‘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; and (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.’⁴⁴ These provisions, while positive for judicial independence, do not provide sufficient guidance to ensure the independence of the judiciary is affected.⁴⁵ As Diana Woodhouse discussed, this section raises several issues.⁴⁶ While it outlines what the Lord Chancellor, and all those involved in the administration of justice, should show awareness of – the independence of the judiciary- it does not explain further how this should be done. This may be due to the fact that the drafting is not detailed enough, or it may be more due to the nature of the principle of judicial independence as it is understood in the UK. The principle, and the links to recent constitutional reforms and its relationship with institutional autonomy will be discussed below.

With all this in mind, it is possible to separate the aims and consequences of the Act into two main categories, institutional changes and declaratory statements. The institutional changes include: forming a separate body for judicial appointments (the Judicial Appointments Commission); the removal of the Appellate Committee from the House of Lords and creating

specific aim of creating judicial independence, whereas the Constitutional Reform Act 2005 seeks to continue that independence through various means.

⁴⁴ The Constitutional Reform Act 2005, ch. 4.

⁴⁵ Explanatory notes on Section 3, the Constitutional Reform Act 2005. These note also state that this section should be read in conjunction with Part 1 of the Courts Act 2003, which sets out the duty of the Lord Chancellor to ensure that there is an efficient and effective system to support the carrying on of the business of the courts of England and Wales.

⁴⁶ D Woodhouse, ‘The Constitutional Reform Act 2005 – defending judicial independence the English way’ (2007) IJCL 156.

a new Supreme Court for the UK, separate from Parliament; and altering the office of Lord Chancellor to ensure a clearer separation of powers. The declaratory statements in Sections 1 states that the Act does not ‘adversely affect’ the rule of law and Section 3 states the need to ‘uphold the continued independence’ of the judiciary.⁴⁷ From an institutional perspective, there seems to be some tension between the declaratory statements and the institutional changes made. The sections above appear to show an intention to maintain a status quo, continuing the independent state of the judiciary and not adversely affecting the rule of law. However, some significant institutional changes have been made to the administration of justice (the Supreme Court and the alterations to the role of Lord Chancellor) that suggest a need for change and a recognition that previous arrangements were unsatisfactory for ensuring the rule of law or judicial independence. These mainly relate to the implications for judicial independence and this point will continue to be discussed below.

The sections above have discussed the impact of constitutional reform in the UK and, more specifically, the CRA 2005 and its implications for the constitution. Therefore, it is now appropriate to consider in more detail other principles referred to above: the rule of law, the separation of powers and judicial independence. The following sections will cover some of the main ideas surrounding those principles and consider links to British constitutional reform and to the subsequent discussion of institutional autonomy.

Judicial independence

The overriding principle behind these reforms is judicial independence. With greater powers being conferred on the judiciary, the weight of any decisions made relies on the judiciary

⁴⁷ The Constitutional Reform Act 2005, ch. 4.

being free from any accusations of partisanship or control from Government. This section considers both facets of judicial independence: individual independence and collective independence although more weight is given to collective independence in this thesis. It outlines the move toward greater collective independence as a result of the CRA 2005 and how this in turn underlines the need for institutional autonomy.

The constitutional principle of judicial independence underpins the main focus of this thesis, institutional autonomy; it is in place to ensure that the rule of law is upheld. Its origins date back to the 1600s when it was decided by Coke, in the case of *Prohibitions del Roy*, that the King could no longer act as judge due to his lack of knowledge of the law and impartiality, and that an independent court of judges must administer justice in England.⁴⁸ Its first recognition by statute, albeit indirect, was in the Act of Settlement 1700 where it was decided that judges who were given tenure based on merit rather than the King's will would be seen to be more independent. This historical synopsis of its early being may lead one to think that there is a theory of judicial independence demonstrating clear ideas and principles in order to decide if a judge, or judicial institution, is, in fact, independent. However, this is not the case. Robert Stevens described the notion as nothing more than 'constitutional rhetoric' whose 'penumbra' is vague.⁴⁹ Some consensus has developed which suggest the main ways judicial independence is preserved is by: security of salary, judges' pay is protected by statute not government; security of tenure, a protection from dismissal if they simply disagree with ministers; a protection from political pressure and intimidation; and being immune from

⁴⁸ (1607) 12 Co Rep 63. Coke declared that, '...the King in his own person cannot adjudge any case... according to the law and custom of England; [because] true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England'.

⁴⁹ Robert Stevens, *Judicial Independence in England: A loss of innocence*, can be seen in P.H. Russell and D.M. O'Brien, *Judicial Independence in the Age of Democracy: critical perspectives from around the world* (University Press of Virginia, Virginia 2001), chapter 8 at page 155.

liability while serving in office. This gives very basic examples of how judicial independence may be preserved and impartiality encouraged, but it does not take in to account external factors beyond the control of individual judges which may affect their independence. The need for greater judicial independence, it has been stated by Government, is to enhance the public perception of the judiciary. Lord Norton of Louth, during a debate on the Supreme Court and judicial reforms in February 2004, referred to the Government proceeding on a ‘perception of a perception.’⁵⁰ He felt strongly that the reasons for reform should be based on actual data and not a perceived perception of what the public concerns may be now, or in the future in relation to the independence of the judiciary. As mentioned in the House of Lords Constitutional Reform Bill Committee’s first report, after assessing public perception of the existing position of the judiciary and the proposed reforms, ‘...opinion does not run high.’⁵¹ The report goes on to quote Professor Stevens who used an example from 1874 when the Conservative Party tried to interfere with the Imperial Court of Appeal on the basis of perceived public opinion; The Times noted then, ‘...there is no public opinion on this subject any more than there is on the transit of Venus.’⁵² Professor Stevens concludes that the case was similar in 2004. What the drafting of the CRA 2005 did make clear was that it intended for judicial independence to be upheld; even if it was not clear about why this was necessary or how it should be done. Therefore, as it is a clear aim of the Act, it is important to show the basic premise of the principle and also how it relates to the idea of institutional autonomy.

The first type of judicial independence accepted in the UK is *individual* independence. This relates to the independence of an individual judge when performing his or her judicial

⁵⁰ Hansard, HL, Vol 657, (12 February 2004). Available at:

<http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040212/text/40212-09.htm>

⁵¹ House of Lords, Constitutional Reform Bill Committee, *First Report*, Session 2003-04, at para 117.

⁵² *Ibid.*

functions. It is logical to assume that in order for a trial or hearing to be conducted in a fair and impartial manner, the judge must be free from interference or pressure from any other source. Other sources of interference may include pressure from other judges, government ministers or the public, but it may also include a degree of internal pressure in the form of personal beliefs and motivations or involvement in a cause. A 'galvanization' of the importance of individual independence was made in the now famous *Pinochet* case.⁵³ This case involved former Chilean dictator, General Pinochet, who, on a trip to the UK, had a warrant issued for his arrest by a Spanish judge. This arrest was for crimes against humanity. By a broad reading of the Extradition Act 1989 in the House of Lords, it was decided that sovereign immunity was not to be given; overruling an earlier decision to the contrary by the then Lord Chief Justice, Lord Bingham of Cornhill.⁵⁴ The severity of the crimes, it was felt, was enough for human rights to take precedence over English law. While the decision itself was internationally controversial for the importance it gave to human rights, it emerged that Lord Hoffman, one of the Law Lords sitting on the case, was heavily involved with Amnesty International, a human rights organisation, and his wife was employed full-time by that same organisation. Immediately, the impartiality of his decision was questioned, amid accusations of bias, and a new hearing was ordered. It was a real test for the uncertain notion of judicial independence and at this time it is fair to say that there was a real public interest in the judiciary and its position. It reinforces the need, not only for a judge to be independent and impartial, but for that judge to be *seen* to be independent and impartial to ensure public confidence in the administration of justice; that decisions are reached in a fair and unbiased way, based purely on the law and evidence in the case.

⁵³ *R v. New Street Stipendiary Magistrate, ex. p. Pinochet Ugarte* [1998] 4 All ER 89 (HL).

⁵⁴ The events surrounding this case are discussed in detail in Robert Stevens, *A loss of innocence? Judicial independence and the separation of powers* (1999) QJLS 370.

The other type of judicial independence operates in addition to the first: that the judiciary as an institution and separate branch of government is seen to be independent. It is this element of the independence that is of particular interest in this thesis and will be focused on from here on. The independence of the judiciary as a whole is often described as *collective independence*. It links closely to the rule of law and the separation of powers, both of which will be discussed shortly. Dame Mary Arden described the judiciary as having *institutional independence* when there was respect shown for it as being a separate institution.⁵⁵ In the late 1980s and early 1990s, supporting the idea of institutional autonomy of the judiciary, there was recognition given to the fact that the judiciary, as an institution, needed to have greater autonomy and control over its administration and funding. Lord Browne-Wilkinson argued for a greater degree of control for judges in both delivering judgments ('the final product') but also '...the administrative infrastructure on which the delivery and enforcement of that product depend.'⁵⁶ In support of, and furthering, Lord Browne-Wilkinson's statement, Sir Francis Purchas said that, 'Constitutional independence will not be achieved if funding for the administration of justice remains subject to the influences of the political marketplace.'⁵⁷ As will be demonstrated, it is this need for greater institutional autonomy of the judiciary that will strengthen the existing independence. These arguments for increased control to be given to judicial institutions and increased collective independence of the judiciary have not come to fruition based on unrealistic government ideology. They are in response to a topic that has called into question the independence of the judiciary: the growth of judicial power. The CRA 2005 enabled a move toward an increase in the collective independence of the judiciary by removing the Law Lords from the House of Lords and altering the office of Lord Chancellor

⁵⁵ M Arden, 'Judicial Independence and Parliaments' in K Zeigler, D Baranger and AW Bradley (eds.), *Constitutionalism and the Role of Parliaments* (2007) chapter 10.

⁵⁶ Lord Browne-Wilkinson, 'The independence of judges in the 1980s', 11th F.A. Mann Lecture. Referenced in Thomas H. Bingham, 'Judicial Independence' (1997) *Arbitration* 86, 93.

⁵⁷ Sir Francis Purchas, 'What is happening to judicial independence?' (1994) *NLJ* 1306.

so that the functions no longer overlapped causing problems in terms of the judiciary's independence. Previously in the UK there has been acknowledgment of the two approaches to judicial independence, but now there is a clear move toward recognising the importance of greater collective independence. The means for ensuring this still further is to recognise the need for institutional autonomy and provides added means for creating a greater degree of autonomy in the functions of the judiciary. The ways in which this autonomy may be achieved, and specifically what it means for the judiciary to be institutional autonomous will be discussed in Chapter 2. This section focuses on two main reasons, or explanations, for this growth: the development of the judicial review process and the introduction of the European Convention on Human Rights into English law by way of the Human Rights Act 1998.

Inevitably, this judicial review function of the judiciary can mean that there may be a number of tensions in its relationship with the executive, but these tensions, it is felt by some, are justifiable in ensuring a balance of power remains between the executive, the judiciary and the legislature.⁵⁸ This status and power to review has not always been in existence to the degree it is currently. The specific reasons for the increase in judicial review are not at issue here, but the involvement of the judiciary in the process requires an increased level of independence, or autonomy, from the other branches of government to reduce any potential criticism of the decisions made: that the judgments are based on fact and the law, not on political will or personal alliances. The other factor that requires an increased level of judicial independence is the introduction of the Human Rights Act. The Human Rights Act was not designed to undermine Parliament's legislative powers and intention, but allowed for British human rights disputes to be settled in British courts instead of requiring litigants to take their case to the

⁵⁸ One such proponent is Lord Woolf, see Harry Woolf, 'Judicial review- the tensions between the executive and the judiciary' (1998) LQR 580.

European Court of Human Rights in Strasbourg.⁵⁹ An important influence of the HRA on the work of the judiciary is Article 6(1): the right to a fair trial. It requires that a stricter view be taken of anything that may undermine the independence and impartiality of judicial institutions.⁶⁰ In *Procola v Luxembourg*, it was stated by the European Court that the fact that individuals could be involved in both the legislative and judicial operations of government, was casting doubt on the ‘institution’s structural impartiality’.⁶¹ It was clear that the Court felt strongly about a clearer separation of government powers and the CRA 2005 was a response to the developments. It was Parliament’s intention to create a more independent judiciary, and reduce the possibility of any claims under Article 6(1), by separating the Appellate Committee of the House of Lords from Parliament and altering the role of Lord Chancellor’s office to reduce involvement in every arm of government. As Lord Bingham stated, the European Convention is ‘concerned with risks and appearances as well as actualities’.⁶²

Rule of Law

The *rationale* behind ensuring a high degree of judicial independence relates to the requirements of the rule of law. The collective, or institutional, independence of the judiciary needs protection and this protection can be achieved through ensuring judicial institutions are able to function in an autonomous manner. A consideration of the main arguments of the concept will allow this section to show how the rule of law as it is applied in the UK and requires greater institutional autonomy of the judiciary in order to ensure a fair application of the law by an independent body.

⁵⁹ V Bogdanor, *The New British Constitution* (Hart Publishing, Oxford 2009) p57, 60.

⁶⁰ R Masterman, ‘A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence’ (2004) PL 51.

⁶¹ (1996) 22 EHRR 193 at [45], discussed in Roger Masterman, ‘A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence’ (2004) PL 52.

⁶² Lord Bingham of Cornhill, ‘A New Supreme Court for the United Kingdom’ *The Constitution Unit Spring Lecture*, 1 May 2002, at page 3.

The basic understanding of the rule of law in relation to judicial independence is that the judiciary must be able to make decisions independently, free from any interference. This requirement of independence is supported by a clearer adherence to the separation of powers doctrine.⁶³ Paul Craig highlights the two main schools of thought surrounding the rule of law. He argues that the various theories offered fall into two categories: formal conceptions and substantive conceptions. Joseph Raz, AV Dicey and Unger are the key writers he cites as supporting the formal conceptions of the rule of law and Dworkin, Sir John Laws and Trevor Allan are those who he feels best represent the substantive conceptions of the rule of law.⁶⁴ While there is not scope to discuss each theory in detail, a summary of the two standpoints will be given and the relationship to the requirement of judicial independence discussed.

The formal conception of the rule of law gives an objective understanding of its application. Raz supports the notion that such formal rules of law are important in establishing a democracy. The formal conceptions do not pass any judgement on whether the law is good or bad but instead tests for certainty in the construction and subsequent application of the law.. The basic requirement, as put forward by Raz, is that laws should be passed in the correct legal manner. This is supplemented by a number of other formal rules: laws should be prospective; should be relatively stable; should be guided by open, general and clear rules; there should be an independent judiciary; there should be access to the courts; and law enforcement agencies should not be allowed to undermine the purpose of the legal rules they are enforcing.⁶⁵ . The other perspective on the rule of law is that it has a substantive

⁶³ T.R.S. Allan, 'Judicial deference and judicial review: legal doctrine and legal theory' (2011) LQR 117.

⁶⁴ Paul P. Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) PL 467, 487.

⁶⁵ *Ibid.*, p469

conception: for those wishing to extend the doctrine beyond these basic, formal rules. The substantive viewpoint allows the development of more detailed judgement on the quality of the law in question: a merits-based analysis, tested against relevant values and principles. For T.R.S. Allan, it is a self-contained, coherent understanding of governmental power, the restrictions on that power and thus enabling questions of the use of that power to be adjudged.⁶⁶ This questioning of power gives an example of why judicial independence is necessary for the rule of law: if the question being adjudged is one between citizen and State or a Government minister, then there must be impartiality on the part of the court. As Lord Goldsmith states, some feel that it is solely the ‘constitutional responsibility’ of the judiciary to uphold the rule of law but he warns of a monopoly being created and emphasises that it is the duty of all constitutional actors to acknowledge the importance of upholding the rule of law.⁶⁷ The CRA 2005 to some extent reinforces this view by listing those responsible for upholding the continued independence of the judiciary under section 3.

A relationship between the rule of law and judicial independence is apparent, as stated above, from the focus of recent constitutional reforms set out by the CRA 2005. They are not mutually exclusive, rather mutually dependent. As Lord Judge stated in a speech in 2009, that judicial independence and the rule of law are most often considered as two separate principles.⁶⁸ This is true to an extent but while they are separate, they are also hugely reliant on each other’s existence. Lord Judge then described them as being ‘...as closely intertwined as a mutually dependent and loving couple after many years of marriage, where one simply

⁶⁶ TRS Allan, ‘The rule of law as the rule of reason: consent and constitutionalism’ (1999) LQR 115, 221.

⁶⁷ The Rt. Hon. Lord Goldsmith, Attorney General, ‘Government and the Rule of Law in the Modern Age’ *speech at the London School of Economics*, February 22 2006.

⁶⁸ A speech by Lord Judge, ‘Judicial Independence and Responsibilities’ 9 April 2009 given at the 16th Commonwealth Law Conference in Hong Kong.

cannot survive without the other.’⁶⁹ From this Lord Judge wished to emphasise the longstanding reliance on each other of the two principles: they are two stand-alone concepts but have been intertwined in their operation for many hundreds of years. The rule of law would struggle to exist as it does currently, without the judiciary to uphold it, and the drive for greater judicial independence would not exist if the rule of law did not require it as ‘Judicial independence is a pre-requisite to the rule of law’.⁷⁰

Therefore in order for the rule of law to be upheld there must be an independent judiciary; judicial independence enhances the rule of law by ensuring that a court may make a fair and accurate decision based on the law without any external interference from other institutions. Some writers describe the rule of law as the main reason for having an independent judiciary, to control actions of the executive but avoid accusations of partisanship when reaching a decision. If any decision is seen to inhibit the executive’s actions, it will most likely receive resistance from either those it affects, or those who view it as too much control.⁷¹ These modern interpretations of the rule of law, with the focus on government control, ties in with the view of T.R.S. Allan given in 1999: that although the rule of law can be interpreted widely and have contextual adaptations, for the UK the focus must be on the judiciary, as an independent branch of government, to protect the individual rights and freedoms of British citizens and to apply the law fairly and universally to all individuals.⁷² The CRA 2005, while stating that the Act does not ‘adversely affect the rule of law’, does seek to create a more independent judiciary, in part, by reforming the House of Lords and creating a Supreme

⁶⁹ *Ibid.*

⁷⁰ The relationship between the rule of law and judicial independence is explicitly mentioned in the Bangalore Principles of Judicial Conduct. Referred to by Lord Judge ‘Judicial Independence and Responsibilities’ 9 April 2009 given at the 16th Commonwealth Law Conference in Hong Kong.

⁷¹ One such writer is A Mason, ‘Envoi to the House of Lords – a view from afar’ (2009) LQR 585.

⁷² TRS Allan, ‘The rule of law as the rule of reason: consent and constitutionalism’ (1999) LQR 115, 221.

Court.⁷³ This demonstrates recognition of the importance of the rule of law and the role the judiciary plays in protecting it. By creating an institutional separation of the judiciary in the Supreme Court, the potential for accusations of a lack of impartiality when discussing matters between the citizen and the State is significantly reduced. Previously, it may have unnerved critics that an un-elected body could so readily disparage the law-making powers of the historically sovereign Parliament. However, this risks becoming an argument once again based on the ‘perception of a perception’. Having assessed what judicial independence means in the context of the UK and its place in the recent constitutional reforms, a closer look at why it is needed was made in this section. The rule of law requires a judiciary independent and impartial to monitor the actions of government.

A separation of powers

The final constitutional principle of importance in this introduction is the separation of powers. The separation of powers doctrine is the *method* by which the greater collective independence of the judiciary can be ensured and this section will endeavour to show how a clearer separation of the branches of government can be ensured, beyond the CRA 2005, by recognition of institutional autonomy. John Locke put forward the doctrine of the separation of powers in 1690 and it was later developed by Montesquieu. Although the first doctrines did not label the separate powers of government as clearly as has become the form more recently since the enactment of the CRA 2005, Montesquieu does, broadly speaking, describe three roles or functions which must be separate in order to act fairly: ‘enacting law’, a legislative role; ‘executing the public resolutions’, the executive function; and ‘trying the causes of the

⁷³ Section 1, Constitutional Reform Act 2005, ch.4.

individual', the judicial process.⁷⁴ This is the basis for what is now understood by many as the separation of powers as applied in the UK. The significance of the separation of powers theory has previously been played down as the constitutional arrangements that existed at that time demonstrated very little functional or institutional separation. However, the rule of law requires an independent judiciary if it is to succeed and the existence of an inter-relationship between the three main branches of government although inevitable, must be subject to a system of checks and balances.⁷⁵ Where the powers of government are an accepted part of society, there is usually a consensus that those powers must be controlled and limited.⁷⁶ Following the rule of law, it can be said that the responsibility for monitoring executive action falls to the judiciary. The Commonwealth (Latimer House) Principles of the Three Branches of Government state the need for the judiciary to demonstrate its separation from the executive and the legislature.⁷⁷ The rules go on to state that in order to create sufficient independence there must be judicial autonomy in the following areas: appointments, funding and training.⁷⁸

The requirement of acknowledging the separation of powers doctrine in the UK is met with a variety of opinion. Some judges and academics feel it has a limited application, only between the judiciary and the legislature, some hold that it is a coverall concept to take in miscellaneous constitutional principles, while others see it as a benefit in the organisation and critical appreciation of constitutional actors. Recent constitutional reform in the UK reflects a

⁷⁴ *De l'Esprit des Lois: Book XI*, chapter 6. See M.J.C. Vile, *Constitutionalism and the Separation of Powers* (OUP, Oxford 1967) p90.

⁷⁵ AW Bradley & ID Ewing, *Constitutional and Administrative Law* (14th edn Pearson Longman, Harlow 2007) p78, 89. See also NW Barber, 'Prelude to the separation of powers' (2001) CLJ 59, 88.

⁷⁶ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (OUP, Oxford 1967) p2.

⁷⁷ Commonwealth Secretariat, 'Commonwealth (Latimer House) Principles of the Three Branches of Government' November 2003, at pages 11, 14.

⁷⁸ Lord Hope of Craighead, 'Judicial independence' (2002) SLT 105, 111.

political will to enhance the separation of the three branches of government, by removing the Appellate Committee from the House of Lords, creating a new, separate Supreme Court for the UK and by altering the office of Lord Chancellor so that the role does not overlap all three branches. Lord Bingham eloquently stated the reasons for reform of the judicial system and made suggestions toward the need for an independent Supreme Court in the Constitution Unit Spring Lecture, 1 May 2002:

To modern eyes, it was always anomalous that a legislative body should exercise judicial power, save in very restricted circumstances. This anomaly may not have mattered in the past. But if the House of Lords is to be reformed, and even if it is not, the opportunity should be taken to reflect in institutional terms what is undoubtedly true in functional terms, that the law lords are judges not legislators and do not belong in a House to whose business they can make no more than a slight contribution.⁷⁹

In response to Lord Bingham's viewpoint above, the designated functions of each branch of government should be carried out with an appropriate degree of institutional separation which affords them the necessary degree of autonomy, free of any interference from the other branches. This level of institutional separation will support the aims of the European Court of Human Rights in ensuring that the judiciary is seen to be independent. The new Supreme Court is physically separate from Parliament and is seeking to raise its public profile as an independent judicial institution. The removal of the UK's highest court from the House of Lords by the CRA 2005 reinforces Montesquieu's idea of a formal separation of each branch of government. His ideal is not necessarily realised as a result, but it does clarify the separation between the judiciary and the legislature.⁸⁰ Robert Stevens discussed the British balance of powers over a clear and rigorously applied separation of the powers of government.⁸¹

⁷⁹ Lord Bingham of Cornhill, 'A New Supreme Court for the United Kingdom' *The Constitution Unit Spring Lecture*, 1 May 2002, at page 10.

⁸⁰ J Lennon, 'A Supreme Court for the United Kingdom: a note on early days' (2010) CJQ 142, 143.

⁸¹ R Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart Publishing, Abingdon 2002) Chapter 7.

Professor Stevens felt, prior to the CRA 2005, the role of Lord Chancellor, the place of the Law Lords in the House of Lords and the doctrine of parliamentary sovereignty prevented a clear separation from existing. While the CRA 2005 has sought to remedy some elements of his concern, the sovereignty of the Westminster Parliament may prevent, he feels, a true separation being achieved due to the judiciary being confined to the powers legislated for it. Other factors such as funding and reliance on administration may have prevented this separation previously, but the creation of the Supreme Court with its degree of funding and administrative freedom, will no doubt represent a separation of which Montesquieu would be proud. There are other ways in which to more formally separate the judiciary from unnecessary constraints in the form of funding and allow for a more independent administration of justice. These ways include the need to formally recognise the idea of institutional autonomy.

Increased autonomy

Having considered the principle of judicial independence and how it relates to important constitutional elements such as the rule of law and the separation of powers in this thesis, it must now be shown how an extension of these ideas could strengthen the existing principles: institutional autonomy. A clearer interpretation of the separation of powers doctrine, as a result of the CRA 2005, has helped to create an increased level of autonomy and independence for the judiciary in the form of the Judicial Appointments Commission and the new Supreme Court. As Lord Hope mentioned in his article for the *Scots Law Times* in 2002, judicial independence can be secured in this way, through increased judicial autonomy in matters such as appointments and funding.⁸² Institutional autonomy is a term that has not

⁸² Lord Hope of Craighead, 'Judicial independence' (2002) SLT 105, 111.

received much, if any, recognition within English legal research and literature, and none in the historical development of constitutional principles; not because it does not merit the time, more that until recently there has not been the opportunity to demonstrate its use and worth within the previous constitutional arrangements of the UK. There is beginning to be some recognition of the term within legal literature but this is limited and no detailed explanation of the term is given.⁸³ This opportunity arises as a result of the changes brought about by the CRA 2005. As mentioned in the section above, until now there has been no clear separation of the branches of government and therefore any suggestion for increased judicial independence through institutional autonomy would have been met with reluctance or amusement due to the significance of changes that would need to be made in order to implement such ideas. The CRA 2005 has made a separation of the judiciary from Parliament and realised the need to enhance this separation in order to ensure a good level of judicial independence. This is why it is only now feasible to discuss and suggest ways in which to enhance that independence by creating increased autonomy as a result of separation.

Other support for this notion came from Lord Browne-Wilkinson and Sir Francis Purchas who both recognised the need for increased autonomy from government in matters such as funding and the administration of the justice system.⁸⁴ As was also seen in the section on judicial independence, if a judicial institution can demonstrate collective independence from Government, then their decisions in any matter will have greater impartiality. This impartiality is what the European Court of Human Rights felt was imperative and for the judicial institution to demonstrate that degree of autonomy; demonstrating to any observer,

⁸³ Diana Woodhouse, 'The Constitutional Reform Act 2005 – defending judicial independence the English way' (2007) *IJCL* 153, 165.

⁸⁴ As per the section 'Judicial Independence' in this chapter: Lord Browne-Wilkinson, 'The independence of judges in the 1980s', 11th F.A. Mann Lecture, referenced in Thomas H. Bingham, 'Judicial Independence' (1997) *Arbitration* 86, 93; and Sir Francis Purchas, 'What is happening to judicial independence?' (1994) *NLJ* 1306.

including interesting members of the public, that the decisions reached are done so free from unnecessary pressures from other sources. The ability for a judicial institution to have control of their budget will enable the administration of justice to be designed and planned from a judicial perspective, and not based on Government strategy or politics. The importance of freedom in relation to the administration of the court will create a specialist recruitment process and will reduce accusations of individuals being appointed based on their political stance. It would also provide a justification to assess the benefits of any existing links to the legislature or the executive. This degree of freedom of administration and funding will also improve the training process. The ideas surrounding the term will be explored in significant detail in Chapter 2.

CHAPTER 2 - INSTITUTIONAL AUTONOMY

The aspects of recent constitutional reform in the UK that are fundamental to this thesis, and their impact on established constitutional principles such as judicial independence, the rule of law and the separation of powers, have been outlined in the previous chapter. It is now pertinent to consider the notion of institutional autonomy and how it could apply in practice and what impact it would have on judicial institutions. There will be an exploration of links between the collective independence of the judiciary and institutional autonomy in order to show how the latter is an extension of the former, rather than a replacement for it. The effects of, and reasons for, giving greater power to the judicial branch of government are discussed in relation to both the notion of institutional autonomy and the implications for the interaction between the three branches.⁸⁵

Institutional autonomy is, broadly speaking, a term which may be used to describe an institution that is self-funding, in charge of its own administration and which operates free from any direct and unnecessary interference from other bodies. The notion of institutional autonomy is not in itself new, but it has not been widely discussed in a legal context. A clear account of what the notion involves and, more specifically, how it can be used within the legal system is needed.⁸⁶ The ideas discussed here are not intended to replace concepts such as judicial independence; rather to extend some of the key values underpinning the rule of law

⁸⁵ Detailed application of the notion of institutional autonomy to the new Supreme Court will take place in Chapter 3.

⁸⁶ See, for example, Diana Woodhouse, "The Constitutional Reform Act 2005- defending judicial independence the English way" (2007) IJCL 157, page 3. Here the term is used within Woodhouse's discussion of the Constitutional Reform Act 2005 but it is not explanation, and an understanding of its place and use is, somewhat, presumed.

and judicial independence, such as ensuring a judicial institution's 'structural impartiality.'⁸⁷ In short, the pursuit of greater institutional autonomy, strengthens the existing independence of any judicial institution, or at least that is what I begin to argue in this chapter.

As will be seen, the three core requirements when considering institutional autonomy are: budgetary freedom, administrative freedom and freedom from unnecessary external interference. While these three requirements may be applicable to a range of institutions, discussion will focus primarily on judicial institutions. It will be argued that there are varying degrees, or levels, of autonomy. The degree of institutional autonomy will be reduced if a sufficient amount of budgetary or administrative freedom cannot be demonstrated, and if there is some unnecessary interference in the fulfilling of core functions, thus affecting the provision of services of that institution.

In order to give a clear account of the notion of institutional autonomy, it is first necessary to dissect the meaning of the term and consider two elements individually: institutions and autonomy. I therefore begin by drawing on political science literature to discuss what is meant by 'institution'.

Institutions

Public lawyers frequently refer to the 'institutions' of government and judicial institutions in particular. However, rarely do public lawyers seek to develop a deeper understanding of what an institution is. Discussions do not cover a sufficiently wide variety of perspectives to really gain a deep understanding of the nature of institutions more generally. Rather, they focus, for

⁸⁷ Roger Masterman, 'A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence' (2004) PL 52.

the most part, on the main branches of government and Parliament. It may be that previously there has been little need for such a detailed understanding of the term, but the institutional focus of recent constitutional reforms suggests it is now important. The most suitable research base to begin compiling such an explanation is political science; an area that has offered input into discussions of judicial independence previously, but where there has also been extensive research into institutions.⁸⁸ Political scientists, like public lawyers, are interested in the workings of government and politics (although political scientists look further into underlying behaviours of political systems and conditions affecting the workings of politics). Public lawyers focus on political systems from a constitutional and, in particular, a legal perspective; discussing the function of the institutions and their relationship with other institutions of government within the workings of the constitution, rather than analysing in detail the theory behind their existence and how they alter dependent on purpose. This next section will seek to reconcile ideas from both fields in order to provide an understanding of ‘institutional autonomy’.

There is no single, clear definition of ‘institution’ in the political science literature.⁸⁹ There are instead three broad approaches. First, some political scientists conceptualise institutions by looking at their form and design.⁹⁰ Second, there is an approach which emphasises the “grammar” of institutions. This approach seeks to identify the purpose of the institution by assessing its nature and type. Finally, there are theories of institutional change which exist to explain the changes which take place within institutions, either by design or evolution. Each

⁸⁸ P. H. Russell, ‘Toward a General Theory of Judicial Independence’ – a chapter in P.H. Russell and D.M. O’Brien, *Judicial Independence in the Age of Democracy: critical perspectives from around the world* (University Press of Virginia, Virginia 2001) p 1, 25.

⁸⁹ C Kingston & G Caballero ‘Comparing Theories of Institutional Change’ 16 June 2008 < <https://www3.amherst.edu/~cgkingston/Comparing.pdf> > accessed 18 October 2011.

⁹⁰ R.E. Goodin, *The Theory of Institutional Design* (CUP, Cambridge 1996). See Chapter 1 ‘Institutions and Their Design’.

will be considered in turn in order to gain a full understanding of the term 'institution': firstly, in the abstract but ultimately in the context of judicial institutions.

Institutional design

There are many different approaches to understanding what is meant by the term 'institution'. The overarching theme of these approaches is that they seek to explain '...observed regularities in the patterns of human behaviour' which collectively indicate institutional design.⁹¹ This discussion will set out two main approaches, of which there are recognised variations: institutions as rules (and norms) and institutions as equilibria. Institutions as rules are those which exist due to patterns of behaviour guided by rules; those involved follow the same norms of behaviour as a result and thus create an institution with a specific function or purpose. On the other hand, it may be that while the rule sets out the expected behaviour or norm, it is, in fact, the expectation of compliance with those rules which leads to an equilibria of behaviour which forms an institution. The equilibria of behaviour is created by 'mutually understood actor expectations' by those involved in the institution on how the institution should operate.⁹² Grief and Kingston discuss the two approaches and state that institutions as rules and institutions as equilibria are, '...best viewed as complements rather than substitutes.'⁹³

The rules which may form an institution were described by North as, 'the rules of the game in society'.⁹⁴ These rules may firstly establish the institution and subsequently govern how it

⁹¹ S.E.S. Crawford & E. Ostrom, 'A Grammar of Institutions' (1995) *American Political Science Review*, Vol 89, 582.

⁹² *Ibid.*, page 583

⁹³ A Grief & C Kingston, 'Institutions: rules or equilibria?' in N Schofield & G Caballero, *Political economy of Institutions, Democracy and Voting* (Springer, New York 2011).

⁹⁴ D North, *Institutions, Institutional Change and Economic Performance* (CUP, Cambridge 1990) p3.

functions. This approach comprises both formal rules and more informal norms of behaviours. According to North, the formal rules are created by those in power, intentionally and for a specific purpose or purposes and may take the form of constitutions or laws. The informal rules are borne out of the society's norms and values and can be best described as the culture of that society.⁹⁵ These informal rules may be expected standards of behaviour, codes of conduct or, in a legal setting, conventions or legislation. For example, Section 3 of the CRA 2005, is the legislative provision for ensuring judicial independence (the formal rule). As can be seen from the example above, when assessing whether the institution is designed by rules, formal or informal, it is possible to identify the relevant law or convention which applies to the institution in question.

The other approach to understanding institutions is viewing institutions as equilibria. This understanding focuses more on the motivation behind the adherence to such rules or norms. The manner in which 'purposeful agents' interact within an institution creates an expected standard of behaviour.⁹⁶ The expectation of such behaviour in turn motivates an adherence to it by other actors within the institution and thus, perpetuates interaction in that way creating equilibrium. The purposeful agents, to borrow the term from political science, are those who are actively involved in the functions of the institution. The rule of law states the need for an independent judiciary and as such, it is expected that judges make decisions based on the facts of a case, free from interference or pressure. A respect for the principle of judicial independence and a fear of repercussions may also result in effective and balanced decision-making. This drive for such independence, and knowledge of the constitutional importance of securing such independence, is what motivates the continuing behaviour of judges, politicians

⁹⁵ *Ibid.*, at p37.

⁹⁶ M Setterfield, *Interactions in Analytical Political Economy: Theory, Policy and Applications* (M.E.Sharpe, New York 2005).

and those involved in the administration of justice to uphold the rule of law. The introduction of the Section 3 requirement as a formal rule may allow the institution to meet these requirements through its design; however, it could be suggested that the expected equilibrium is what protects the independence. It can be argued that this expectation of an institution as equilibria is not sufficient to protect the aforementioned independence but it may be able to explain how judicial institutions have come about to function in an independent manner prior to the introduction of the CRA 2005. Such an approach is useful; however, the notion of a specific and shared motivation of all institutional actors is complex and difficult to demonstrate. Institutional design is analysed in order to begin to identify the intentions behind an institution's creation and lead on to further analysis of its intended purpose.

Institutional purpose

There are two main aspects of institutional purpose which will be considered here: a grammar of institution which offers an 'institutional statement' and a comparative discussion of the nature and type of institutions; specifically in the context of judicial institutions.

Crawford and Ostrom offer a grammar, or language, of institutions as a means of clarifying the arguments and theories which discuss institutions as equilibria and institutions as rules and reasons why they may change; generally adding to the final 'picture' of the institution in which the design and purpose may become clear.⁹⁷ Crawford and Ostrom use the term 'institutional statement' to encompass these approaches.⁹⁸ The statement, '...refers to a shared linguistic constraint or opportunity that prescribes, permits or advises actions or outcomes for

⁹⁷ S.E.S. Crawford & E. Ostrom, 'A Grammar of Institutions' (1995) *American Political Science Review*, Vol 89, 582, 600.

⁹⁸ *Ibid.*, p583.

actors' and is applicable to both individual actors and the institution as a whole.⁹⁹ These institutional statements are useful when contextually analysing a specific institution to obtain information about its main purpose and functions. There are five dimensions set out by Crawford and Ostrom: firstly, 'Attribute' which shows who is the target of that institution; secondly, 'Deontic' which describes whether the action, the various functions of the institution, may be done, must be done or must not be done; thirdly, the 'Aim' is what the action or functions should achieve, to which the 'Deontic' applies; fourthly, the 'Conditions' describe when, where and how much the 'Aim' is permitted, obligatory or forbidden; and lastly, the 'Or Else' dimension which identifies consequences should a rule not be followed.¹⁰⁰ In order to apply this theory to judicial institutions, it is necessary to reduce the idea of a court to an idealized archetype. Michael Shapiro describes four 'propositions' which are often used to define a 'conventional prototype' of a court: '...independence, adversariness, decision according to precedent and "winner takes all" decisions.'¹⁰¹ Shapiro argues that such a rigid application of the archetypal court is wrong as it does not, in fact, describe the functions of many courts.¹⁰² However, this idealized archetype will be used here to see the grammar of institutions theory in practice as it will bring simplicity to a fairly abstract notion.

The first dimension, 'Attribute' asks who the target of the institution is. In the case of the archetypal court, the principal actors are the judges and judicial staff and the individuals seeking to resolve a dispute, for example, an individual or the State in a civil or criminal

⁹⁹ *Ibid.*, p583.

¹⁰⁰ A Hertier, *Explaining Institutional Change in Europe* (OUP, Oxford 2007) p5.

¹⁰¹ M Shapiro, *Courts: a comparative and political analysis* (University of Chicago, London 1981) p1.

¹⁰² Shapiro goes on to state that such a simplistic archetype can easily be challenged by the social control and law making aspects of the judicial function.

proceedings.¹⁰³ The second dimension, 'Deontic' looks at how pertinent the action, or function, required might be; in the case of a court and a claimant seeking resolution the archetypal court's primary function is to reach a decision based on the facts of the case (as Shapiro mentions, such functions are additional when considering social control or law-making functions of courts).¹⁰⁴ The action of providing a judgment must be done; this is where independence should be demonstrated and clearly seen. The third dimension offers the expansion of this second element in which the 'Aim' of that decision is made clear. When undertaking court proceedings, the decision will be given and a remedy suggested by the judge. The remedy may take a number of forms but this can be identified as the ultimate aim of the institution, regardless of the type of case. For example, the remedy may be damages in a civil case, it may be indictment of an individual responsible for a crime or, in a judicial review hearing, it may be to make a declaration of incompatibility under the Human Rights Act 1998 if a statute is deemed to be in contravention of the European Convention on Human Rights. The fourth dimension, 'Conditions' relate to how the 'Aim' is performed. In the case of a court, the conditions may prescribe who can apply for proceedings and to which court and by which means. For example, the appeal process within the UK. A personal injury claimant can not apply straight to the UKSC. A Magistrate's Court must make a decision and the appeal process should be followed if a claimant wished to challenge the decision. The final dimension, the 'Or Else' element, identifies what happens if a court did not follow that procedure.

The nature of the institution relates to its services and functions, and latterly its aims and strategies. Therefore if it is a court, for example, then it offers services in terms of trials,

¹⁰³Other litigants may include corporations or unincorporated associations. The examples given is not an exhaustive list.

¹⁰⁴ M Shapiro, *Courts: a comparative and political analysis* (University of Chicago, London 1981) p1.

hearings and also as a part of the judicial system working alongside the police force to reduce crime and to rehabilitate offenders through correct sentencing. The nature of the institution is a descriptive element providing information about the work of the institution. Clarification can be given by labeling the nature of the institution, i.e. educational or judicial, public sector or private sector. Labeling the type of institution is the secondary point for gaining a clear understanding of the institution under scrutiny. The 'type' facet of the definition offers clarity when looking at the institution's purpose before applying any of the theory above. In the case of judicial institutions in the UK, there are a number of different types of court. The type of court will affect which cases can be heard, for example, the Chancery Division of the High Court would not hear matters relating to divorce proceedings. The place of the court within the overall court structure will also affect which cases can be heard. Another example would be the Supreme Court, which will only hear appeals from the High Court or the Court of Appeal; proceedings do not begin in the Supreme Court. A point of note here relates to the individual courts and the types of legal questions they are faced with. The Supreme Court will be hearing complex and challenging matters of public importance therefore the need for institutional autonomy is greater than for magistrate's or crown courts which are hearing questions of fact. Thus, it is necessary to ascertain the nature and type of the court in order to assess the level of institutional autonomy required. A clear notion of the court's type is particularly useful when applying the three main requirements of institutional autonomy, as will be seen later in this chapter.

Institutional change

These approaches to discovering the purpose of an institution and the focus on the design of an institution, through equilibrium and the creation of rules and norms, do not result in the

formation of the perfect institution; there may still be issues in carrying out the intended function or functions of the institution in question. A third aspect of institutions which is considered by political scientists is how institutions change and what drives them to do so. The common perspectives are that there is: a spontaneous evolution, a deliberate design or a product of both.¹⁰⁵ F. A. Hayek, furthers the understanding of institutional change through spontaneous evolution. He discusses two different types of institution: a ‘made’ order (*taxis*) and a ‘spontaneous’ order (*kosmos*). The distinction is whether the institution has been designed, or whether it has evolved through practice and repetition of behaviours to be recognised as an institution. This echoes the previous discussion in terms of institutions as rules and institutions as equilibria.

Spontaneous evolution relates to more informal rules and practice which develop over a long period of time and subsequently govern the behaviour of the institution and its actors.¹⁰⁶ In a constitutional context, this type of informal rule is perhaps best illustrated by constitutional conventions. Quite often, where there is no explicit statutory provision on a matter, convention will develop to guide behaviour.¹⁰⁷ Much of Hayek’s work focuses on types of economy. He identifies a free market economy as an example of a spontaneous order, arguing that it provides a more efficient allocation of societal resources than a strategy specifically designed by individual actors.¹⁰⁸ The nature of a supply and demand relationship between actors in a free market economy results in an organic evolution of a system which is

¹⁰⁵ C Kingston & G Caballero, 'Comparing theories of institutional change' (2009) *Journal of Institutional Economics*, 151.

¹⁰⁶ A Hertier, *Explaining Institutional Change in Europe* (OUP, Oxford 2007). Héritier explains, in detail, the varying process of institutional change and the effect this then has on the institutions in question.

¹⁰⁷ See discussion in Chapter 3 regarding the relationship between the President of the Supreme Court and the Chief Executive.

¹⁰⁸ C Petsoulas, *Hayek's Liberalism and Its Origins: His Idea of Spontaneous Order and the Scottish Enlightenment* (Routledge Studies in Social and Political Thought, 2001) p2.

dependent on both demand for a product or service and competition. This idea can be identified in a constitutional context in terms of areas where conventions develop to govern interaction between institutions or actors. In a court setting, where there is no legislative provision governing the relationship between actors, such as a judge and a clerk, convention may develop should a conflict of interest arise, for example. The evolution of convention is an example of change through evolution, rather than planned design. In relation to courts, this may

The process of institutional change by deliberate design revisits Hayek's 'made' order.¹⁰⁹ This intentional change is designed on a large scale for a specific purpose. In a political context, this may be the process of reform, which often results in the creation of new agencies or bodies. Once this major change occurs, smaller, incremental changes occur to achieve stability in the functioning of that institution. On the other hand, it may be difficult to clearly label the institutional change as one of deliberate design or solely the process of evolution. It may be more appropriate to consider that there is an element of both to be seen in the changes which occur. This may be that a statute sets out specific provision for the creation of a new institution, but it is difficult to govern on the more detailed interactions of that institution and its actors with other institutions without the gift of foresight. Therefore, convention will often develop when a matter requires governance not provided by statute and thus, there exists deliberate rules supported by informal conventions.

¹⁰⁹ *Ibid.*

The suggestion is that theories of institutional change such as these offer an alternative, richer, perspective from which to view recent constitutional reforms in the UK.¹¹⁰ The creation of new institutions under the CRA 2005 would appear to be the product of deliberate design based on a review of previous interactions between main actors. The Judicial Appointments Commission, the changes to the office of Lord Chancellor and the creation of the Supreme Court are all set out by the 2005 Act and respond to various demands for improvement. However, it is difficult to argue that there has been change through deliberate design if one considers, for example, the history of the changes to the judicial appointments process where the Lord Chancellor had altered the process prior to the CRA 2005. In fact, many of the reforms contained in the CRA 2005 were not conceptually new; these institutions were formed as a response to changes in practice or behaviour in the pre-existing institutions.¹¹¹ It has been seen that those new institutions, as well as pre-existing institutions, have evolved and are developing new rules to govern interactions; largely in areas where the CRA 2005 does not legislate.

Regardless of research, there is not a singular, uniform definition of institutions. The approaches discussed here do overlap and require careful application to judicial institutions; their individual functions and purpose differing from the simplistic archetype which is often referred to. Identifying the institutional design and purpose can, in turn, help to explain the existence of any institutional change which takes place. Crawford and Ostrom's discussion of institutional statements offers a method for ascertaining the nature of specific judicial institutions and their main functions. An assessment of the institutional design and purpose of

¹¹⁰A Greif, *Institutions and the Path to the Modern Economy: lessons from Medieval trade* (CUP, Cambridge 2006), p158.

¹¹¹The arguments set out in Chapter 1 relating to the need for constitutional reform and the aims of the Constitutional Reform Act 2005 show the areas in which the changes in practice, over a number of years, could be argued to be evolutionary thus inciting institutional change.

the court and a note of any institutional change which has taken place – spontaneous or deliberate- will enrich the picture of the institution's current levels of autonomy. The discussion has considered the term 'autonomy' in a different context, moving away from literature in other areas of law; the discussions of institutional design and change may show how an institution evolves according to the need for change, whether it be deliberate or otherwise; and this, in turn, can establish the motivation and purpose behind that institution.

Conclusions made as to the motivation and purpose behind a particular institution's development are not the end of the discussion of institutions. In order for an institution to demonstrate autonomy, more information is required. Information such as the financing and organisation of the institution and the freedom the institution has in fulfilling its purpose must also be obtained. The means for doing this is considered next.

Autonomy and self-determination

In its most basic sense, self-determination is the right or ability that an individual has to make decisions about his or her own life. The notion of autonomy in any case relates to choice; the choices available to an individual and that individual's ability to make them free from coercion. Expanding on that, self-determination is the free choice of one's own acts without external compulsion. In a political context, self-determination is seen as the freedom of the people of a given territory to determine their own political status and how they will be governed, without any undue influence from any other country. This has clear links to the current discussion of institutional autonomy stating the right to govern, or operate, free from unnecessary interference from others. While an individual, or even societal, perspective is

useful it is important to understand autonomy and self-determination from an institutional perspective: more importantly, how it applies to a judicial institution.

In taking judicial office, a judge will be sworn in and take two oaths, one of which states: “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.”¹¹² This oath, or collective allegiance to judicial office, dates back to the Magna Carta in 1215 and is an acknowledgment by individual judges of the collective aim of their role within the judicial system. However, a judicial institution that receives no guidance and operates free from any constraints when acting in its capacity as a court is by no means desirable. As stated by Seidman, nobody would want a court to have that level of independence or, ‘...freedom to decide a case as the court sees fit without any constraint, exogenous or endogenous, actual or prospective’ as it would prevent any system of monitoring the behavior of the courts and the decisions taken.¹¹³ As Burbank and Friedman state, ‘Courts are institutions run by human beings. Human beings are subject to selfish or venal motives’ and as such, it is important that all those involved in the institution hold a collective belief as to the core functions.¹¹⁴ The judicial oath provides a basis from which individual institutions may build up a more detailed objective. This need for a common objective and collective belief is seemingly more important if the ideas held by American Legal Realists, are to be given note. It is unlikely that any lawyer would argue that a judge can be entirely impartial to an issue but this is why judges are expected to step down from a

¹¹² The second oath is an affirmation of allegiance to Crown. Judiciary of England and Wales, ‘Oaths’ 2011 <<http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/oaths#headingAnchor1>> accessed 11 April 2011.

¹¹³ Seidman, L.M. ‘The impossibility of judicial independence’ 2001, paper presented at a conference sponsored by the American Judicature Society and the Brennan Center for Justice, University of Pennsylvania, Philadelphia, PA. Referenced in S Burbank and B Friedman (eds.), *Judicial Independence at the Crossroads: an interdisciplinary approach* (Sage Publications, California 2002) ‘Reconsidering Judicial Independence’ pp 11, 12.

¹¹⁴ *Ibid.*, at page 12.

case should they have any personal interest in proceedings. The case of Lord Hoffman in the *Pinochet* case is a prime example of this.¹¹⁵ While autonomy is desirable for the overarching institution, individual actors (judges) must subscribe to the collective belief of the organisation. The judicial oath and the established practice of the judiciary could be held as the collective belief and any behaviour deviating from this could be seen as a type of unnecessary interference with the collective belief in carrying out the core functions.

While any institutions will have inextricable links to an higher authority, as will be seen shortly, in determining whether institutional autonomy exists, and on what level, it is necessary to look at whether the institution can carry out its core functions with the required degree of autonomy or whether unnecessary constraints are placed upon it.

Requisite elements of effective institutional autonomy

There are three main elements of the notion of institutional autonomy that are put forward here. These elements have been developed to cover all aspects of an institution's functions and, as we shall see, offer guidance when we are determining whether the level of independence of a given institution is sufficient to secure autonomy.

Budgetary freedom

The first aspect of institutional autonomy is budgetary freedom. The funding and allocation of budgets is, on the whole, fundamental to any institution and must be a primary consideration in any discussion of this nature; the importance of understanding the specific details of an

¹¹⁵ *R v. New Street Stipendiary Magistrate, ex. p. Pinochet Ugarte* [1998] 4 All ER 89 (HL). The facts of this case and their relevance to the thesis are discussed in Chapter 1.

institution's fiscal arrangements is that a decision on whether or not that institution could be seen to be autonomous can be reached once the other essential requirements are considered. The relevance of this budgetary freedom will differ depending on the nature and purpose of a specific institution. Decisions relating to funding can dictate the success of an institution in fulfilling its intended purpose, but who makes those decisions can give a reasonably clear indication of whether or not there was an intention to create a degree of institutional autonomy.

The starting point when determining whether or not an institution has budgetary freedom is to look closely at their financial arrangements:

- Where does the money come from;
- Who decides the budget; and
- How much freedom does the institution have when allocating resources, or spending money?

It can be said that almost every business must have some sort of financial links with other businesses in order to exist. Daintith and Page acknowledge the linking nature of finance and how it creates "an interdependence" between businesses linked by some common purpose.¹¹⁶ This common purpose may only be the fact that one wishes to buy the other's product; or it could be that the businesses are part of a franchise and depend on each other's success to be successful themselves. More relevant for these purposes, the institutions could be working together within a system of government. Daintith and Page also state that any business that wishes to function successfully in a financial market must have links with a "financial firm"

¹¹⁶ T Daintith and A Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (OUP, Oxford 1999) p3.

and make well-informed judgements in relation to investments and other financial issues.¹¹⁷

In the broadest sense, a financial firm may be a bank or any trading firm. Applied to a judicial institution such as the UKSC, the ‘financial firm’ in question is the executive government.¹¹⁸

The interdependence of the three main branches of government demonstrates how each is reliant on the other to monitor and regulate behaviour. The system of checks and balances does not only relate to conduct and powers, but also to financial provision. While interdependency of this nature would appear feasible, and even necessary, the institutions involved must be afforded the necessary freedom and autonomy in carrying out their main functions.¹¹⁹

It is important here to make the distinction between an institution’s core and non-core functions. This is useful when looking at the financial arrangements and any powers the institution has to allocate the budget. If an institution has the freedom to decide how to allocate the budget in relation to its core functions, it would suggest a higher level of institutional autonomy. In the previous section discussing political science approaches, Crawford and Ostrom made reference to broad and narrow prescriptions. This was then applied to the UKSC using the term ‘function’. Core functions are the functions the institution must perform in order to be a viable institution and fulfil the purpose of its design. This relates to the ‘Attribute’, ‘Deontic’ and ‘Aim’ dimensions of Crawford and Ostrom’s theory and a decision about the type and nature of the institution can further explain what the core functions would be expected to be. In the case of a court, the core functions are to hear cases impartially and offer remedies. More specifically, in the case of the UKSC it is possible to

¹¹⁷ *Ibid.* at page 2.

¹¹⁸ T Daintith and A Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (OUP, Oxford 1999) p4, 5.

¹¹⁹ *Ibid.*

look at the Government papers and debate prior to the commencement of the CRA 2005 for specific expectations. Non-core functions may relate to issues such as judges giving speeches at conferences or dinners. The recent television documentary on BBC Four about the UKSC could be classed as a non-core function of the Justices, but this does not make it unnecessary. Such an act of transparency is exactly what the reforms have striven for; that the public can begin to see and take interest in proceedings of the justice system. These core and non-core functions will be discussed in the following sections. But what is it that makes an institution have enough budgetary freedom to qualify as manifesting institutional autonomy? It is important to look at the following questions in some detail.

Provision of finance

Firstly, where does the money come from?

A high level of financial autonomy would be demonstrated by an institution that could create enough turn-over annually to enable them to fund their entire budget for the following year themselves and not be reliant on any other agent for the provision of finance. That level of financial independence is unlikely and it will be presumed here that the institution's funding comes from elsewhere. The provision of finance usually occurs when a new institution requires financial backing to start-up, or when an existing institution requires finance in order to develop and grow into a successful enterprise; an annual budget is a prime example. This budgetary provision may take the form of loans or grants or may even result from sponsorship by another company but could also be contributed to from the net profit of the institution. Every institution whatever its type will rely on external funding, whether it is through payment for the provision of their services/product or whether it is from, for example, a

government department as a result of a Spending Review. Public sector institutions such as courts, which receive funding from government departments are ultimately being paid for through taxation. Individual taxpayers do not, generally, get involved in the management decisions judicial institutions which may, on the face of it, seem a positive implication for institutional autonomy. The government institution, the Treasury, which provides the funding may, however, have an impact on decision-making of the court should it, for example, limit funding.. If a private sector institution, such as a bank, were to provide funding or invest in an institution, it is unlikely that the same level of autonomy can be achieved. By investing money into the core functions of that institution, the funding institution would have taken a level of risk. Therefore, it would be important for them to make a return on that investment through the success of the institution. It would seem reasonable in this situation for a company to retain a certain level of control over the expenditure of the funding; immediately having repercussions for the level of institutional autonomy.

This first question aids an understanding of the fiscal arrangements but it does not dictate whether or not there is institutional autonomy as a result as every institution relies on funds coming from somewhere. The issue is at what level the budget is decided and what approval process is in place; awareness of the range of decision-making powers that an institution has will be important in deciding whether or not institutional autonomy exists.

Responsibility for budgeting

Secondly, there is the question of who is responsible for the budget for that institution. The spending review from the previous year will guide the process of deciding what the budget is, in terms of amount and more importantly, it should be decided by the institution itself and not

be wholly reliant on any other institution or agent for direction. This will mean that the institution, such as a court, should have a designated officer for finance who makes such decisions with their team, such as a Chief Executive or President. It would seem reasonable to expect some sort of safeguarding and committee-based work when deciding budgets. An institution may have sufficient autonomy to decide what money it needs and how that money may be spent. It would, however, take an extremely responsible system of management in order to prevent any abuse of that budget. A budget of, for example, £20,000 per annum may seem reasonable on the face of it unless that £20,000 is to pay for lavish holidays. Therefore, a committee stage of the budgeting process will mean that the allocation of the estimate will be vetted and approved. On the inclusion of a committee stage, it would be necessary to assess how much influence that committee has on decision-making. In the case of a court receiving finance from the Treasury, as per the earlier example, the Treasury solely regulates the decisions made by the court to ensure they are satisfied with the budgetary process it is unlikely to reduce the autonomy of the court as it is acting in a regulatory capacity. If the Treasury had the power to limit or veto a budget request then it could be argued that there is little autonomy for the court as another authority has a say over whether or not they can have the money they require. The committee element should merely act as a system of checking that the budget is reasonable and attainable if the institution is intended to have a good level of autonomy.

Allocation of resources

A further analysis of this comes when considering the freedom an institution has in relation to the allocation of the resources- the final element in this discussion of budgetary freedom. This is hugely significant in deciding whether or not there is institutional autonomy as the

allocation of resources has been the primary consideration in Government spending reviews up until very recently.¹²⁰ The allocation of resources is the main financial decision-making of any institution and a focused approach is needed when considering this in relation to a specific institution. For the purposes of institutional autonomy, in all contexts judicial or otherwise, the institution should have freedom in certain aspects. The following list shows the freedoms expected, plus an example of their application to judicial institutions. There should be freedom to allocate resources in the following areas: employees' salaries (the payment of court staff and judges), any equipment necessary for the provision of services which will include the administration of the institution (computers or courtroom furniture, for example). It may also include: funds for any work to be sub-contracted; travel expenses of staff; the reasonable provision of food and drink. The allocation of funds to salaries and equipment must be decided and made by the institution if there is to be a high level of institutional autonomy. The other, supplementary, requirements may make the case for institutional autonomy stronger should it be argued at any time. However, the powers for decision-making in relation to the allocation of resources must lie with the institution.

It is here that the core and non-core functions become relevant, as the allocation of resources to core functions should be able to be done freely and without restrictions placed upon it. This is required under the notion of institutional autonomy and, as will be seen later, can affect the level of institutional autonomy that exists. If there is restriction placed upon the allocation of resources toward non-core functions then it would be unlikely that this would significantly reduce the degree of institutional autonomy. In the case of a court, restrictions placed on

¹²⁰ Since the general election in May 2010, the new coalition government has said that the October 2010 Spending Review will, "consider new and radical approaches to public service provision" in an attempt to reduce the United Kingdom's financial deficit. (HM Treasury, *Spending Review Framework*, Command Paper CM7872 June 2010).

allocating resources to carry out casework, to pay judges and staff and to maintain a courthouse would be deemed to detrimentally affect the institution's autonomy. It may not be a negative matter if the institution in question is not striving for greater independence. However, it would be seen as unfavourable for a court, more specifically the Supreme Court.

Administrative freedom

This second element in the notion of institutional autonomy is, in some respects, an extension of the budgetary freedom requirement with more specific analysis of some of the ideas raised. However, it is worthy of consideration in its own right as it ensures an in-depth evaluation of the day-to-day workings of an institution and helps to decide whether or not the institution is run in an independent fashion. As will be seen in the next chapter, a lack of freedom to administer an institution can have a significant and negative impact on an institution's autonomy.

The administration of justice operates on two levels: at the highest level, there is the administration of the judicial branch of government and how it works alongside the legislature and the executive. The wider courts system has developed and provides direction on all issues of the law and this system strives to be independent both at an institutional level in terms of the different courts but also at an individual level concerning the individual judges in deciding cases.¹²¹ The bodies which exist within the justice system have a range of important functions in the administration of, '...criminal, civil and family justice, democracy

¹²¹ The Administration of Justice Act 1970 ch.31 provides detail about the business, procedure and jurisdiction of all courts.

and rights, and... inspectorates and ombudsmen.¹²² Such bodies include the Law Commission, the Ministry of Justice, the newly created Her Majesty's Courts and Tribunals Service and the Court's Funds Office.

Facets of administrative freedom

Administrative freedom covers a variety of aspects within an institution, including the work of the institution and its workforce. An important factor is whether or not the administration is independent in nature. The administrative freedom requirement is to include the provision of human resources and supporting administration, including: recruitment; training and development of workforce; monitoring behaviour and performance of workforce; developing the institution as an organisation; and other administration business. These are universal provisions which apply to any institution- judicial or non-judicial- although they will relate to the specific area in question. The basics of the human resource provision are deciding whether or not the institution can support itself and the activities of its workforce. For example, if a newly recruited trainee needs further development does that institution have the means to provide, or source, that training? Or if an employee has a problem regarding their pay, is there a payroll team to advise them? Supporting administration relates to the organisation of operations and the staff who ensure its successful completion.

Administrative autonomy may also be demonstrated by an institution being proactive in its development and design, instead of waiting for guidance on future plans. An institution that does not take charge of its own growth must be considered as having a lower level of autonomy. The freedom that an administration has in implementing this process can aid the

¹²² Justice, 'Organisations' 27 September 2011 <<http://www.justice.gov.uk/about/index.htm>> accessed on 14 October 2011.

decision regarding institutional autonomy: whether it exists and on what level. Part of this notion of development and design may relate to broad decisions about future aims of the institution but may be as specific as decision relating to the use of particular communication systems or the range services offered within that institution. An important aspect of administration is the communication between actors within the institution and with external contacts. There should be freedom both in the choice of systems used, and in the way in which they are used, on a daily basis. The services offered by an institution can relate directly to its core functions- the administration which allows a court to decide cases- or it could include support services such as catering. Consideration of such aspects of administration can show a true picture of the autonomy which exists.

Her Majesty's Courts and Tribunals Service oversees the administration of justice in courts in England and Wales.¹²³ It operates as an agency of the Ministry of Justice and links with a number of government departments to ensure access to justice as far as is possible. This agency operates above the individual courts but below the main branches of government and partners the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals to oversee the administration of judicial institutions.¹²⁴ The Judicial Office operates in five groups: Strategy, Communications and Governance; HR for the Judiciary; senior judicial support; Judicial College; and Corporate Services.¹²⁵ The Judicial Office provides support for over 43,000 employees of judicial institutions in England and Wales.¹²⁶ The office of the Lord Chief Justice gives guidance on executive matters affecting any judicial institution's day-to-

¹²³ Justice, 'Organisations: Her Majesty's Courts and Tribunals Service' 15 April 2011 <<http://www.justice.gov.uk/about/hmcts/index.htm>> accessed 21 April 2011.

¹²⁴ *Ibid.*

¹²⁵ Judiciary of England and Wales, 'Judicial Office' 2011 <<http://www.judiciary.gov.uk/training-support/jo-index>> accessed 10 April 2011.

¹²⁶ *Ibid.*

day running in its capacity as a court; filtering information from Government to the individual institutions. While officially it is the Lord Chief Justice who provides direct management of judicial functions, through Her Majesty's Courts and Tribunals Service the Ministry of Justice, a government department, may still be involved in the administration of justice. This may have large-scale implications for institutional autonomy and would need consideration when assessing the institutional autonomy of individual courts.

Unnecessary interference

An institution which has been able to demonstrate a good level of budgetary freedom through a consultation of various financial procedures and also a good level of freedom in the day-to-day administration of functions must finally show what interference exists from third parties in order to complete the analysis of its institutional autonomy. This interference relates directly to the autonomy and self-determination of the institution and is, perhaps, the most complex yet important element of institutional autonomy. Autonomy and the ability to determine one's own destiny (self-determination) not only relate to people but can also relate to institutions as well; if there is any interference that limits that self-determination then it would be fair to say that the autonomy is reduced. To build on the theory surrounding institutions, the equilibria of expectation is negatively affected if a judicial institution is subjected to unnecessary interference, from either internal or external sources. This interference would upset the balance of the actors and their actions within the institution.

What is deemed unnecessary?

It may be considered an ideal situation if an institution were able to function free from any external pressures or interference for its entire lifetime. This, however, is unlikely to be the

case in many cases. Most institutions welcome some kind of external involvement in decision-making processes, even if only in the form of advice and guidance, as this relieves the pressure of leaving the decision-making to be made entirely within the administration of the institution. The ability to make every decision may be beyond most institutions and would also rely on being wholly self-funded to avoid any input, or interference, from any other source. The pressure of making all decisions relating to budgets and administration would be an enormous pressure for even the strongest, most successful business. It may also be the case that an institution should not be allowed to function free from any interference due to convention and practice in that area. One example of an institution that requires constant interference is Parliament. It would never be desirable for a parliament to operate free from any external pressures as any external pressure acts as a system of monitoring the operations and behaviour of an institution. The UK constitution, through its principle of a separation of powers, encourages a system of checks and balances to monitor the functioning and behaviour of the three main branches and can help to determine what interference has occurred and whether or not it is unnecessary. Roger Masterman describes the doctrine as: a tool of institutional design, a system of checks and balances, and as a mechanism by which to ensure governmental efficiency.¹²⁷ He goes on to state how, ‘the notion of judicial independence – for so long a tool designed to ensure the fairness of *individual* proceedings – has begun to take on an *institutional* dynamic more in keeping with the notion of the judiciary as an autonomous, or third, branch of government.¹²⁸ This summary of the objectives of the separation of powers doctrine demonstrates that there is a will, more so since the Constitutional Reform Act’s enactment, to ensure that judicial institutions can operate with the degree of autonomy required to secure judicial independence. Such a degree of autonomy

¹²⁷ Roger Masterman, ‘The Form and Substance of the United Kingdom’s Separation of Powers’ *Speech at the British Politics Group conference*, 1 September 2010 at page 1.

¹²⁸ *Ibid.*, at page 3.

may be reduced in relation to finance or administration, but it can be significantly reduced if there is unnecessary interference preventing the institution fulfilling its intended purpose.

In determining what is meant by unnecessary interference, it is perhaps easier to firstly consider what interference, or aid, is considered necessary. Such situations may include: when the financial need dictates; or in order to implement new measures or develop the institution in some way. These situations may dictate whether interference is necessary but ultimately, the decision to request interference from another source lies with the institution. Therefore, the ideas surrounding unnecessary interference largely centre on the idea of an institution requesting help. If an institution requests help for any reason, then institutional autonomy is not, immediately, affected, as it is the institution taking the action. If, however, the request for help is made by an external source and that help is provided without any input from the institution then this may well reduce the institutional autonomy, as the institution is a passive actor in the process. Therefore, if the institution has not requested help, or interference, but it is given then that could be classed as unnecessary interference.

In light of this, certain situations may arise where the interference requested is not deemed unnecessary. Firstly, if the financial situation of the institution dictates the need for help: for example, if an institution had exhausted its funds and needed some sort of loan from a bank in order to continue operations, then it is unlikely that it would be argued to be unnecessary interference as it has been requested. This may arise due to a problem with the funding process. The courts in England and Wales are funded like any other government department as a part of the Ministry of Justice and await a budget determined by Spending Reviews. This reliance on Government decision-making reduces the level of institutional autonomy. Due to

the wide-ranging cuts to funding across the public sector, financial issues have come under significant scrutiny. The reduction of a budget due to Government spending cuts is an example of when this type of interference is unnecessary, and detrimental to the degree of institutional autonomy that may be achieved. Secondly, in any emergency situation consent to be given aid is presumed. This could apply on an institutional level if there is some need for crisis management within the institution.¹²⁹ The idea of crisis management does link to the third situation when interference may be necessary: that there are new measures to be implemented or the institution needs some sort of development. It has been said that a crisis occurs due to the old operating system being unable to cope with an event, requiring some type of development to cope in the future.¹³⁰ It could be said here that such a crisis may occur internally within the institution, or within the wider framework in which it sits. In the case of judicial institutions there may be a change to the policy of how cases are reported due to negative consequences of media coverage of the court's work; this internal change may be deemed necessary. Or it may be at a time when there is significant constitutional change, possibly because of a 'constitutional moment'.¹³¹

Specifically related to judicial institutions, an additional situation when interference is deemed to be necessary arises if the office of the Lord Chief Justice gives guidance on executive matters affecting any judicial institution's day-to-day running in its capacity as a court. This statement is assuming that the Lord Chief Justice will always have the institution's best interests at heart, which may not necessarily be the case. The role of the Lord Chief Justice in relation to judicial institutions will be discussed below in the section on external

¹²⁹ Crisis management may be needed as a result of some unexpected event that affects employees, stakeholders or the general public.

¹³⁰ Julie M. Novak and Timothy L. Sellnow, "Reducing Organizational Risk through Participatory Communication" (2009) *Journal of Applied Communication Research* 349, 373.

¹³¹ V Bogdanor, *The New British Constitution* (Hart Publishing, Oxford 2009).

versus internal interference. As will be seen in Chapter 3, there are some notable examples of the type of interference that is deemed to be unnecessary specifically for judicial institutions. Under the CRA 2005, section 3 makes a declaration to guarantee the independence of the judiciary. The means for ensuring this independence is to avoid unnecessary interference with the core functions of judicial institutions. If there were to be criticism of a judge's decision made by a Government minister, for example, then this could be said to undermine the level of institutional autonomy that the court enjoyed.

Hierarchy of authority

In any societal situation there is some degree of 'hierarchy of authority' amongst the main actors.¹³² For example, a police constable patrolling the street can make an arrest, but he/she must take any orders from his Chief Inspector on the circumstances of that arrest due to an established hierarchy of authority. Identifying the hierarchy of authority for an institution could be useful in seeing where the interference is coming from and whether or not it is reasonable. If it is coming from a source with greater authority and does not contradict any legislation or guidance that gives the institution powers, then it would most likely be acceptable. Interference from a higher authority may affect the level of institutional autonomy depending on what the interference is. If it falls into one of the three, aforementioned situations then there should be little effect on the autonomy of the institution. However, if the interference was a piece of legislation that alters the powers given to the institution then this would significantly reduce the autonomy as there is little the institution can do to stop it happening. If the interference were coming from a body beneath the institution in the

¹³² S Burbank and B Friedman (eds.), *Judicial Independence at the Crossroads: an interdisciplinary approach* (Sage Publications, California 2002).

hierarchy of authority, it would be important to look closely at why that body was interfering and to what ends.

For judicial institutions, and as stated above, even if the interfering agent is the Lord Chief Justice, their interference must be questioned. If the interference were to come from the executive branch of government, then that would need close inspection due to the basic principles of the rule of law and particularly the doctrine of separation of powers. It would be important to analyse the powers that the executive branch of government has and decide if there is any interference that jeopardises the existing, organised system of government. The executive should not, under most circumstances, be involved in any business of the judiciary and vice versa. This again reiterates the importance of the separation of powers in providing a means for securing institutional autonomy. This allows the branches of government to act independently from each other, helping to uphold the rule of law. It is here that the role of constitutional convention may arise. One such convention exists which states that the executive do not criticise the judiciary and vice versa. The adherence to this convention is one for debate, with instances of Home Secretaries failing to do so. As mentioned above, this is an important example of the type of unnecessary interference with which judicial institutions may be faced.

From this it can be said that a certain level of interference, in the situations outlined previously, is in place as a system of monitoring the behaviour of an institution. When deciding whether or not a type of interference is unnecessary, the main points above can be used as a guide. As with all the elements of institutional autonomy, a degree of flexibility and a good knowledge of the institution should be used in applying them.

Internal and external threats to institutional autonomy

It is easy to assume that most threats to institutional autonomy would come from an external source and indeed, unnecessary interference could, legitimately, be called extraneous interference instead. However, there are occasions when the interference comes from within the institution whether it is on an individual level from an employee or more widely from within the sector that the institution operates that justifies the scope of the term 'unnecessary'. The previous discussion of hierarchy of authority is again relevant when deciding whether the interference, if it is internal, is unnecessary. If the interference comes from the management of the institution in the form of a direction for improvement or development then it is unlikely to be seen as interference, more as guidance being provided from within the institution. However, should that direction become more of an order to carry out a specific task or function that the institution must follow due to the hierarchy of authority, the autonomy would be reduced. The example given above was if a piece of legislation changed the powers conferred on that institution, then the hierarchy of authority would suggest that there is little the institution could do to prevent the interference therefore reducing the level of institutional autonomy. Move this example to an internal situation, such as the management giving orders to the payroll department to freeze salaries and again there is little that department can do but follow the order. In the majority of situations, the internal interference will stem from some external factor (the freezing of pay may stem from a global recession) but it is important to consider this as a possible factor in reducing the level of institutional autonomy. Another situation of interference may arise in relation to a private investor being the funding source for the institution. If that investor retained a level of control over the investment he or she made, then from an internal perspective they could place unwanted pressure on the institution. Although the investor was, originally, an external source of funding for the institution, if the

institution allowed a continuing role in the development and financial business then that investor becomes an internal figure.

Another form of internal interference could be said to come from the main actors within judicial institutions themselves. Political scientists have often claimed that judicial ideology decides cases not the law: that judges decide cases based on their own beliefs.¹³³ Such claims stem from a reaction to the jurisprudential movement in 20th-Century America, American Legal Realism. The American Legal Realism movement argues that judges do not decide cases based on the law in terms of statutes and precedent but really due to what they, as judges, decide is “fair” on the facts of the case.¹³⁴ These claims, if substantiated, could have notable repercussions in the debate surrounding judicial independence. The Realists suggest that an internal interference with that independence comes from judges’ own beliefs and not from external sources and pressures: pressures such as affiliations to political parties or pressures from a higher authority within the judiciary. Such claims must be investigated and further research into an area which demonstrates considerable knowledge of institutions- both judicial and non-judicial- should be made in order to provide a rounded approach to a reasonably abstract, and under-documented, notion as institutional autonomy.

A topical example of internal interference would be to continue the previous discussion of the role of the Lord Chief Justice and his place within the judiciary. Having considerable power placed on him by the CRA 2005 as head of the judiciary, the Lord Chief Justice would be well within his rights to ask a court, for example, to speed up the time it is taking for them to

¹³³ For a brief discussion of these arguments see S Burbank and B Friedman (eds.), *Judicial Independence at the Crossroads: an interdisciplinary approach* (Sage Publications, California 2002), pp 24, 26.

¹³⁴ Brian Leiter, ‘American Legal Realism’ – can be seen in W Edmundson & M Gloding (eds.), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell, Oxford 2003).

hear cases to ensure the effective administration of justice. This guidance is an acceptable form of interference, as it does not alter the autonomy of that court. If, however, the Lord Chief Justice were to tell that court how to decide a particular case or which judge should hear it then this type of interference would produce the type of internal clash that may reduce the institutional autonomy for that judicial institution from an internal perspective. It is at this point that the factors concerning institutional design and purpose are relevant. Consideration of the formal rules (laws or policy) which govern the institution should be undertaken, as well as an assessment of any informal rules (such as conventions) which may have developed. This will enable a picture to be created of the institution's purpose and whether the type of internal interference experienced is something which is governed by formal rules. If it has become a pattern of behaviour which has developed into an informal convention, it must still be analysed to decide if that informal convention is having a negative impact on the institution's autonomy. Something to note at this point is that the Lord Chief Justice has no formal responsibilities toward the UKSC thus externalising the role in relation to interference and an important factor to remember in later discussions of the UKSC.

An example of possible external interference for judicial institutions, now as such due to changes made by the CRA 2005, is the office of Lord Chancellor. While the Lord Chancellor still has responsibility to the judiciary, now enshrined in section 3 of the CRA 2005, the office itself has a different quality from that prior to the reforms. The Lord Chancellor is a Cabinet minister and also has the title Secretary of State for Justice.¹³⁵ By placing ultimate responsibility for the judicial system with the Lord Chief Justice as Head of the Judiciary, it makes the separation of powers much clearer but has also made the Lord Chancellor external

¹³⁵ United Kingdom Parliament, 'The Lord Chancellor' -- <http://www.parliament.uk/about/mps-and-lords/principal/lord-chancellor/> accessed 10 September 2011.

to the UKSC and the judiciary as a whole. It is now more important than before that the actions of the Lord Chancellor are monitored and that any interaction with the judiciary is justified. A recent regulatory document Her Majesty's Court Service mentions a possible partnership between the Ministry of Justice and the Lord Chancellor. This could be classed as a new type of partnership between the judiciary and the office of Lord Chancellor and may result in 'useful' interference. For interference to be considered necessary, it would need to be seen that there was a consensus toward a similar objective. The actions should be motivated by the collective belief of the judiciary, not by the Executive.

It is important to state that role of individual actors may alter dependent on the institution in question and therefore, their interference with one institution as opposed to another may be deemed necessary in one situation but unnecessary in another.

Levels of institutional autonomy

The notion of differing levels of institutional autonomy has been mentioned throughout this chapter; the intention is to convey that this is not a rigid concept, but a fluid notion of autonomy. This reiterates the main ideas of the political science approaches discussed earlier. It may be possible, on assessing the design and purpose of the institution in question, to analyse the intended level of autonomy. In the institutional design, it may be evident whether or not the institution is capable of functioning in an autonomous manner.

In order to see how the levels of institutional autonomy might be applied, it is useful to consider the opposite: institutional autonomy on an absolute or non-absolute spectrum. Such a

spectrum suggests that either institutional autonomy exists or it does not. This may be clear in terms of arriving at a decision following the analysis of the three required elements, however, it is not helpful to applying the notion of institutional autonomy in the UK, as it should be viewed as a changeable situation. The other difficulty with viewing the notion on an absolute or non-absolute spectrum is the need for extremely detailed criteria which are easily measured. This is unlikely to be possible in an evolving constitution but equally it would not be helpful to the notion or to supporting the concept of judicial independence. Part of the role of institutional autonomy is to aid in assessing whether there is sufficient autonomy for a judicial institution and whether, in turn, there is sufficient collective judicial independence. By forming a conclusion as to the level of institutional autonomy, it enables a more accurate evaluation of whether it is sufficient or not.

Below are diagrammatic examples of both scenarios, seeking to explain institutional autonomy in an absolute sense and comparatively, in terms of level.

Figure 1. Absolute vs. Non-Absolute Spectrum

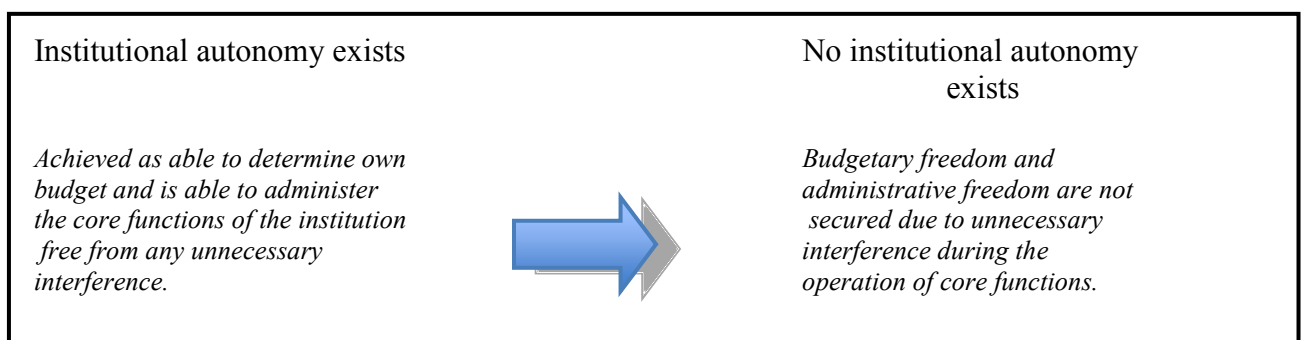
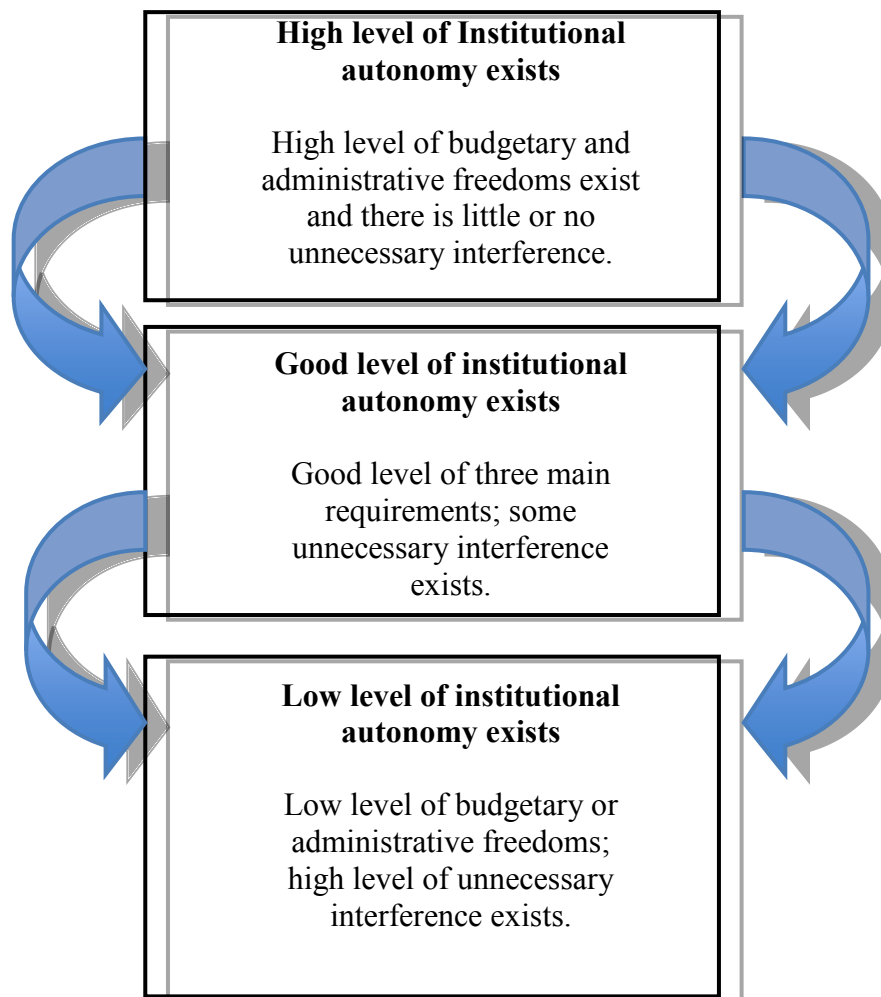


Figure 2. High and Low levels of Institutional Autonomy



The strength of an institution's institutional autonomy can be determined by application of Figure 2., something that is of far more use than Figure 1's absolute or non-absolute spectrum. By showing to what level an institution has autonomy, assessment can be made of why that level has been achieved to begin with and how that level may be improved. The institution, or court, may use the strength of institutional autonomy to put a case forward against the current level of judicial independence. If institutional autonomy is weak, judicial independence is arguably weak as well. In addition to these diagrams, it must be said that the level of institutional autonomy may change depending on time and the institution. For example, when the Labour Government put the constitutional reforms into motion, the

country was enjoying something of an economic boom. Suggestions of such freedom in terms of budget for the Supreme Court, for example, were seen as viable and realistic when other institutions were too enjoying such autonomy. However, due to the recession and the number of cuts put in place in order to restore financial security in Britain, the Supreme Court is now finding such freedoms are not being realised.¹³⁶ This would suggest that the role of finance is fundamental to the level of institutional autonomy. The idea that with access to more funding support an institution is likely to have greater freedom in terms of allocating resources and running its administration. Conversely, if there are limitations to funding, due to national or global factors, then it will no doubt be somewhat necessary for a higher authority to place limitations on the spending of institutions. This would not be limited to the judicial system, but this is something which would, and has, affected all number of institutions in a range of sectors, both public and private. Here it is necessary to reiterate the need to apply the notion of institutional autonomy in a critical way; it is context-dependent and is not, therefore, a notion which can be applied universally and indiscriminately.

In this thesis, and in a wider application of institutional autonomy within the UK constitution, Figure 2 is to be applied. Institutional autonomy is intended to support the rule of law in ensuring judicial independence. Although, arguably, there should be a high level of institutional autonomy in order to do this, a good level is equally beneficial. Furthermore, a low level of institutional autonomy is similarly useful as it should provide a driving force to improving that level of institutional autonomy and thus improving the degree of judicial independence for that institution. Thorough understanding of budgetary freedom, administrative freedom and from where unnecessary interference comes will be needed to

¹³⁶ Funding of the Supreme Court, both proposed and realised, is analysed in detail in Chapter 3.

identify which level of institutional autonomy is reached. As will be seen in the analysis of the UKSC in Chapter 3, a thorough analysis can be made of each of the requirements and a decision may be reached as to a judicial institution's institutional autonomy and subsequently, its judicial independence.

CHAPTER 3 - INSTITUTIONAL AUTONOMY AND THE UNITED KINGDOM SUPREME COURT

At a time of significant constitutional reform, there will always be suggestions for further development. The recognition of institutional autonomy is one such development. This chapter will discuss what institutional autonomy means within the context of the UK and critically analyse the *intended* (the proposals discussed for protection of judicial independence) and *realised* (the existing legislative provision for protection of judicial independence) degree of institutional autonomy that exists in relation to the UKSC. From this, it will be possible to draw conclusions as to the future of institutional autonomy within the constitutional arrangements of the UK. The recent constitutional reforms in the UK appear to demonstrate a drive to ensure the protection of judicial independence and to, more formally, insulate the judiciary from the executive and the legislature. Therefore, it is now timely to suggest a means of ensuring this protection still further: through the recognition and implementation of the notion of institutional autonomy.

Lord Woolf stated prior to the enactment of the CRA 2005, the ‘judiciary was too exposed as arrangements stood’¹³⁷ and while judicial independence is clearly a focus of the CRA 2005, there seems to have been a subtle disregard of the implications of the creation of the Supreme Court in relation to that constitutional principle.¹³⁸ The Ministry of Justice felt the creation of an independent Supreme Court would be a useful means to, ‘...[provide] greater clarity in our constitutional arrangements by further separating the judiciary from the legislature.’¹³⁹ One

¹³⁷ Lord Woolf, ‘The Rule of Law and a Change in the Constitution’ Squire Centenary Lecture, 3 March 2004 at Cambridge University.

¹³⁸ J Lennon, ‘A Supreme Court for the United Kingdom: a note on early days’ (2010) CJK 140,142. Jo Lennon gives examples of the apparent lack of acknowledgement for the formalisation of judicial independence in the Constitutional Reform Act 2005 and through the creation of the Supreme Court.

¹³⁹ Ministry of Justice, ‘The Supreme Court--Significance to the UK’ (London: 2010), <http://www.supremecourt.gov.uk/about/significance-to-the-uk.html> [Accessed February 24 2011].

part of the reason for this disregard may be due to the fact that any significant changes as a result of the formalisation of judicial autonomy in the Supreme Court may not be seen for many years, until an event requires the judicial independence, or institutional autonomy, of the court to be scrutinised.

The explicit requirements of institutional autonomy for a judicial institution, as laid down by the previous chapter, will be applied to the UKSC, considering some relevant ‘test’ cases to discuss the importance and role of institutional autonomy. The analysis will conclude to what degree institutional autonomy exists and whether or not the current degree is sufficient.

Institutional autonomy and its impact in the United Kingdom

The acknowledgment of institutional autonomy will inevitably impact on existing legislative protection of the autonomy and independence of judicial institutions, but first it is necessary to consider what form the existing protection takes and how effective it is. It can be clearly argued that the reforms are moving in the right direction to ensure greater protection for judicial independence, but recognition of the notion of institutional autonomy within the United Kingdom can further that desired level of protection. The statutory declaration of the protection of judicial independence in section 3 of the CRA 2005 is one of the first times that the principle of judicial independence has received statutory recognition; an important development but one which can still further the case for institutional autonomy. While its inclusion in statute is significant for the protection of judicial independence, little guidance is offered, as previously discussed, as to what form that protection would take.

The structural changes made to the office of Lord Chancellor as a result of the CRA 2005 were major: by altering the role of Lord Chancellor to no longer cover all three branches of government, there was immediately an improvement on the separation of powers that previously existed. The constant, however, was the duty to uphold and protect the independence of the judiciary. At the time, it was not clear how the reformed role of the Lord Chancellor might ensure the protection of judicial independence but one aim was to reduce any unjustified response from Government on judicial decision-making. As was mentioned by the House of Lords Select Committee on Constitution, while the CRA 2005, and the Human Rights Act 1998, had created a more separate identity for the judicial branch of government, this would no doubt lead to tensions between the two branches of government.¹⁴⁰ Professor Kate Maleson summarised the possible explanation for these increased tensions and how they came to fruition: due to the Human Rights Act 1998 and the CRA 2005, judges are required to, "...police constitutional boundaries and determine sensitive human rights issues" that would, previously, have been unimaginable.¹⁴¹ Charles Clarke, former Home Secretary acknowledge that the Human Rights Act 2005 has, 'shifted the balance of power toward the judiciary' and as a result, discussions needed to occur to re-evaluate the constitutional arrangements in place at that time.¹⁴² These developments document the current trend toward restructuring and reshaping institutional arrangements within the constitution and the move toward greater institutional autonomy for the final court of appeal in the UK. As is suggested, one main impact of institutional change was an increased tension, but it was felt by some that

¹⁴⁰ House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07.

¹⁴¹ House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07 Appendix 3: A paper by Professor Kate Maleson, 'The effect of the Constitutional Reform Act 2005 on the relationship between the judiciary, the executive and Parliament' A recent article by Professor Maleson for Public Law titled 'The Evolving Role of the Supreme Court' discusses these tensions in detail and the reasons for them. This will be addressed further in Chapter 4.

¹⁴² House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07, at page 15, para. 32. This paragraph also recognises other academic acknowledgement of the shift in power and the increasing role of the judiciary.

this was not a problem and just an expected part of the working of government. Lord Bingham discussed the fact that while these tensions exist, and can be heightened at times of a threat to national security, they are, 'inevitable, and in [his] view entirely proper'.¹⁴³ The judicial consensus that tension is an inevitable, yet proper, by-product of any constitutional relationship did not match to the varying opinions of government and the press: Charles Clarke, in the same report, states that the tensions had highlighted matters which should be resolved in order for those relationships to be of benefit to the constitution. One newspaper editor documented 'anxieties on the judicial side'- seemingly contrary to general judicial opinion on the matter at the time.¹⁴⁴ It now becomes pertinent to note that the recognition of the notion of institutional autonomy should not result in a lack of prevention of any sort of interaction between the three branches of government, but that what interaction exists should, to use the words of Lord Bingham, be 'entirely proper'.¹⁴⁵

At the time of the enactment of the CRA 2005, some observers were unsure how judicial independence should be protected under section 3. Lord Lloyd offered two aspects to the defence as he viewed it. The first was for the Lord Chancellor to raise concerns with the Cabinet if there is an attempt to restrict the jurisdiction of the courts. While the Lord Chancellor, as a result of the changes in legislation, is no longer the Head of the Judiciary, '...it is essential that he should remain a jealous guardian of judicial independence in Cabinet.'¹⁴⁶ The second aspect of defending judicial independence offered by Lord Lloyd is related to attacks made on individual judges by the government or external sources. This is, thankfully, not a common occurrence but one which has arisen and will, no doubt, continue to

¹⁴³ Lord Bingham of Cornhill, "The Rule of Law" (2007) CLJ 67.

¹⁴⁴ Paul Dacre, editor of the Daily Mail giving information as a witness to the Select Committee on the Constitution's 6th report- House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07, at page 16, para. 34.

¹⁴⁵ Lord Bingham of Cornhill, "The Rule of Law" (2007) CLJ 67.

¹⁴⁶ House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07 at page 17, para. 39.

do so; therefore a consideration of this element will be made - with specific and detailed reference to the Craig Sweeney case considered in the Select Committee on Constitution's sixth report. The case is documented as the first real test of how the new relationship between the Lord Chancellor and the judiciary is working and the report considers the existing tensions between government actors at the time.¹⁴⁷ Further to this second defence of judicial independence, in recent months it has become clear that the Lord Chancellor's relationship with government ministers can even now impact on the perceived independence of the judiciary.

Lord Falconer, in his role as Lord Chancellor in 2007, stated his duty under section 3 was to speak out privately, but publicly if necessary, against any attacks in order to defend the independence of the judiciary.¹⁴⁸ On the face of it, this obligation appears to provide a reasonable degree of protection for judicial independence and uses the Lord Chancellor's position within the Cabinet to the advantage of the judiciary in giving a necessary stage for debate of any concerns raised. There have been a few occasions where the Lord Chancellor has been forced to speak privately to ministers regarding public attacks on the judiciary but the case of note relates to an occasion when the Lord Chancellor had to speak out publicly in order to defend the judiciary: the Craig Sweeney case.¹⁴⁹ The events in question surrounded the government response, from then Home Secretary the Rt Hon John Reid MP, in relation to

¹⁴⁷ AW Bradley, 'Relations between Executive, Judiciary and Parliament: an evolving saga?' (2008) PL 470, 489 cites the case, and the response from government is heavily criticised in the Select Committee of the Constitution, 6th Report of Session 2006/07.

¹⁴⁸ House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07 at page 18, para. 42. Lord Falconer provided evidence as a witness for this report in which he discussed the obligations he had in his role as Lord Chancellor.

¹⁴⁹ The Sixth Report of the House of Lords Select Committee documents two examples of attacks on the judiciary made within the public domain by David Blunkett MP and Michael Howard MP in 2003 and 1995 respectively. See House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07 at page 18, para. 44.

the sentence passed for convicted paedophile Craig Sweeney. Craig Sweeney was sentenced to life imprisonment after kidnapping and attacking a three-year old girl from her home in Cardiff on 3 January 2006. The judge, Cardiff Recorder John Griffiths QC, sentenced Sweeney to the minimum tariff of five years and 108 days and stated at the time that Sweeney could be eligible for early release but felt that this would be “unlikely”.¹⁵⁰ The sentence was immediately attacked by the victim’s family as an insult; they felt that the criminal justice system had failed their daughter in adequately sentencing her attacker.¹⁵¹ The significance of this case lies in the differing response of various actors involved in the short time after the decision was given.

On the day of the press reporting on the sentence, the then Home Secretary, John Reid described the sentencing as ‘unduly lenient’; making an overt, direct public criticism of the judiciary, more specifically the decision of an individual judge. The Home Office, supporting Dr Reid’s comments, stated that while the life sentence is the ‘ultimate sanction a court can make’ it was felt that the minimum tariff did not reflect the seriousness of the crime.¹⁵² Not only did the Home Secretary comment on the length of the sentence, he also requested that the Lord Chancellor refer the decision for consideration by the Court of Appeal.¹⁵³ For a government minister to take such a stance against the judiciary and become so involved in the functions of the judiciary seems to exemplify the reasons why it is necessary to protect the independence and autonomy of judicial institutions. The decision by Reid to talk so publicly against the judiciary does not adhere to Lord Lloyd’s understanding of the need to protect the

¹⁵⁰ The Guardian, ‘Reid seeks review of paedophile sentence’. The Guardian, London. Monday 12 June 2006 <<http://www.guardian.co.uk/uk/2006/jun/12/ukcrime.immigrationpolicy>> accessed 10 March 2011.

¹⁵¹ BBC, ‘Child sex snatch jailing insult’ 12 June 2006 <<http://news.bbc.co.uk/1/hi/wales/5069656.stm>> accessed 09 March 2011.

¹⁵² *Ibid.*, at 18.

¹⁵³ Ben Russell, ‘Reid seeks review of paedophile’s sentence as girl’s family hits out’ The Independent, 13 June 2006 <<http://www.independent.co.uk/news/uk/politics/reid-seeks-review-of-paedophiles-sentence-as-girls-family-hit-out-482157.html>> accessed 10 April 2011.

judiciary from external attacks. Although Reid is external to the judiciary, he is still expected to uphold his duty under section 3 in his role as a government minister. Arguably, the lack of clarity for how this is done can be remedied in this very instance by demonstrating behaviour which is not considered acceptable under section 3. However, the Chief Crown Prosecutor for South Wales also stated an intention to refer the case to the Attorney-General and request an appeal. In accordance with section 3 of the CRA 2005, this type of behaviour from another member of the judiciary is wholly unacceptable when striving to create greater protection of judicial independence. As Lord Falconer acknowledged, there are two options for raising concerns either to speak to the individual privately, or publicly. The decision by both Reid and the Chief Crown Prosecutor to speak publicly against the decision shows a clear disregard for their duties under section 3, and for the need to provide further clarity for ways to protect judicial independence.

The other important reason to consider the Sweeney case is the speed at which the responses were made to the decision. After the decision on Monday 12 June 2006, Dr Reid, the press and some individual judges passed comment on the sentence on Tuesday 13 June; with the general consensus that it was too lenient. Thus, the sentencing process and the judges themselves came under considerable attack.¹⁵⁴ It was not until Thursday 15 June 2006, three days after the sentence was passed, that the Lord Chancellor commented publicly on the reaction to the decision. On BBC's Question Time, he stated that 'we' should be careful not to criticise the judges where it is the system which is at fault.¹⁵⁵ He condemned the fact that much of the criticism had occurred internally, coming from other judges. Vera Baird QC, who at the

¹⁵⁴ See the House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07 at page 19 'The Craig Sweeney case: sequence of events table in which all response is documented fully.

¹⁵⁵ See the House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07 at page 19 'The Craig Sweeney case: sequence of events table in which all response is documented fully. The Lord Chancellor's reaction is documented at Thursday 15 June 2006.

time was the Parliamentary Under-Secretary of State for the Department of Constitutional Affairs, commented when appearing on BBC's Any Questions? that the judge had, 'got the [sentencing] formula wrong'.¹⁵⁶ However, the Lord Chancellor was also careful to maintain that John Reid did not attack the judge, but the system itself. The Lord Chancellor's actions at this time are an interesting example of divided responsibility between maintaining harmonious relationships with government ministers and ensuring protection of judicial independence. It is questionable whether his actions did succeed in protecting the judiciary – placing blame on the system, while avoiding attacking an individual judge, does arguably still attack judicial process, something which does not aid judicial independence and the overall integrity of the judicial system.

The general reaction to the Sweeney decision, and how the Lord Chancellor dealt with the response, was that it was an insufficient protection for judicial independence.¹⁵⁷ Although the Sweeney case is used to demonstrate an attack made by a Government minister on a member of the judiciary, it still has some useful implications for the notion of institutional autonomy in relation to internal and external threats. The importance of reducing any direct criticism of judicial work by government is another reason to embrace the notion of institutional autonomy. External interference may come from the executive or legislative branches of government, but could include the media and the impact that focus can have on a judicial institution. The recognition of the requirement of limits to the unnecessary interference can serve to further extend and support the statutory rule in Section 3 of the CRA 2005. An established practice of recognising the degree of institutional autonomy would enable a degree of prevention of such interference; offering a basis from which to challenge whatever

¹⁵⁶ *Ibid.*, Vera Baird's reaction is mentioned at Friday 16 June 2006.

¹⁵⁷ Frances Gibb, Legal Editor of *The Times* and Joshua Rozenburg, Legal Editor of *The Daily Telegraph* both felt that the judicial reaction did not occur quickly enough and that the Lord Chancellor should have provided comment and defence of the judicial decision immediately.

behaviour occurs. If it is acknowledged that an institution, be it judicial or otherwise, requires a reduction in interference from any other source then a strategy for that reduction can be made. In the case of a court, if the interference were coming from the media, for example, then it could be stated that this was affecting the level of institutional autonomy and, by proxy, affecting the independence of the institution. Institutional autonomy would be in place to support an argument for greater independence and protection from threats to that independence by having the means to assess the level of autonomy and publish it unambiguously. The Select Committee's sixth report suggests that changes need to be made by the Prime Minister to the Ministerial Code to ensure that constitutional conventions are recognised and adhered to in order to regulate interactions between the branches of government.¹⁵⁸ The Sweeney case demonstrated the first proper test of the changes of the relationship between the executive and the judiciary and suggests that although clarification of the separation of powers had begun to take place, it was not yet sufficient to uphold the element of the rule of requiring an independent judiciary. The concept of power in the doctrine is important, and each separate branch or institution must be fully aware of its powers and how they work in line with other institutions. It was clear that further to this legislative separation, greater awareness of institutional separation, and how it can be achieved, was needed.¹⁵⁹ This institutional separation of the most senior judges, the Law Lords, came about following the enactment of Part 3 of the CRA 2005 and the creation of the new UKSC.

¹⁵⁸ House of Lords Select Committee on Constitution, *Sixth Report*, Session 2006-07 at page 19. Para. 51 and 52.

¹⁵⁹ Institutional separation of branches within government would include monitoring the relationships between actors, i.e. government ministers and judges or the Lord Chancellor and the judiciary.

The development of legislative provision for institutional autonomy

The business of the Supreme Court began on 1 October 2009, realising an institutional separation of the Law Lords from the House of Lords. The impact this new separation might have on the constitution and judicial independence was debated heavily beforehand. However, there was still some degree of trepidation when waiting to see what it would really mean to have a Supreme Court: institutionally separate from Government. Part 3 of the CRA 2005 provides the legislative provision for the Court's creation but prior to an analysis of those provisions, it is important to consider the development of proposals for the Supreme Court and whether the intended objectives are aligned with the realised situation and business of the Court.

Following the announcement of major changes to the machinery of government by the Blair government in June 2003 in a press release, there was call for a clear outline of the proposals so that they may be subjected to thorough scrutiny, both within Parliament and by consultation with the judiciary. On 26 January 2004, the Government announced the outcome of the Lord Chancellor and Lord Chief Justices' negotiations in relation to the transfer of functions from the Lord Chancellor to the judiciary and the Lord Chief Justice. This outcome is known as the 'Concordat' and is felt by some to have become a constitutional convention that guides practice of government.¹⁶⁰ The Concordat pre-empted the Constitutional Reform Bill's passage through Parliament and explains that the Lord Chief Justice and the Lord Chancellor (the Secretary of State, a Minister responsible for judiciary-related functions) should have their responsibilities set out by statute, 'so as to provide clarity and transparency

¹⁶⁰ The House of Commons Constitutional Affairs Committee, *Third Report*, Session 2004-05 at para. 7 states: 'we agree: many of the principles set out in the Concordat are reflected in the [Constitutional Reform] Bill. Further recognition, even entrenchment, is unnecessary. The Concordat will remain a document of constitutional importance.'

in [the] relationship.’¹⁶¹ The Concordat sets out the need for statute to ensure that the new rearrangements can uphold judicial independence and that all Government ministers should look to ensure this is protected. At the time, the office of Lord Chancellor was transferred to the Secretary of State for the newly created Department for Constitutional Affairs. The Concordat discussed arrangements for the judiciary as a whole, and did not make detailed reference to the Supreme Court. However, there is an important section on the provision of resources. It states how, as set out in Part 1 of the Courts Act 2003, the Secretary of State should ensure that there are sufficient resources to allow the courts to carry out their business as planned. The resources in question relate to financial, material and human resources.¹⁶² Such provision is in line with the notion of institutional autonomy and suggests an intention to ensure that judicial institutions are able to function with a sufficient degree of independence; therefore upholding the rule of law. In addition to this provision, there is the further proposal that the arrangements should allow the judiciary to be involved in strategic planning of resources and budgetary bids.

The Lord Chancellor, and Secretary of State for Constitutional Affairs, Lord Falconer, was clear during the passage of the Constitutional Reform Bill through Parliament in 2004 that the Supreme Court should be ‘administered as a distinct constitutional entity’ and also enjoy financial independence.¹⁶³ The impression given at this time was for a court whose links to any minister would merely be as a conduit for information, not as a provider of finance or resources. Part 2 of the Constitutional Reform Bill outlined provision for the new Supreme Court but was, however, somewhat stark in terms of aiding in the interpretation of sections.

¹⁶¹ House of Lords, Constitutional Reform Bill Committee, *First Report*, Session 2003-04 at Appendix 6 ‘The Lord Chancellor’s Judiciary-Related functions: Proposals (the “concordat”)', para. 3.

¹⁶² *Ibid.*, at para. 19.

¹⁶³ HL Hansard, 8 March 2004, at column 982.

House of Lords debates on the Bill during its passage provide a much more worthwhile set of information on the intentions of Government. Lord Falconer, in a House of Lords debate on 8 March 2004 stated that the Constitutional Reform Bill ‘...seeks to make our constitution more transparent and logical by creating at the apex of the judicial systems a Supreme Court which is visibly independent of the legislature’: a clear statement of the importance of autonomy and independence.¹⁶⁴ An interesting, and important, point for discussion is the fact that Lord Falconer set out that the Supreme Court would not be a part of Her Majesty’s Court Service but instead provide a small court service of its own. Lord Falconer states that while Minister, the Secretary of State for Constitutional Affairs (now Justice Secretary), must ensure that there are sufficient resources for the Court to carry out its business the Supreme Court would not be a Part of the Court System. It would, instead, ‘...form a separate entity administered for the benefit of all constituent parts of the UK.’¹⁶⁵ This clearly demonstrates a need for institutional separation, both physical in a new building away from Parliament, but also a functional separation of the duties and role of the court. The legally separate institution also provides the final court of appeal for Scotland and Northern Ireland and it is important to note that the Supreme Court ‘...falls outside the remit of the Lord Chief Justice’.¹⁶⁶ At this point, there are no significant changes or additions to those outlined by the Concordat in early 2004.

The sections of the CRA which relate to the Supreme Court have varying implications for the notion of institutional autonomy. In the enacted statute, the Supreme Court provisions fall under Part 3, not Part 2 as in the Bill. Section 23 makes provision for the creation of a Supreme Court and the twelve justices to be appointed: outlining also the appointment of a

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, at column 983.

¹⁶⁶ Judiciary of England and Wales, ‘The Supreme Court’ 2011 <<http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/the-supreme-court>>

President and Deputy President of the Court.¹⁶⁷ In relation to the provision of resources discussed before the Act's enactment, it was suggested that the finance for the Court would come straight from the Treasury and be paid out of the Consolidated Fund- thus removing, or minimising, Government involvement in the process. Following estimates formed by the House of Commons, an annual amount of funding would be handed to the Supreme Court and the Chief Executive would work with the President to decide how that money is spend; seemingly a very positive intention toward granting institutional autonomy, specifically in relation to budgetary freedom. The majority of the Constitutional Reform Bill Committee felt that the Supreme Court should have, '...greater financial and administrative autonomy' and be established, 'according to the model of a non-ministerial department.'¹⁶⁸ Therefore, as funding would go straight from the Treasury to the Court, there could be little need for ministerial involvement in the funding process. Section 34(5) in relation to judicial Salaries and Allowances, states that 'Salaries payable under this section are to be charged on and paid out of the Consolidated Fund of the United Kingdom.'¹⁶⁹ This provision suggests an adherence to the initial proposals; however, there is no real mention of the procedure for budgeting and the provision of finance for the Court's administration. Section 52 'Fees' states that the Lord Chancellor should prescribe any fees that arise in a matter dealt with by the Supreme Court. The explanatory notes of the Act state that, in line with the duty of the Lord Chancellor in section 52, subsection (3), the power to prescribe fees must be used with regard for the principle that access to the courts should not be denied. This appears to lack clarity in terms of what is meant by the term 'fees'. If it is expenditure, then this should be covered by an already-decided budget. The Act does not provide guidance for the budgetary process of the Supreme Court. This lack of clarity and provision may, or may not, be deliberate however,

¹⁶⁷ Constitutional Reform Act 2005, Part 3, section 23(1-7).

¹⁶⁸ House of Lords, Constitutional Reform Bill Committee, *First Report*, Session 2003-04, at para 268.

¹⁶⁹ Constitutional Reform Act 2005, Part 3.

it has recently become apparent that the area is one which calls for guidance to be offered, as will be seen below.

The development of proposals from the initial announcements for constitutional reform in 2003 to the enactment of the Constitutional Reform Act in 2005; culminating in the creation of the Supreme Court in 2009 have shown an interesting progression of thought in terms of allowing a degree of institutional autonomy for the judiciary and the highest court of the UK. The proposals for independence and the realised degree may be somewhat different and a specific analysis of each requirement of institutional autonomy is needed to assess the institutional autonomy of the Supreme Court.

The UKSC: an analysis of its institutional autonomy

As outlined by Chapter 2, there are three main requirements for institutional autonomy: budgetary freedom, administrative freedom and the lack of unnecessary interference. Each of these requirements can guide the analysis of how much autonomy and independence exists for the Supreme Court and whether or not this is sufficient to satisfy section 3 of the CRA 2005 and ultimately, the rule of law.

Budgetary freedom

There are three main aspects to the understanding of budgetary freedom: the provision of finance; the responsibility for budgeting; and the allocation of resources. It is important to consider each of these elements separately when analysing the degree of institutional autonomy that exists for a given institution. In relation to the Supreme Court, it is possible to

look at the intended legislative creation of budgetary freedom but also to look into more detailed reports on budgets and progress from its foundation to assess the realised level of freedom. Firstly, the responsibility for budgeting and the allocation of resources will be considered, followed by a discussion surrounding the provision. Following the intentions of the Labour Government for constitutional reform and to ensure budgetary freedom, the Supreme Court Chief Executive Jenny Rowe explained that the Court should have its own Estimate and the annual granting of funds should not come via the Ministry of Justice.¹⁷⁰ Rowe outlined how the Court would receive a three-year allocation of funds as a result of the Government Spending Review. The current provision of finance for the Supreme Court is an area of some unrest for members of the judiciary and proponents of an institutionally autonomous Supreme Court.

The responsibility for budgeting in the Supreme Court falls to the President and the Chief Executive.¹⁷¹ The Chief Executive negotiates a bid with the President that is currently put forward for approval by the Lord Chancellor and the Ministry of Justice. While this may sound relatively satisfactory in terms of the Supreme Court having autonomy to decide what finance is required and place a bid, the process of having said finance provided is altogether much more complex and ultimately, does not promote autonomy. Again, this situation does not reflect that proposed by Lord Falconer, that the Supreme Court could decide, based on a number of factors, on a budget and that bid would be scrutinised by the Treasury. As will be seen, it is reluctance on the part of the Treasury that, in part, is responsible for the much lower degree of autonomy in relation to budgeting. Once the finance has been given to the Court, the responsibility falls to the President and Chief Executive as to how and where the money is

¹⁷⁰ Jenny Rowe, *'Speech on the status of the Supreme Court'*, 17 November 2008 at the UKSC conference, Law Society, London.

¹⁷¹ Section 51, Constitutional Reform Act 2005. A detailed analysis of the role and responsibilities of the Chief Executive will occur in the following section on administrative freedom.

spent. The allocation of resources, provided through funding, is left to the decision of the Supreme Court and this would appear to be a positive step to allowing a greater level of autonomous decision-making. However, under Section 49(2) of the CRA 2005, all such decisions relating to officers and staff must still be agreed with the Lord Chancellor.

The provision of finance to the Supreme Court is an area that has recently received a great deal of criticism from senior members of the judiciary. In a speech at the UCL's Constitution Unit, Lord Phillips, the former President of the Supreme Court, outlined a number of concerns relating to the budgetary freedom of the Supreme Court. One of the main aims surrounding the creation of a new supreme court was to achieve institutional independence of the judiciary but also to demonstrate a new degree of financial independence.¹⁷² It can be seen that a higher degree of financial independence can lead to securing autonomy, through a reduction of control from internal or external sources in terms of deciding how much funding should be allocated to the institution in question. Lord Falconer set out proposals for the Supreme Court to place a bid for finance directly to the Treasury and after scrutiny, the budget would be sent directly to the Supreme Court from the Consolidated Fund; a proposal that, on the face of it, seems relatively straightforward and allows for a good degree of autonomy. Sadly, the intended degree of financial independence and the actual degree are somewhat different. This was an area for much debate during the Bill's passage through Parliament as some felt that the Court should not have such a degree of budgetary freedom, while others supported the notion.¹⁷³ The initial point of interest when discussing the provision of finance requirement is the Middlesex Guildhall itself and the process of obtaining the building in which the Supreme Court is now housed. The acquisition of the building from construction group, Kier, was not

¹⁷² House of Lords, Constitutional Reform Bill Committee, *First Report*, Session 2003-04 at Appendix 6 'The Lord Chancellor's Judiciary-Related functions: Proposals (the "concordat")', para. 19.

¹⁷³ See earlier comment from Constitutional Reform Bill Committee: House of Lords, Constitutional Reform Bill Committee, *First Report*, Session 2003-04, at para 268.

made by the Government or by Her Majesty's Courts Service; the thirty-year leasehold was purchased by Prupim, a part of Prudential's asset management branch, for somewhere in the region of £1.8 million per annum.¹⁷⁴ While it is ambitious to assume that there is funding, especially in a time of little or no economic growth, for a new institution to purchase such a building outright, the link to an external body who retains ultimate control over the institution in terms of the building itself must reduce, to some degree, the level of budgetary freedom. It is a potential restriction or limiting factor in the process of deciding a budget bid and a consideration that, to a variable degree, could affect the institutional autonomy of the Supreme Court. The variable degree occurs depending on how much or little interference the body holding ownership which to make in the business of the institution, in this case Prupim and the Supreme Court. As discussed in the Commons on 8 February 2007, 'the capital construction costs involved in the refurbishment of Middlesex Guildhall will be met by regular charges (rent) over a 30-year period as part of the lease and leaseback arrangement [they] are using'.¹⁷⁵

Further to the acquisition and ownership of the building, and the subsequent associated costs such as rental expenditure, there is also the matter of the budgeting process. There has been a great degree of friction from the Treasury in deciding how finance will be provided for the Supreme Court; with the Treasury rejecting outright the proposal of 'a completely free-standing body' that deals with them directly.¹⁷⁶ The Treasury's suggestion that the Supreme Court should recover full running costs from the cost of court fees was rejected, with senior Justices feeling it would result in a denial of access to justice from costs being unattainable

¹⁷⁴ Graham Ruddick, "Prupim buys new UK Supreme Court" The Telegraph, London. October 2 2009 <<http://www.telegraph.co.uk/finance/newsbysector/constructionandproperty/6255821/Prupim-buys-new-UK-Supreme-Court.html>> accessed 12 February 2011.

¹⁷⁵ Hansard HC, Vol 456, Col. 1170W (8 Feb 2007).

¹⁷⁶ Lord Phillips, *Lecture on Judicial Independence*, University College London, 8 February 2011, at page 13. Available at: <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/launch>

for many of those wishing to appeal. The current system of funding is complex and does not encourage a great deal of autonomy in this area. Lord Falconer's proposal for the budget to be provided from the Consolidated Fund was derived from a consideration of the provision of finance for the Appellate Committee within the House of Lords prior to the Supreme Court's creation. The Law Lords, in their position in the Upper House, had a 'relatively direct tap into government coffers' using the process of a committee to decide the budget and Parliament to provide finance from the Consolidated Fund; a stark contrast to the new system in practice at present.¹⁷⁷ The Supreme Court currently receives contribution-based finance: an amount of funding is taken from civil court fees across England and Wales, but also Scotland and Northern Ireland (as the Supreme Court has jurisdiction there); "wider market initiatives" in the form of finance from merchandise and rental of facilities to others; and then the shortfall is provided by the Treasury. Regardless of the need for contribution, the civil courts have so far not met the required amount, and the Lord Chancellor has had to make up the remaining finance required. Lord Phillips feels that this is unsatisfactory in ensuring any degree of financial independence- such a heavy reliance on contributions from other courts, and in the current case, Government by way of the Lord Chancellor, will inevitably subject the Court to the negotiations with Government and other bodies for finance that the CRA 2005 had hoped to avoid.¹⁷⁸ It would seem that in the process of ensuring judicial independence, through a clearer physical operation of the separation of powers by removing the Law Lords from the House of Lords, has, in fact, reduced their financial independence and therefore the institutional autonomy. The autonomy that existed previously may not have been transparent- the position of the Appellate Committee in Parliament is difficult to justify if the separation of

¹⁷⁷ The Economist, 'The Supreme Court: Cheap at the price' September 30 2010, The Economist, London. <<http://www.economist.com/node/17151231>> accessed 10 March 2011.

¹⁷⁸ Lord Phillips, *Lecture on Judicial Independence*, University College London, 8 February 2011, at page 15. Available at: <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/launch>

powers is to be employed- but in the case of budgetary freedom, the degree was greater before the removal of the Appellate Committee to the Supreme Court. This outcome is not the product of deliberate design, but rather a more informal product from the evolution of the institution. There is a sense of irony in the reality of the current degree of budgetary freedom since it seems to contravene the intention of creating greater independence.

The most recent budget for 2010/11 has been subject to constraints placed upon it by the Lord Chancellor. Due to spending cuts throughout the public sector, it is reasonable to assume that all institutions should endeavour to make savings or cuts where it is viable to do so. However, a letter from the Lord Chancellor to the then President of the Supreme Court, Lord Phillips, noted the possibility of the amalgamating the Supreme Court with the rest of the Courts Service in order to reduce costs. It may be that if the Supreme Court was merged with the Courts Service, it would mean that it would have less need to draw funding from other courts' fees. Again, Lord Phillips reacted stating that this was, 'totally unacceptable' both for institutional autonomy and for the principle of judicial independence.¹⁷⁹ If the Supreme Court were to be viewed as a part of the existing Courts Service, it would no longer be viewed as a separate constitutional entity and this would mean that the final court of appeal in the UK was not as clearly separate from other judicial and political institutions as intended by the CRA 2005. After Phillips' speech on 8 February, there was a swift reaction from Government and Ken Clarke MP, Justice Secretary and Lord Chancellor, insisted that lack of power to set, and receive, its own budget made the court was no different from any other body that he was responsible for. This may be true, but again it does not seem conducive to securing greater independence; as already outlined, greater independence is achieved by taking a multi-faceted approach of which budgetary freedom is fundamental. This seems an odd justification when

¹⁷⁹ *Ibid.*, at page 16.

the initial proposals had promised the Supreme Court a good degree of budgetary freedom before its creation, however this does demonstrate the influence of changing government and changing government priorities. There are other financial links to Government which are currently affecting the degree of institutional autonomy and budgetary freedom: the Supreme Court's finance system. Presently, the Ministry of Justice's finance contractor provides the Supreme Court's finance system but the Supreme Court's Director of Finance, Olufemi Oguntunde, has recently put forward a proposal relating to the current finance systems used in the Court.¹⁸⁰ Mr Oguntunde is suggesting that the UKSC should purchase, and administer, its own finance system both in relation to budgeting and also in relation to payment and receipt of fees. In terms of institutional autonomy, this would be a beneficial removal of another link to a Government department and one that could add to the degree of institutional autonomy secured. Both of these instances demonstrate close links and ties to the Ministry of Justice, something that the previous Government was adamant should not occur.

If the Supreme Court were to be considered in the same process as a government department in the provision of courts services with Her Majesty's Court Service, as implied by the Justice Secretary, it would reduce any degree of autonomy to a minimum since it would be subjected to the same constraints as all other courts. The reasoning behind an autonomous top Court was to ensure it was seen to independent from Government and able to operate with the necessary freedoms to secure that independence. Although the proposals and Lord Phillips' suggestions for the budgetary freedom of the Supreme Court would achieve a very high degree, thus satisfying that element of institutional autonomy, there must be a level of practicability in the processes adopted. While it may be useful for the process to echo the previous system in the House of Lords and work directly between the Court and the Treasury,

¹⁸⁰ United Kingdom Supreme Court Management Board, *Minutes of meeting held 24 January 2011* <http://www.supremecourt.gov.uk/docs/mb_mins_110124.pdf> at 6.4

there are reasons why this has not happened. The notion of greater institutional autonomy can provide the basis for a critical evaluation of the current degree and may offer remedies should it be wholly unsatisfactory. However, in the event that the process is working and providing adequate finance, albeit subject to wide-ranging cuts to funding, it must be felt to some degree that the current budgetary freedom must be sufficient. The above outlines an undeniable contrast between the proposed provision of finance by Lord Falconer, before the CRA 2005 was drafted, and the current system of subsidised funding, by way of contribution, suggests that the government may not as committed to creating a greater degree budgetary freedom as was first thought. This could be due to a change in Government, but it may also be a response to the change in financial climate and until the UK regains its economic stability, it is perhaps unreasonable to assume that independent institutions can afford to be wholly responsible for their own finance. Recognition of the need for budgetary freedom as part of the notion of institutional autonomy could drive the strategic development in this area and aid a more fluid budgetary process once the finance is available and such stringent rehabilitation of the economy is replaced by a system of effective maintenance.

Administrative freedom

The second facet of the notion of institutional autonomy is that of administrative freedom. While it can be considered individually, there is often a natural overlap with the budgetary freedom requirement. This is due to the two elements of 'normal' functioning institutions- finance and administration- being inextricably linked. In the case of the Supreme Court, the head of the institution is the Chief Executive; a role put in place by section 48(1) of the CRA 2005. The Executive team, which operates alongside the twelve Justices, ensures effective

day-to-day running of the Court but is also involved in budgeting and in developing the institution's independence. The twelve justices continue to hear cases and make decisions based on precedent; the President of the Court, liaises closely with the Executive team to ensure that resources are provided and staffing is adequate.

The administrative freedom of the Court does not only relate to the overall administration, but also to the accountability of the Chief Executive. The Chief Executive, by way of section 48(3)(a-b) of the CRA 2005, may be asked to carry out functions in relation to appointments and staffing of the Court and also non-judicial functions. Section 48(4) of the Act provides that, '[t]he chief executive must carry out his functions...in accordance with any directions given by the President of the Court' and this could be an important provision for the notion of institutional autonomy in that it requires the President of the Supreme Court to retain ultimate direction as to the administration of his Court.¹⁸¹ There is a conflict, however, in the understanding of how the Court would be administered and the reality of the accountability of both the President of the Court and the Chief Executive. The Chief Executive, Jenny Rowe, is a civil servant appointed as a lay member of the Court's Executive team. The then Justice Secretary, Ken Clarke, pointed out that this accountability to government would be the same for a chief executive of a government quango.¹⁸² Lord Phillips' in his reaction to the Court's current procedure stated that the staff of the Court needed to be accountable to the Chief Executive who, in turn, needed to be accountable to the President of the Court. This insular system of accountability he felt would ensure the autonomy and independence of the Court through its administration. However, the Chief Executive's connections to government as a civil servant would suggest that the independence of the Court could be put in jeopardy. This

¹⁸¹ Constitutional Reform Act 2005.

¹⁸² Hélène Mulholland, 'Kenneth Clarke rejects claim of threat to supreme court independence' February 9 2011. The Guardian, London. < <http://www.guardian.co.uk/politics/2011/feb/09/kenneth-clarke-rejects-claim-supreme-court-independence> > accessed 12 March 2011.

is unlikely as the Chief Executive receives her functions from the President, not the government and the process of providing annual reports merely aids in the argument for creating a transparent justice system. It is useful to be aware of the accountability arrangements, but during the first year and a half of the Court's business there has been little concern over the decisions made by the Chief Executive and certainly no accusations of loyalty to government. It is important to remember that the overarching aim of creating the new UKSC was to 'clarify the relationship between the Judiciary, Government and Parliament' not to remove all connection between the three branches.¹⁸³ There is an argument against Phillips' reaction that the Chief Executive should ultimately be responsible to the Court as a whole rather than specifically to the President. If there were to be a clash of opinion or a difference in motivation or outlook between the President and the Chief Executive, then this is where informal rules may need to develop. It is not possible to legislate for every eventuality or predict how different institutional actors will interact with each other. If the relationship between the President and the Chief Executive were to be problematic, this is where convention may develop in order to govern their interactions. This would reflect the expected behaviour of those actors and should ultimately be for the benefit of the Court as a whole. There is the possibility that a future President may use the statutory accountability of the Chief Executive to enforce procedures which may not be in the wider interests of the Court.

The other aspect of the administrative freedom requirement is the freedom that the institution has in terms of deciding how and where the resources are allocated. The amount and type of resources that the Court has available is linked, inevitably, to the budgetary process and the amount of finance received. Feedback from the former President of the Supreme Court, Lord

¹⁸³ Supreme Court of the United Kingdom, *Business Plan 2010-11*. Page 4, para. 2. Available at: <http://www.supremecourt.gov.uk/docs/bp_1011.pdf> Accessed 06/01/2011.

Phillips, stated that the Chief Executive, Jenny Rowe, made the transition from the House of Lords to the Middlesex Guildhall as seamless as possible.¹⁸⁴ Such comments would suggest the Chief Executive had a good level of freedom and control in determining how early resources were used to set-up the Court and to begin business but also adhered, as would be expected, to the statutory duty under section 51.¹⁸⁵

Further to this freedom for the Chief Executive to fulfil her functions to allocate resources in the creation of the Court and in relation to budget, is the freedom to decide on more specific aspects of administration. In an interview with the editors of the UKSC Blog, Baroness Hale commented on, ‘...one or two branding things’ which directly link to the notion of administrative freedom and have a negative impact on the level of administrative freedom enjoyed by the UKSC.¹⁸⁶ Firstly, in relation to communications systems, Baroness Hale notes how the Supreme Court joined the government’s secure intranet which in itself raises some concerns for autonomy. However, in addition to using this government intranet, there is a notice at the bottom of messages which states that emails will be recorded and monitored by the Ministry of Justice. As Baroness Hale states, it is not, ‘...acceptable for emails sent from or within any court to suggest that its email traffic is monitored by government.’¹⁸⁷ It is fairly clear to see how this affects institutional autonomy by demonstrating clear and current links to government, but also in terms of judicial independence for securing transparency. The other branding issue which Baroness Hale discusses in the interview relates to provision of catering services. Baroness Hale relates what she refers to as a ‘silly little story’ that demonstrates a

¹⁸⁴ Lord Phillips, *Lecture on Judicial Independence*, University College London, 8 February 2011, at page 17. Available at: <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/launch>

¹⁸⁵ Of the Constitutional Reform Act 2005, Part 3.

¹⁸⁶ Dan Tench and Laura Coogan, ‘Baroness Brenda Hale: “I often ask myself ‘why am I here?’”’ Guardian Legal Network, September 16 2010 < <http://www.guardian.co.uk/law/2010/sep/16/uk-supreme-court-judiciary> > accessed 24 August 2011.

¹⁸⁷ Dan Tench and Laura Coogan, ‘Baroness Brenda Hale: “I often ask myself ‘why am I here?’”’ Guardian Legal Network, September 16 2010 < <http://www.guardian.co.uk/law/2010/sep/16/uk-supreme-court-judiciary> > accessed 24 August 2011.

more significant issue of autonomy for the Court.¹⁸⁸ On requesting a bottle of water from the Supreme Court's café she was told, '...it was ministry policy that they couldn't sell bottled water because tap water was good enough.'¹⁸⁹ To achieve sufficient administrative freedom, the Supreme Court should have its own directive on catering arrangements and alike and not follow Ministry of Justice or government policy. While this may seem a very small and specific instance of the intrusion of government policy on the non-core functions of the Supreme Court, it has a significant impact on the level of institutional autonomy.

The above discussion demonstrates that the Supreme Court's administration is not flawless and is subject to some influential links to government. The accountability of the Chief Executive and the powers that she has to determine how resources are allocated would seem sufficient to achieve a good degree of administrative freedom. However, on closer inspection, there are some specific policy issues which mean that the Court does not have as much administrative freedom, thus negatively impacting the notion of institutional autonomy. A further reduction in administrative freedom could occur if the Court's administration is subjected to unwanted interference from government in relation to the allocation of resources or if there is a request for greater accountability by the Chief Executive to government itself.

Unnecessary interference

The notion of institutional autonomy does not suggest that the Court should not be subject to any interference but that any interference is useful or necessary. The earlier example of the *Sweeney* case is exactly the type of interference affecting judicial institutions that would be

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

deemed unnecessary by the notion of institutional autonomy.

The other element to this is the need to gain an understanding of any hierarchy of authority that exists surrounding the judicial institution in question. In relation to this, it is necessary to look at the type of interference coming from institutions higher than the Supreme Court. The hierarchy in question relates to the three main branches of government; as noted by Roger Masterman, '[u]nder a sovereign legislature, any division of power between the arms of government is therefore hierarchical, rather than as between co-equal branches.'¹⁹⁰ Some may consider this a naïve view of the current system of government: Alison Young stated the need for change when considering Parliamentary sovereignty as being legislative sovereignty only.¹⁹¹ Until there is formalisation of this change in approach, and while the current view is of a sovereign Parliament and a clear separation of powers, it is right to consider the Supreme Court to be part of hierarchy of authority with the Executive and Parliament. If Parliament passes legislation conferring new powers on the Supreme Court, or limiting current powers, then it will, in most cases, be accepted and adhered to.¹⁹² Parliament is above the Supreme Court, as a part of the judiciary, in terms of authority, whereas the Executive could be considered 'co-equal' with the judiciary, to use Masterman's term; this would support the need to ensure institutional autonomy from Government by way of an independent Supreme Court.¹⁹³ When assessing the institutional autonomy of the Supreme Court, it is useful to note that interference, by way of orders or legislation, from Parliament will not adversely affect the Court's autonomy. If there is interference from the Executive, or a governmental department such as the Ministry of Justice, then it could be questioned.

¹⁹⁰ Roger Masterman, 'The Form and Substance of the United Kingdom's Separation of Powers' *Speech at the British Politics Group conference*, 1 September 2010.

¹⁹¹ A.L. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, Oxford 2008).

¹⁹² In most cases, providing there is a successful passage through the House of Commons and House of Lords.

¹⁹³ *Ibid.*, at N^o 37.

The last element of unnecessary interference is the idea that there can be both internal and external interference. Firstly, external threats to the institutional autonomy of the Supreme Court relate mainly to the provision of finance. The current economic climate and Government drive for growth has meant that there have been significant cuts to public sector funding: a government figure states savings of between 25% and 40% in the spending review year of 2010/11.¹⁹⁴ This is a significant reduction in funding provision and suggests that the, already unsatisfactory, system of funding for the Supreme Court will be subjected to further constraints. It is unlikely that the Courts Service will be able to provide the estimated contribution and that the Supreme Court will be forced to request contribution from the Ministry of Justice. This, in turn, will be a lesser contribution if the Government cuts occur as expected. Such a reduction in funding has resulted in unnecessary external interference for the Supreme Court as it becomes ever more reliant on contribution.

The second type of interference, from internal sources, must also be assessed. Some external threats to institutional autonomy are expected as no business or institution is insular or should desire to be so. However, there is also the possibility of interference coming from internal sources. In this case, sources within the judiciary. The main cause of interference for the Supreme Court is the office of Lord Chancellor within the judiciary. As has been shown, throughout the CRA 2005 there are constant references to the Lord Chancellor and demonstrations of a reliance on the decisions of the Lord Chancellor when providing resources, funding, courthouse, staff and appointments. This level of involvement is significantly affecting the degree of institutional autonomy. At present, the need for approval

¹⁹⁴ Lord Phillips, *Lecture on Judicial Independence*, University College London, 8 February 2011, at page 15. Available at: <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/launch>

and involvement of the Lord Chancellor is not allowing for true independence of decision-making powers for the President and Chief Executive of the Supreme Court. While it is important to retain some process of checking the systems in place in areas such as appointments and resource funding, the Lord Chancellor should have minimal involvement and control over the Supreme Court's functions. Another possible source of internal interference for the Supreme Court could come from an unharmonious relationship between the President of the Court and the Chief Executive. This could be due to professional differences of opinion or may arise due to the President's legal objectives and the Chief Executive's administrative objectives and civil service connections.

An interesting point to consider is the rather enigmatic role of the Lord Chief Justice. The notion of institutional autonomy sets out two types of interference: those external to the judiciary and those which occur internally. Any potential interference from the Lord Chief Justice would, on the face of it, be classed as internal as he is a member of the judiciary. However, the Lord Chief Justice is not a member of the UKSC so in relation to any interference with the function of the Supreme Court, the Lord Chief Justice could be seen to be an external form of interference. A further consideration in relation to this role is when the Lord Chief Justice sits as an ad hoc judge in the UKSC; which would place him in an internal role. As stated in the previous chapter, as Head of the Judiciary, the Lord Chief Justice should share the common judicial objective of ensuring greater judicial independence and in theory would not act in a way which may jeopardise this.

An example of unnecessary interference affecting the Supreme Court came in response to Lord Phillips' speech in February 2011. The Law Gazette has commented that the Home

Office was unimpressed by the apparent attack on the Government from the judiciary and that there would be a greater reaction than Ken Clarke's appearance on Radio 4 the following morning.¹⁹⁵ In the House of Commons on the 16 February 2011, Secretary of State for the Home Department, Theresa May MP condemned the decision of the UKSC in April 2010 in relation to the sex offenders' register.¹⁹⁶ She stated that, 'the Government are disappointed and appalled by that ruling', arguing that 'it places the rights of sex offenders above the right of the public'.¹⁹⁷ Such an attack on a previous decision of the Court raises questions, the timing of such criticism occurring shortly after the President of the Court complains about unsatisfactory government involvement in the judicial business of the Supreme Court. The judgment in *R (F) (by his litigation friend F) v Secretary of State for the Home Department* stated that sections of the Sexual Offences Act 2003 were incompatible with Article 8 of the European Convention on Human Rights.¹⁹⁸ Part 2 of the Sexual Offences Act 2003 relates to Notification Requirements. Section 82 of the Sexual Offences Act 2003 requires that individuals who are sentenced to 30 months or longer in prison after an offence be subject to a notification requirement indefinitely to allow the justice system to be aware of their location, regardless of whether or not it is outside the jurisdiction. The notification requirements mean that the individual is placed on the commonly termed the 'sex offenders' register' for life. This, the Supreme Court Justices felt, could be a breach of Article 8 Convention right to privacy and a decision must be made which discusses proportionality of the offence and the sentence.

¹⁹⁵ The article refers to the Home Office looking 'for a stick to beat [Lord Phillips] with.' Joshua Rozenburg, 'Senior judge Lord Phillips learns the hard way after criticizing government' 22 February 2011 <<http://www.lawgazette.co.uk/opinion/joshua-rozenberg/bla>> accessed 10 March 2011.

¹⁹⁶ HC Hansard, 16 February 2011: column 959

¹⁹⁷ *Ibid.*

¹⁹⁸ [2010] UKSC 17.

The Human Rights Act 1998, section 4(4)(b) requires that should a court find legislation to be contrary to Convention rights that they may make a declaration of incompatibility. However, subsection (6)(a) of the same section states that a declaration of incompatibility, ‘does not affect the validity, continuing operation or enforcement of the provision’.¹⁹⁹ Former Home Secretary Jack Straw MP present in the House of Commons questioned the fact that the government need not take any notice of the declaration of incompatibility to which May replied that Parliament would have the final decision on the issue.²⁰⁰ May goes on to finish the debate by saying that the Conservative government will, ‘ensure that [they] take action to assert the rights of Parliament’; stating a frustration within government that decisions of Parliament are ‘increasingly being overturned by the Courts’.²⁰¹ Although the above example of the Supreme Court’s ruling relating to Article 8, and another judgment given by Strasbourg on votes for prisoners, could be used to show how the courts overturn Parliament decisions, as Joshua Rozenburg comments, ‘The trouble with the law is that it’s never quite what the government wants it to be.’²⁰²

As in the *Sweeney* case and the sixth report of the House of Lords Select Committee on Constitution, while the judges may still be subject to criticism by government, section 3 of the CRA 2005 requires all those involved in the administration of justice to uphold the independence of the judiciary. Therefore, in an instance such as this, it seems improper that a government minister should so publicly attack a decision of the Supreme Court. While May does goes on to concede that the Court was not suggesting that offenders automatically come off the register but that their cases should be subject to review, by publicly discussing the

¹⁹⁹ Section 4, subsection (6)(a) Human Rights Act 1998 c.42

²⁰⁰ HC Hansard, 16 February 2011: column 963.

²⁰¹ *Ibid.*, at column 969.

²⁰² Joshua Rozenburg, ‘Senior judge Lord Phillips learns the hard way after criticizing government’ 22 February 2011 <<http://www.lawgazette.co.uk/opinion/joshua-rozenberg/bla>> accessed 10 March 2011.

matter she laid it open to ministerial and press comment thus subjecting it to an extra degree of unnecessary interference.²⁰³ The unnecessary interference requirement of the notion of institutional autonomy may guide those subject to section 3 of the CRA 2005 by outlining the type of interference which is necessary and that which would be deemed unnecessary and therefore detrimental to judicial independence.

Existing degree of institutional autonomy

To conclude it is clear that the proposals set out by the Concordat and Lord Falconer in 2004 have to some degree not been realised. However, the creation of the UKSC and the completion of over a year's business without any considerable problems for the administration of the Court is still very positive. The overriding objective to uphold judicial independence has come under scrutiny since the enactment of the CRA 2005: both in 2006 with the Craig Sweeney case and in February of last year as a result of Lord Phillips' speech at the University College London's Constitution Unit and the subsequent response.

To respond to the criticism by Lord Phillips' of the current financial independence of the Supreme Court, it would appear on closer analysis that although there may be a more direct way to receive finance with minimised government involvement, the current process has provided the Court with adequate resources and allowed it to carry out its functions. Arguably, the fact of funding by contribution is not ideal and does result in some constraint on the budgetary process. However, the degree of budgetary freedom set out by Lord Falconer, and reiterated by Lord Phillips, does not take into account the current economic climate and while a simple transaction with the Treasury and the Supreme Court would no

²⁰³ HC Hansard, 16 February 2011: column 959.

doubt improve the institutional autonomy of the Court, it is perhaps not practical at this present time. What must not be forgotten is that through the process of setting up the Supreme Court, there is a greater transparency of separation between Parliament, the Government and the Judiciary and that the area of finance is one which is currently much bigger than within the remit of the Supreme Court, the judiciary or even the Government. Further to the degree of budgetary freedom required to protect judicial independence further by recognising the notion of institutional autonomy is the degree of administrative independence that exists. The freedom in relation to the allocation of resources by the Chief Executive appears adequate and although linked to the level of finance provided, the process of using the resources given to support the Court's business is happily in line with the CRA 2005.²⁰⁴ The accountability of the Chief Executive to the President of the Supreme Court does raise the possibility of a conflict between his judicial objectives and the Chief Executive's links to government as a civil servant. The current situation does not significantly reduce the administrative freedom as all government departments and institutions, as stated by the Justice Secretary, are subject to restrictions on administration due to a lack of financial stability. What is important is to ensure that the Court retains its autonomy in terms of decision-making and allocating its resources.

Analysis of the unnecessary interference would suggest that the Court is still subject to external threats to its independence, as per the Sweeney case. The decision by the Home Secretary to openly criticise the Supreme Court decision of last April does not meet the requirements of a sufficient lack of interference. Arguably, the Human Rights Act 1998 created the possibility of such interference due to the section 4 provisions for making declarations of incompatibility. However, the section 3 duty to uphold judicial independence

²⁰⁴ Part 3, section 51 requires the Chief Executive to ensure that the resources are used to provide an effective and efficient system for the Court.

in the CRA 2005 should govern the behaviour of those in government when it comes to commenting on the business of the judiciary. Similarly, the judiciary should refrain from commenting in such a way against actions of the government. But as Lord Bingham said, a degree of tension is necessary in a constitution that adheres to the separation of powers doctrine and a system of checks and balances yet should always be entirely proper.

While an exact remedy is not within the remit of this thesis, if institutional autonomy were to be recognised, Lord Falconer's proposals of 2004 would be a helpful starting point. The interference from external sources is to some degree unavoidable, and the under-spend of the Court over the first session means that the proposed cuts will affect the budget bid but may not affect the administration of the Court's functions.²⁰⁵ Direct liaison with HM Treasury on budget issues and the provision of finance coming directly from the Consolidated Fund might result in increased profit for the Courts Service that is currently contributing to the running cost of the Supreme Court but would require significant negotiation and changes to be made by all three branches of government. The administration is currently working effectively, although the accountability of the Chief Executive to the President is an area of debate. For the notion of institutional autonomy, the accountability to the President could both be of benefit and increase administrative freedom by reducing government involvement. However, the President is subject to government constraints and that would filter down to the functions conferred upon the Chief Executive. The degree of unnecessary interference is particularly useful to the protection of judicial independence as it can offer a benchmark in terms of what is deemed necessary or unnecessary and by highlighting that the interference is not always external- there are internal threats as well.

²⁰⁵ Supreme Court of the United Kingdom, *Business Plan 2010-11*. Para. 36, page 18. Available at: http://www.supremecourt.gov.uk/docs/bp_1011.pdf Accessed 06/01/2011.

To summarise, this analysis of institutional autonomy demonstrates areas that still require development to ensure autonomy is possible and that all unnecessary and avoidable links to Government are removed.

CHAPTER 4 - THE FUTURE FOR INSTITUTIONAL AUTONOMY

This final chapter summarises the main points raised by this thesis and provides some concluding thoughts. Is an extra notion of institutional autonomy required, in addition to the ‘protections’ of judicial independence that already exist? Lord Phillips and the University College London’s Constitution Unit’s new research project would suggest that judicial independence is an undeniably current topic for consideration; being fundamental to securing the rule of law in the UK. Institutional autonomy, as set out by this thesis, could provide an extra guarantee of the independence of judicial institutions. Institutional autonomy requires a detailed investigation of the judicial institution’s design and intended purpose, as well as an assessment of the freedom allowed for financing and the day-to-day administration of the institution. This, and the type of information required in order to achieve a full assessment of the degree of institutional autonomy, could be met with some resistance. Since the introduction of the Freedom of Information Act 2000, such a process is made much easier with access to required information on a more open basis although information retrieval is not without obstacle. What is also important to consider, is that the notion of institutional autonomy by degree is a fluid concept and will change depending on the overall intended degree of autonomy for that institution. Pre-commencement debates and subsequent drafting of provisions surrounding the CRA 2005 clearly demonstrate an intention to create a truly independent top court. Yet, as Lord Phillips observed, there are still areas of concern surrounding the financial and administrative independence of the court that must be addressed. Application of the notion of institutional autonomy can show how these areas are

failing currently to ensure adequate judicial independence and remedies can be offered as to how these areas can be improved and autonomy secured.

The UKSC's institutional autonomy: an evaluation

The current status of funding for the Supreme Court is unsatisfactory and the complex process holds too many links to other institutions and to Government departments such as the Ministry of Justice. From this, it cannot be said that a sufficient degree of institutional autonomy exists. The Supreme Court is reliant on contributions; the Lord Chancellor must compensate for any shortfall in the contributions made to the running of the Court by the various court services. As discussed previously, the ultimate goal for an institution is to be financially self-sufficient; making enough profit to cover all costs and to be able to provide adequate funding for resources. Reports from Management Board meetings of the Supreme Court suggest an under-spend for the first year of business and a predicted under-spend for this financial year.²⁰⁶ According to previous reports (and awaiting the report on this current year), it would seem that the Supreme Court has adequate financial systems in place therefore making it seem feasible to allow greater autonomy to the Court in requesting finance. It seems that the most opposition for greater financial independence came from the Treasury, citing reluctance for an independent body, regardless of pre-existing bodies such as the National Audit Office operating the same process successfully. It would be interesting to establish if this is a reluctance to acknowledge changes to constitutional arrangements, or whether it was a fear of adequate management strategy that caused the Treasury's rejection of the proposals. Either way, it can now be put forward to the Treasury that the Supreme Court clearly has

²⁰⁶ The Supreme Court, Meetings, 2011 < <http://www.supremecourt.gov.uk/about/meetings.html> > accessed 19 April 2011. A comprehensive list of all monthly meetings of the Supreme Court Management Board.

established and proven successful financial planning in place and can place a realistic and non-extravagant funding bid. These arguments, although supported by evidence, may be met with resistance until the country's economy has become more stable and there is less scrutiny of all financial decisions. The issues surrounding internal interference from the Lord Chancellor's office are more complex in terms of offering potential remedies. The obligations placed on the office by the Constitutional Reform Act, to defend and uphold judicial independence, result in a level of interference which is currently unhelpful if striving for adequate institutional autonomy; mainly due to continued links with government. The fact that the Court is reliant on his approval for appointments, funding and also finding a suitable venue may trigger questions as to how such links with a Government minister can allow for the Court to be truly independent. The previous relationship between President and Chief Executive proved harmonious. However, since the retirement of Lord Phillips, it will be interesting to see how new relationships develop between the Chief Executive and the new President. Will it be equally harmonious?

Chapter 1 outlined arguments made by Lord Browne-Wilkinson and Sir Francis Purchas for there to be a greater degree of autonomy. They both felt that said autonomy would only be achievable if the funding and administration of courts was not, 'subject to the influences of the political marketplace.'²⁰⁷ In line with these requirements is the notion of institutional autonomy. Having considered the current position of the Supreme Court, it could not be said that the Court operates free from those influences. The financial and administrative links to the Ministry of Justice and the government as a whole are limiting the Court achieving the necessary autonomy. Achieving a higher level of institutional autonomy in the Supreme Court

²⁰⁷ Sir Francis Purchas, 'What is happening to judicial independence?' (1994) NLJ 1306 and Lord Browne-Wilkinson, 'The independence of judges in the 1980s', 11th F.A. Mann Lecture. Referenced in Thomas H. Bingham, 'Judicial Independence' (1997) *Arbitration* 86, 93.

is currently hindered by those issues. The proposals for funding as set out by the Concordat would provide for a better level of autonomy and should be considered as the Court moves forward and evolves. In relation to the administration issues, notice should be taken of the concerns over branding raised by Baroness Hale. The Court should review all policy which governs its administration and look at ways to reduce or eliminate government involvement where reasonable and practicable. The reasons why these changes are necessary are far-reaching and benefit not only the Supreme Court but the fundamental constitutional principles which support its creation.

An increased level of institutional autonomy in the Supreme Court would be beneficial, primarily, in ensuring adherence to the rule of law. In order to develop the existing degree of institutional autonomy, there would need to be a greater awareness of its existence and the benefits it offers in terms of supporting the principle of judicial independence. In a time of such political and social flux, it is important that the judiciary is seen to act both within its powers and in the interests of the public. It is particularly pertinent that there are no suggestions of political decision making to maintain confidence in the justice system. The coalition government will inevitably come into conflict on issues relating to policy and law; when such conflict arises it is important that the judiciary is seen as independent and therefore capable to monitor and advise. The nation-wide riots in August demonstrate another example of the role of the judiciary coming to the forefront of political and public consideration reinforcing why the judiciary must be seen to be as independent as possible.

The evolving role of the UKSC

The arguments for requiring greater institutional autonomy of the Supreme Court are strengthening due to its evolving role. Commentators have raised the issue of the Court developing into a type of constitutional court more associated with countries such as the United States. If this were to be case, intentionally or otherwise, it is even more important that there is clear collective independence of the court. This may be demonstrable through achieving a high level of institutional autonomy which is perhaps more easily proven than judicial independence itself. Professor Kate Maleson has recently spoken of a 'strengthening judicial role' as a result of the Supreme Court's creation.²⁰⁸ Maleson attributes this strengthening role to the responsibilities placed upon the Court by the Human Rights Act and the explicit removal of the Appellate Committee from the House of Lords to enable more effective consideration of Executive functions. There are the legal implications under Article 6(1) of the ECHR if the Court is not seen to be acting fairly and impartially in this event, but again the public perception becomes relevant again. As has already been discussed, the extent to which the public were or are interested in the Supreme Court is not clear but it is guaranteed that should an issue arise where the Court made a declaration of incompatibility and Parliament did not agree, the media response would be sure to provoke an interest. But aside from discussing potential situations as this, the reality is that there is a significant deficit in public interest in the Supreme Court and the need for judicial independence. This need to change and promoting the notion of institutional autonomy may aid in achieving this by offering a clearer and more measurable set of criteria and justifications for independent courts.

²⁰⁸ K Maleson, 'The evolving role of the Supreme Court' (2011) Public Law 754, 772.

At the beginning of this thesis the issue of a growth of judicial power was discussed, with specific reference to the increase in judicial review and the implementation of the Human Rights Act. This growth of power has continued and is now being discussed more specifically in relation to the decisions being made by the UKSC. The idea of the Supreme Court having more power than when it was the Appellate Committee of the House of Lords is an issue of contention within the Court itself. Last November, Lord Hope of Craighead, the Deputy President of the Court, gave a speech entitled ‘Do We Really Need a Supreme Court?’²⁰⁹ As Hope states, the question is redundant in terms of getting rid of the Court since it is contained in statute. But what he did want to highlight and clarify was the developing role of the Court. He notes that it has done more than iron out a ‘constitutional wrinkle’ but has rather created a new institution with great constitutional significance.²¹⁰ Maleson notes how this acknowledgement of change was not welcomed by the former President of the Court, Lord Phillips. Phillips maintained that the reforms would not change the functions of the Committee within the Supreme Court; a view supported by Lord Bingham at the time.²¹¹ It is not clear whether the former President’s reluctance to allow court to become too powerful prevented it changing. It will be interesting to observe the change in the Court following the retirement of Lord Phillips, and over the coming years, to see whether more prescriptive rules or informal conventions develop to restrict the Court’s influence and maintain equilibria, or whether the Court’s focus may change with a change to the presidency.

²⁰⁹ Lord Hope of Craighead, ‘Do We Really Need a Supreme Court?’ 25 November 2010, speech given at Newcastle Law School < http://www.supremecourt.gov.uk/docs/speech_101125.pdf > accessed 23 October 2011.

²¹⁰ *Ibid.*, p10.

²¹¹ K Maleson, ‘The evolving role of the Supreme Court’ (2011) Public Law 756.

Development of the notion of institutional autonomy

The notion of institutional autonomy is relevant to any judicial institution as the rule of law dictates the need for an independent judiciary, universally. A consideration of the elements of institutional autonomy will enable an assessment to be made in relation to that judicial institution's independence. However, it is unlikely that it would be necessary or desirable for the lower courts to have the same level of institutional autonomy as top courts. This may stem from the need for a progressive scale of institutional autonomy to be developed. The importance of each requisite element will differ depending on the institution's design and intended purpose. This echoes the need for a detailed assessment and understanding of institutional design. The levels of expected budgetary freedom and administrative freedom and what counts as unnecessary interference will differ from those of the Supreme Court as outlined above. Arguably, the higher courts require a higher level of institutional autonomy as they are involved in monitoring the actions of the Executive, through judicial review and under the Human Rights Act.

The final consideration for this thesis is how institutional autonomy should be viewed, both presently and as a notion for development. At present, a notion of institutional autonomy is all that can be offered for consideration. However, if it were to be deemed a useful and worthwhile addition to enhance the statutory need for ensuring greater judicial independence, then there may be reasons for giving it more strength. There would need to be discussion of whether its existence as a notion was sufficient to rely on it. It may develop informally as a concept or convention through an established practice of applying the elements or there may be call for more stringent application by inclusion in policy or legislation. This, sadly, is not

something this thesis can predict but it will be an interesting focus for future discussion of the need for judicial independence within the UK constitution.

The justification for these ideas will become clear as the role of the Supreme Court evolves. If the Court develops into something which mirrors the US Supreme Court, a more constitutional court, then a notion of institutional autonomy will be particularly important. As the Court accepts greater constitutional responsibility and power, the interference in the three areas of institutional autonomy will be greater too. Thus, ensuring a high level of institutional autonomy is even more crucial to support and evidence the independence required by the rule of law. Malleon outlines various ways in which the nature of the top court is changing and indicating a move towards affording the Justices greater power and recognition of the notion of institutional autonomy may serve in, 'strengthen the legitimacy of an increasingly powerful and high-profile Supreme Court.'²¹²

²¹² K Malleon, 'The evolving role of the Supreme Court' (2011) Public Law 772.

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