Courts in the United Kingdom

Chris Hanretty*

Courts in the United Kingdom have evolved gradually over the past seven hundred years. The modern court system is sophisticated, displaying both specialisation by area of law and regional differentiation. Courts display moderate to high levels of de facto judicial independence without many guarantees of de jure judicial independence. Appointment to the courts system is now very strongly apolitical; this, coupled with a weak form of fundamental rights review, means that debates about judicial politics have been limited. Despite this, UK courts offer lessons for those interested in the introduction of rights catalogues and in theories of constitutional review.

1 STRUCTURE OF THE COURT SYSTEM

There are three court systems in the United Kingdom: the court system of England and Wales, the Scottish court system, and the Northern Irish court system. There are separate tribunals which deal with specialised matters affecting all of the United Kingdom (and in particular with taxation and immigration), but the UK Supreme Court is the only "general purpose" court which has jurisdiction across the United Kingdom.

* *Royal Holloway, University of London* chris.hanretty@rhul.ac.uk

Courts in the UK are structured in this way because (i) there are devolved assemblies which write bodies of law which are subject to judicial interpretation and because (ii) Scots law developed separately from English law and was more strongly influenced by Roman law. The UK is therefore like Canada is its bijuralism, but unlike Canada insofar as it lacks a clear separation between "federal" and "state" law and courts. "Welsh law", for example, is emerging as an autonomous area of law set down by the Welsh Assembly, but there are no Welsh courts or Welsh judges.

The English court system (which the Northern Irish court system resembles) is structured in the following way. The most important first-instance court in civil matters is the High Court. The High Court is structured into three divisions (the Queen's Bench Division, the Chancery Division, and the Family division); each of these divisions may in turn contain more specialised courts which deal with matters relating to (for example) intellectual property, shipping law, or the protection of vulnerable individuals. Civil matters not dealt with by the High Court may be dealt with by county courts or (in areas like employment law) by tribunals. Criminal matters may be dealt with by magistrates' courts or for more serious crimes by Crown Courts. Decisions of the High Court, the county courts, and the tribunals may be appealled to the Court of Appeal (Civil Division); decisions of the Crown Court may be appealled to the Court of Appeal's Criminal Division. Ordinarily most cases heard by the Supreme Court have first been appealled to the Court of Appeal, but appeals may "leapfrog" the Court of Appeal in exceptional cases.

The Scottish court system draws a sharper distinction between civil and criminal cases. Additionally, because of the special place of Scots law, criminal cases from Scotland may only be appealled to the Supreme

Court where they raise human rights issues.

The Supreme Court of the United Kingdom was set up under the Constitutional Reform Act 2005 and came into operation in 2009. It replaced the Appellate Committee of the House of Lords, which had acted as the UK's apex court despite formally being a committee of the legislature. A little under half of the court's caseload is in public law. Most (around 80%) of these cases are heard in panels of five, although the court also sits in panels of seven or nine. The court consists of twelve judges, some of whom must be expert in the law of Scotland and Northern Ireland. Its members are nominated by a special appointments commission and formally appointed by the monarch upon the recommendation of the Lord Chancellor (the member of the executive with responsibility for the court system). Members serve until they reach the statutory retirement age, which is now 70.

Courts in the United Kingdom, including the Supreme Court, enjoy no power to set aside UK legislation on the grounds that it is unconstitutional or on the grounds that it violates individual rights. This is because of a vestigial commitment to the doctrine of parliamentary sovereignty, the idea that "Parliament has... the right to make or unmake any law... [and] that no person or body [has] a right to override or set aside the legislation of Parliament" (Dicey 1950, 39). Fundamental rights protection in UK law is therefore carried out by a peculiarly British compromise. Where Parliament legislates in a way which is incompatible with the human rights found in the Human Rights Act 1998 (which gives domestic effect to the rights contained in the European Convention on Human Rights), the courts must first attempt to interpret the legislation in a way which is compatible with those rights. If it is not possible to interpret the legislation in this way, the courts must issue a "declaration of incompatibility", which signals to Parliament that

the legislation is incompatible with human rights but which leaves the legislation in force. Most scholars have classified this as "weak-form" constitutional review (Tushnet 2002) and as an example of "political constitutionalism"; some within the UK would still describe it as involving too little "political constitutionalism" and too much "legal constitutionalism" (Tomkins 2005).

2 JUDICIAL INDEPENDENCE

Despite various learned encomia for the 1701 Act of Settlement (Klerman and Mahoney 2005; North and Weingast 1989), the contemporary UK is generally supports the argument that de jure independence does not explain de facto independence. Many of the items that researchers commonly look for when measuring de jure judicial independence are either lacking or ambiguous in the UK. Accordingly the UK tends to score poorly on measures of de jure judicial independence. It is helpful to illustrate this by taking as an example the index of de jure judicial independence found in Melton and Ginsburg (2014). This index features six elements: (1) the presence/absence of a constitutional statement on judicial independence; (2) judicial tenure; (3) selection procedure; (4) removal procedure; (5) removal conditions; and (6) constitutional measures to insulate judicial salaries. Absent a codified constitution, it is difficult to see how the UK can score highly on *constitutional* protections for judicial independence (criteria 1 and 6). The UK does score highly in virtue of having life tenure for judges until a specified retirement age (criterion 2), and in virtue of having (since 2006) a judicial appointments commission (criterion 3). But formally the protections against the removal of judges in superior courts (criteria 4 and 5) are limited, requiring only a petition from both Houses (presumably on a

majority of those voting rather than a supermajority).[1] A defence of the UK's protections for judicial independence might be mounted by pointing out that the removal provisions must be interpreted narrowly, else Parliament would have used them more frequently – but since this risks mingling de jure and de facto, a better response is to acknowledge that de jure provisions matter less for de facto judicial independence than, say, politico-cultural norms, which, though they may be sustained by de jure provisions (Gee et al. 2015, 13), are ultimately more important.

Measure	Scale	UK value	UK rank	UK value ten years earlier
V-Dem highest court judicial independence (variable v2juhcind_osp)	0-4	3.33 (2018)	25th of 179	3.42 (2008)
V-Dem lower court judicial independence (variable v2juncind_osp)	0-4	2.99 (2018)	35th of 179	3.04 (2008)
Linzer and Staton (2015), as updated	0-1	0.99 (2015)	3rd of 171	1.00 (2005)
Cingranelli and Richards (2010)	0, 1 or 2	2 (2011)	1st (equal to 65 other countries)	2 (2001)

The UK generally scores well in measures of *de facto* judicial independence, and is ordinarily comfortably within the top 20% of countries. Table 1 shows the values of selected indices of de facto judicial independence for the UK. The composite measure by Linzer and Staton (2015) gives the UK a much higher ranking than any of the V-Dem measures (Coppedge et al. 2018); the difference stems from the way that some of the components of the Linzer and Staton measure (in partic-

[1] Circuit and District court judges may be removed by the Lord Chancellor and the Lord Chief Justice following a disciplinary inquiry. More senior judges who have fallen short of the required standards have been gently persuaded to resign or have been allowed to run out the clock. Peter Smith, for example, resigned in October 2017 just a few days before the holding off a disciplinary tribunal.

ular Cingranelli (2010) and Howard and Carey (2003)) rely on country reports written by the United States State Department, which are generally more favourable towards the United Kingdom than to other countries with similar levels of judicial independence as measured by other indicators. Although the V-Dem measure gives the UK a lower rank than many in the UK would expect, this ranking does not reflect any deterioration in absolute values of de facto judicial independence: these have remained roughly constant over the past 20 years. The UK's rank is therefore a consequence of improvements in other countries, rather than back-sliding on the part of the UK. This does however imply that changes like the introduction of the Human Rights Act and the creation of a separate Supreme Court have either had no effect or have compensated for deterioration elsewhere.

There are few ways in which governments can exert pressure over the judiciary. "Salaries may not be reduced, except by statute" (Gee et al. 2015, 79). Increases in salary are determined by the Senior Salaries Review Board (SSRB), which reviews a range of public sector salaries. "The practical effect of the SSRB's advisory role has been to distance ministers from involvement in judicial pay, with few fierce battles being fought over judicial salaries in modern times" (Gee et al. 2015, 79), though there have been significant disputes over judicial pensions, which are an important stable source of future income for self-employed barristers considering a judicial career.

3 APPOINTMENTS

Since 2005 (2002 in Scotland), senior judicial appointments have been entrusted to different appointments commissions:

- the Judicial Appointments Commission [for England and Wales];

- the Northern Ireland Judicial Appointments Commission
- the Judicial Appointments Board for Scotland

The judiciary is well-represented on these commissions: six of fifteen commissioners in England and Wales and four of twelve board members in Scotland must be drawn from the judiciary. The legal profession is also represented by two members on both the JAC and the Judicial Appointments Board for Scotland.

Where a vacancy for a senior judicial role arises, the relevant appointments commission must advertise the vacancy, invite applications, and make a selection from the pool of applicants. In England and Wales, the selection is forwarded to the Lord Chancellor, who may request that the commission reconsider its selection, reject the selection, or appoint the selected individual. Each of these options may only be used once, and so the Lord Chancellor may not repeatedly reject selected individuals until s/he gets the nominee they want. Only once has the Lord Chancellor made use of the power to request reconsideration: in 2010 the (Labour) Lord Chancellor Jack Straw requested that the Commission reconsider its choice of Sir Nicholas Wall for the position of President of the Family Division, perhaps because Wall had previously criticised government policy vocally (Gee 2017). Ministers enjoy even less power in Scotland, where they may only request reconsideration. These provisions apply to senior judicial roles: since 2013, recommendations for appointments to lower courts and tribunals have gone instead to the Lord Chief Justice (the head of the judiciary in England and Wales).

Before 2005, the system used to appoint senior members of the judiciary in England and Wales was a system of ministerial appointment. Bailey and Ching (2002) described the method for appointing Lords of Appeal in Ordinary (i.e., the Law Lords) and Lords Justice of Appeal

(i.e., members of the Court of Appeal) as follows:

> "Appointment to the positions of… Lord of Appeal in Ordinary and Lord Justice of Appeal are made by the Queen, acting by convention on the advice of the Prime Minister, who in turn will have consulted the Lord Chancellor. The effective voice in all appointments is normally that of the Lord Chancellor, following consultations with members of the judiciary and leading members of the legal profession. Occasionally, the Prime Minister may override the Lord Chancellor's views in relation to senior staff appointments" (p. 253-254).

Since the Lord Chancellor was, until 2012, almost always a lawyer, the legal profession was well represented within this process, and Lords Chancellor, although they were politically well-connected, took seriously their duty to protect the independence of the judiciary. Then as now, the effective pool of candidates was restricted, since appointment to the Court of Appeal and the House of Lords was almost always made from within the ranks of existing High Court judges. This has meant that although the method of appointment is less open to political preferment than it might seem.

The present system fits well the definition of a "sheltered" appointment system given by Valdini and Shortell (2016), where "selectors are [not] visible and accountable to the public [or] able to claim credit for diversifying the bench". Indeed, Valdini and Shortell describe the post-2005 system of appointments as the "epitome" of a sheltered system. Although the system used before 2005 did involve an "exposed" selector (the Prime Minister, acting upon the recommendation of the Lord Chancellor), neither the Prime Minister nor the Lord Chancel-

lor was ordinarily exposed to blame or credit for their selections, even when the Prime Minister over-rode their Lord Chancellor's recommendations (as Margaret Thatcher did) or when the Lord Chancellor failed to pass on the recommendations of senior judges (as Lord Mackay of Clashfern did). Past research on appointments before and after the 2005 reform has examined whether particular characteristics are rewarded or penalized as part of the selection process. Two groups of characteristics have received particular attention: the political affiliation of judges (insofar as this can be determined), and the socially exclusive character of appointees.

I deal first with political preferment. Appointments to the senior judiciary in the United Kingdom were, prior to the second world war, overtly political. "[O]f the 139 judges appointed [between 1832 and 1906], eighty were members of the House of Commons at the time of their nomination; eleven others had been candidates for Parliament" (Laski 1925, 533–534). Stevens (1993) (p. 41) judged that patronage appointments died out some time between 1912 and the mid-1920s. The last senior judge to have previously served as an MP was Jack Simon, Baron Simon of Glaisdale, who served as a Conservative MP between 1951 and 1962 and retired as a Law Lord in 1977. Of course, judges may be politically preferred even where they have not stood for office, and a number of pieces of research have investigated whether there is political preferment in appointments to judicial office in the UK.

Tate (1992) studied appointment to the Court of Appeal and House of Lords from the ranks of the High Court over the period 1876 to 1972. He found that judges with a demonstrable partisan affiliation were more likely to be promoted over the course of their career. However, Tate based this hypothesis on the premise that partisan political activity would be more likely to "make a potential appellate judge can-

didate better known to the appointing officials, even if it does not win their partisan favor" (p. 257): he did not test directly whether High Court judges with the same partisan affiliation as an appointing Lord Chancellor were more likely to be promoted.

Hanretty (2015) improved on Tate (1992) by modelling judges' success in individual promotion rounds over the period 1880 to 2005. He found that there was no evidence that Lord Chancellors promoted individuals with the same recognisable partisan affiliation. If anything, there was evidence that Lord Chancellors penalized co-partisans. There was, however, evidence that governments did have "favourites": judges who had previously been appointed by a Conservative government, or previously promoted under a Conservative government, were more likely to be promoted again under a Conservative government. This was evidence for a very soft form of political preferment.

Salzberger and Fenn (1999) went beyond partisan affiliation to look at how judges' on-court behaviour in the period 1951 to 1986 affected their chances of promotion over the course of their career. They found no good evidence to suggest that "government-friendly" judges (i.e., judges who were more likely to rule against the government in public law cases) were more likely to be promoted, either when pooling all appoinments are looking specifically at appointments made by Conservative governments considering friendliness to measures defended by Conservative governments.

In the same way that politics can affect the initial selection of judges, it can also affect judicial retirement. Judges may retire early if by doing so they can ensure that their preferred party gets to appoint their successor. However, Massie, Randazzo, and Songer (2014) find no ev-

idence of strategic retirement in the UK in either the post-war period or the period since the modern court system emerged (1875-2010).

A bigger concern than political preferrment is social exclusivity. The senior British judiciary is elitist, both in the sense that it prizes merit above all other characteristics, and in the pejorative sense that its members are incredibly privilieged individuals who have often had every sort of advantage in life. As of early 2019, 65% of senior judges in England and Wales had attended private schools, compared to 7% of the general population. This figure was higher than any other professional group for which information was available, including senior civil servants (59%) and diplomats (52%). 71% had attended Oxford or Cambridge, compared to 1% of the population – again higher than any other group.[2] The senior judiciary is also overwhelmingly male: 76% of judges on both the High Court and the Court of Appeal are male. The first judge appointed to the UK's top court, Baroness Hale, was only appointed in 2004, 23 years after the first female appointee to the Supreme Court of the United States (Sandra Day O'Connor, 1981); 22 years after the first female appointee to the Supreme Court of Canada (Bertha Wilson; 1982); and 17 years after the first female appointee to the High Court of Australia (Mary Gaudron, 1987). Some measure of the social exclusivity of judges comes from the efforts researchers have had to go to to differentiate between "elite" and "non-elite" candidates within the pool of High Court judges: Tate (1992) differentiated between those who had attended "elite" colleges at Oxbridge (Balliol, New College, Christchurch, Trinity (Cambridge) and King's) and "elite" private schools (being those named in the 1864 Clarendon Commission report, viz. Charterhouse, Eton, Harrow, Merchant Taylors,

[2]These figures come from a report jointly produced by the Sutton Trust and the Social Mobility Commission, entitled "Elitist Britain 2019", available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811045

Rugby, St. Paul's, Shrewsbury, Westminster and Winchester). These are distinctions only applicable to the top one percent of British society.

The question that researchers have had to address is whether the methods used to appoint judges have rewarded these characteristics, or whether these characteristics are already disproportionately present in the pool of candidates. Since appointment to the Court of Appeal or the Supreme Court is almost always from the ranks of High Court judges, and since High Court judges are almost always appointed from the bar, and since the bar itself is socially unrepresentative, it is possible that the judiciary is only socially unrepresentative because the bar is too. Most research, however, has suggested that the method of appointment makes senior judges even more unrepresentative of British society as a whole. Tate (1992) found that family status directly affected promotion prospects. Hanretty (2015) found that membership of elite social clubs such as the Atheneum or the Garrick improved promotion prospects. Blanes i Vidal and Leaver (2011) found that candidates who had an "elite trajectory" – by which they mean attendance at a private school followed by Oxbridge and a top ranking set of barristers, or private school followed by some other route, or state school followed by Oxbridge and a top ranking set of barristers – were more likely to be appointed, but this elite differential disappeared after reforms to judicial selection were announced in June 2003. Blanes i Vidal and Leaver (2011) is particularly important because it features controls for the rate at which high court judges were reversed on appeal, a common proxy for merit.

The effects of reform

It is an open question whether reforms to appointments since 2005,

whether or not they made the judiciary more independent (and evidence from the V-Dem project suggests it did not), made it more likely that non-traditional candidates would be appointed judges or promoted to the Court of Appeal or Supreme Court. Comparative evidence from Valdini and Shortell (2016) suggests that, because the reforms made the process more sheltered, the push for opening up the judiciary was abated. This argument is endorsed in different terms by Gee, who views the involvement of the judiciary as excessive and likely to result in judicial members of appointment panels reproducing their own social characteristics. Finally, the evidence from Blanes i Vidal and Leaver (2011) suggests a preference, on the part of judges, for social elites, which now operates without a check from politicians. This is weak evidence that the good intentions behind the 2005 reform may have had effects not intended by its promoters.

4 MULTILEVEL GOVERNANCE

Devolution

As a formally unitary state with significant asymmetric devolution of power to its constituent nations, it is reasonable to expect that the UK would see a reasonable volume of litigation relating to devolution. That expectation has not been borne out. In the first ten years of Scottish and Welsh devolution, there were essentially no cases dealing with the competences of the devolved administrations. The lack of devolution litigation – which came as a surprise to government lawyers – can be explained by institutional and partisan factors. The institutional features pre-empting devolution legislation concern the way in which legislation is introduced. The presiding officer in both the Scottish Parliament and Welsh Assembly must state that legislation does not outstrip

the parliament's competences. Government ministers introducing legislation must also certify that the legislation is within the Parliament's competences. The partisan background to devolution also helped: for the first ten years, the administrations in Cardiff, Edinburgh and London were all led by figures from the Labour party. Courts thus had either "no role" (Hazell 2007) or a "remarkably limited role" (Trench 2012) in devolution. Although more cases have come to the Supreme Court in the past ten years, they remain a very limited part of the court's caseload, comprising no more than one or two cases per year. The contrast between British courts and courts in Spain – another country with asymmetric devolution and secessionist movements – is remarkable.

Oddly, whilst most Scottish devolution issues have arisen in the context of ordinary litigation, Welsh devolution issues are more likely to arise through a reference question made by the Attorney-General for England and Wales (that is, by the principal law officer of the government in London), a rare British dalliance with abstract constitutional review of the kind more commonly found amongst constitutional courts (but not unknown to the Canadian Supreme Court).

European Union law

The UK's relationship with th eEU has always been fraught. The relationship between UK cours and the Court of Justice of the European Union (CJEU) has been less fraught, if not exactly warm. Under Art. 267 of the Treaty on the Functioning of the European Union, UK courts (like all other courts and tribunals in EU member states) must request a preliminary ruling from the CJEU on any matter of EU law which is necessary to decide a case and which is not *acte claire* (sufficiently clear). It is well known that UK courts issue relatively few requests for preliminary references per head of population, which might speak to

a certain *froideur*. However, this low rate is slightly misleading. Until the 1980s, UK judges were content to decide EU law cases themselves, viewing most provisions as *acte claire* and not referring; this changed after the 1980s. Second, the number of preliminary references expressed *as a proportion of cases involving EU law* is not particularl law. Indeed, in discrete areas of EU law, UK courts have been more willing to refer than courts in other countries. Finally, no UK court has ever refused to implement a ruling of the CJEU, as courts in other countries have done. The closest the Supreme Court has come was in the HS2 case, where the court raised the possibility that certain constitutional principles might trump EU law – though in doing this, the court was only doing what the German Federal Constitutional Court had done many years earlier in the Maastricht judgement case.[3] In aggregate, the relationship between UK courts and the CJEU is mostly respectful in limited to discrete areas of law, in virtue of which the relationship is less intense than in other countries.

The European Court of Human Rights

If the relationship between UK courts and the CJEU can be described as respectful but not warm, then the UK courts' relationship with the European Court of Human Rights (ECtHR) can properly be described as "strained" (Ziegler, Wicks, and Hodson 2015). Under s. 2 of the the Human Rights Act 1998, UK courts must "take into account" ECtHR jurisprudence when deciding cases involving human rights claims. A key question for the courts has been to decide whether "taking account of" means following, and if so under what conditions; and whether the courts may outpace Strasbourg jurisprudence, and afford plaintiffs more generous rights protection. The Supreme Court has on one oc-

[3]Bundesverfassungsgericht, Judgment of Oct. 12, 1993 (Maastricht), 89 Entscheidungen des Bundesverfassungsgerichts 155.

casion (*R v Horncastle (and others)* [2009] UKSC 14, a case involving hearsay evidence) declined to follow Strasbourg jurisprudence. On other occasions it has exceeded Strabourg jurisprudence, and in other cases still it has encouraged plaintiffs not to base their claims on Convention rights, but rather on rights found in the common law, a strategy which Stephenson has described as "autochtonous constitutionalism" (Stephenson 2015). A desire to create a domestic human rights jurisprudence would make sense if judges feared attempts on the part of a future Conservative government to withdraw from, or otherwise curtail access to the provisions of, the European Court of Human Rights.

The terrain post-Brexit

These three isues - devolution, UK courts' relationship with the ECtHR, and UK courts' relationship with the CJEU – have been grouped under the heading of multilevel governance. This is appropriate because these three areas are interlinked. In the process of exiting the EU, British judges will probably still have to take account of CJEU jurisprudence for many years. In repatriating areas of policy from the EU, UK governments will have to decide which, if any, policy areas are to be devolved, furthering altering the UK's domestic constitutional settlement. Finally, the Brexit process, although logically distinc from the UK's continued membership of the Council of Europe may encourage those on the right of the political spectrum to urge the severing of ties with the Strasbourg court. These interlinked developments, possible and actual, are such that even courts which exercise a great deal of restraint and politesse are likely to end up more politically exposed than they have been up until this point.

5 JUDICIAL BEHAVIOUR

Outcomes at the top

Blanes i Vidal and Leaver (2015) studied whether or not the Court of Appeal's Civil Division decided to allow or dismiss appeals from first instance courts as a function of whether or not the judges on the panel have, or are scheduled to, work with the author of the first instance opinion. (This is possible because High Court judges are occasionally asked to sit on the Court of Appeal). Although the paper is about appeals, the authors motivate the issue as a specific example of a broader phenomenon of (potentially biased) peer review. They find substantial effects: "the proportion of reviewer affirmances is 30% points higher in the group where reviewers know they will soon work with their reviewee, relative to groups where such interaction is absent" (p. 431).

Hanretty (2014) examined outcomes in the House of Lords between 1968 and 2003, using data from the HCJD. He tested whether "haves" came out ahead – that is, whether governmental and corporate litigants won out over individuals. The principal finding – that governmental litigants, but not corporate litigants, enjoy such an advantage – has not been borne out by more recent research in the UK Supreme Court (Hanretty 2020), which finds no such advantage.

Outcomes elsewhere

There have been relatively few studies of outcomes on first-instance courts. This may reflect the greater difficulty of coding case factors relevant to the outcome, particularly where the first-instance courts are generalist courts. What research has been done concentrates on outcomes in specific areas of law:

- Marinescu (2011) finds that judges in employment tribunals are sensitive to local economic conditions. Judges in economically distressed areas are significantly less likely to rule in favour of dismissed employees: "a one-point increase in the unemployment rate leads to a seven-point decrease in [the probability of a pro-worker] outcome". Marinescu rationalizes this as an unwillingness to impose extra costs on firm when "times are tough".
- Pina-Sánchez, Lightowlers, and Roberts (2017) found that judges in criminal cases are somewhat sensitive to (local) public opinion: judges were significantly more likely to impose a custodial sentence in the wake of riots in England in 2011, and this effect was concentrated in towns affected by the rioting.
- Blackwell (2013) found that there was significant within-judge variation even in tax cases: the probability of a pro-taxpayer outcome conditional on the case being heard by a judge at the first quartile was between 0.24 and 0.26; this increased to 0.35 - 0.37 if being heard by a judge at the third quartile.

Judicial votes

Hanretty (2013) analyses the votes of judges in non-unanimous cases before the House of Lords between 1968 and 2003 (the period covered by the High Courts Judicial Database). He analyses these votes using a standard item response model, which links whether or not a judge dissented ($y = 0$) or was in the majority ($y = 1$) as a function of the judge's ideal point, the location of the case, and the degree to which that case discriminates with respect to some underlying dimension. He finds that a one-dimensional item response model, which recovers judges' political positions in other jurisdictions, fails to recover any such differences in the UK. The fit of the model is poor, and the judge "locations" cannot be interpreted as positions in any political space, but rather re-

flect judges' propensity to dissent, which he interprets not as a political stance, but rather a matter of personality. Some of the findings in relation to the poor fit of such a model relate to David Robertson's much earlier work using multidimensional scaling on the pairwise rates of agreement between judges in the House of Lords (Robertson 1982), in which he found that MDS solutions "are not technically very good" (p. 10).

A more recent analysis of dissenting votes on the Supreme Court by the same author comes to a very different conclusion. Hanretty (2020) (ch. 7) analyses the decision to dissent or concur in decisions taken by the UK Supreme Court, and finds that judges can be arrayed on a spectrum running from left to right. He argues that judges' positions are political, and cannot be interpreted as doctrinal differences regarding the proper degree of discretion to be given to governmental actors.

Arvind and Stirton (2016) analyse all non-unanimous cases of the House of Lords and Supreme Court in which a state body featured as litigant. The model uses the same parameters as an item response model – judges have ideal points, cases have locations – but the outcome variable is recorded differently: the outcome is given a score of 2 if the state body won, a 1 if the state body recorded a partial win, or a 0 if the state body lost. In modelling these outcomes, they are able to position judges on a "red-light/green-light scale" (Harlow and Rawlings 2006), with some judges prepared to grant state actors considerably more latitude ("green-light" judges like Lords Brown, Rodger, Carswell and Walker), and others more restricted in their approach (red-light judges). They show that the recovered judge positions are not correlated with dissent, but are correlated with the proportion of pro-state decisions each judge reaches (though their estimates are rather at odds with a similar exercise which examined

the proportion of pro-human rights decisions given by judges: Poole and Shah (2011)).

Iaryczower and Katz (2015) extend the standard ideal point model by incorporating an element of learning. Judges receive a "private" signal which indicates whether case-specific information favours one alternative (allowing or dismissing) or another. Judges' private information may be close to the unobserved 'true' value (precise judges) are far from it (imprecise judges). Iaryczower and Katz (2015) are thus able to recover both judge positions on a left-right scale, and in terms of precision (more or less precise judges).

In order to fit this model, Iaryczower and Katz (2015), like Arvind and Stirton (2016), are required to code cases in a particular direction. They use the same liberal/conservative coding used in the HCJD, though they note that "for about a third of the individual decisions, the liberal-conservative classification taken from the HCJD does not coincide with the labeling obtained from the IRT model, the largest proportion of them involving public law appeals" (p. 77).

They argue that a combined learning plus ideology model substantially outperforms a spatial model, and reach several ancillary conclusions which are based both the judge ideology parameters ("no statistically significant differences in ability between judges with and without political experience, or between Conservative and Liberal/Labour nominees") on the judge sensitivity parameters (experience increases sensitivity; sensitivity is higher in commercial cases and lowest in other cases).

The literature on judges' votes offers inconsistent conclusions. If we do not label outcomes in particular ways, and are interested only in an exploratory analysis of the differences of opinion on the court, then the

main thing we find is a non-political division between frequent and infrequent dissenters. If we are prepared to label outcomes as pro- or anti-state, we find that judges differ in this way; if instead we label outcomes as liberal or conservative, we find that judges differ in this way. This means that it is very important to analyse the ways in which judges' votes and the corresponding court-level outcomes are categorised.

6 CONCLUSIONS

As a long-standing democracy, the UK offers an ample historical record against which to test claims about the relationship between politics and the courts. Structural issues relating to the court system, such as the appointments system and the relationship between domestic and transnational courts, have come to the fore over the past 15 years. Work on within-system factors, and in particular the role played by individual judges decidin particular cases is less well-developed, but may now be ripe for exploration. The startup costs for researchers interested in exploring the UK are low, particularly for those familiar with common law systems, but the items of further reading below provide some general (and accessible) overviews.

7 FURTHER READING

- Paterson (2013): an incredibly rich account of the dialogue between different actors involved in the work of the House of Lords and Supreme Court.
- Gee et al. (2015): a major study of judicial independence which looks at the constant stresses and strains on the relationship between politicians and judges
- Hanretty (2020): a nose-to-tail account of judicial behaviour on

the UK Supreme Court which uses quantitative methods.

- Darbyshire (2008) or alternately Darbyshire (2011): two overviews of the English legal system from a legal and anthropological perspective, written by the same author
- The UK Constitutional Law Association blog, at https://ukconstitutionallaw.org/blog/. It is not an exaggeration to say that posts on this blog have changed how the constitution is viewed.

REFERENCES

Arvind, TT, and Lindsay Stirton. 2016. "Legal ideology, legal doctrine and the UK's top judges." *Public Law* 2016(July): 418–436.

Bailey, SH, and J Ching. 2002. *Smith, Bailey & Gunn on the Modern English System*. London: Sweet & Maxwell.

Blackwell, Michael. 2013. "Variation in the outcomes of tax appeals between special commissioners: An empirical study." *British Tax Review* 154(2): 154–175.

Blanes i Vidal, Jordi, and Clare Leaver. 2011. "Are tenured judges insulated from political pressure?" *Journal of public economics* 95(7-8): 570–586.

Blanes i Vidal, Jordi, and Clare Leaver. 2015. "Bias in open peer-review: Evidence from the English superior courts." *The Journal of Law, Economics, and Organization* 31(3): 431–471.

Cingranelli, David L. 2010. "The Cingranelli-Richards (CIRI) human rights dataset."

Coppedge, Michael et al. 2018. "V-dem codebook v9."

Darbyshire, Penny. 2008. *Darbyshire on the english legal system*. Sweet & Maxwell.

Darbyshire, Penny. 2011. *Sitting in judgment: The working lives of judges*. Bloomsbury Publishing.

Dicey, A.V. 1950. *Introduction to the study of the law of the constitution*. ed. E.C.S. Wade. London: Macmillan.

Gee, Graham. 2017. "Rethinking the Lord Chancellor's role in judicial appointments." *Legal Ethics* 20(1): 4–20.

Gee, Graham et al. 2015. *The politics of judicial independence in the UK's changing constitution*. Cambridge University Press.

Hanretty, Chris. 2020. *A court of specialists: Judicial behaviour on the UK Supreme Court*. Oxford: Oxford University Press.

Hanretty, Chris. 2014. "Haves and have-nots before the Law Lords." *Political Studies* 62(3): 686–697.

Hanretty, Chris. 2015. "The appointment of judges by ministers: Political preferment in England, 1880–2005." *Journal of Law and Courts* 3(2): 305–329.

Hanretty, Chris. 2013. "The decisions and ideal points of British Law Lords." *British Journal of Political Science* 43(3): 703–716.

Harlow, Carol, and Richard Rawlings. 2006. *Law and administration*. Cambridge University Press.

Hazell, Robert. 2007. "Out of court: Why have the courts played no role in resolving devolution disputes in the United Kingdom?" *Publius: The Journal of Federalism* 37(4): 578–598.

Howard, Robert M, and Henry F Carey. 2003. "Is an independent judiciary necessary for democracy." *Judicature* 87: 284.

Iaryczower, Matias, and Gabriel Katz. 2015. "More than politics: Ability and ideology in the British Appellate Committee." *The Journal of Law, Economics, and Organization* 32(1): 61–93.

Klerman, Daniel M, and Paul G Mahoney. 2005. "The value of judicial independence: Evidence from eighteenth century England." *American Law and Economics Review* 7(1): 1–27.

Laski, Harold J. 1925. "Technique of judicial appointment." *Mich. L. Rev.* 24: 529.

Linzer, Drew A, and Jeffrey K Staton. 2015. "A global measure of judicial independence, 1948–2012." *Journal of Law and Courts* 3(2): 223–256.

Marinescu, Ioana. 2011. "Are judges sensitive to economic conditions? Evidence from UK employment tribunals." *ILR Review* 64(4): 673–698.

Massie, Tajuana, Kirk A Randazzo, and Donald R Songer. 2014. "The politics of judicial retirement in Canada and the United Kingdom." *Journal of Law and Courts* 2(2): 273–299.

Melton, James, and Tom Ginsburg. 2014. "Does de jure judicial independence really matter? A reevaluation of explanations for judicial independence." *Journal of Law and Courts* 2(2): 187–217.

North, Douglass C, and Barry R Weingast. 1989. "Constitutions and commitment: The evolution of institutions governing public choice in seventeenth-century England." *The journal of economic history* 49(4): 803–832.

Paterson, Alan. 2013. *Final judgment: The last law lords and the supreme*

court. Bloomsbury Publishing.

Pina-Sánchez, Jose, Carly Lightowlers, and Julian Roberts. 2017. "Exploring the punitive surge: Crown Court sentencing practices before and after the 2011 English riots." *Criminology & Criminal Justice* 17(3): 319–339.

Poole, Thomas, and Sangeeta Shah. 2011. "The Law Lords and human rights." *The Modern Law Review* 74(1): 79–105.

Robertson, David. 1982. "Judicial ideology in the House of Lords: A jurimetric analysis." *British Journal of Political Science* 12(1): 1–25.

Salzberger, Eli, and Paul Fenn. 1999. "Judicial independence: Some evidence from the English Court of Appeal." *The Journal of Law and Economics* 42(2): 831–847.

Stephenson, Scott. 2015. "The Supreme Court's renewed interest in autochthonous constitutionalism." *Public law* (3): 394–402.

Stevens, Robert Bocking. 1993. *The independence of the judiciary: The view from the Lord Chancellor's office*. Oxford University Press, USA.

Tate, C Neal. 1992. "Recruitment to the British Appellate Judiciary, 1876-1972: Causal models." *International Political Science Review* 13(3): 249–267.

Tomkins, Adam. 2005. *Our republican constitution*. Hart Publishing.

Trench, Alan. 2012. "The courts and devolution in the UK." *The British Journal of Politics and International Relations* 14(2): 303–322.

Tushnet, Mark. 2002. "Alternative forms of judicial review." *Mich. L. Rev.* 101: 2781.

Valdini, Melody E, and Christopher Shortell. 2016. "Women's representation in the highest court: A comparative analysis of the appointment of female justices." *Political Research Quarterly* 69(4): 865–876.

Ziegler, Katja S, Elizabeth Wicks, and Loveday Hodson. 2015. *The UK and European Human Rights: A strained relationship?* Bloomsbury Publishing.