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Institutional Independence and Accountability of the Judiciary

Lionel Cohen Lecture 2022, Jerusalem, 30 May 2022

The Rt Hon The Lord Burnett of Maldon[*]

It is an honour to have been asked to give this Lionel Cohen Lecture deferred from 2020 when the COVID pandemic was sweeping the world. It is a great pleasure to be with you at the Hebrew University of Jerusalem.

My starting point is Aristotle. In his *Politics* he had this to say about human nature and governance: 'Man, when perfected, is the best of animals, but when separated from law and justice, he is the worst of all'.[1]

He would, no doubt, have had much to say about how that applies to world affairs at the present time. My focus today, though, is on one way in which democracies organise themselves to ensure that they can bring out the best in society; and that is through securing judicial independence. Without judicial independence, both individual and institutional, mankind will become separated from law and justice.

Judicial independence as a constitutional principle is well-trodden ground. It is considered by the Latimer House Principles, agreed by the Commonwealth nations, which state that '[a]n independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice'.[2]

It is also supported by Article 10 of the Universal Declaration of Human Rights,[3] Article 6 of the European Convention on Human Rights,[4] and the Bangalore Principles of Judicial Conduct.[5]

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[*] Lord Chief Justice of England and Wales.

[1] Aristotle, *Politics*, Book I, 1253.a31

[2] Commonwealth (Latimer House) Principles on the Three Branches of Government, November 2003, Principle IV.

[3] UNGA Res 217A (III) (10 December 1948), UN Doc A/810, Art 10: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. See also United Nations Congress, Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan (Italy), 26 August–6 September 1985, Principle 1: 'The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary', https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary.

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 221, Art 6(1): 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

[5] United Nations Office on Drugs and Crime, The Bangalore Principles of Judicial Conduct, 2018, Principle 1: 'Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects', and

It is codified in standards developed at this university, the Mount Scopus International Standards of Judicial Independence[6] and the pioneering work of Professor Shetreet, both in respect of their development and his work, *Judges on Trial*.[7] It is a subject on which many judges, and others, have spoken in the past.[8] It is one on which I spoke four years ago in Brisbane, but its importance more than justifies the attention it has received.

I return to it today not to look again at the issues I then considered, but to focus specifically on institutional independence of the judiciary. That is what the Mount Scopus Standards refer to as 'collective independence' as distinct from the individual independence of judges and their ability to decide cases on their substantive merits absent any improper pressure or influence.[9] Both aspects of judicial independence are nonetheless connected.

The relationship between institutional independence and accountability is also worthy of consideration. Of course, the judiciary is not accountable to any other institution: not to the executive, nor to Parliament or an electorate. One view is that the two concepts are incompatible; that there can be no real independence where there is accountability. That might tend to the conclusion that those who make a virtue of judicial independence are, in reality, making a claim for judicial unaccountability. However, as I hope to demonstrate, judicial accountability is secured in various, more subtle ways.

There is another view. It is that independence and accountability are not only compatible, but that they are mutually supportive. Institutional independence requires proper and effective accountability. The emphasis here is on *proper accountability*, which compromises neither individual nor institutional judicial independence. There is an inherent risk that accountability mechanisms may lead to the erosion of institutional independence. Before exploring these issues, I should say something of what institutional independence means, and how it is protected in England and Wales, before considering accountability and how it can both protect and erode institutional independence.

It is through an independent and accountable judiciary that we secure the delivery of law and justice that Aristotle noted as being of such importance. Or, as the Mount Scopus Standards put it, '[a]n independent and impartial judiciary is an institution of the highest value in every society and an essential pillar of liberty and the rule of law.[10]

How, then, is this essential pillar of liberty and the rule of law secured in England and Wales? A brief glance at our uncodified Constitution might lead one to conclude that it is a recent innovation. A search of the statute book for the term 'judicial independence' would yield nothing

1.1–1.6, https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf.

[6] International Association of Judicial Independence and World Peace, 19 March 2008, as amended 2012, https://www.jiwp.org/mt-scopus-standards.

[7] Shimon Shetreet and Sophie Turenne, *Judges on Trial* (Cambridge University Press 2013).

[8] See Jack Beatson, *The Rule of Law and the Separation of Powers* (Hart 2021) for a recent concise exploration of the issue.

[9] Referred to as substantive and personal independence; see Mount Scopus International Standards of Judicial Independence (n 6) Principle 2.2.

[10] ibid Principle 1.1.

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before 2005. The first time in our history that the constitutional principle of judicial independence was explicitly referred to in a statute was the Constitutional Reform Act 2005. That legislation restructured the role of the Lord Chancellor who, until then, had been head of the judiciary, Speaker of the House of Lords (the Upper Chamber of Parliament), and a senior cabinet minister. He was also directly responsible for judicial appointments. The Lord Speaker now presides in the House of Lords,[11] the Lord Chief Justice is head of the judiciary,[12] and the Judicial Appointments Commission recommends judges for appointment.[13]

Section 1 of the 2005 Act recognises the 'existing constitutional principle of the rule of law' and the 'Lord Chancellor's existing constitutional role in relation to [it]'. Section 3 guarantees continued judicial independence. It imposes a duty on the Lord Chancellor, all Ministers and those with a responsibility for matters relating to the judiciary or to the administration of justice to uphold the continued independence of the judiciary. The Lord Chancellor, other Ministers of the Crown, and others responsible for the administration of justice are required to continue to secure that constitutional principle. It imposes specific duties, too. The Lord Chancellor and other Ministers of the Crown must not seek to influence individual judicial decisions through any special access to the judiciary. Importantly, the Lord Chancellor must have regard to (i) the need to defend judicial independence; (ii) the need for the judiciary to have the support necessary to exercise its functions; and (iii) the need for the public interest regarding matters relating to the judiciary or to the administration of justice to be properly represented in decisions affecting them. The judiciary, for these purposes, includes all courts in the United Kingdom and international courts.[14]

These are important, wide-ranging and specific duties. They were not new in 2005 but reflected the accepted position governed until then by constitutional convention. They provide the structure for the institutional independence of the judiciary. The obligations imposed on the Lord Chancellor, Ministers of the Crown and public officials concerned with the administration of justice are positive. In imposing an obligation on the Lord Chancellor to have regard to defending the independence of the judiciary, he is required to be active in support of the judiciary, within government and, if necessary, in public when that independence is threatened or attacked.

Institutional independence requires proper funding of the courts. The duty to have regard to necessary support encompasses proper funding. All these obligations are brought together with clarity in the Lord Chancellor's oath, taken before the Lord Chief Justice and senior judges in the Royal Courts of Justice on appointment:[15]

> I, … do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible.

[11] Constitutional Reform Act 2005, s 18 and Sch 6.
[12] ibid s 7.
[13] ibid s 61.
[14] ibid s 3(7).
[15] ibid s 17.

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Neither judicial independence nor the rule of law is defined in the 2005 Act; nor is there any real discussion of their content in the Explanatory Notes to the Act. A neat, all-encompassing definition of either term would prove difficult. The best may be found in Lord Bingham's short work, *The Rule of Law*.[16] However, inherent in the rule of law is the separation of powers, of which judicial independence is an integral part.

Separation of powers provides a starting point to flesh out institutional independence. Forgive me for a reference to Magna Carta to which much more is often attributed than can be justified. However, its acknowledgement that the King would not sell, delay or deny justice marks a dividing line between the judicial and executive powers of the state.[17] It was not, for example, for the King to solicit payment from litigants to delay justice being done.[18] Justice was to be done according to law, not according to the whim of the Sovereign. Magna Carta also required that only those learned in the law be appointed justices.[19] That was a point at which the great seventeenth-century Lord Chief Justice Sir Edward Coke, Magna Carta's greatest supporter, built upon in his dealings with James I in the *Prohibitions del Roi*. He decided that the King could not act as a judge in his own courts.[20] The judicial power of the state could not be exercised by the executive. That view has echoed from Bodin in the sixteenth century, through Locke, and the authors of the Federalist Papers.[21] When those two powers are joined together the result, as Montesquieu put it, is 'arrogance and tyranny'[22] in the executive.

It is one thing to separate the judicial power of the state from that of the executive. It is no more than a necessary condition by which we give effect to the rule of law. Improper influence can be effected more subtly, and effectively, than through unity of power. Such influence was exercised by the simple expedient of removing judges from office, or simply refusing to reappoint them. Sir Edward Coke was removed from office by James I. His grandson, Charles II, also engaged in the practice of suspending judges from sitting, while forcing others to take early retirement; and James II sacked 12 judges who refused to rule as he wanted them to do.[23] Uncertainty of office can be a powerful means to secure favourable judgments.

With the Act of Settlement 1701, the power to dismiss judges in such ways was set aside: security of tenure was established. Judges would – and they still do – hold office in good behaviour.[24] Members of the senior judiciary were (and are still) removable only following a resolution

[16] Tom Bingham, *The Rule of Law* (Allen Lane 2010).
[17] Magna Carta (2015), Ch 40.
[18] J.C. Holt, *Magna Carta* (2nd edn, Cambridge University Press 1992) 179, and see 84, where it is noted that John incentivised his knights to join his army by offering to stay claims brought against them.
[19] Magna Carta (2015), Ch 45.
[20] (1607) 12 Co Rep 63 ('the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or betwixt party and party, concerning his inheritance, chattels, or goods etc., but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England'.
[21] Jean Bodin, *Les Six Livres de la République* (1576) cited in Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 452; John Locke, *Two Treatises of Government* (1690) (Cambridge University Press 1994); Alexander Hamilton, James Madison and John Jay, *Federalist Papers* (Signet 2003) No 47, 48, 78.
[22] Charles Montesquieu, *De l'Esprit des Lois* (1748) (Cambridge University Press 1989) Book XI, 6.
[23] John Baker, *An Introduction to English Legal History* (Oxford University Press 2019) 179.
[24] See, for instance, Senior Courts Act 1981, s 11.

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of both Houses of Parliament. Until 1760, judicial office determined with the demise of the Crown but that changed and full security of tenure was established.[25]

The 1760 legislation also secured another aspect of institutional independence; it provided for security of salary.[26] No longer could the judiciary be influenced by threats to reduce their income. That protection remains today, although whether it protects against pension reductions remains moot.[27] It was further supplemented by judicial immunity from suit for civil liability for acts carried out while exercising a judicial function,[28] and by vesting judicial discipline in the Lord Chancellor as head of the judiciary until 2005, when it became the joint responsibility of the Lord Chancellor and Lord Chief Justice.[29]

A further, perhaps underestimated, feature of institutional independence merits mention. As the Consultative Council of European Judges noted for the Council of Europe in 2007, control over judicial training and judicial promotion are also important aspects of institutional independence.[30] Executive control over judicial training could foster an executive-minded judiciary if it was subverted to that end, or be used to encourage a particular approach to cases supported by the government. Our judicial training is provided by the Judicial College, formerly the Judicial Studies Board, under the statutory responsibility of the Lord Chief Justice.[31] So, too, executive control of judicial promotions could lead to appointments based on familiarity with the executive or on how sympathetic an appointee might be to the prevailing political mood. It might encourage judges to toe the executive line for fear of prejudicing future promotion prospects.

The extent of executive involvement in senior judicial appointments, even in mature democracies, varies enormously. In England and Wales, for example, the Lord Chancellor has a role in identifying the criteria for appointment and may reject a recommendation from the appointing Commission, but only for a reason.[32] That has yet to happen. It is the Lord Chancellor who formally starts the appointments process, but it is the Judicial Appointments Commission that decides on who to recommend. By contrast, in the United States politics play a central role in the identification of a candidate for many federal appointments, and then with Senate approval. There is executive involvement in many systems of judicial appointment, but in those governed by conventions understood by all and not simply the letter of the relevant appointments laws, the outcomes will be likely to respect institutional independence. There was, so far as I am aware, no criticism that appointments made by successive Lord Chancellors, despite their anomalous constitutional position, were made on party political grounds. That, no doubt, was because the individuals of very high standing, both as lawyers and politicians, who became Lord Chancellor had

[25] Commissions and Salaries of Judges Act 1760, s 1.
[26] ibid s 3.
[27] Senior Courts Act 1981, s 12.
[28] *Hamond v Howell* (1677) 2 Mod 218; *Sirros v Moore* [1975] QB 118; *Re MC (A Minor)* [1985] AC 528.
[29] Constitutional Reform Act 2005, s 108.
[30] As noted by the Consultative Council of European Judges, Opinion 10, 23 November 2007, paras 48, 65, https://rm.coe.int/168070098e.
[31] Constitutional Reform Act 2005, s 7(2)(b).
[32] Judicial Appointments Regulations 2013, SI 2013/2192, regs 9, 15, 21, 27.

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their constitutional responsibilities so deeply ingrained within them. It worked because they knew where the constitutional boundaries lay and would not have dreamt of crossing them.

We have seen that by the 1760s two of the three most fundamental aspects of institutional independence, as identified by the Canadian Supreme Court in *R v Valente*,[33] were in place: security of tenure, and security of salary. The third it identified was judicial control of the administration of justice system,[34] in so far as that bears upon the exercise of the judicial power of the state.

There are different views about the extent to which institutional independence requires judicial control of the court's administration. Lord Browne-Wilkinson, for instance, took the view that it required the judiciary to control the court service in its entirety. That model has been adopted in Scotland and in Ireland, but not in England and Wales and the United Kingdom Tribunals. Instead, and consistently with the Mount Scopus Standards, the wider court administration, in the form of Her Majesty's Courts and Tribunals Service (HMCTS), is carried out as a partnership between the Lord Chancellor, Lord Chief Justice and Senior President of Tribunals. The partnership is governed by a Framework Document.[35] The Court Service is an executive agency and, as such, is part of the civil service, but it is run by a board which has non-executive members including its chair, senior executives of the Court Service, three judicial members and a representative of the Ministry of Justice. In addition, we have the Judicial Office, a relatively small department, which operates independently of the Ministry of Justice and is answerable to the Lord Chief Justice and the Senior President of Tribunals. The Mount Scopus Standards highlight how institutional independence requires either a partnership model of court administration or a judicial model. It emphasises how executive-only models of control may compromise institutional independence.[36]

A distinct aspect of the administration of justice where judicial control is vital is in controlling the listing of cases. Were the executive able to control the listing of cases it could manipulate the order in which cases are heard. It could delay claims against the government or others. It could put pressure on the judiciary by over-listing. It could engineer priority for cases for political reasons which ignore the wider interests of justice. There was a time recently when there was public pressure in our jurisdiction to prioritise knife-crime cases. Currently there is pressure to prioritise serious sex cases. Maybe next year it will be crimes of fraud against the elderly. However, the point is that prioritising one type of case necessarily slows down others. Judges balance the interests of justice for all those who are concerned with cases awaiting a hearing in their courts when it comes to priorities. They must not bend to prevailing but changing political winds.

[33] [1985] 2 SCR 673, paras 27, 40.
[34] ibid para 47.
[35] HMCTS, Framework Document, July 2014, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf.
[36] Mount Scopus International Standards of Judicial Independence (n 6) Principle 2.13 ('The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive').

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The Concordat between the Lord Chancellor and Lord Chief Justice, which formed the basis of the 2005 Act,[37] recognised that listing is a judicial function. Of course, the organisation of lists in any court will often be determined, in the first instance, by officials; but they act subject to listing policies of the judiciary, not the executive. Judges may move cases if the interests of justice require and ultimately make very difficult decisions about prioritisation, particularly in the criminal jurisdiction.

The elements necessary for institutional independence focus on separating the executive and Parliament from the judiciary and also on securing its independence from the former. Institutional independence today would also include independence from powerful non-state actors, such as large corporations, trade unions, pressure groups, the media, and so on.[38]

Institutional independence is not, however, a one-way street. It requires more than ensuring that the judiciary is protected from improper pressure or control. It also requires the executive and Parliament to be respected by the judiciary. Just as it is for the executive and Parliament to remain within their constitutional provinces, so it is for the judiciary.[39] This takes several forms.

The first is that judges should not form part of the legislature. It was certainly anomalous until 2005 that my predecessors were active members of the House of Lords as were the Lords of Appeal in ordinary (the Law Lords). They spoke and voted in the House of Lords, and sat on committees, rather than confine themselves to determining appeals. That system, which had its roots in centuries of constitutional evolution, caused few obvious practical problems because all concerned recognised the proper limits on their involvement. The Law Lords often contributed to technical committees and spoke on matters relating to the administration of justice. Lord Bingham, on appointment as Lord Chief Justice, made a powerful maiden speech on the importance of international law[40] and, famously, Lord Lane as Lord Chief Justice intervened in 1989 in a debate about the regulation of legal services.[41] The 2005 Act secured this aspect of the separation of powers and institutional independence. The Law Lords were separated from the House of Lords with the creation of the Supreme Court, and serving judges who are peers (there are three of us) were barred from taking part in the proceedings of the House of Lords.[42] Judges had been prohibited from sitting in the House of Commons since the early nineteenth century.[43]

Nor should judges act as advisers to the executive, as Lord Chief Justice Mansfield did for many years. He was said at one time to be de facto Prime Minister[44] – a clear case of unity rather

[37] Lord Chancellor's Department, 'The Lord Chancellor's Judiciary-Related Functions: Proposals (the "Concordat")', January 2004, para 36.
[38] See, for example, an open letter from environmental protest group Insulate Britain dated 20 April 2022, declaring the British courts a 'site of nonviolent civil resistance', https://www.insulatebritain.com/open-letter-to-the-uk-judiciary.
[39] cf *M v The Home Office* [1992] QB 270, 314.
[40] HL Deb 3 July 1996, Vol 573 Col 1465–1468.
[41] HL Deb 7 April 1989, Vol 5050 Col 1329–1333. Lord Lane described the proposed reforms of legal services as an attempt to 'disembowel the [legal] system'.
[42] Constitutional Reform Act 2005, s 137.
[43] Now see House of Commons (Disqualification) Act 1975, ss 1(1)(a), 1(2) and Sch 1.
[44] Norman S Poser, *Lord Mansfield: Justice in the Age of Reason* (McGill 2013).

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than separation of powers. He was not alone: until the time of Lord Ellenborough it was not unusual for Chief Justices to sit in the Cabinet.[45]

Lord Reading, our first Jewish Chief Justice, took office on the eve of the First World War. He spent more time advising the government than acting in his judicial capacity. For much of 1914 and 1915 he tackled the financial crisis brought about by the war and led the Anglo-French Financial Commission to seek financial assistance from the United States. He mediated the 1916 Cabinet crisis between Asquith and Lloyd George. In September 1917 he held a special appointment of High Commissioner to the United States and Canada, and in 1918 he was appointed British Ambassador to the United States, all the while remaining Lord Chief Justice. He even attended War Cabinet meetings. It is perhaps little surprise that after all that excitement he found his post-war return to life on the bench a little dull and sought fulfilment elsewhere, notably as Viceroy of India.

The second is that judges should be allergic to politics. It is not for judges to advise the government or Parliament; nor is it for them to offer their views on political matters in public, or privately to the government. It is appropriate and often necessary for the judiciary, in our jurisdiction through the Lord Chief Justice or nominated delegates, to comment on the technical or operational aspects of proposed legislation. We may discuss with government how policy proposals or proposed legislation may affect the practical operation of the administration of justice, but we do not comment on the political merits of proposed legislation. Great care must be taken if judges assist Select Committees of Parliament to avoid becoming embroiled in political controversy.[46] Where a judge strays from this position of strict political neutrality and makes 'politically controversial remarks' the executive may make an equally 'robust', if polite, response.[47]

Where does this leave institutional independence? It requires the separation of powers. The judiciary must be independent of government and Parliament, institutionally, individually and through influence. All three must respect the roles of the other. There must be an appointments and promotions process that is not subject to political manipulation. Judges must have security of tenure and protection of their terms and conditions, especially salary and retirement age, to avoid the executive or legislature exerting pressure. There must be secure and enforceable mechanisms to ensure that the administration of justice is adequately funded. Judicial training should be for the judiciary. The executive must not have control of judicial discipline. It requires independence of administration, achieved at the least through a partnership model of court administration.

Having set out the essential elements of institutional independence, I turn to consider institutional accountability. The government is accountable to Parliament and to the electorate through general elections. It must also operate within the law, a matter for the determination of the courts when the government is challenged. Parliament as an institution is not accountable to any other. It has extensive and necessary protection from the scrutiny of the courts, but individually

[45] See the House of Lords debate on Lord Ellenborough's position as Lord Chief Justice and Cabinet Minister: HL Deb 3 March 1806, Vol 16 Col 253–284.
[46] Judicial Executive Board, 'Guidance to Judges on Appearances before Select Committees', October 2012, para 13, https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/select_committee_guidance.pdf.
[47] Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th edn, Penguin 1998) 375.

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members of the House of Commons must submit themselves periodically to the electorate, and members of the legislature are subject to constant scrutiny through the public nature of their activities and the reporting of a free press.

Whilst it is uncontroversial that the judiciary is not accountable to any other institution, that does not mean that either individually or institutionally judges are unaccountable. The precise mechanism of accountability will vary from country to country and be informed by its individual constitutional arrangements and historical developments. I shall endeavour to identify various features of our system that introduce accountability.

The first form of direct accountability comes through open justice. It is the bedrock of the common law described by Jeremy Bentham as the 'keenest spur to exertion and the surest of all guards against improbity'.[48] It is guaranteed by Article 6 of the European Convention on Human Rights[49] and, in part, by Article 14 of the International Covenant on Civil and Political Rights.[50] It is subject only to limited exceptions and provides a powerful check against arbitrary behaviour. Open justice ensures that what goes on in courts and tribunals can be seen, reported on and discussed, including critically. An important aspect of open justice is the wide availability to the public of decisions and judgments from courts and tribunals at all levels and not only to the parties. Judges should be realistic enough to recognise that much of our output is not of interest beyond the parties to a dispute, but it is important that there should be public access to that which is. Historically there was much wider verbatim reporting of court proceedings and high-profile cases than now exists in the newspapers. Published collections of law reports for centuries have been an authoritative source of the law and continue to be vital for sorting the wheat from the chaff; but the availability of all judgments of importance on the internet has widened public accessibility and expanded the boundaries of open justice. Greater openness of this sort will not only secure greater accountability but will help to support institutional independence by enhancing public understanding of what the courts do and how judicial decisions are made.

A modern approach to open justice has included supporting the expansion of the lawfulness of broadcasting court proceedings, when to do so does not have an adverse impact on the administration of justice.

Linked to open justice, is appellate accountability. Almost all judicial decisions are capable of being appealed against if they arguably disclose legal error. This provides direct accountability for individual judges and is an important part of institutional accountability. Along with openness, it is a means by which high standards are maintained within the judiciary. That the judicial process does so reduces the possibility that calls may be made for security of tenure to be weakened to deal with judges who 'reach the wrong decision', or for there to be an executive override of judicial decisions, in effect an appeal from the court to the executive.

[48] Jeremy Bentham, 'Draught for the Organization of Judicial Establishment' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait 1843) Vol 4, 316.

[49] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 221.

[50] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171.

In any system there must be a final court of appeal, but in most democracies ultimate sovereignty does not lie with the courts. In the United Kingdom it is open to Parliament to legislate to reverse a judicial decision. In systems governed by a constitution with enhanced majority requirements for its amendment, that may be less easy to do, but it can be done.

A further aspect of openness has developed since the 2005 Act. It takes the form of explanatory accountability. It is not inconsistent with institutional independence because the extent to which it takes place lies in the hands of the judiciary. It supports that form of independence because it is a means by which the judiciary can explain to the public how justice is being administered. It is a means by which political and public confidence in the judiciary can be maintained. This accountability takes several forms. I and my recent predecessors have given an annual press conference dealing with a wide range of issues, some unpredictable, but we do not discuss individual decisions. The Lord Chief Justice lays an annual report before Parliament, setting out how the courts have operated and summarising other activity. The Lord Chief Justice attends Parliamentary Select Committees – the Justice Committee of the House of Commons and the Constitution Committee of the House of Lords – to discuss the justice system and developments in the administration of justice. Other judges appear before select committees to help with discrete and technical questions. It is also now relatively common for judges to take part in broadcast discussions and to give media interviews. Our own website hosts content, including podcasts and video clips, of judges explaining what they do.[51]

One of the great traditions of the common law has been public participation in the administration of justice and decision making. In England and Wales the public is directly involved in the delivery of criminal justice. Justices of the Peace – lay people who come from all walks of life – determine criminal cases in the Magistrates' and Youth Courts. They are also increasingly involved in determining family and child-related disputes. Juries have almost disappeared from civil cases in our jurisdiction but decide guilt or innocence in all serious criminal cases tried in the Crown Court. Whilst there are about 14,000 magistrates, hundreds of thousands of people serve annually as jurors.[52] Non-lawyers also sit as members of many tribunals. Direct engagement of the public with the judicial process not only helps to secure confidence and consent in the justice system but enhances accountability. Importantly, through giving the public direct involvement, people see for themselves how justice is done in a way that informs wider public debate.

One form of accountability that is common in other walks of life is not compatible with institutional independence or indeed the individual independence of judges; this is what is sometimes known as 'sacrificial accountability'. Someone may be sacked, feel obliged to resign or be subject to intolerable pressure to resign either for their own perceived failings or that of an institution. Sir Jack Beatson has recently described it as a form of accountability that 'involves losing

[51] https://www.judiciary.uk.

[52] 784,087 people served as jurors in 2019: Ministry of Justice, 'Criminal Court Statistics Quarterly: January to March 2020', 25 June 2020, 5, https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2020.

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your job'. As he goes on to say: 'In the absence of safeguards such as those in the Act of Settlement [now the Senior Courts Act 1981], and the procedures dealing with discipline and ill-heath …, sacrificial accountability is seen as inconsistent with independence'.[53]

The need for security of tenure does not make judges immune from disciplinary action, including if misconduct were serious enough, removal from office. A disciplinary system which does not focus on judicial decisions, but rather on judicial conduct, is a proper means of accountability. An effective, efficient and fair system of investigation into complaints of misconduct by members of the judiciary is an important aspect of accountability. Were judges able to act in ways that brought the judiciary into disrepute without any form of redress or sanction, the judiciary as an institution would itself be brought into disrepute. That would undermine public confidence. An effective disciplinary process, which provides for adverse findings to be made public, is thus an important means by which institutional independence is maintained while, at the same time, providing for accountability. As has been noted in the United States, 'judicial independence [was] not intended to insulate individual judges from accountability to "the world as a whole (including the judicial branch itself)," but "to safeguard the branch's independence" from its two competitors'.[54]

Disciplinary accountability supports that independence by helping to safeguard the judiciary from executive or parliamentary sacrificial accountability, while ensuring that individual judges remain properly accountable for their behaviour. In the words of Advocate-General Tankev: '[A] disciplinary regime … embodies a set of rules that permits judges to be held accountable for serious forms of misconduct and thus contributes to enhancing public confidence in the courts'.[55]

Institutional independence is not only consistent with various forms of accountability but is supported by them. The judiciary should not be immune from scrutiny and accountability. Such accountability must be tailored to be effective but also consistent with the need to ensure that the judiciary can discharge its constitutional function effectively. As the European Network of the Councils of the Judiciary concluded:[56]

> A Judiciary that claims independence but which refuses to be accountable to society will not enjoy the trust of society and will not achieve the independence for which it strives … independence must be earned. It is, by no means, automatic.

That comes through direct, appellate, disciplinary and explanatory accountability.

What about the risks that accountability mechanisms may pose for institutional independence? Such mechanisms may be open to abuse. Attempts to cow the judiciary need not be as overt as threatening to remove them from office, as the Stuart kings did.

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[53] Jack Beatson, *The Rule of Law and Separation of Powers* (Hart 2021) 107.
[54] As noted in Cynthia Gray, *The Line between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability* (2004) 32(4) *Hofstra Law Review*, article 11, 4.
[55] Case C-719/19, *European Commission v Poland*, ECLI:EU:C:2021:366, para 6.
[56] European Network of Councils for the Judiciary (ENCJ), 'Independence and Accountability of the Judiciary', ENCJ Report 2013/2014, 13 June 2014, 4.

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The most obvious area in which accountability mechanisms can undermine institutional independence is disciplinary accountability. I indicated earlier my view that discipline of the judiciary cannot lie in the hands of the executive. Concerns in this area most recently have been raised in Europe in respect of Poland. Changes were made in 2017 to the composition of the National Council for the Judiciary, the body responsible for judicial appointments, dismissal and retirement. Those changes resulted in the majority of its membership being appointed by the legislature. The consequence was said to have resulted in its being subject to the 'domination of political powers over the judiciary … inconsistent with the principle of the separation of powers'.[57]

The European Court of Justice has considered the composition and powers of this body in several cases. It has also done so in respect of a similar body in Romania. In both instances it stressed the need for such bodies to be independent of the executive and legislature, be free of external influence, and for disciplinary procedures, for which they are responsible, to be subject to guarantees that 'prevent any risk of its being used as a system of political control of the content of judicial decisions'.[58]

It ought to be obvious that the ability of either of the two other branches of the state to control judicial disciplinary proceedings would place the judiciary in the position our judges were in under the Stuart kings. It would leave them open to the subtle, improper pressure of coercion or the outright pressure of punitive measures, both of which undermine individual judicial independence and, through that, the institutional independence of the judiciary. Improper pressure, which a 2017 survey of European judiciaries showed was of concern in several jurisdictions, is perhaps most insidious in this form.[59] As I have already noted, in England and Wales final decisions on judicial discipline is for the Lord Chief Justice and Lord Chancellor. They must agree on an outcome.[60] Complaints are investigated by the independent Judicial Complaints Investigations Office, which sits in the Judicial Office, supported by judges. Whilst the Lord Chancellor is, of course, a member of the executive, in judicial discipline matters he is here discharging a quasi-judicial function as Lord Chancellor and not as Secretary of State for Justice (his concurrent political office). He does not receive assistance from his political special advisers; they are not established civil servants and must be kept away from much of the work of the Lord Chancellor.

The role of the Lord Chancellor in our judicial complaints system leads me back to one of my starting points: the role of the executive in supporting institutional independence. The central

[57] Pawel Filipek, cited in Morgane Coué, Mélanie Vianney-Liaud and Justine Pédron, 'Judging the Judiciary: Responding to Judicial Misconduct Without Threatening Independence', 2021, 10, https://www.ejtn.eu/PageFiles/19763/TH-2021-04%20FR.pdf.

[58] CJEU, Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Romanian Judges Forum*, 18 May 2021, ECLI:EU:C:2021:393, para 198. See also, for instance, CJEU, Cases C-585/18, C-624/18 and C-625/18 *AK v Krajowa Rada Sądownictwa*, 19 November 2019, ECLI:EU:C:2019:982; CJEU, Case C-791/19 *Commission v Poland – Disciplinary Regime for Judges*, 15 July 2021, ECLI:EU:C:2021:596.

[59] As noted by Geoffrey Vos, 'Limits of, and Threats to Judicial Independence', 19 October 2017, Victoria University, Wellington (New Zealand)), paras 34 ff.

[60] Constitutional Reform Act 2005, s 108.

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point is that attacks on or a diminution in the institutional independence of the judiciary not only undermines the judiciary, but the rule of law itself. An illustration far away in both time and geography makes the point. It comes from the United States in the nineteenth century.

President Andrew Jackson refused to enforce a judgment of the Supreme Court. In doing so, he sent a message that enforcement of federal law, as the judgment required, was optional. The State of South Carolina received the message and enacted legislation to that effect.[61] By failing to respect the Court's role, the President had undermined his authority and that of Congress, a point recently reiterated by Lord Reed, President of the United Kingdom Supreme Court in the *UNISON* case. That case concerned the validity of Employment Tribunal fees. Lord Reed stressed that without access to the courts, democracy is imperilled. As he put it: 'Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade'.[62]

Executive support for the judiciary is not an optional extra within a democracy governed by the rule of law. It is a necessary means of securing it.

The Constitutional Reform Act 2005 enshrines in statute long-understood conventions regarding the rule of law and judicial independence, which apply to all Ministers of the Crown and other public servants. The constitutional conventions depend on all abiding by them. They have long conditioned the conduct of those who operate in the space those conventions occupy. They were (and still are) reflected in the rules that govern proceedings in Parliament itself. However, the Act imposes enhanced positive duties upon the Lord Chancellor who, despite the profound legislative changes to the role, remains the constitutional lynchpin between executive and judiciary. It is the Lord Chancellor who is charged particularly with defending the independence of the judiciary and who solemnly undertakes to do so in the oath of office. That entails a duty to engage publicly on behalf of the judiciary in the rare circumstances when public attacks are launched upon the judiciary as a whole or upon individual judges. It calls for Lord Chancellors to bring to the Cabinet table not only their political experience and judgment as Secretary of State for Justice but also, as Lord Chancellor, their enhanced duty with respect to the rule of law and judicial independence. Like a trustee of an organisation or a non-executive director of a company, Lord Chancellors must be ready to deploy their authority and say 'no' in circumstances where such a response may be unwelcome. They must be able to rein in their colleagues who occasionally say things that sit uneasily with the rule of law or judicial independence. In these, and many other ways, the Lord Chancellor remains the guardian of our institutional independence.

[61] *Worcester v Georgia* 31 US (6 Pet) 515; see Stephen Breyer, *America's Supreme Court: Making Democracy Work* (Oxford University Press 2010) 26 ff.
[62] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, [68].