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The Judiciary within the State: Governance and Cohesion of the Judiciary

Lionel Cohen Lecture 2017, Jerusalem, 15 May 2017

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1. Introduction

I am particularly grateful to be accorded the honour and privilege of giving this year's Lionel Cohen Lecture as it enables me to examine the position of the judiciary within the state.

2. The Times in which We Live: 2017

Some events in the past year or so have made this opportune. First, in the United Kingdom (UK) and in other countries, the judiciary has been drawn into what some have characterised as political decision making – the characterisation used by those who oppose the decision as being a decision made not on the law, but for political or other impermissible purposes. What, however, may be of greater concern, certainly in the UK and in other countries, is the unprecedented nature of attacks made on the judiciary for such decisions by those who characterise the decisions as political.

Second, the past year or so have also seen, as far as England and Wales is concerned, the completion of a decade after the coming into effect of the new constitutional position of the judiciary under the Constitutional Reform Act 2005 (the 2005 Act) and the creation on 9 May 2007 of the Ministry of Justice, with much wider responsibilities than those of the former Lord Chancellor's Department and its short-time successor, the Department for Constitutional Affairs.[1] The 2005 Act secured three major constitutional reforms, each of which sought to introduce a more principled commitment to the doctrine of separation of powers than had previously been the case. First, it removed the Lords of Appeal in Ordinary from the House of Lords through the creation of the United Kingdom Supreme Court.[2] Second, it placed judicial appointments under the auspices of the independent Judicial Appointments Commission.[3] Third, it placed the relationship between the judiciary of England and Wales and the government on a different footing, as the office of Lord Chancellor was shorn of its role of Head of the Judiciary, which was

[*] Lord Chief Justice of England and Wales. I wish to thank Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, for his help in preparing this lecture.

[1] Lord Chancellor's Office and then Department: 1885–12 June 2003; Department for Constitutional Affairs, 12 June 2003–9 May 2007.

[2] Constitutional Reform Act 2005 (UK), Ch 3, s 24.

[3] ibid Sch 12.

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transferred to the Lord Chief Justice.[4] Events have shown, perhaps surprisingly, a lack of understanding of this change in the position of the judiciary within the state, and the way in which the relationships between the branches of the state should best work in the public interest of the state as a whole.

The past year or so has also seen the beginning of a reform programme of the courts and tribunals and of the delivery of justice in England and Wales on a scale that has not been undertaken since the reforms of the late nineteenth century. It is a reform programme that is based on the presently available products of the technological revolution. However, the scale and scope of the reform carries with it risks, particularly when it is not possible to evaluate fully at this time what the effect of change (especially through the use of technology) will be on the way in which the judiciary and the legal professions work and on the delivery of justice to the public.

It is therefore apposite, in the context to which I have referred, to examine two interrelated subjects on the position of the judiciary within the state:

- the governance and cohesion of the judiciary;
- the relationship of the judiciary with the other branches of the state.

I must, of course, do this primarily by reference to England and Wales, as that is where I have experienced what has happened and is happening, though the basic issues facing the judiciaries in each democracy are very, very similar. I do not think that they are likely to become easier to resolve.

My view, in summary, is that the judiciary needs to ensure that it has its own governance structure and its own internal cohesion so that it can protect its independent position when performing its role in upholding the rule of law and its ability to carry out its other functions and responsibilities for the benefit of the public. There needs to be a greater understanding of the necessary working relations between the judiciary, in the light of its changed position within the state, and the other branches of the state and the media – I include the media as it is often treated as the fourth and, as Burke is believed to have said, the most powerful branch of the state.[5]

These two interrelated subjects are too large to cover in one lecture. So, in this lecture here at the Hebrew University of Jerusalem, I intend to concentrate on the governance and cohesion of the judiciary, while in the Michael Ryle Memorial Lecture in June 2017 in the Palace of Westminster, I intend to focus on the working relationship between the judiciary and the other branches of the state and the media.

In the second lecture I will try and explain how the judiciary now performs many of the tasks that the executive in Whitehall, through the Lord Chancellor, gradually acquired during the twentieth century, and how its changed position requires a clear understanding of the way in which the relationships between the judiciary and the other branches of the state should best work. I give

[4] ibid Ch 1, s 7.

[5] Thomas Carlyle, 'Lecture V: The Hero as a Man of Letters. Johnsonm Roesseau, and Burns', in *Sartor Resartus, On Heroes, Hero-Worship and the Heroic in History* (Dent 1948) 384, 392 ('Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all').

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this epitome as, in my view, the judiciary is having to develop a different relationship with the other branches of state and those other branches ought to adapt appropriately to this change.

In this lecture I wish to explore the way in which the judiciary should, as it must, establish internal cohesion and a governance structure. This is a subject that might at first sight seem rather uninteresting. It has received far too little study, with some exceptions.[6] There are countless studies of the workings of cabinet government, of the organisation of Parliament so that it can better hold the executive to account, of corporate governance, and even the governance of law firms, but very little on the way in which the judicial branch of the state operates internally and how it should be governed. This is perhaps surprising, but I hope it is not because it falls within the same category of the rarely performed opera or other work, for which there is good reason why it is rarely performed. My view is that consideration will show that internal cohesion and proper governance are essential. Without it, a judiciary is greatly disadvantaged in its ability to uphold the rule of law. It would not be able to discharge its functions and responsibilities for the benefit of the public and without interference from the other branches of the state.

Some of the functions of a contemporary judiciary, such as delivering impartial and independent judgments on disputes brought before the courts, have been accepted for centuries. Other responsibilities and functions, and their relationship with the other branches of the state, are more fluid; they are sometimes more difficult to discern, change from time to time and vary from country to country.

3. THE EXAMPLE OF LIONEL, LORD COHEN

Indeed, Lord Cohen's career as a judge provides an example drawn from the UK of how fluid the functions and responsibilities of the judiciary and the other branches of the state can be. First, and quite conventionally, his depth of Chancery experience led him to be appointed, in the same year as he became a judge, Chairman of the Committee on Company Law Amendment in 1943 by the then Chancellor of the Exchequer, Hugh Dalton. The Cohen Committee's report effectively formed the basis of what was to become the Companies Act 1948[7] – the most significant piece of companies' legislation for the next fifty years. It did so because, through his skilful chairmanship, the Committee was able to reach a consensus on its most important recommendations. As Lord Jowitt, the Lord Chancellor, put it when he introduced the Companies Bill for its second reading in the House of Lords in 1946:[8]

> It was a very powerful Committee, and the members were unanimous on all major matters. It is a matter which is, therefore, completely free from controversy in the ordinary Party sense, and a matter on which

[6] In academia see, eg, Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, Cambridge University Press 2013); Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 80.

[7] Cohen Committee, 'Report of the Committee on the Company Law Amendment', June 1945, http://www.takeovers.gov.au/content/Resources/other_resources/Cohen_Committee.aspx.

[8] Lord Hansard Jowitt, 'Companies Bill [HL]', 17 December 1946, vol 144, cc 999–1072, http://hansard.millbanksystems.com/lords/1946/dec/17/companies-bill-hl#S5LV0144P0_19461217_HOL_7.

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> I very much hope I shall receive from all quarters of the House suggestions as to how we can improve the Bill which we now put before you.

It was, perhaps, unfortunate that Lord Cohen (Cohen LJ at the time) was not able to be in the House to assist the Lord Chancellor when he was asked to explain the meaning of five lines of the Bill relating to proxies. Discretion being the better part of valour, the Lord Chancellor accepted an amendment relating to the lines, and having done so informed the House that 'wild horses would not make [him] waste your Lordships' time by telling you what these lines meant'.[9] The future Lord Cohen would have had no such difficulty if he had been there.

More relevant to the fluidity of responsibilities was Lord Cohen's appointment in 1957 as Chairman of the Council on Prices, Productivity and Incomes – a function that might now seem to be wholly incompatible with his position as a serving judge.[10] That was because the task of the Council was to formulate a prices and incomes policy for a new government. Today that would be thought to be one of the most political tasks a judge could be asked to perform, even in an era where judges chaired many bodies[11] – characterised by AP Herbert as 'government by Radcliffery' after Viscount Radcliffe,[12] who is the best-known judge to be called on to chair many, many committees, commissions and inquiries.[13]

The prime minister at the time, Harold MacMillan, wanted to produce a policy on prices and incomes through an advisory body that was independent of government, the trade unions and employers. Why would the government seek to appoint a judge to chair a body that had such a political purpose? A Downing Street minute in March 1957 explained:[14]

> The chairman would need to be a prominent figure, well-known for independence of mind and aptitude for the subject and for sifting conflicting evidence. This points in the general direction of an eminent legal figure. He would need to be available for his duties with some regularity, as the Council's studies will probably extend over the year, whatever the frequency of its statements, but need not be full-time.

Lord Cohen was approached at the end of July 1957. Apart from modestly raising his own qualification for the post, his principal questions were whether it was right to appoint a judge as chairman, whether he would be given the necessary time to perform the task by the Lord Chancellor, and as to the composition of the Council. The Chancellor of the Exchequer, Peter Thorneycroft, and the Lord Chancellor, Viscount Kilmuir, must have been persuasive at meetings on 1 August

[9] Lord Hansard Jowitt, 'Companies Bill [HL]', 11 December 1947, vol 145, cc 475–538, http://hansard.millbank-systems.com/lords/1947/feb/11/companies-bill-hl#S5LV0145P0_19470211_HOL_138.

[10] Indeed, it was described by Lord Browne-Wilkinson as his 'most conspicuous and somewhat controversial assignment': Richard Wilberforce, 'Cohen, Lionel Leonard, Baron Cohen (1888–1973)' in *Oxford Dictionary of National Biography* (Oxford University Press 2004).

[11] Robert Stevens, *The Independence of the Judiciary* (Oxford University Press 1993) 98.

[12] He was appointed a Law Lord directly from the Bar in 1949 and sat until 1964.

[13] The 51st Lionel Cohen lecture given in 2004 by Sir Jack Beatson illustrates how attitudes towards the use of judges in relation to inquiries has changed so fundamentally: Jack Beatson, 'Should Judges Conduct Public Inquiries?' (2004) 37 *Israel Law Review* 238.

[14] Council on Prices, Productivity and Incomes: Minutes, Submissions and Reports, National Archives.

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1957; they seem to have assured him it was right he should do the work, that the post was part-time and he would be required for about a year. He provisionally accepted the role subject to the other members of the Council being known to him. All was resolved and his appointment was publicly announced on 13 August 1957.

Almost inevitably the Council's recommendations proved controversial[15] with their content and their authors, including Lord Cohen, being subject to criticism.[16] The role took its toll: he was recorded by the Joint Permanent Secretary to the Treasury in March 1958 as telling the Chancellor of the Exchequer, by then Derek Heathcoat-Amory,[17]

> That he was feeling ready to give up at any time and he has got to the stage when anything to do with the law was easy, anything outside it too much like hard work. He is not suggesting that he ought to give up immediately but he would definitely not like to stay beyond Easter 1959.

A letter to Viscount Kilmuir later in the month expressed the strong view that as a matter of principle a judge should not be absent from his duties, as the chairmanship had proved to be a strenuous full-time post.[18] He should therefore be allowed to resign. He was not able to do so until after the publication of the Council's third report in 1959.

There are, of course, examples of much greater fluidity in earlier centuries or in times of war, but what Lord Cohen undertook occurred during the lifetime of some of us. It demonstrates that there is no rigidity in the functions and responsibilities the judiciary can be asked to carry out. Indeed, many of the functions that were transferred to the judiciary by the 2005 Act are functions which had at earlier times – such as at the time of the enactment of the Judicature Acts 1873–75 – been seen as clear responsibilities of the judiciary.

4. THE FUNCTIONS AND RESPONSIBILITIES THAT A JUDICIARY MUST NOW PERFORM

At the present time, in addition to the core duty of individual judges and appellate courts to determine cases before them (and, in the case of a common law judiciary, to develop the law), the judiciary has a number of extensive functions and responsibilities. Those functions, which will differ from state to state, are likely now to include:

- the efficient delivery of justice, including assignment of cases and deployment;

[15] Mark Burfton, *Britain's Productivity Problem, 1948–1990* (Palgrave Macmillan 2004) 111ff; a good example of severe party political criticism of the Council is that by Douglas Jay (a senior Labour Party politician) as a 'ridiculous organisation' in questions in the House of Commons on 27 February 1958. He also commented: 'Is it not a fraud on the taxpayer that the partisan opinions of these three individuals should be propagated at the public expense?'.

[16] This criticism must be contrasted with the view of one commentator, who noted the report was 'a model of lucid argument, perceptiveness and relevance, and economy of word and number': Howard Ellis, 'First Report by the Council, Productivity, and Incomes' (1958) 48 *The American Economic Review* 1039, 1040.

[17] Prime Minister's Office, Correspondence and Papers, 1951–1964: Industrial Relations, Council on Prices, Productivity and Incomes.

[18] Stevens (n 11) 98. There was little concern about the use of judges for such a purpose from a political viewpoint; the concern was that expressed by Lord Cohen, being absence from judicial work.

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- performance standards and accountability for performance;
- finance and court administration;
- recruitment, appointment, career development and succession planning;
- training;
- health and welfare of the judiciary;
- developing procedural law;
- ethics and discipline;
- relations with the public and with communities;
- relations with the judiciaries of other states;
- relations with the media; and
- relations with the executive and Parliament.

This is a formidable list, but is one that certainly represents what the judiciary of England and Wales have now to do, either on their own or with others, and which many modern judiciaries may also do. The formidable nature of the list is an indication of why cohesion and governance are so necessary.

5. The Size of a Modern Judiciary

Another factor relevant to the need for cohesion and governance is the size and complexity of a modern judiciary. In many states, the judiciary is now, in contrast to previous times, comparatively large. In England and Wales, at the time of the Judicature Acts 1873–75 and the building of the Royal Courts of Justice in London, there were only about 21 judges, including the two Chief Justices, Chief Baron of the Exchequer, the Master of the Rolls, President of the Probate, Divorce and Admiralty Division, and the Lord Chancellor. There were about 60 County Court judges, some masters and registrars, a few stipendiary magistrates (largely in the Metropolis), part-time judges chairing Quarter Sessions (where moderately serious crime was tried), and a significant number of justices of the peace. The only forms of tribunal were bodies such as the Railway and Canal Commission, composed of a High Court judge and an individual with experience of the industry nominated by the Home Secretary.[19]

Today the picture is vastly different. There are 12 judges of the Supreme Court, about 150 judges of the Court of Appeal and High Court, about 680 circuit judges, about 450 district judges, about 150 district judges who sit in the Magistrates' Courts, a large number of recorders and other judges who sit part-time, and about 5,000 tribunal judges (most of whom sit part-time), quite apart from the magistracy. Although the courts and tribunals in England and Wales are structured separately, increasingly they are operating together. For the purposes of this lecture I intend to treat the whole of the judiciary of England and Wales as one body, as the judges of the courts and tribunals and magistrates perform the same functions, are treated

[19] Richard Jackson, *The Machinery of Justice in England* (4th edn, Cambridge University Press 1964) 327.

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by the public simply as judges, and their fundamental duty of upholding the rule of law is the same.

6. COHESION

Even without the wider functions and responsibilities I have outlined, the duty of each judge to determine disputes, sitting alone or on appeal with colleagues, could not be discharged without some form of cohesion with other judges. A judiciary of any size, operating at different levels and doing very different types of work, often faces difficult issues in the day-to-day business of determining disputes. However, each judge will also face other issues which are common to all and which are highly material to their ability to determine cases independently. These will include the facilities which are provided to enable them to work; the functioning of court administration; their ethical standards, training, welfare and remuneration; and dealings with the executive, the legislature and the media.

It would, of course, be theoretically possible for individual judges or groups of judges to try to deal with such issues independently of others, but that is simply not practicable for a modern judiciary. Nor would it be desirable for a judiciary composed of several groups of judges to function without a coherent structure to protect its position and its independence, both institutional and individual. It would face the real risk that the perception of the judiciary from the standpoint of Parliament, the executive and the public would be governed by the least effective group.

Equally, where individuals or individual groups take different stances on the issues common to them, two risks would necessarily arise. First, they might seek to lobby or otherwise influence the executive or Parliament competitively in order to obtain some particular advantage, with the risk of transforming the judiciary into competing parts. Second, the executive or Parliament would readily be tempted into a negotiating strategy based on divide and rule. Either risk would undermine the judiciary's institutional independence and the rule of law. Competition between the branches of the state might, as Madison had it, be beneficial;[20] competition within a branch is not necessarily beneficial. Where the judiciary is concerned, it would be positively harmful.

In addition, as Alexander Hamilton famously pointed out, the judiciary has been viewed as the weakest of the branches of the state.[21] The reforms in the UK did not alter this structural feature, which is evident in most states and not just the UK. This is obvious in a number of respects. The judiciary, for example, is dependent for its financing on the other two branches and generally does not have at its disposal the resources, both human and financial, through which it can protect its position. As it is essential for the judiciary to remain above politics and to abstain from any form of lobbying in the press and other media, it does not have available to itself the other means which the other two branches of the state can use to buttress their position. A judiciary that lobbied the media would be one that called into question its ability both to do and be seen to do justice.

[20] Alexander Hamilton, John Madison and John Jay, *The Federalist Papers*, No 51 (Signet 2003) 317ff.
[21] Alexander Hamilton, John Madison and John Jay, *The Federalist Papers*, No 78 (Signet 2003) 464.

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I do not think, therefore, it can be doubted that a judiciary must have cohesion that covers the whole judiciary of each state, province or nation, to enable it to uphold both the individual and institutional independence of the judiciary on which the rule of law depends. Clearly, a governance structure is needed for that purpose and also to enable it to discharge for the benefit of the public the many functions and responsibilities I have described. How should that be done?

7. GOVERNANCE

7.1. THE ABILITY OF THE JUDICIARY OF ENGLAND AND WALES TO CREATE ITS OWN STRUCTURE

In England and Wales, although statutory provisions govern such tasks as initial appointment to the judiciary, promotion within it, discipline and procedural rule making, there are no statutory provisions that regulate either the way in which the judiciary is governed internally or the distribution of many of its functions and responsibilities. This is in contrast to the position in many states where governance of the judiciary is laid down in legislation.

The 2005 Act vested all the powers in the Lord Chief Justice as the Head of the Judiciary and President of all of the courts in England and Wales. It did so deliberately, but not to create an office with autocratic powers. The intention was to enable the judiciary to devise and, when necessary, reform its own internal governance structure without recourse to Parliament. The intention was that, while functions would be formally vested in the Lord Chief Justice, a collegiate approach would be taken: functions would be delegated to other leadership judges as appropriate, and powers would be exercised through a governance structure. Thus, it has been for the judiciary of England and Wales to create the governance structure that best suits its ability to uphold the rule of law and enables it to perform its duties and responsibilities.[22]

7.2. HIERARCHY AND PARTICIPATION

It would, of course, be theoretically possible for those placed in the position of a chief justice or a judge in charge of a region or a court to try to discharge such functions through the simple operation of a hierarchy, but that simply would not work for a number of reasons. Any system of governance must combine leadership and representation, as is in fact the position in many democratic states.

The system of governance for the judiciary of England and Wales after the 2005 Act was built on what had been in place, as so often happens in the UK. That was an executive body called 'the Extended Family' (the Heads of Division and a small number of other senior judges) and a more representative body, the Judges' Council.[23] The Judges' Council was established by legislation in

[22] See, for instance, the wide-ranging list of formal delegations made by Lord Chief Justices since 2006: Lord Chief Justice of England and Wales, 'Delegation of Statutory Functions – Issue No. 2 of 2015', https://www.judiciary.gov.uk/wp-content/uploads/2015/05/lcj-statutory-delegations-dec2015.pdf.

[23] For the history of the Judges Council, see John Thomas, 'The Judges' Council' [2005] *Public Law* 608.

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1873 and for the first 20 years of its existence was very active and responsible for a considerable amount of reform.[24] During the twentieth century it fell into abeyance; its reforming role was increasingly taken over by the Lord Chancellor as Head of the Judiciary; the statutory provisions creating it were repealed in 1981.[25] It was revived on a non-statutory basis in 1988, though at that time, as it had done since 1873, it represented only the judges of the High Court and the Court of Appeal. Its membership was extended when Lord Woolf was Lord Chief Justice in 2002 to include other parts of the judiciary.[26]

On the coming into force of the 2005 Act, the 'Extended Family' became the Judicial Executive Board and the Judges' Council was, again, expanded to include the entire judiciary of the courts and subsequently the judiciary of the tribunals. It is unnecessary to trace the history since 2006, save to say that a review was carried out with the help of outside consultants in 2016–17, as ten years had elapsed since the creation of the structure and it was necessary to ensure that it was fit for purpose to carry out the reform programme currently being undertaken, as well as the inevitable complexities that arise from Brexit.

7.3. LEADERSHIP

The Judicial Executive Board is composed of the Lord Chief Justice and the Heads of Division (appointed to their office through the independent Judicial Appointments Commission) and other senior judges whose roles are given to them by the Lord Chief Justice. Like any new governance structure, it has taken time to evolve into a body with a clear executive and strategic purpose. I consider it would be difficult for any modern judiciary to operate without leadership being exercised by such a board with the Chief Justice as its chair.

The creation of any such board gave rise to the risk that the senior judges would spend far too much of their time on leadership issues and not give a significant proportion of their working time to their judicial work of deciding cases and giving judgments in cases of importance. It is the performance of that work that is not only their primary duty, but it is what provides them with the authority to lead the judiciary both externally and internally. What has proved hard to bring about was the delegation of as much as possible to other judges and to the officials who support the judiciary in the Judicial Office of England and Wales, which has proved invaluable since its creation in 2005. Although it proved difficult at first to persuade the executive to provide sufficient funding from Parliament, it eventually became clear that it was far better that judges should spend their time judging and dealing with cases, and that they would have more time to do so if proper support was provided. However, it was also necessary for judges to understand how to delegate. Although the judiciary in England and Wales accepted the need for continuing education in law with the establishment of the Judicial College (formerly the Judicial Studies Board) in 1979,

[24] Supreme Court of Judicature Act 1873 (UK), s 75.
[25] By its omissions from the consolidating Act. The Lord Chancellor's Department considered it inappropriate and a threat to the increase in the powers they had obtained under the Courts Act 1971.
[26] For the reasons for the change, see Lord Harry Kenneth Woolf, 'The Needs of a 21st Century Judge' in *The Pursuit of Justice* (Oxford University Press 2008) 175.

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training for leadership (such as the need for delegation) is far more recent and the 'executive coaching' of judges in the problems they encounter in leadership even more so.

7.4. REPRESENTATION

Although it is clear that the body of the judiciary as a whole must also participate in governance, this has not proved easy to achieve in many states; indeed, methods of composing a representative body have in some instances resulted in clashes between what is described as the leadership hierarchy and the body of judges. In England and Wales it was fortunate that the change to the Judges' Council (to make it more representative) occurred prior to the sudden change in the position of the Lord Chancellor, which led to the 2005 Act. On that occasion, and on subsequent occasions when the composition has been enlarged, the solution adopted was to accord representation on the Council to the representative associations of the different parts of the judiciary. This has proved effective as the representatives have their own associations whom they can consult and inform, so that the Council can carry out its functions in the knowledge of the various views that different parts of the judiciary may hold.

More difficult, however, has been finding the right and effective role of the Council. Whereas the functions of the Judicial Executive Board after the governance review in 2016–17 (to which I have referred) are clear, the functions of the Council are still evolving. It has a central role in setting and revising the ethical code for the judiciary, devising policy on welfare and health, organising arrangements with the media, and discussing the various issues that affect the judiciary as a whole, such as the reform programme and the difficult issues relating to remuneration. Its effective work is performed through a number of committees. Might I take two examples? At the prompting of the Senior Salaries Review Board (which each year provides independent advice to the executive on judicial pay), it was decided in 2014 to undertake a survey of judicial attitudes, including morale. A working group composed of representatives of the Council played a central role in arranging the survey and in its publication.[27] A second example is the Committee for Wales, as one of the unusual features of the single jurisdiction of the courts of England and Wales is that there are two legislatures which produce primary legislation: the Parliament at Westminster and the National Assembly in Cardiff. In consequence, in certain areas (such as landlord and tenant) the law is now different in Wales from its equivalent in England. The position is further complicated by other matters, such as the requirement within Wales that the English and Welsh languages be treated on the basis of equality, the lack of a justice function in the devolved Welsh government, and the existence of a set of tribunals which are not part of the unified structure of the courts and tribunals of England and Wales. The Committee has led the way in making this somewhat fragmented structure work in practice.

[27] The survey, which was conducted online, was designed and carried out by Professor Cheryl Thomas, Co-Director of the Judicial Institute at University College London. A second survey was carried out in 2016: Cheryl Thomas, '2016 UK Judicial Attitude Survey', *UCL Judicial Institute*, 7 February 2017, https://www.judiciary.gov.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf.

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The achievement of Lord Woolf in moulding the shape of the Council can, in retrospect, be seen to be of considerable importance in establishing a governance structure that works effectively to produce cohesion and to enable the judiciary to discharge its new responsibilities.

7.5. Local Governance

Until the centralising reform of the courts in 1971 (as a result of the Royal Commission on Assizes and Quarter Sessions chaired by Lord Beeching),[28] and the further reforms that removed local Magistrates' Courts Committees in 2003, much of the administration of justice had been local.

The new structure devised by the judiciary after 2005 had left local governance largely to the workings of the hierarchy through a system of presiding judges and local judges in charge of each jurisdiction. The implementation of the reform programme showed that this was an error, as changes that affected the judiciary on a local level were being proposed without the judges having a voice in those local decisions. As a result of the review in 2016–17, Local Leadership Groups representative of the judiciary and court administration have been created at the local level, chaired by a judge who holds a leadership post.

However, determining the remit and extent of local leadership is not entirely straightforward; some matters are obvious, such as the selection of technology; some are less obvious, such as ensuring local practices do not develop in court procedure, something a local bar is often keen to encourage as it discourages competition from outside.

There are two further issues on which I must touch briefly: public participation in judicial governance, and governance in a state with more than one jurisdiction.

7.6. Public Participation in Judicial Governance

A feature of the governance structure of England and Wales is that it operates entirely through the judiciary and its own officials. In several states, particularly in continental Europe, Councils for the Judiciary (which share some of the combined functions of the Judicial Executive Board and Judges' Council in England and Wales, and have other functions such as appointments) have representation from the legal profession and wider sections of society. In England and Wales, two of the most important functions relevant to the judiciary – appointments and discipline – have significant lay participation. In the former, most of the members of the Judicial Appointments Commission and of each appointing panel are lay members. In respect of the latter function (disciplinary issues), the lay representation is provided in the composition of disciplinary tribunals and by the need for all sanctions to be agreed between the Lord Chancellor and the Lord Chief Justice. It is perhaps therefore unsurprising that the governance of the judiciary in

[28] Cmnd 4153 of 1969 (HMSO), a report which one contemporary reviewer noted was 'workmanlike' but lacking any understanding that the administration of justice was a function of the state: WT Wells, 'The Royal Commission on Assizes and Quarter Sessions 1966–1969' (1970) 41 *The Political Quarterly* 216.

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England and Wales has developed without lay participation, as the functions for which lay participation is essential are provided for separately.

However, there is, in my view, much to be said for the Judicial Executive Board having at least one external member to bring an external and independent perspective to day-to-day and strategic decision making.

7.7. Governance in a State with More than One Jurisdiction

The structure of the judiciary of the UK has evolved so that the jurisdictions of England and Wales, Scotland, and Northern Ireland are separate, each with its own governance structure and relationships with the executive and legislative branches. The governance of the Supreme Court relates solely to the justices of that court, though it is represented on the Judges' Councils for England and Wales and for Scotland.

It is therefore necessary to provide, within the overall governance of the judiciary, for a mechanism for dialogue and mutual decision making on matters of common interest. This is done more formally in Australia, for example, where there is a Conference of Chief Justices and also a Judicial Conference of Australia that is representative of the judiciaries of Australia. In the UK, a similar result is achieved by an informal conference system between the Chief Justices and Presidents. The reasons for such a governance structure are obvious, particularly in relations with Parliament and the executive.

8. Protecion of Individual Independence and Dissenting Views

Although it is essential for the reasons that I have given for the judiciary as an institution to have coherence and a clear and effective governance structure, 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 independently.

It was always understood when the Lord Chancellor was Head of the Judiciary that he could never seek to dictate his views to judges. 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. On the contrary, the new system strengthens and protects that right and the giving of dissenting opinions that may be unpopular.

It is important therefore to distinguish between the internal governance of the judiciary for the purposes I have outlined *and* the independence of each individual judge whose decisions can be reviewed only by a public and transparent system of appellate courts. This is a clear line. For example, there should never be any comment on a judgment through the governance structure as distinct from the appellate structure, although it is clearly appropriate for the governance structure to give general guidance to the judiciary in relation to the application of the code of judicial conduct, such as occurred during the Brexit debate and referendum, when judges were advised not to comment in any way on the subject of Brexit. Furthermore, it is important that a

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governance structure will defend a judge whose judgment is attacked without commenting on the merits of the judgment.

Thus, in this lecture, it is not necessary for me to address the issue of judicial activism as most commonly understood – developing substantive law – and the relationship of that activity with the executive and Parliament. I will, however, make use of another meaning of the term 'judicial activism' as I turn to consider the value to the public of judicial cohesion and governance as it has developed in England and Wales. It is important to examine the question of public value as, if it can be shown, it helps to demonstrate the wider importance of judicial cohesion and good judicial governance.

9. THE VALUE OF COHESION AND GOVERNANCE IN DISCHARGING THE RESPONSIBILITIES OF THE JUDICIARY

9.1. THE COMFORTABLE OLD DAYS

Lord Mackay of Clashfern, when he was Lord Chancellor in the 1990s, was able to take the view that it was only necessary for a judge to have some control or influence over what he described as the administrative penumbra immediately surrounding the judicial process, such as listing.[29] The remainder could be left to the Lord Chancellor.

This was a relatively comfortable world for the judiciary. However, as is apparent from recollections and contemporary materials – particularly the lecture given in 1987 by Lord Browne-Wilkinson entitled 'The Independence of the Judiciary in the 1980s'[30] – there were many who were unhappy with this position, which compromised the independence of the judiciary that had, in effect, resulted from the centralisation of the administration of justice under the control of the Lord Chancellor's Department after the Courts Act 1971 (as a result of the recommendations of the Beeching Commission). However, when that world changed as a result of the 2005 Act, it would have been impossible for the judiciary to have properly discharged its new responsibilities and functions for the benefit of the public without cohesion within the judiciary and a system of governance.

While the importance of what I have tried to explain is, I hope, clear to those interested in the working of the Constitution and of the judiciary, it is essential to ask a further question. Has the cohesion and governance of the judiciary benefited the public in their day-to-day lives and businesses? May I illustrate why I consider that it has benefited the public by a brief examination of two aspects of the judiciary's functions in relation to the delivery of justice.

9.2. THE RESPONSIBILITY FOR THE DELIVERY OF JUSTICE; ACCOUNTABILITY FOR PERFORMANCE; FINANCE AND ADMINISTRATION

The first aspect has been the way in which the judiciary has demonstrated the discharge of its significant responsibility for the efficient delivery of justice and the performance of the courts.

[29] Francis Purchas, 'What is Happening to Judicial Independence?', *New Law Journal*, 30 September 1994, 1308.
[30] Lord Nicolas Browne-Wilkinson, 'The Independence of the Judiciary in the 1980s' [1988] *Public Law* 44.

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Although it is the obligation of the executive to obtain from Parliament the funds necessary for the administration of justice, the judiciary is responsible with the Lord Chancellor, under an agreement made in 2008, for the organisation that provides the court administration: Her Majesty's Courts and Tribunals Service. Assumption of the responsibilities undertaken by the judiciary has included, of necessity, a significant responsibility, subject to the provision of sufficient resources, for the timely and efficient delivery of justice.

This was not, at first, a responsibility readily accepted by many judges, but it is now accepted that this is a judicial responsibility – save by a handful who pine for what are said to have been the comfortable old days. How, therefore, do judges show that this is a responsibility they are properly discharging for the benefit of the public?

Although accountability for judicial decisions is achieved through open justice and the structure of the appellate courts, it is clear that the public is entitled to information about the overall functioning of courts both locally and nationally. The judges, therefore, have had to work with the court administration to refashion the information required from the courts, as what had previously been used did not provide an accurate overall measure of the performance of the system. In 2007 the Judicial Executive Board and the Judges' Council approved a paper setting out the principles of explanatory accountability and a recommendation that the Lord Chief Justice should publish an annual report.[31] After a slow and somewhat sporadic start, the Judicial Executive Board has now put in place a system for annual reports to Parliament made by the Lord Chief Justice on behalf of the Board.[32]

9.3. The Ability to Reform and to be Activist

The second aspect that illustrates benefit to the public is the revival of the other use of the term 'judicial activism' – that is to say, activism in leading substantial improvement in the delivery of justice by far-reaching reform. It has helped in bringing focus to the way in which the best case for resources can be made to the executive and to Parliament, and the resources so obtained be properly expended. Without this assumption of responsibility, I do not believe that the current

[31] The paper was published in October 2007 after a report of the Constitution Committee of the House of Lords in July and October 2007: Judiciary of England and Wales, 'The Accountability of the Judiciary', October 2007, https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf. The decision to provide an annual report followed the practice of some of the courts at that time of providing reports on their work.

[32] See the 2014, 2015 and 2016 reports of the Lord Chief Justice presented to Parliament under s 5(1) of the Constitutional Reform Act 2005. The use of s 5 for the purpose of presenting the report was helpful as it demonstrated that a direct statement could be made to Parliament on ordinary routine matters and that the power under s 5 was not limited to circumstances of crisis in the relations between the judiciary and the executive, the so-called nuclear option. The reports can be found at: 'Lord Chief Justice Report 2014', Presentation to Parliament pursuant to Section 5(1) of the Constitutional Reform Act 2005, 2014, https://www.judiciary.gov.uk/wp-content/uploads/2014/12/lcj_report_2014-final.pdf; 'Lord Chief Justice Report 2015', Presentation to Parliament pursuant to Section 5(1) of the Constitutional Reform Act 2005, 2015, https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf; 'Lord Chief Justice Report 2016', Presentation to Parliament pursuant to Section 5(1) of the Constitutional Reform Act 2005, 2016, https://www.judiciary.gov.uk/wp-content/uploads/2016/11/lcj-report-2016-final-web.pdf.

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reform programme would have been commenced, and certainly its far-reaching nature would not have been envisaged.

As judicial responsibilities have increased in the manner I have described, so too has the extent of that activism as the reform programme has touched on so many of the responsibilities of the judiciary. It has, for example, required the judiciary to be activist in the promotion of online dispute resolution, in changing the ways in which physical access to justice can be improved, in the revision of procedural law, and in the scope of training. None of this would be possible without the required cohesion in the judiciary to agree on the necessary reforms and for leadership and governance in implementation of those reforms. However, this activism has to take into account, apart from the views of the executive and Parliament,[33] the position of the legal professions and the public.

9.4. Relations with the Legal Professions

A judicial system does not function well unless there is a good relationship between those responsible for the operation of the system and the legal professions that practise within it; reform is impossible without it. Although some of the issues relating to the functioning of the legal professions will be the responsibility of the executive (such as the provision of legal aid) or of those that regulate the conduct of the professions (where that is not the responsibility of the judiciary), the wide transfer of significant responsibility to the judiciary for the delivery of justice, its performance and for reform entails a strong working relationship between the judiciary and the professions.

This takes two forms. First, there is regular contact between the Lord Chief Justice or the Master of the Rolls and, for instance, the President of the Law Society, the Chairman of the Bar, the Chartered Institute of Legal Executives and the various regulatory bodies, the Legal Services Board, the Solicitors Regulation Authority and the Bar Standards Board. Second, the governance system has enabled a more formal structure to be put in place. Three leading judges are responsible for more structured engagement with the professions and the regulatory bodies, for leading on specific initiatives and for maintaining the good working relationship, while ensuring that constitutional proprieties are secured.

9.5. The Relationship of the Judiciary and the Public

The activism in relation to reform is also constrained by public acceptability. The judiciary over the years has developed its relations with the public and has built on that in dealing with reform.

First, the judiciary has for some time assumed responsibility for helping the public to understand the centrality of justice to the functioning of the state, the economy and society; to that end courts hold open days and judges and magistrates attend schools and universities to speak about justice. This is of particular importance in the context of better public understanding of the need

[33] To be considered in the Michael Ryle Memorial Lecture, June 2017.

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for proper financing of a judicial system which has to compete with other state activities, such as defence and health.

Second, the judiciary has also had to address the increasing diversity – particularly ethnic diversity – of our society, both in relation to an understanding of the courts and recruitment to the judiciary and magistracy. A scheme for Circuit Community Liaison Judges was originally devised by the Lord Chancellor's Department in the early 2000s. With the transfer of responsibilities in 2005, the judiciary built on this in 2006 to create a system of Diversity and Community Relations Judges, led and organised entirely by the judiciary; they now number over 100.

There is therefore a firm basis on which judges have obtained the experience to explain the reform programme to a much wider audience, and to show how the use of technology can transform and improve the delivery of justice. As one of the objectives of the reforms is to enable the public to deal on their own with smaller disputes through the use of technology, such a benefit will not be realised unless the public are aware of it.

10. RELATIONS WITH OTHER JUDICIARIES

Time does not permit me to examine the value of the way in which cohesion and a system of governance have enabled the judiciary to discharge its other functions and responsibilities in a way that has benefited the public, save one – the relations with the judiciaries of other states – as it illustrates another benefit of judicial cohesion and governance.

Prior to 2005, relations with the judiciaries of other states were carried out under the leadership of the Lord Chancellor. Since the 2005 Act the judiciary has carried out these responsibilities, including judicial exchanges, cooperation through international organisations of judges, and help in developing nations.

However, the judiciary has been able to go a little further, which is of wider benefit to the public. Two examples may illustrate this. As the effective operation of the rule of law is a necessary basis for the proper functioning of an economy, the judiciary decided it should attempt to strengthen cooperation between commercial courts worldwide. It was in this context that the judiciary (led by the judge in charge of the Commercial Court in London) initiated and organised a Standing International Forum of Commercial Courts. It had its first meeting in London on 5 May 2017, attended by senior judges and heads of jurisdiction from 23 separate jurisdictions to discuss how they could work together to improve the delivery of justice to commercial users of the courts, not only in their own state but also internationally. The judges agreed a programme, which, as it develops over the years, should achieve that objective through close and direct cooperation between judges.

Second, the judiciary has a policy of supporting the judiciaries of another state within the EU when help is requested in relation to actions where there is objective evidence that such action might imperil judicial independence in that other state.[34] This arose very recently in relation to

[34] Under the principle of mutual cooperation and recognition within the EU, the judiciary of each Member State has a significant interest in the independence of the other judiciaries.

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Poland; through the European Network of Councils for the Judiciary, the Judges' Council of England and Wales has provided support.

11. CONCLUSION

Without cohesion and without a proper system of governance, the judiciary would have been heavily exposed to the risk of failing to perform its core responsibilities and the responsibilities passed to it, and be vulnerable to attack that would erode its independence. The essential investment of £1 billion in the reform programme would not have been obtained without it. The judiciary would not have had the means of dealing with greater public focus on the judiciary and the means of showing how the public has benefited from a properly independent and modern justice system.

As in many spheres in relation to law and the administration of justice, some of this involves nothing new or radical.[35] The functions and responsibilities of the judiciary have been fluid, as the life of Lord Cohen demonstrated. Judges, therefore, should not be concerned that they have embarked on wholly new ventures. However, whatever the precise ambit of the responsibilities of the judiciary may be, what is essential is that it has cohesion and has a system of proper governance. The judiciary needs this so that it can maintain its core function of upholding the rule of law and delivering justice; and so that it can carry out its other functions for the benefit of the public without compromising the independence, impartiality and standing a judge brings to each task. It is also a fundamental precondition of the proper functioning of the relationship of the judiciary with the other branches of the state and the media – the subject to which I will turn in the Michael Ryle Memorial Lecture in June 2017.

[35] For example, much of the radical thinking that lay behind the reforms of the 1870s was brought about by the Judicature Commissions, on which the judges played such an important role. The abolition of the old common law forms of action was the consequence of judge-led Commissions in the 1850s to 1870s. The creation of a single, omnicompetent High Court and Court of Appeal was the product of the 1st report of the Judicature Commission in the early 1870s, the members of which were Lord Cairns (then a judge of the Court of Appeal in Chancery, soon to be Lord Chancellor); the Commission's chair, Sir William Page Wood, Vice-Chancellor; and Sir Colin Blackburn, then a judge of the Court of Queen's Bench, to name but three. The Commercial Court and the Court of Criminal Appeal were both created as a result of recommendations from the Judges' Council in the 1890s: Thomas (n 23) 613 ff.

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