Atkin Lecture

The Reform Club, London

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"JUDICIAL INDEPENDENCE: INTERNAL AND EXTERNAL CHALLENGES AND OPPORTUNITIES"

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1. Introduction:

1. It is a great honour to be invited to give this lecture. Lord Atkin's paradigm changing speech in *Donoghue v Stevenson* and his dissent in *Liversidge v Anderson*[1] are known to all lawyers and law students, but his illuminating contributions stretch across many areas of private and public law. Professor Robert Stevens, a pioneer of scholarship on the judiciary in this country and a member of this club, stated that "between 1930 and 1940, no law lord had greater influence in the House of Lords".[2]

2. Lord Atkin was one of the cadre of judges appointed by Lord Haldane who believed in appointments based on "high legal and professional qualification"[3] rather than political affiliations. There are, no doubt, many examples from his career which have some resonance to the question of judicial independence today. His dissent in *Liversidge v*

[1] [1942] AC 206.
[2] *Law and Politics: The House of Lords as a Judicial Body, 1800 -1976,* (1978, UNC Press) at 284.
[3] Haldane, *An Autobiography* (1929) 270

Anderson showed he was courageously independent, and an aspect of the saga provides a telling example of a challenge to the internal independence of the judiciary.

3. Lord Simon, the Lord Chancellor and Head of the judiciary, who had not sat in the case, obtained advance copies of the speeches. He was disturbed by the force of Lord Atkin's language, in particular his statement that the only authority which might justify the method of construction favoured by the majority was the exchange between Humpty Dumpty and Alice in *Through the Looking Glass* where Humpty Dumpty said that when he used a word "it means just what I choose it to mean, neither more nor less". Lord Simon asked Lord Atkin to consider removing the passage because it satirized the views of the other judges and might be regarded as wounding to them.[4] Lord Atkin politely declined to do so. But Lord Atkin was also sensitive to what he considered to be questions that are for courts and those that are for policy-makers. Robert Stevens comments that his "speeches give the overall impression that he was anxious to make the relationship between the judiciary and the other branches of government an intelligent and responsible one", particularly in dealings with the legislature.[5]

4. The meaning and significance of judicial independence in our constitution is a huge topic, and there are many international articulations of the principles.[6] A much cited statement by the Supreme Court of Canada in 1985 is that "the traditional constitutional value of judicial independence ... connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on **objective** conditions or guarantees" and

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4 See Lewis, *op cit.,* 138-140 and Stevens, *Law and Politics* etc. at 287. The passage (*Through the Looking Glass*, c. vi.) is quoted at [1942] AC 206 at 244.

5 *Law and Politics* at 289

6 See the principles adopted by the General Assembly of the United Nations (1985), the Bangalore Principles of Judicial conduct (2002) and the Commonwealth's Latimer House Principles on the Independence of the Judiciary (2003).

that the relationship is both individual and institutional.[7] In his Denning society lecture in 2016, Lord Hodge identified what he described as ten pillars which support judicial independence.[8]

5. I cannot possibly cover all of them. In fact, there is no need to do so. The topic has been extremely well-covered in the UK since 2003 when the government announced a fundamental reform of the office of Lord Chancellor, and the creation of a Judicial Appointments Commission and a UK Supreme Court. Valuable books[9] appeared in 2013 and in 2015 and there have been many, many talks and articles by judges on this and allied topics.[10] They include the magisterial Lionel Cohen and Michael Ryle Memorial lectures given earlier this year by Lord Thomas, then Lord Chief Justice[11] and Sir Geoffrey Vos's talk last month in New Zealand with a very similar title to mine. I hasten

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7 *Valente v. The Queen [*1985] 2 S.C.R. 673 at [15] and [18] per Le Dain J giving the judgment of the court. There is also discussion of "adjudicative" and "administrative" independence. In both Canada and England and Wales, it is the executive which provides the administration, the court rooms and court staff, albeit, since the 2008 Framework Agreement between the Lord Chancellor and the Lord Chief Justice, *HMCS Framework Document,* Cm 7350 (2008), in partnership with the judiciary. In *Valente* it was also stated at [52] that "The essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11 (*d*) [of the Canadian Charter of Rights] … may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function."

8 *Upholding the Rule of Law: how we preserve judicial independence in the United Kingdom,* Lincoln's Inn Denning Society, 7 November 2016. The ten pillars are:- (1) A clear constitutional commitment to the independence of the judiciary and the rule of law; (2) Exclusion, or at the very least, minimisation, of political considerations as an influence on the appointment and promotion of judges; (3) Adequate finance; (4) Personal immunity from suit from acts and omissions in the exercise of judicial functions; (5) Security of tenure; (6) The separation of powers; (7) accountability; (8) "Role recognition" by judges; (9) Performance and moral authority; (10) Maintaining political and public understanding and support.

9 Shetreet and Turenne, *Judges on Trial* 2nd ed., 2013, CUP (a totally new book rather than a new edition of Professor Shetreet's pioneering and fundamentally important 1976 work (North Holland) bearing the same title, and Gee, Hazell, Malleson and O'Brien *The Politics of Judicial Independence in the UK's changing Constitution* (2015, CUP).

10 See *New Model Judiciary* (2015) 20 JR 63. In last three months of 2014 25 lectures by judges of the Supreme Court, Court of Appeal and High Court, 13 of which were by Supreme Court justices. Interrogation of the relevant websites for 2015, 2016 and 2017 (to 12 September) show 2015: UKSC 33; CA and HCJs 38, a total of 71; 2016: UKSC 21, CA and HCJs 24, a total of 45; 2017 (to 12 September) UKSC 13, CA and HCJs 25, a total of 38.

11 *The Judiciary within the State – Governance and Cohesion of the Judiciary,* (Lionel Cohen Lecture Jerusalem, 15 May 2017); *The Judiciary within the State – The relationship between the branches of the State* (Michael Ryle Memorial Lecture, 15 June 2017. Lord Thomas dealt with internal governance and the need for cohesion, and with the relationship of the judiciary with the other branches of the state, including the media which has been described (by either Macaulay or Edmund Burke) as the fourth estate.

to say I chose my title a year ago when Roger Billis invited me to give this talk.[12] There has been particular scrutiny of the challenges posed by the reactions of politicians and the media to sensitive cases such as the article 50 case and the 2006 case of a sexual assault of a three-year old girl which led the House of Lords Select Committee on the Constitution to criticise ministers including the then Lord Chancellor, Lord Falconer.[13] Regretfully, I have no time this evening to deal with those challenges.

6. There remains much to say. The Constitutional Reform Act largely replaced an important area of the unwritten constitution with a new legislative scheme.[14] Soon after the announcement of the changes on 12 June 2003 the judiciary started to work out their implications. In the 12 years since the Constitutional Reform Act there have been significant changes in the administrative and managerial roles of selected members of the senior judiciary. We have developed our own governance structure and a different relationship with the other branches of the State.[15] The birth and infancy of this phase of our constitutional development has passed. We have reached the teens, a stage which can be turbulent and which often has profound effects on future maturity. We have also just had important changes in personnel, with a new President of the Supreme Court and a new Lord Chief Justice of England and Wales. Moreover, there have been five Lord Chancellors in the seven years since 2010 compared with 12 in the previous 60 years.[16] It is an appropriate time to take stock. I am going to focus on: (i) institutional

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12 Sir Geoffrey principally dealt with the work of the European Network of Councils for the Judiciary on judicial independence and accountability.

13 For a full account see HL, Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament,* 6th Report of Session 2006-07, HL 151 §§ 45-49. The Committee also said that the senior judiciary "could have acted more quickly to head off the inflammatory and unfair press coverage".

14 HL, Select Committee on the Constitution, Constitutional Reform Act 2005*,* 5th Report of Session 2005-06, HL 83 §41.

15 See Lord Chief Justice's Michael Ryle Memorial lecture, §4.

16 Between 1950 and 1997 there were 9, and between 1997 and 2010 there were 3 (Lord Irvine, the last holder of the office who was also head of the judiciary and appointed the judges, Lord Falconer, and Jack Straw MP).

independence;[17] (ii) individual and institutional accountability; (iii) the role of the judiciary in the reform of the administration of justice; (iv) governance structures and practices; and (v) issues concerning appointments, promotions, and tenure which could affect independence.

7. The nature of the reforms government proposed in 2003 and 2007 and their impact on our constitutional framework left the judiciary with no choice but to take the initiatives which led to the agreements between the Lord Chief Justice and the Lord Chancellor in the 2004 Concordat and in the 2008 Framework Document about the Court Service.[18] The way the government proceeded on both occasions left no time for the development of a fully worked out scheme. Indeed, because the government considered that the changes in 2003 when Lord Irvine was dismissed and in 2006 when the Ministry of Justice was created were merely to the "machinery of government", they saw no need for any scheme. The judiciary, however, considered that they raised significant constitutional issues. They considered that the Ministry of Justice should not be brought into existence until necessary safeguards had been agreed to address the conflicts they foresaw. Their views were rejected. Lord Falconer stated that failure to agree would not stop the Ministry being created on 9 May 2007 and that "any outstanding areas of disagreement would have to 'evolve'".[19]

8. It is true that the way matters developed then, and more recently, is in tune with the way other parts of our unwritten constitution have developed. Consider, for example, the development of and changes that have occurred in the office of Prime Minister and the

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[17] Gee, Hazell, Malleson and O'Brien term this "collective" independence, but the term "institutional" is more common: see e.g. *Valente v. The Queen [*1985] 2 S.C.R. 673 referred to above.

[18] *HMCS Framework Document,* Cm 7350 (2008), revised in 2011 after tribunals were brought into the system and HMCTS was created (see Cm 8043) and again in 2014 (see Cm 8882).

[19] See HL, Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament,* 6th Report of Session 2006-07, HL 151 § 64.

nature of Cabinet government since Robert Walpole.[20] But is it appropriate for constitutional development to occur by self-created judicial governance structures? Or with mechanisms for accountability and a new and different relationship with the other branches of the State to be supported only by informal understandings between the judiciary and the other branches? Is the flexibility that some see as an advantage, a sufficient advantage to prevent interference (both external and internal) with the fundamentals of judicial independence because the structures are insufficiently durable or because aspects of those fundamentals and their importance to the rule of law are simply not understood? [21]

2. Institutional independence:

9. In the United Kingdom, individual independence in the sense of non-interference in an individual judge's decision-making in particular cases is more clearly understood and more firmly established than is the institutional or collective independence of the judiciary from the other branches of the state. The latter involves (albeit to differing degrees in different States) independence from the legislature and the executive in appointments, promotion, career development, and training, discipline and codes of conduct, court administration, and protection of the image of justice. [22] Until 2003, because the Lord Chancellor, a senior government minister, was head of the judiciary, "there was "little independence in a collective, or institutional, sense".[23]

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[20] See de Smith, *Constitutional and Administrative Law* Penguin, (5th ed. 1985) 171-2 ("The Cabinet and the Prime Minister … are hardly recognised in the statute book and they are almost invisible in the law reports. … [The Prime Minister's] powers and duties are determined almost exclusively by convention and usage"). See also Bagehot, *The English Constitution* (1867) (Fontana ed., 1963) 65ff and RHS Crossman's introduction, 20-24, 48-53; Jennings, *The Queen's Government* (Penguin Revised ed.) Ch 7; Hennessy, *The Prime Minister, The office and its holders since 1945* (Allen & Lane 2000).

[21] See Beatson, *Reforming an Unwritten Constitution* (2010) 126 LQR 48, 54 and 71 for the argument that the way other constitutional changes were made since 1997 produced a system the hallmark of which is complexity rather than transparency, let alone clarity and that the willingness to revisit decisions means the constitution remains a construct of convention rather than one of law and to that extent unstable.

[22] Consultative Council of European Judges, Opinion on Councils for the Judiciary (2007), at §42.

[23] See Woodhouse in Canivet, Andenas and Fairgrieve eds., *Independence, Accountability, and the Judiciary* (2006) at 122.

10. The independence of the judiciary and the need to uphold it is now expressly recognised in section 3 of the Constitutional Reform Act 2005. Section 3(1) imposes on Ministers a duty to "uphold the continued independence of the judiciary".[24] It could not be clearer. Because the duty applies to all with responsibility for matters relating to the judiciary or otherwise to the administration of justice" it follows that it applies to the legislature, including Parliamentary Committees considering these matters and increasingly taking evidence from judges.[25] It also applies to judges holding leadership positions. Moreover, the requirement in section 3(6) 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,[26] and (c) the need for the public interest in matters relating to the judiciary and the administration of justice to be "properly represented" in decisions affecting those matters shows that section 3 is also concerned with institutional independence.

11. The judiciary recognised from the outset that greater independence would lead to calls for greater accountability, a concept which is entirely admirable, but the breadth of which means it needs unpacking. In 2007, the Judicial Executive Board and the Judges' Council approved a document adopting the distinction between "explanatory" accountability and "sacrificial" accountability. Explanatory accountability occurs in judgments giving the reasons for decisions in individual cases. It also occurs where judges in leadership positions, publicly report on the administration of justice in reports

[24] I leave aside the possible significance of the word "continued", which word is not to be found in the Commonwealth's Latimer House Principles on the Independence of the Judiciary (see section (IV)) or the Basic Principles on the Independence of the Judiciary endorsed by the General Assembly in Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[25] The history and the rules about Parliamentary proceedings, such as Article 9 of the Bill of Rights.is summarised in Shetreet, *Judges on Trial* (1976) 7-8 and 12-15, Ch. VIII, and 384-386.

[26] This must be seen as supplementing the Lord Chancellor's statutory duty, now in the Courts Act 2003, "to ensure that there is an efficient and effective system to support the carrying on of the business of the courts" and "to provide appropriate services" for them, including staff and accommodation. This depends on adequate financing of the justice system, but it has to be recognised that the system has to play its part in the reductions in public finances made since the financial crisis in 2008.

or in public evidence to Parliamentary Committees. This is regarded as consistent with judicial independence, and may even enhance it. "Sacrificial" accountability involves losing your job - which (absent the statutory and constitutional safeguards and the procedures for questions of discipline and ill-health) is seen as inconsistent with independence. Accordingly, not all forms of accountability are consistent with independence, and one cannot simply say that accountability is the *quid pro quo* for independence.[27]

12. I have in the past advocated the development of new constitutional conventions to assist the process of "bedding in" the new arrangements without turning the judiciary into just another "player" in the policy and political processes.[28] Have such conventions emerged, and, if so, do they suffice? Moreover, what consequences follow from the increased management responsibilities of judges in leadership positions over other judges and their active participation in initiatives for law reform and court reform? Is there any tension between what is described as "succession planning" and the Judicial Appointments Commission's role in ensuring fair and transparent procedures for appointments? Do matters such as these mean that it is now desirable for the judiciary to engage in further scrutiny of the concepts of independence and accountability? Do we need to ensure that the judiciary's initiation of, and participation in, reform does not inappropriately compromise its independence? Also, is there a need to ensure that legitimate leadership and management responsibilities do not result an inappropriate form of accountability by other judges?

3. Individual and Institutional accountability:

13. For an individual judge, accountability is primarily through the appeal process and the statutory arrangements governing discipline and removal. In the case of the senior

[27] Vos §4

[28] *Judicial Independence and Accountability: Pressures and Opportunities,* Nottingham Trent University, 16 April 2008, (2008) 9 TJR 1 and *The New Model Judiciary* (2015) 20 JR 63.

judiciary, removal requires an address by both Houses of Parliament, although formal advice or reprimands may be given by the Lord Chief Justice after disciplinary proceedings.[29]

14. Institutional accountability is something which, like governance, has evolved in recent years largely as a result of initiatives by the judiciary. Since the changes which culminated in the Constitutional Reform Act 2005, although under no legal obligation to do so,[30] those holding the office of Lord Chief Justice have recognized the value of publishing a document aimed at increasing the understanding of the public and the other parts of the State of the role of judges, and developments and pressures in the court system. Since 2012 a Report has been presented to Parliament annually. Additionally, after internal and external consultation, the Judicial Executive Board has given guidance about the circumstances in which judges can appropriately give evidence to Parliamentary Committees and more recently about engagement with the executive on legislative proposals and draft bills.

4. The role of the judiciary in reform of the administration of justice:

15. My first example of the opportunities and challenges for independence, governance and accountability is provided by what Lord Thomas described as the revival of the use by the judiciary of its knowledge of the system to improve it. He considered that this could be done by initiating and leading reform in the administration of the court system as part of the judiciary's partnership with the Lord Chancellor through HMCTS, the Court and Tribunal service, by advising on policy and legislation about the administration of justice, and by explaining their initiatives to the wider public.[31] At present, the most

[29] See Senior Courts Act 1981, s. 11 (embodying the protection that originates in the Act of Settlement 1701). See generally Shetreet & Turenne, pp 286-288. Where a senior judge is permanently disabled from performing his or her duties and precluded by incapacity from resigning, the Lord Chancellor has the power to vacate the office.

[30] The Senior President of Tribunals is under a legal obligation under section 43 of the Tribunals Courts and Enforcement Act 2007 to report to the Lord Chancellor on matters concerning tribunal cases that the Lord Chancellor has asked him to cover and those which he wishes to cover. The Act obliges the Lord Chancellor to publish the report, although this has in practice been done by the Senior President of Tribunals

[31] Lionel Cohen lecture, § 53 ff., also §29. Michael Ryle §3

wide-ranging of these initiatives is the court reform programme involving digitization and new common procedural regimes.[32] The technical and procedural advice members of the senior judiciary are providing to government as part of the preparation for BREXIT, for example on the mutual recognition and enforcement of judgments and choice of jurisdiction, while less visible, is also of significance.

16. The fact that HMCTS has to work within a structure involving centrally negotiated MoJ contracts, and does not have control over its own finances, is a weakness.[33] It is, however, a weakness that shared with all programmes which depend on public financing, and democratic control over resources is not in itself offensive to the independence of the judiciary.[34] Joshua Rozenberg has said that one reason for the failure of previous reforms to the courts was the judiciary's lack of involvement in the governance of the courts.[35] He perceptively observes that the involvement of judges enables them to ensure that values and principles central to an effective justice system, such as judicial independence, the rule of law and open justice are reflected in what is proposed. If judges do this, and ensure their "judicial" attributes are not swamped by their managerial and administrative roles, this will certainly be so. Nevertheless, as the reaction, particularly during the second half of the twentieth century, to the reports of public inquiries chaired by a serving judge at the request of government shows,[36] there are challenges when judges step outside their core function of deciding cases.

17. The first is that, if the judiciary as an institution is proactive in devising and promoting a reform there is a risk of it being drawn into policy and possibly political controversy

[32] The Lord Chief Justice's Report (2016) p 7 described it as "the most radical" since 1873
[33] Gee, Hazel, Malleson and O'Brien op. cit., 43.
[34] Bingham, *The Business of Judging* 2000 (OUP) 57
[35] *The Online Court: Will it work?* (2017) pp 4-5.
[36] Devlin, *The Judge* 9; Stevens, *The Independence of the Judiciary* (1993), 169-172; *The English Judges: Their Role in the Changing Constitution* (2002) 29 and 83-85; Beatson, (2003-4) 53 Is. LR. 238, (2005) 121 LQR 221.

about aspects of the administration of justice, or any rate of being seen as just another lobbying group seeking to advance its own interests. If its role goes beyond initiating the policy agenda or helping to set it and extends to the more operational aspects of the implementation of the agreed policy, to "delivery", there are other risks.

18. In September 2017, the chairman of the Bar Council, expressed concern that this could be a threat to the independence of the judiciary as an institution. He said: "if judges become too closely identified with a programme of modernisation where success is dependent on funding and implementation by the Executive, there is a risk that in the future we will evaluate our judges on their ability to be effective managers rather than fearless independent judges who are independent of the Executive".[37] He also considered that the rise in judge-led reform and the partnership between the Executive and the judiciary of which HMCTS is the embodiment means that barristers and their representative bodies may need to start speaking out against such proposals. The reforming judges, he said, will not always get it right, perhaps because insufficient funds have been made available and, while it is important to ensure that reform is affordable, the Bar did not want to start thinking of judges in the way that people think of politicians. I ask what the impact of such criticism, whether by the legal profession, the media (including social media), or politicians will be on the way the judiciary is seen?

19. What about responses by the judge to such criticism? The chairman of the Bar Council observed that judges have not been shy of promoting their initiatives to maximise the chances of implementation, sometimes adopting an "evangelical" tone. I do not know whether he had in mind the role of Lord Thomas and others in the court reform programme or Sir Rupert Jackson's role in his innovative and comprehensive review of civil litigation costs. The reactions to Sir Rupert's report varied from wholehearted

[37] Andrew Langdon QC, The Barrister 11 September 2017

welcome to condemnation as a threat to access to justice.[38] Sir Rupert had the lead role in implementing his report, which had the support of the Judicial Executive Board.[39] Since its implementation, he has given at least three lectures on the topic, two pointing out where he thought things had gone wrong, and one reiterating the advantages of costs management and replying politely but robustly to the critics of it in the profession.[40]

20. The position taken by Sir Brian Leveson, who conducted a wide-ranging inquiry into the British Press,[41] a sensitive and hotly contested area of public policy, but not an area in which the judiciary had an institutional view, was different. Sir Brian has been unwilling to be drawn into discussion of the merits of the proposals in his report.[42] His reasons when giving evidence to the Culture, Media and Sport Committee[43] and the evidence given by other judges (including me) to an inquiry by the Select Committee on the Inquiries Act 2005[44] were that the judge might: (a) be drawn into giving an opinion on a variation to what he had proposed without hearing evidence; (b) be drawn into political debate with accompanying risks to the perception of impartiality; and (c) implementation of reform proposals was the shared responsibility and domain of the legislative and executive branches of the state.[45] Although these reasons were given

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[38] See the comments by solicitors and barristers in the Law Society Gazette, 31 March 2014, 4 April 2016 and 31 July 2017. The Law Society itself stated that it had reservations about introducing the recommendations in his July 2017 supplementary report on Fixed Recoverable because they were not supported by robust empirical evidence.

[39] See *Simmons v Castle* [2012] EWCA Civ. 1039 at [7]

[40] See *Confronting Costs Management,* Harbour Litigation Funding Lecture 13 May 2015. The references to the two earlier lectures are at §2.19. Jackson LJ's defence of his reforms was robust. See, for example, §10.2 where lawyers are said to dislike costs management "because it means more work and requires people to develop new skills" and §10.3 where it is stated that the views of lawyers are not the litmus test because the civil justice system exists to deliver civil justice at proportionate cost, not to promote the contentment or convenience of lawyers".

[41] *An Inquiry into the culture, practices and ethics of the British Press* (2012, HC 780-I to 780-IV).

[42] *Privacy in the 21st Century* (University of Technology, Sydney) 7 December 2012 and *News Gathering in a Time of Change* (Melbourne University Centre for Advanced Journalism) 12 December 2012

[43] See Hearing 10 October 2013

[44] Its report is HL 143 of Session 2013-14 (11 March 2014).

[45] The Committee at §268 referred to my evidence on this and stated that it "encapsulated what seem to us to be the most important issues in relation to the relationship between the judiciary and the executive". See also my *The New Model Judiciary and the other two branches of the State* (2015) 20(2) Judicial Review 63, at 71

about proposals on which the judiciary did not have an institutional view, they are also of relevance where it does.

21. Secondly, if reform led by a single judge or on which a particular judge has advised government, is implemented, should the judge who led it or provided the advice hear a case concerning the reform? Might a reasonable person legitimately see the judge or the judiciary as not impartial in relation to disputes about those reforms, or is there no real problem in relation to the adjudicative process? What if the reform is one that was the result of a Judicial Executive Board initiative or has been endorsed by that body? The fact that a judge has taken a view on an issue in a previous case which has been overruled does not in itself preclude him or her sitting on a later case on the same point. This is because precedent must and will be followed. Again, a view expressed by a judge in a book or an article does not preclude him or her from sitting. The judge should have an open mind because the view previously expressed has not been tested by the forensic anvil of adversarial argument in court. But, the examples I have given show that these scenarios require sensitive handling. Moreover, the decisions of the European Court of Human Rights in *Bryan v United Kingdom*[46] and *McGonnell v United Kingdom*[47] illustrate the difficulties which can arise as to compliance with article 6 of the European Convention on Human Rights if judges sit in cases where they have been involved in creating legislative measures in relation to the administration of justice.

22. If a particular judge is so identified with a particular reform which he or she has initiated or about which he or she has expressed strong extra-curial views or provided advice to government, should consideration be given to that judge not sitting on cases involving

[46] (1996) 21 EHRR 342 (planning inspector not independent of the Secretary of State who had set the policy challenged, but access to judicial review meant no violation of article 6) .

[47] (2000) 30 EHRR 289 (The direct involvement of the Bailiff of Guernsey in the passage of legislation relevant to McGonnell's planning application cast doubt upon his judicial impartiality and independence as a judge in an appeal against refusal of planning permission).

the issue, at least until the reform beds down? The guidance on engagement with the executive on legislative proposals and draft bills seeks to avoid the difficulty. It does so by stating that constitutional convention and the need to preserve independence means that, with one exception, engagement should be limited to technical and procedural aspects of proposals. The exception is that it is permissible for the judiciary – by which is meant the Lord Chief Justice or a relevant leadership judge designated by the Lord Chief Justice – to comment on the merits of a policy where that policy affects judicial independence or the rule of law.

23. Where such a reform is one which could be achieved by the development of the common law in a suitable case, is it appropriate for leadership judges to select an appropriate case in which to do so? The proposals of the Law Commission in the early 1990s about levels of damages and the recoverability of payments made under a mistake of law were substantially but not wholly implemented in this way,[48] but in hotly contested litigation where the court grappled with the necessary policy issues. The costs review's proposal that general damages should rise by 10% to balance the proposal that success fees and after the event insurance premiums should no longer be recoverable was implemented in an uncontested application to approve a settlement of an appeal.[49] The court was not addressed on the level of general damages. Indeed, it stated that this would not have been <u>appropriate</u> for three reasons. First, the increase was one part of a coherent package which the Lord Chief Justice, with the unanimous support of the Judicial Executive Board, had approved. Secondly, government had enacted the package on the basis that the judiciary would give effect to the 10% increase in damages.[50] Thirdly, the change did not affect that case because it was introduced prospectively. This looks like pure legislation being shoehorned into an adjudicative process.

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48 *Heil v Rankin* [2000] EWCA Civ. 84, [2001] QB 272; and *Kleinwort Benson Ltd. v Lincoln CC* [1999] 2 AC 349

49 *Simmons v Castle* [2013] 1 WLR 1239

50 Ibid at [7], [13], and [17].

24. An allied challenge has arisen because active participation in reform projects requires the involvement of a greater number of judges with significant leadership and administrative jobs which takes them out of court. The burdens on such judges were significantly increased as a result of the reforms between 2003 and 2005, and the Framework Agreement with HMCTS in 2008. For example, a time and motion study two years ago showed that a significant percentage of the time of Court of Appeal judges is being spent on administrative and management tasks. Many of these are vital to the administration of justice, but there has not been an increase in the number of judges to reflect this or the 59% increase in the workload of the court in the period between 2010 and 2016. The system has relied on the commitment of those in post to do what the job requires and their laudable willingness to date to take on additional tasks. It remains to be seen whether that commitment and willingness continues.

25. More broadly, growth in the case load in certain areas has led to pressure to allocate work to less senior judges. There has, in my time as a judge, been a very significant increase in the number of circuit judges who have been appointed as deputy High Court judges and sit in the High Court, particularly in the Administrative Court. Many of them are excellent, but few were originally public law specialists. In that respect, they are unlike the circuit judges who sit in the Court of Appeal Criminal Division who often have more experience in trying the sort of cases that that court hears than those sitting with them. Moreover, their deployment in this way leaves a gap at the circuit level, and the fact that appointment as a Deputy High Court Judge is seen as a step to promotion may leave them open to subtle pressures.

26. The reality is that in all areas of work, business is being pushed down to a lower level. What is going on in the courts is the legal equivalent of seeing the practice nurse when one would in the past have seen the GP. Care must be taken not to hollow out the

resource serving the senior courts in complex cases or to so overload the judges sitting in those courts that they are prevented from fulfilling their primary function of deciding cases to the high standard that has been achieved in the past and for which this country has a well-deserved reputation. It also has to be remembered that we are already doing more with less. The size of our judiciary is small when compared to those in European states. We have the smallest number of salaried judges per capita in the EU.[51] For example, there are 2,200 salaried judges in the UK for a population of 65.6 million in 2016. Italy has 10,000 judges for a population of 60.6 million, [52] and my estimate of the position in Germany in 2015 is that they have over 18,000 judges for a population of c 82 million.

5. What limitations, if any, does the principle of judicial independence put on governance structures and practices?

27. I have said that because the duty under section 3(1) of the Constitutional Reform Act applies to "all with responsibility for matters relating to the judiciary or otherwise to the administration of justice" it applies to judges in leadership positions. One consequence is that the responsibility imposed on the Lord Chief Justice by section 7 for "making arrangements" for the "training and guidance of the judiciary" and for "deployment ... and the allocation of work within courts" must be understood as subject to the principle of individual independence in decision-making.

28. In his Lionel Cohen lecture, Lord Thomas showed strong support for such an approach. He stated that, although a clear and effective governance is essential for the judiciary as an institution, it is also "essential that the individual independence of each judge is maintained, and particularly the right of judges to decide cases entirely freely and

[51] The 2017 European Justice scoreboard, fig. 35. See https://www.encj.eu/images/stories/pdf/Scoreboard/scoreboard2017-report.pdf

[52] Vos, §51

independently". It "was therefore of considerable importance to ensure that the system of governance in place since the 2005 Act can never be used to stifle or inhibit the expression in judgments of views that might not appeal to the mainstream of judicial opinion".[53] He saw a clear line between general guidance by the Lord Chief Justice, for example in relation to the code of conduct, and comment on and guidance about a particular decision.[54] There should never be comment on the latter through the judicial governance structure. The only proper place for such comment is in the decision of an appellate court. The line identified by him applies to guidance by any other leadership judge within his or her sphere of operation. Lord Thomas did not point to any particular constraints designed to ensure the line is maintained. It should not depend purely on awareness by leadership judges of the relevant constitutional principles, and it is clear that it does not. The *Guide to Judicial Conduct* provides that judges discharging leadership or management functions "will treat everyone equally" and that when involved in selecting for appointment, promotion or specific roles they will make decisions by reference to "sound, objective criteria", on the basis of "personal merit, experience, competence, performance, skills, and abilities". In relation to training, appraisal and deployment it states they "will act so as to provide equality of opportunity and treatment". [55]

29. Lord Thomas's reference to a distinction between general guidance about application of the code of conduct and guidance about a particular decision suggests a binary distinction. But the position may be more complicated. Just as it is said that it is incorrect to suggest, as some politicians have, that "judges can and should be functionally and practically free from influence from the executive and the legislature

[53] §§ 43-44.
[54] § 45.
[55] Issued in 2013 and amended in July 2016, § 4.5. Appendix 1 contains a *Dignity at Work* statement which states that the Lord Chief Justice and Senior President of Tribunals expect all to ensure that "everyone is able to work in an atmosphere in which they can develop professionally and use their abilities to their full potential", but its concern is with the freedom of judges from "harassment", "victimisation" and "bullying".

[only] **in their decision-making**",[56] so it is incorrect to regard the independence of judges from judges above them in the hierarchy as limited to their decision-making. Even there, there is room for some co-ordination in relation to practice and procedure, as is shown in cases in the Family Division where judgments have stated that the section giving guidance on what should be done in future cases has been shown to the President of the Family Division, who has authorised the judge in question to say that he or she agrees with what is said in the judgment.[57] Sir Geoffrey Vos correctly stated that judges must accept some pro-active court management in order to achieve an efficient and effective system. But he also recognised that some kinds of judicial leadership are a potential challenge to judicial independence.[58] How might the line be drawn in this area,[59] and are there potential disadvantages of too informal a system?

30. It is clearly not only legitimate but highly desirable to allocate work according to a judge's expertise. But I do not consider that it would be legitimate to do so on the ground that a particular judge is "unsound" on certain issues in areas within his or her expertise. Take, for example, the differences in the not too distant past between judges of the Family Division as to the merits of more openness in hearings and judgments and the differences of views as to the role of the courts as opposed to Parliament when catastrophically injured individuals or those with terminal diseases claim the "right to die".[60] Nor, in my view, is it legitimate to allocate work to existing experts in a way which precludes other judges from being given the opportunity to develop expertise in new areas. I doubt that equality of opportunity and treatment are provided where the member of a court with the greatest expertise in an area is allocated all or all the

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[56] Vos §58

[57] E.g. *Re W (Abduction: Procedure)* [1995] 1 FLR 878 (Wall J)*; Re L (Care Proceedings: Human Rights Claims)* [2003] EWHC 665 (Fam) (Munby J); *O'Connel & Ors (Children)* [2005] EWCA Civ 759 (guidance as to McKenzie Friends); *B (Litigants In Person: Timely Service of Documents), Re* [2016] EWHC 2365 (Fam) (Peter Jackson J)

[58] Vos §52

[59] Constitutional Reform Act 2005, s. 7

[60] *Nicklinson v Ministry of Justice* [2014] UKSC 38, [2015] AC 657; *R (Conway) v Ministry of Justice* [2017] EWHC 2447 (Admin)

significant cases in that area in a first instance court, or where a small cadre of judges is selected to do all the work in a new area without others being given the opportunity to express interest. One consequence may be that when there is a need for a person with that expertise in a higher court there is only one plausible candidate. I doubt whether deployment which is likely to create this is a legitimate form of "succession planning".

31. It is also important, even in this era of greater specialisation, for a common law system to remain flexible. Our ability to function with many fewer judges per capita than civil law countries depends on such flexibility. It is in any event likely to be counterproductive for other reasons for a particular judge to be identified with all or virtually all decision-making in a sensitive area, as was the position in the early 2000s in the cases of defamation and immigration.[61]

32. Are the passages in the *Guide to Judicial Conduct* to which I have referred specific enough to prevent a leadership judge from making such decisions? The system may be too informal and may favour those who are known to leadership judges, perhaps because they have pushed themselves forward more than their colleagues. I understand that the question of giving all judges the opportunity to show interest in working in an area is being considered. That is to be welcomed. But I venture to suggest that the use of the term "succession planning", while appropriate for describing work that is necessary in identifying future needs in the abstract, may be inappropriate in this context. It could be perceived as indicating the *modus operandi* of a self-perpetuating oligarchy and the internal judicial equivalent of the Lord Chancellor's tap on the shoulder when it should be regarded as part of the career support that is offered to all.

33. My second example is based on the decision during 2015 that more Court of Appeal cases should be heard by 2 rather than 3 judges. It is legitimate to allocate work in an

[61] Eady J (defamation) and Collins and Sullivan JJ (immigration)

appellate court to a constitution of two because a judicial assessment has been made about the complexity of the case. But it is doubtful whether it is legitimate to do so primarily because of the volume of cases pending for hearing. Sitting as two can lead to pressure to agree in order to avoid a rehearing before a differently constituted court, including pressure by the more senior, the more dominant personality, or the person with greater experience in the area. Solutions to disagreement such as letting the decision below stand, or (as was the case in the Queen's Bench Division until 1915) allowing the views of the senior to prevail by the junior withdrawing his judgment[62] seem unattractive.[63] There are also practical considerations. For example, would there be pressure to produce a bland judgment in order to achieve agreement as one sometimes suspects to be the case with judgments of the European Court of Justice.

7. Appointments, Promotion and tenure:

34. Turning to appointments, promotion and tenure, it is generally accepted that there is a need for fair and transparent procedures, and that continuity and stability are important components in underpinning the independence of the judiciary. It is for that reason that, while it was unfortunate that excellent candidates were precluded from applying to be Lord Chief Justice this year, I considered that the principle that the person appointed should be able to serve a minimum of 4 years was absolutely correct. Of the 18 Lord Chief Justices since 1874, 12 were aged 64 or under. Of those appointed since 1940, all but 4 served for 5 years or more. Two of the 4 who did not, vacated the office after 4 and 3 years only because they were appointed as the Senior Law Lord, to preside in cases in

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62 See Megarry's *Miscellany at Law* 145-147.

63 There were examples of the views of the junior judge prevailing when the case went on appeal, and this may still happen where, as in a recent case, the two judges set out their opposing views; but the junior judge concurs in the order and the court gives permission to appeal: see *R (Privacy International)* v *Investigatory Powers Tribunal, Secretary of State for Foreign and Commonwealth Affairs, and GCHQ* [2017] EWHC 114 (Admin). Leggatt J disagreed with Sir Brian Leveson PQBD's view that judicial review did not lie against the decision of the tribunal but (at [62]) stated that he saw "the cogency" of the contrary opinion and that "in circumstances where [the Administrative Court] … is not the final arbiter of the law that it applies, nothing would be served by causing the issue to be re-argued before a different constitution" the right course was "to concur in the result, while recording my reservations".

the UK's final court of appeal.[64] Of the other 2, one vacated the office after being diagnosed with a terminal illness, and only one was appointed less than five years before his statutory retirement age. The principle that a person appointed to a post should be able to serve for a minimum period should apply to all appointments to the senior judiciary, although, where the post does not carry leadership and management responsibilities, the minimum period can be shorter.

35. There is another age-related matter of relevance to continuity and experience. The average age of those appointed to the High Court is creeping up. Of the 13 High Court judges recently appointed, three are in their 60s, the oldest is 66. It is true that 4 are in their 40s, the age Lord Atkin was when he was appointed. It is also true that of the present members of the Court of Appeal, three, including the longest serving member of the Court, were appointed when aged 52 or 53. That is roughly the age Lord Atkin was when appointed to that court, and roughly the age other great judges, such as Lord Reid and Lord Wilberforce, were when appointed to the House of Lords.[65] But the gradual increase in the average age will in practice mean that there is likely to be a smaller pool available for selection for promotion to the Court of Appeal because some will not have acquired enough experience before retirement, or could only serve for a very short time. This has obvious knock-on effects for the Supreme Court, and the tenure of those appointed to that court.[66]

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[64] Lord Taylor served 4 years and resigned after diagnosed with a brain tumour. Lords Bingham and Phillips respectively served 4 and 3 years before being appointed Senior Law Lord and, in Lord Phillips's case after a year, the first President of the Supreme Court

[65] He was 52, the age Sales LJ was when appointed in 2014. Arden and Singh LJJ were 53 when appointed in 2000 and 2017. Of remaining 33 current members of the court, 13 were appointed between the ages of 56 and 59 and 20 were 60 or over.

[66] Lord Atkin was appointed to the HL at the age of 61 after nine years in the CA, and, in the absence of a compulsory retirement age, then served for 15 years. He was younger than all but one of the current English members of the Supreme Court on appointment. The exception is Baroness Hale who was 59 when she was appointed to the House of Lords. Of the eight other English members, three were under 65 on appointment. The current Northern Irish and Scottish members of the Supreme Court, Lord Kerr, Lord Reed and Lord Hodge, were respectively appointed at the ages of 61, 56 and 60. Lady Black and Lord Briggs, the youngest English members of the court, were appointed at the age of 63, but Baroness Hale and Lord Neuberger were 59 when they were appointed to the House of Lords. The ages of the other current members of the Supreme Court on appointment were: Lords Mance 62, Wilson 66, Sumption, 64,

36. There is also the effect of the unfilled vacancies at High Court level, 6 in the 2016 recruitment exercise, and the significant increase in the number of early retirements in the High Court and Court of Appeal[67] on the pool of experienced judges available for promotion. Of the 7 members of the Court of Appeal who have retired since October 2015, four have left early, three of them between 3 and 5 years early. Of the 13 High Court judges who have retired since then, 11 have left early.

37. The number of early retirements is also of relevance to suggestions, for example by the House of Lords Constitution Committee, [68] that recruitment difficulties be addressed by increasing the retirement age of the senior judiciary or at least of those in the Court of Appeal and the Supreme Court. Given the numbers of early retirements, increasing the age of retirement is unlikely in the long term to be an effective way of addressing the problem. Two other factors should be considered in this context. The first is whether the current workload and conditions of service are appropriate for a group of relatively elderly men and women. I have referred to the 59% increase in the caseload of the Court of Appeal since 2010. The second is how, given judges' security of tenure if of good

Carnwath 67, Hughes 65, and Lord Lloyd Jones 65. Two of the recent appointees replaced Lord Clarke and Lord Toulson, respectively appointed at the ages of 66 and 67. Lord Collins, who was appointed at the same time as Lord Kerr, was then aged 68.

[67] House of Lords, Select Committee on the Constitution, 7th Report 2017-19 *Judicial Appointments; follow-up,* HL 32 §61. Senior Salaries Review Body, 39th Annual Report 2017 §1.53. 13 appointments have been announced in the current and it is said that more will be, but it appears that not all the 25 vacancies will be filled. In the light of these difficulties, could the JAC and the system do more to avoid leaving a gap between a vacancy and the appointment of the replacement? Taking the last 15 appointments, only two were immediate replacements. In 8 cases, there was a gap of between 6-9 months, and in 5 cases there was a gap of between 10 and 12 months.

[68] Judicial Appointments (25th Report, Session 2010–12, HL 272, §173. The government rejected this, stating that the current retirement age sought to balance retaining experienced senior judiciary, while ensuring that high quality applicants can attain the highest judicial offices and that it did not consider that the current retirement age compromised the quality of the higher judiciary, or worked disadvantageously against those following less traditional career paths. The Committee's recent "follow-up" report (7th Report, Session 2017-19, HL 32, 2 November 2017) at §45 considered that further consideration should be given to this but also noted Lord Thomas's view that caution is required: note 69 below.

behaviour, to handle those who are still capable of doing the work to a high standard, but not at the pace they were able to achieve when slightly younger.[69]

38. The view that there should be direct appointments to appellate courts from practising lawyers or legal scholars has been around for some time, primarily in the context of addressing questions of diversity, and primarily gender diversity. If the pool of experienced High Court and Court of Appeal judges is reduced, one result may be increased pressure to appoint directly to appellate courts. If that happens, it will in turn make the High Court less attractive to high-fliers of the sort that have traditionally been appointed to it. This is serious because a key element in safeguarding the independence of the judiciary is the quality of justice delivered, and a crucial element in that is the quality of the High Court bench.[70]

39. My final point relates to two proposals that were in the Prisons and Courts Bill 2017 which fell because of the election this year, both in Schedule 15. The first was to enable the Lord Chief Justice and Heads of Division, who at present cannot be appointed on a fixed term basis, to be so appointed.[71] The second was to require a person so appointed, if not already a member of the Court of Appeal, to be recommended for appointment as an ordinary judge of that court, to take effect when the person ceased to hold the fixed term appointment.[72]

40. What would be the effect of appointing a person as Lord Chief Justice or as a Head of Division for a fixed term on the status of the offices and the influence of the office

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[69] In his evidence to the Constitution Committee (22 March 2017), Lord Thomas stated: "my experience has been that from time to time when you cross a certain age threshold your faculties may not be as good as they were a year or two before. The problem with the judiciary is that you cannot say to someone, 'You've got to go now', so we need to be very cautious."

[70] This is the view of the ENCJ: see Vos §19

[71] Clause 56 and Schedule 15, §1 (inserting a new subsection (1A) to section 10 of the Senior Courts Act 1981: see: https://publications.parliament.uk/pa/cm201617/cmpublic/PrisonsCourts/memo/PCB19.pdf

[72] Clause 56 and Schedule 15, §1 (inserting new subsections (2A) and (2B) to section 10, and new subsection (2A) to section 11 of the Senior Courts Act 1981.

holder? It would make the post more like that of a revolving chair of a committee with a real risk that the office would be diminished. Members of the legislative and executive branches of government, and other judges who do not favour the initiatives of a particular office holder would be able to seek to delay them in the hope that the next holder of the office had a different view. Fixed term appointments might also remove flexibility to deal with exigencies which arise. For example, it is well known that Lord Woolf delayed his retirement in order to provide continuity in dealing with the consequences of the changes to the office of Lord Chancellor in 2004.[73] A regular revolving door might also lead to increased jostling for position and possibly to currying for favour.

41. Also, what would the effect be of appointing someone to such a position who was not a member of the Court of Appeal? Unless that person was already a member of the Supreme Court, and there is no indication that is what was contemplated, the person would have no or very limited appellate experience. Another question is what those appointed Lord Chief Justice or as a Head of Division for a limited term would do after their appointment ended. Those appointed to their leadership positions because of management and leadership skills may not be the right people for appointment to the Supreme Court. Although they would be "ordinary" members of the Court of Appeal, would they be content with undertaking a full load of appeals and applications for permission to appeal? If not, the burdens on others would increase in view of statutory limit on the number of Court of Appeal judges. [74]

42. In representations before the Public Bill committee reviewing the Bill, the Lord Chief Justice and Senior President of Tribunals stated that they supported the clauses relating

[73] Lord Thomas could not have done this in 2017, because of his age, but his predecessor, Lord Judge, whose retirement age was 75, but left office when he was 73, could have. Should the necessity arise again, since Lord Burnett is now aged 59, it would be possible for him to do so as well.

[74] Senior Courts Act 1981 s. 2(1)(b)(3), as amended by the Maximum Number of Judges Order 2015 No. 1885. Although those holding a fixed term leadership post would not count towards the statutory maximum of 39 judges in the Court of Appeal while holding the post, they would do so afterwards.

to the courts and tribunals and the delivery of justice because of their critical importance to the reform.[75] They did not say anything specific about the provisions in Schedule 15, but Lord Thomas's evidence to the Constitution Committee in March stated he was attracted by the idea of fixed terms. He acknowledged that they are controversial, and, it is to be hoped that, if there is to be a new Courts Bill, before it is introduced a great deal of thought is given to what is proposed in relation to the offices of Lord Chief Justice and the Heads of Division.

7. Conclusion:

43. The primary question I have addressed is whether there should be greater transparency as to the ways judges in leadership positions show how they are ensuring that values and principles central to an effective justice system, such as judicial independence, the rule of law and open justice are reflected in their relationships with others. I mean their relationships with the other branches of government when leadership judges are involved in policy initiatives and reform, and their relationships with other judges who are not in leadership positions. One way of fostering this might be to have a new concordat between the Lord Chief Justice and the Lord Chancellor, perhaps with the participation of the President of the Supreme Court and, in the light of the importance of the Select Committees on the Constitution and on Justice, with the participation of Parliament or those committees.

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[75] See https://publications.parliament.uk/pa/cm201617/cmpublic/PrisonsCourts/memo/PCB19.pdf