II – Independence and Accountability of Judges and Adjudicators

Adjudicative Independence: Canadian Perspectives

*John Evans**

1. Introduction

Judicial independence is for judges what academic freedom is for professors. Both are generally acknowledged as indispensable. Judicial independence is the bedrock of the rule of law in a democratic society because it allows for the impartial adjudication of disputes according to law, free from external influences. Academic freedom protects the dispassionate pursuit of truth through research, writing, and teaching. These principles preserve the legitimacy of the institutions and activities to which they relate and thereby protect the fundamental public interests in justice, and in advancing our understanding of the world, society, and the human condition.

Both concepts are, however, contingent and contested at the margins. Governments are tempted to rail against judicial decisions that do not conform to their policy preferences or political interests, and to call into question the legitimacy of decision-makers who are neither elected, nor politically accountable to the Legislature or the Executive. It is never too difficult to arouse a suspicion in the public that judicial independence and academic freedom are merely devices created by judges and professors to ensure that their privileges and policy preferences are beyond the reach of the public at large and its elected representatives.

On the other hand, judges and professors can stretch the concepts of judicial independence and academic freedom beyond their intended goals; they are not all about us, but about the respective public interests that they serve. To be frank, we are both rather good at persuading ourselves, if not others, that our professional and personal interests are one and the same as the public good. The danger is that unduly expanding these concepts will discredit them and render them incapable of performing their essential functions.

Judicial independence and academic freedom must also be dynamic concepts if they are to remain functional. They must evolve in response to new demands and challenges relating to, for example: the proper roles of the judiciary and the academy in contemporary society; competing and growing demands for public

* J.M. Evans is Judge in the Federal Court of Appeal, Canada. He wishes to thank Kathrin Furniss, his law clerk for the judicial year 2011-12, for her substantial contributions to the preparation of this paper. Her work here, as in all other aspects of her professional responsibilities, is characterized by diligent research and perceptiveness.

accountability in the exercise of power and use of scarce resources; and changing demographics and societal values.

In Canada, the independence of the judiciary has traditionally and principally been concerned with protecting judges from attempts by the government to improperly influence the course or outcome of litigation, whether or not the government is a party. Another important aspect of judicial independence concerns the institutional independence of courts. While the Executive retains overall financial control by setting courts' budgets, some aspects of the operation of courts are so closely linked to the adjudication of cases that judicial independence requires that they be left within the control of the court itself, normally acting through its chief justice.[1] These core areas of judicial administration include: the assignment of judges to cases; the sittings of the court; the establishment of court lists; the allocation of courtrooms; and the direction of the court staff engaged in carrying out these and other functions connected to the performance of judges' adjudicative responsibilities. Institutional independence as an aspect of judicial independence is not discussed further in this paper.[2]

Maintaining the confidence of the public in the impartial and independent character of the judiciary is of vital importance to the rule of law. The legal arrangements for securing judicial independence must therefore be sufficiently robust to satisfy a sceptical public that its judges will decide cases according to law, without fear or favour. The legal test of judicial independence is objective: would a reasonably informed person, having thought the matter through in a practical manner, conclude that the judge was independent?[3]

Political culture and public opinion give judicial independence its vitality; both the Legislature and the Executive (and particularly its political heads, the Ministers) must be mindful not to trespass on terrain of the Judiciary and thus bring into question its independence. They should, for example, not voice criticisms of individual judicial decisions that, because of their content or tone, might appear to members of the public as likely to intimidate judges and thus to call into question their independence. This, of course, is in no way to say that judges and their decisions are above or immune from vigorous criticism from public and politicians alike. But there are lines that, in the interests of maintaining judicial independence, should not be crossed.

The first half of my paper gives a brief account of the constitutional framework within which judicial independence is secured in Canada, and compares judges and members of administrative tribunals in this regard. The second part describes three contemporary pressure points where judicial independence comes up

1 See *R. v. Valente*, [1985] 2 S.C.R. 673 (*Valente* case).

2 See further, Fabien Gélinas, Judicial Independence in Canada: A Critical Overview, in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition*, Springer, Heidelberg, 2012, p. 567.

3 *Valente* case *supra* footnote 1, paras. 21-22.

against the competing principle of accountability: the processes for the appointment of judges, for the determination of judges' salaries and pensions, and for the disposition of complaints of judicial misconduct. The Constitution does not deal expressly with any of these issues, although the constitutional guarantees of judges' security of tenure and financial security form an essential backdrop. And it is to this that I now turn.

2. The Constitutional Framework

1. *The Judiciary*

If political culture and public opinion provide the necessary vitality to judicial independence, the law and the Constitution provide its essential form and structure. Canada is a federation and is in some respects very decentralized; however, compared with the United States, the federal level of government plays a relatively small role in the regulation of trade and commerce. For example, only last year, the Supreme Court of Canada declared unconstitutional a federal Bill creating a federal scheme for the regulation of the capital market and securities industry.[4]

However, the *Constitution Act, 1867*, which sets out the division of powers between the provinces and the central government, does not rigorously apply the federal principle to the judiciary, unlike the Constitutions of the United States, and Australia for example. Thus, section 96 confers on the federal government the power to appoint the judges of the superior courts and courts of appeal in each of the ten provinces and the three territories, which administer both provincial and federal law within their borders. Section 101 also authorizes the federal Parliament to create additional courts for the administration of federal law (currently, the Tax Court of Canada,[5] the Federal Court and Federal Court of Appeal[6]), and "a General Court of Appeal for Canada" – the Supreme Court of Canada, our national court of last resort from provincial courts of appeal and the Federal Court of Appeal. The federal government appoints the judges of the section 101 courts, and is responsible for paying the salaries and pensions of the all the judges it appoints.

4 *Reference re Securities Act*, 2011 SCC 66.

5 Formerly the Tax Review Board, the Tax Court of Canada principally hears appeals by taxpayers from federal income tax and goods and services tax (analogous to VAT) assessments.

6 The Federal Courts were established in 1971 by the *Federal Courts Act*, R.S.C. 1985, c. F-7. They decide disputes governed by wide areas of federal law, including disputes between individuals and the federal government and its agencies (federal administrative law), taxation appeals, intellectual property, Aboriginal law, maritime law, and any issues of constitutional law arising therefrom. In contrast, the Supreme Court of Canada, also a statutory court and created in 1875, determines disputes involving constitutional law, provincial laws (statutory and non-statutory, the civil law of Quebec and the common law of other jurisdictions), and federal laws, including the *Criminal Code*.

On the other hand, the administration of justice in the provinces is the responsibility of the provincial level of government.[7] This includes the creation, operation, and financing of the courts in the province (including those in which federally appointed judge sit) and the appointment of judges to the courts below the level of the superior courts. Provincially appointed judges decide all but the most serious criminal cases, as well as cases involving aspects of family law and the welfare of children. There is a right of appeal from the provincial court of a province to its superior court.

Drawing on the British *Act of Settlement* of 1701, Canada's *Constitution Act, 1867* sets out the three basic safeguards of independence for the judges of the superior courts: tenure in office until the age of 75 during good behaviour; dismissal from office only on an address passed by both Houses of the federal Parliament; and a salary and pension provided by Act of Parliament.[8]

These explicit protections of the independence of superior court judges do not apply to judges of the lower courts appointed by provincial governments.[9] However, in 1997, the Supreme Court extended to provincial court judges the protections of the basic principles of security of tenure, salary, and pension.[10] It held that judicial independence is an unwritten principle of the Constitution that extends beyond its specific provisions; guarantees of security of tenure, salary, and pension analogous to those of superior court judges apply to all judges.[11]

---

7 *Constitution Act 1867* (UK), 30 & 31 Victoria, c. 3, s. 92(14).

8 The relevant text of the *Constitution Act 1867*, *ibid.*, reads as follows:
"99 (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.
(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.
100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada."

9 Nor is it altogether clear that these provisions apply to judges of the courts created by federal legislation under section 101. Section 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (*Charter*) provides that those charged with offences are entitled to a trial before an independent and impartial tribunal. This provision applies to provincial courts when exercising their criminal, but not their civil jurisdiction.

10 *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (*Judges' Remuneration Reference*). If judges of the federally created courts are not within the express provisions of the *Constitution Act, 1867*, they are certainly covered by this decision.

11 See *supra* footnote 9.

2. *Administrative Tribunals*

Unlike judges of the courts, members of administrative tribunals, whether federal or provincial, enjoy no constitutional protection for their independence.[12] This may seem particularly surprising given that governments, both federal and provincial, are parties to most administrative proceedings in Canada, and often have a stake in the outcome that goes well beyond the particular case.

Nonetheless, in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*[13] the Supreme Court of Canada held that administrative tribunals are part of the Executive branch of government because their function is to implement government policy in the context of particular facts. Accordingly, members of administrative tribunals do not enjoy the kind of protection of their independence that in the *Judges' Remuneration Reference* the Supreme Court found implicit in the Constitution for judges not covered by the specific provisions of the *Constitution Act, 1867*.

Ocean Port has been the subject of much critical commentary by scholars and others who have pointed out that the bright line drawn by the Supreme Court between courts and administrative tribunals is too stark. While some administrative bodies certainly fulfil the policy implementation function described by the Supreme Court in *Ocean Port*, others are better described as "rights tribunals" and are much more akin to courts. It is thus arguably inappropriate to deny to members of *all* administrative tribunals any constitutional guarantee of independence to protect tribunal members from improper interference by government with their decisions.[14] The criticisms made of *Ocean Port* include the following.

---

12 The only hint of constitutional guarantee of the independence of all adjudicative decision-makers appears in subsection 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, which provides that individuals' legal rights and obligations must be determined by a "fair hearing in accordance with the principles of fundamental justice". The *Bill of Rights* was enacted by the Parliament of Canada in 1960, and was a precursor of the *Charter*, *ibid.*, which is a part of Canada's formal Constitution. While described as having 'quasi-constitutional status', the *Bill of Rights* is a federal statute and therefore does not apply to legislation, administrative acts, or institutions of provincial governments. Before the *Charter*, the courts construed the *Bill of Rights* narrowly; since the *Charter*, it has been largely ignored. Nonetheless, it is still in force and contains some provisions, such as the enjoyment of property described in section 1(a), which are not found in the *Charter*. *See generally* Peter Hogg, *Constitutional Law of Canada* (5th ed.), Thomson Reuters, Toronto, 2007, chapter 35 (loose-leaf, consulted on 8 May 2012). The procedural fairness of a decision of an administrative tribunal may also be challenged in judicial review proceedings on the ground that the tribunal was not independent. However, since this is a common law rule, it may be excluded by statute either expressly or by necessary implication. See Brown & Evans, *Judicial Review of Administrative Action in Canada* (6th ed.), Canvasback, Toronto, 2011, chapter 11 at p. 21-25, 69-74 (loose-leaf, consulted on 14 May, 2012).

13 2001 SCC 52, [2001] 2 S.C.R. 781 (*Ocean Port* case).

14 *See e.g.* Ron Ellis, Fair Hearings in an *Ocean Port* World: A Textured Concept, *Journal of Law and Social Policy*, Vol. 18, 2003, p. 46; Ron Ellis, The Justicizing of Quasi-Judicial Tribunals. Part I, *Canadian Journal of Administrative Law & Practise*, Vol. 19, 2006, No. 3, p. 303 & Ron Ellis, The

First, there is little functional difference between what courts and many administrative "rights tribunals" do. Both adjudicate disputes between individuals (including the government) and determine their rights and obligations on the basis of findings of fact, apply the relevant law to those facts, and exercise their discretion over the award of the appropriate remedy or some other aspect of the dispute.

Second, these functional similarities are reflected in their decision-making processes. The common law rules of natural justice and the duty of procedural fairness, or their statutory codifications, provide for participatory procedures that are to a large extent simplified versions of the procedures followed by the courts.

Third, whether a legislature entrusts the resolution of disputes arising from a statutory scheme to a court or a specialist tribunal may be more a question of practicality than principle. Further, whether an adjudicative body is called a court or a tribunal is little guide to its functions, powers, or formality. For example, the chair of the Competition *Tribunal* is a Federal Court Judge, as are some of its members, and its powers and procedures closely resemble those of courts. On the other hand, provincial small claims *courts*, which deal mainly with consumer disputes involving small sums of money, are highly informal.

Fourth, many administrative tribunals deal with matters involving relatively small amounts of money (social assistance, employment insurance, workers' entitlement to vacation pay or minimum wage, and disputes between landlords and tenants, for example). However, small sums of money may be very important to those of modest means. The larger sums of money at stake in commercial disputes that end up in a superior court are not necessarily more important to the parties concerned.

Some administrative tribunals regularly adjudicate disputes involving constitutional rights: the Immigration and Refugee Board,[15] the National Parole Board, mental competency tribunals, and human rights tribunals,[16] for instance. Indeed, most adjudicative tribunals also have express or implicit jurisdiction to decide questions of constitutional law necessary to dispose of a matter properly before them, to determine the constitutional validity of provisions of the statute under which they operate, and to fashion an appropriate remedy for breach of an individual's constitutional right.[17]

Justicizing of Quasi-Judicial Tribunals. Part II, *Canadian Journal of Administrative Law & Practise*, Vol. 20, 2007, No. 1, p. 69.

15 A determination by the Board to accept or reject a person's claim for refugee status in Canada may literally be a question of life or death.

16 Human rights tribunals adjudicate disputes arising under anti-discrimination legislation. These disputes often have constitutional overtones, in the sense that they may raise issues very similar to those arising under the constitutional guarantee of equality and freedom from discrimination in section 15 of the *Canadian Charter of Rights and Freedoms*, *supra* note 8. The *Charter* was added to the Canadian Constitution in 1982.

17 *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (*Conway* case).

The truth of the matter is that administrative tribunals are immensely varied in the functions they perform, the powers they exercise, and the seriousness of the impact that they have on the rights and interests of individuals. Tribunals are normally specifically created and designed to decide disputes arising from the administration of a particular statutory program or a cluster of programs in a given area ("land use planning" or "social justice", for example).[18] While some are truly adjudicative ("rights tribunals"), others render individual decisions, or make general rules and policies, that are governed more by the exercise of broad discretion and public policy choices than by the application of more or less precise statutory standards to individual facts.

On the other hand, tribunals created to regulate an area of economic activity (telecommunications, energy, foreign investment, and securities, for example) typically render their decisions on the basis of broad statutory grants of discretion which call for the balancing of competing interests in order to determine where the public interest lies. It may be appropriate to keep those exercising these powers on a shorter political leash. One model of independence may well not fit all administrative decision-makers. Critics argue that the *Ocean Port* decision fails to acknowledge this.[19]

I should note here one constitutional interface between the courts and administrative adjudication, which relates to the independence of courts and the lack of similar guarantees for administrative tribunals. The Canadian Constitution does not expressly guarantee a right to judicial review of decisions made by administrative bodies affecting individuals' legal rights, even though the decision-maker is not independent of the Executive and, like decisions made by courts, the decision turns on the interpretation of legislation and the finding of facts.[20]

However, the Supreme Court has held that provincial legislatures may not entirely exclude decisions of administrative tribunals from judicial review in the superior courts.[21] The Court inferred this limitation from the power of the federal government under section 96 of the *Constitution Act* to appoint judges to the superior courts in the provinces. The Court reasoned that it would make a mockery of this

18 The province of Ontario recently 'clustered' adjudicative tribunals working in similar areas through the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33 Schedule 5, ss. 15-19.

19 See *supra* note 14. It is also notable that the Supreme Court subsequently appeared to recognize the varied character of administrative bodies (see *Bell Canada v. Canadian Telephone Employees Assn.*, 2003 SCC 36, [2003] 1 S.C.R. 884 at paras. 21-22). The issue of administrative independence has not been fully resolved.

20 Of course, if the decision affects a person's constitutionally protected rights, it is always possible to challenge the decision in a superior court. Tribunals' decisions engaging the constitution are always subject to review.

21 *Crevier v. Attorney General for Québec*, [1981] 2 S.C.R. 220 (*Crevier*). Previously, courts had narrowly interpreted clauses limiting judicial review so that they did not preclude decisions that were beyond the tribunal's 'jurisdiction'. The preclusive clause considered in *Crevier* was held to exclude all judicial review, even of decisions outside the tribunal's jurisdiction.

appointing power if provinces could remove the core jurisdiction of the courts in which federally appointed judges sit and give to a provincial tribunal the power to decide the limits of its own jurisdiction without the possibility of review in the superior courts.

Nowadays, this constitutional right to judicial review is viewed as based on the rule of law, rather than on the division of powers between the federal and provincial levels of government. In particular, it reflects the notion that no one's legal rights or duties may be conclusively determined by an administrative body (whose members may not have the essential protections of independence) without some level of scrutiny by an independent court.[22]

3. Three Current Pressure Points

Judicial independence is not an absolute value, but must be balanced against other constitutional principles. As mentioned earlier, in recent years judicial independence has been important in Canada in three areas: the processes for appointing judges, fixing the level of judges' compensation, and for disciplining judges for misconduct. In each instance, the task has been to design a process that appropriately balances judicial independence and political or public accountability.

1. Judicial Appointments

If judicial independence were an absolute principle, then judicial appointments would be free from all political influence. However, democratic principles require political accountability for the appointment of senior public office-holders, including judges. In a parliamentary system of government such as Canada's, political accountability is secured through the Minister responsible for making the appointment. The question is how to find a process that strikes a satisfactory balance between these competing principles.

The approximately 1,100 judges of the superior courts in Canada are appointed by the federal government from members of the Bar of the Province or Territory where they are to sit.[23] The legal profession in Canada is organized on the common law model, in the sense that law students do not elect a career as a judge or an advocate. Candidates for judicial appointment must have been qualified to practise law for at least ten years.[24] In their pre-judicial lives, most judges will

22 Since *Crevier*, *ibid.*, administrative law has seen the virtual disappearance of the concept of 'jurisdictional' provisions in an enabling statute. It is therefore difficult to define how much judicial review is constitutionally guaranteed. For most purposes, it may extend only to administrative tribunal decisions that can be shown to be unreasonable. With or without a preclusive clause limiting judicial review, courts normally defer to tribunals' interpretation of their enabling legislation unless it is unreasonable.

23 *Constitution Act, 1867*, ss. 97 and 98.

24 *Judges Act*, R.S.C. 1985, c. J-1, s. 3. In fact, most appointees have been lawyers for at least twenty years.

have been in private practice as lawyers; government lawyers and, more rarely, law professors (like me) are also appointed from time to time.

In Canada, the appointment process for all federally appointed judges, other than judges of the Supreme Court of Canada, has three stages. First, under a non-statutory process introduced in 1988, an advisory committee in each province assesses the qualifications of lawyers who have applied for a judicial appointment. On the basis of a candidate's letter of application, and informal and confidential consultations within the profession, the committee determines whether to recommend or not recommend the candidate as suitable for a judicial appointment. These committees comprise judges, lawyers, and non-lawyer nominees of the federal Minister of Justice. The committees' confidential recommendations are sent to the Minister of Justice. About 40% of applicants are recommended.

Ministers are not in law bound by the committees' recommendations. However, they have undertaken not to appoint candidates whom a committee has not recommended. Nonetheless, this is a relatively small restriction of the Government's appointment power because at any given time the number of those recommended by an advisory committee for judicial appointment exceeds the number of judicial vacancies. In addition, the present Government instructed the advisory committees that candidates were to be put into one of only two categories: recommended or not recommended for judicial appointment. Previously, candidates had been ranked as highly qualified, qualified, or not qualified.

At the second stage, the Minister recommends to the Cabinet the name of a person to be appointed to a particular position. At this stage, political "jockeying" may occur among "recommended" candidates. Third, the Minister recommends to Cabinet the appointment of a particular person to a vacancy. Cabinet usually, but by no means always, accepts the Minister's recommendation.

This process has attracted much criticism recently, not because of the quality of those appointed as judges, but because it is non-transparent and overly politically partisan.[25] Although not traditionally seen as relevant to the post-appointment independence of judges, the present appointment system has also been criticised on the ground that it puts the perceived independence of judges into question in two respects.

25 See e.g. Lorne Sossin, Judicial Appointment, Democratic Aspirations, and the Culture of Accountability, *University of New Brunswick Law Journal*, Vol. 58, 2008, p. 11; Troy Riddell, Lori Hausegger & Matthew Henniger, Federal Judicial Appointments: A Look at Patronage in Federal Judicial Appointments since 1988, *University of Toronto Law Journal*, Vol. 58, 2008, p. 39. It is also said that the current appointment process has resulted in the recent appointment of too few women and members of visible minorities (*see e.g.* Jeff Bassett, Minority lawyers demand diversity among appointed judges, *The Globe and Mail* (8 March 2012), <m.theglobeandmail.com>). The legitimacy of the exercise of judicial power depends in part at least on judges being representative of the population as a whole.

First, it might be thought that a judge appointed through political connections is likely to be disposed to find in favour of the government who appointed him or her, as a matter of gratitude or loyalty. Judicial security of tenure after appointment only goes so far by way of ensuring judicial independence. Loyalties may be seen as persisting after appointment, and the possibility of promotion to a higher court may be regarded as an additional inducement to favour the government side in litigation.[26]

Second, it may be thought that Governments will tend to appoint judges who share their particular ideology on, for example, law and order, environmental issues, or labour relations. The independence or impartiality of such judges may be regarded as suspect because of their ideological inclinations.

Not surprisingly, commentators complain that the determination of a litigant's legal rights, or the length of a prison sentence imposed on a person convicted of a crime, should not depend on whether a case comes before Judge *X* who was appointed by one Government, or Judge *Y* who was appointed by another. Indeed, a recent academic study has attracted public attention because it purports to show a wide disparity among judges of the Federal Court in the frequency with which they have granted leave to applicants seeking judicial review of tribunal decisions in immigration and refugee cases.[27] The author argues that his study suggests that judges appointed by the present Government are more likely to find in favour of the Minister than those appointed by previous Governments.

I express no view on the validity of the methodology employed in this study or on the soundness of its conclusions. I would only say that judging is as much art as science; finding the facts, formulating the legal rule relevant to a given case, and applying it to the facts, are far from being mechanical exercises. Judges inevitably bring to these tasks, especially in close cases, a perspective shaped by their life experiences, values, and personal philosophy.

Provinces have their own processes for appointing judges to provincial courts. The process in Ontario, Canada's largest and most culturally diverse province, is widely admired.[28] Vacancies are advertised and applications are invited. The selection committee conducts formal interviews with candidates and places three names before the provincial Attorney General, who is normally expected to select from this list. The process is believed to have greatly reduced the role of partisan political influence in judicial appointments and to have resulted in a Bench that is not only very competent, but also closely reflects the gender, ethnic, and racial

26 The promotion of judges to higher courts is entirely a matter for the Minister of Justice. Might a reasonably informed person think that judges interested in promotion would be reluctant to make decision that would displease the Government?

27 Sean Rehaag, Judicial Review of Refugee Determinations: The Luck of the Draw?, *Queen's Law Journal*, Vol. 38, 2012, No. 1, p. 1-58.

28 Ontario's appointment process is described in: Judicial Appointments Advisory Committee, *Annual Report for 2010*, Ontario Court of Justice, Toronto, 2011, p. 13-20 www.ontariocourts.ca>.

diversity of the Province, and is perceived as independent. Giving the Minister the power to select from among three names ensures an appropriate level of political accountability.

The appointment by the federal government of the nine judges to Canada's highest court, the Supreme Court of Canada, has attracted much media attention in recent years, largely because of the public's awareness of the Court's increased powers following the addition of the *Canadian Charter of Rights and Freedoms* to the Constitution in 1982, which has brought many controversial issues to the Court. *Charter* cases have included challenges to the validity of legislation concerning the refugee determination process, a woman's right to an abortion, child pornography, and collective bargaining rights.[29] The *Charter* has also been the basis for challenging the validity of Ministers' decisions to close a safe injection drug facility, and to refuse to request the United States to return a Canadian citizen detained in the Guantanamo Bay facility.[30]

Nonetheless, appointments to our Supreme Court have not so far been ideologically-driven to anywhere near the same extent as in the United States, where law and order, racial equality, reproductive rights, religion and the state, and sexual orientation are highly divisive political issues.

Recent changes to the process for appointing judges to the Supreme Court of Canada are designed to make it more transparent. Although the precise details of this non-statutory process remain in flux, the essential elements seem to be as follows.[31]

First, after consulting broadly in the legal community, the Minister of Justice identifies six or more candidates to fill a vacancy on the Court. Second, these names go to an all-party advisory committee composed of Members of Parliament, which consults broadly and evaluates the candidates identified by the Minister and reduces the Minister's list to three names. Third, the prime minister nominates

29 See *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (refugee process); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (abortion); *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 (child pornography); *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 (collective bargaining).

30 See *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 (safe injection); *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 (return of Guantanamo detainee).

31 See Sossin 2008 *supra*; Benjamin Alarie & Andrew Green, Policy Preferences and Appointments to the Supreme Court of Canada, *Osgoode Hall Law Journal*, Vol. 47, 2009, No. 1, p. 6-12. The composition of the nine-judge Supreme Court of Canada is regional. That is, three judges must by law come from the Province of Québec (Canada's only civil law and francophone jurisdiction); and by convention three come from Ontario (Canada's most populous province), and one from British Columbia, one from the three provinces of Alberta, Saskatchewan or Manitoba, and one from the Atlantic region provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland and Labrador. When a judge retires, his or her successor will be appointed from the same region.

one of these candidates. Fourth, the chosen candidate appears at a televised hearing held by an all-party parliamentary committee, at which he or she makes a statement of their judicial philosophy and answers questions from Parliamentarians. Fifth, the prime minister makes the final selection and the person is appointed by order in council.

It is too early to say how broadly acceptable this process will prove to be. Suffice it to say that critics complain that it still leaves too much power in the hands of the Executive and provides too little by way of accountability for its exercise. In my view, the larger question is whether judicial independence requires a more radical de-politicisation of the appointment process for all federally appointed judges.

I suspect that the time may be ripe for a serious conversation in Canada along these lines. Ontario's appointment process, in both design and operation, offers a very attractive alternative model. It appears to have produced high quality judges and strengthened judicial independence, while retaining with the Minister the ultimate power to appoint and effective political accountability for its exercise. In my opinion, the processes for the appointment of judges by the federal government should be tilted more to enhancing judicial independence, and political power (and hence accountability) reduced.

2. *Judicial Compensation*

Financial security is an important aspect of judicial independence. Hence, section 100 of the *Constitution Act, 1867* requires that judges be paid such salaries and pensions as are prescribed in a statute enacted by the Parliament of Canada. However, section 100 is silent on the process by which the appropriate level of statutory compensation is to be determined. In a parliamentary system of government, such as Canada's, the Executive effectively determines the levels of judicial compensation as part of its responsibility for the expenditure of public funds, at least when it has a parliamentary majority. The challenge is to design a process for determining judges' compensation that both safeguards judicial independence and recognizes governmental accountability for the expenditure of public funds.

Here is the problem. In one form or another, the federal government is a frequent litigant before the superior courts. Indeed, no other litigant appears as frequently in either the Federal Courts or the Supreme Court of Canada. The fact that judges are dependent on a frequent litigant for maintaining or increasing their levels of compensation may lead to a public perception that judges are likely to find in favour of the government in litigation, especially in politically sensitive cases, in order to protect their own financial interests.

The Constitution provides no mechanisms for dealing with this delicate issue. However, this did not deter the Supreme Court of Canada in the *Judges' Remuneration Reference* from establishing the governing principles. The case concerned the validity of legislated reductions of the salaries of provincial court judges in three

provinces, as part of across-the-board cuts to remuneration in the public service in the provinces concerned.

The Court stated that it was entirely inconsistent with judicial independence for judges to negotiate with the Executive over compensation increases, decreases, or freezes. On the other hand, the Court also recognized that it would be unfair to require judges to wait passively for whatever the Government might decide to do, if anything, with respect to judicial compensation. To allow governmental inaction over time to reduce the purchasing power of judicial compensation is inconsistent with the spirit, if not the letter, of section 100 of the *Constitution Act* which provides that the salaries and pensions of superior court judges must be fixed by Act of Parliament. The Court resolved the tension between the Executive's responsibility for public expenditure and judicial independence by inferring from the "unwritten constitutional principle" of judicial independence the institutional mechanisms for determining judicial compensation, which Parliament has now codified.[32]

Every four years, an independent commission is struck to make recommendations to the government, on the basis of objective criteria, on the levels of judicial compensation.[33] One member of the commission is appointed by the federal Government, and one by the Superior Court Judges Association; the chair is appointed by the other two members. The parties make written and oral submissions to the commission, and adduce evidence, on the basis of which the commission makes recommendations to the Government in a published report. The Government must respond within six months. Governments are not bound to implement these recommendations because they are ultimately responsible for public finances. However, if they do not accept a commission's recommendations, they must provide reasons for their decision. Similar provisions have been enacted by provincial legislatures for dealing with the salaries of judges appointed by the provinces.

It was anticipated that governments would normally implement the recommendations of an independent and well-informed commission. But this is not how it has worked out. Commission reports have generally been regarded as carefully researched and reasoned, and balanced in their recommendations. However, governments have given them relatively little deference. The present federal Government has twice significantly reduced the salary increases recommended by two commissions. Judges of the superior courts are yet to follow the example of some provincial court judges and applied for judicial review of the legal-

32 *Judges Act*, R.S.C. 1985, c J-1, ss. 25-26.3.

33 If, mid-way through a four-year cycle, economic conditions require a reduction in judicial salaries a part of a broader program of public sector wage restraint, the government would convene a commission and obtain its recommendation. The *Judges' Remuneration Reference* also held that the government could not reduce judicial salaries to a point that judges' independence was in jeopardy. The concept of a constitutionally guaranteed wage for judges, and defined by judges, has provoked some skepticism among commentators!

ity of the Executive's exercise of its statutory discretion not to accept commission recommendations.[34]

It is obvious that the system is not working well. In my view, the Commission process is unduly formalistic, expensive, and adversarial. The results are too often unacceptable to the ultimate paymaster. The not uncommon applications by provincial court judges for judicial review by superior court judges of government compensation decisions are frankly embarrassing. The public may be right to be sceptical of a system for determining judges' pay in which the judges write the rules, referee disputes, and are players of the game![35] This is an area in which, in my opinion, the concept of judicial independence has been stretched too far.

3. Judicial Discipline

Superior court judges may only be dismissed from office for misconduct following a Parliamentary resolution.[36] No superior court judge has ever been dismissed, although there have been a few "pre-emptive" resignations when dismissal seemed a real possibility. Security of tenure is at the heart of judicial independence. A legal system in which judges fear dismissal if they render a decision that displeases the Government does not comply with the rule of law. The appeal process is the

34 See e.g. *Alberta Provincial Judges' Association v. Alberta* (1999), 177 D.L.R. (4th) 418 (Alta. C.A.) (the Alberta Government's reasons for departing from the commission's recommendations with respect to remuneration of provincial court judges were not rational; the Court ordered implementation of the recommendations); *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)* (2001), 2001 MBQB 191, 202 D.L.R. (4th) 698 (Man. Q.B.) (commission's recommendations rejected by the government ordered implemented because the reasons for rejecting them were either irrelevant, unsupported by economic facts, did not respond to the specific recommendation, or did not provide a proper analysis with respect to the Committee's concerns); *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405 (legislation abolishing supernumerary (part-time) judges unconstitutional because the change was not approved by an independent compensation commission); *Bodner v. Alberta*, 2005 SCC 44, [2005] 2 S.C.R. 286 (the reasons given by New Brunswick, Ontario, and Alberta for departing from the recommendations were rational; however, the Quebec government needed to reconsider the issue, their reasons having been rejected as unreasonable).

35 The Supreme Court's decision in the *Judges' Remuneration Reference* has been subject to considerable negative criticism by commentators. They have argued, among other things, that the Court constructed out of whole cloth a legal process for reviewing changes to judges' salary levels that was extremely detailed, cumbersome, and based on dubious legal principles. The Court, it was said, had gone too far to protect judicial salaries, for reasons not reasonably connected to judicial independence. *See e.g.* Robert G. Richards, Provincial Court Judges Decision – Case Comment, *Saskatchewan Law Review*, Vol. 61, 1998, p. 575; Tsvi Kahana, The Constitution as a Collective Agreement: Remuneration of Provincial Court Judges in Canada, *Queen's Law Journal*, Vol. 29, 2004, p. 445; Peter W. Hogg, The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries, *in* Adam Dodek & Lorne Sossin (eds.)., *Judicial Independence In Context*, Irwin Law, Toronto, 2010, p. 25; Lori Sterling & Sean Hanley, The Case for Dialogue in the Judicial Remuneration Process, *in* Adam Dodek & Lorne Sossin (eds.), *Judicial Independence In Context*, Irwin Law, Toronto, 2010, p. 37.

36 Judges of provincial courts enjoy similar protections, though an address by the legislature is not required: *Judges' Remuneration Reference* at para. 115.

normal, public method of correcting errors in the way in which a judge decided a case or conducted the proceeding.

However, judges should also be accountable to the public for behaviour, in and out of court, that falls short of the standards expected of judges, even if it is not so serious as to render them unfit to hold office and thus liable to dismissal. The tension between judicial independence and accountability has increased with the decline of public deference to authority figures, including judges, and a more democratic culture.

Not all kinds of judicial misconduct can be appropriately remedied through the appeal process, such as: allegations of racist or sexist comments; a pattern of chronic delays in rendering judgments or of rudeness to participants in a trial; a criminal conviction for driving under the influence of alcohol; and sexual harassment of court staff.

The Canadian Judicial Council (CJC) is a statutory body composed principally of chief justices and associate chief justices.[37] Its mandate is "to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts …".[38] As part of this mandate the CJC receives complaints of judicial misconduct from members of the public.[39]

A member of the Judicial Conduct Committee of the CJC reviews each complaint. Most complaints are dismissed summarily because, for example, they are about a judge's decision rather than his or her conduct, or concern a provincially rather than federally appointed judge.

If a complaint is not immediately resolved in this manner, it is the subject of further investigation, sometimes by independent counsel. The report of the investigation is considered by a Review Panel of three or five judges. If the Panel finds the complaint to be unmeritorious, it is dismissed. If the Panel is of the view that the complaint has merit, but is not serious enough to warrant possible dismissal, the Panel will dismiss the complaint but may express concern or, with the judge's consent, recommend counselling. Up to this point, the process is not public.

However, if the Panel is satisfied that the complaint is sufficiently serious that it could result in a finding that the judge is unfit to hold office, it refers the complaint to the CJC's Inquiry Committee. The Committee holds public hearings on the complaints referred to it and prepares a report for the full Council of the CJC. If the Council concludes on the basis of this report that the judge's conduct constitutes

37 *Judges Act supra* footnote 32, s. 59.

38 *Id.*, s. 60(1).

39 For an overview of the complaints process, see Gélinas 2012 *supra*, p. 15-19. The CJC has published a handbook or guide for judges, which is couched in general terms: Canadian Judicial Council, *Ethical Principles for Judges*, Canadian Judicial Council, Ottawa, 1998.

misbehaviour for the purpose of section 99 of the *Constitution Act, 1867*, it may recommend to the Minister of Justice that a resolution be put before Parliament that the judge be dismissed from office.

Very few complaints have proceeded to a hearing before the Inquiry Committee; most are disposed of summarily by a member of the Judicial Conduct Committee without a formal investigation or, less often, by the Review Panel following an investigation. For example, in the 2010-2011 fiscal year, the CJC received approximately 150 complaints, closed 140 complaint files, and had 45 complaint files under review at various stages of the process.[40] Only 8 complaints have been referred to the Inquiry Committee since the CJC's inception.

These arrangements have attracted criticisms from different quarters. For example, some commentators have criticised the process up to the point that a complaint is referred to the Inquiry Committee, on the ground that it is overly confidential. When the CJC describes in its annual reports the work of the Judicial Conduct Committee it does not publish the names of the judges against whom complaints have been dismissed. However, publication of more details may undermine a judge's ability to continue in office, even if the complaint is dismissed. Others go further and argue that the public can have no confidence in a discipline system in which, for the most part, judges investigate each other; disciplinary bodies for other professions typically include representatives of the public.

Some judges have also expressed doubts about the complaints process, on the ground that the judge against whom a complaint is made is not sufficiently informed about the progress of the investigation; some have even questioned whether the whole process is compatible with the constitutional guarantee of judicial independence.

All I would say is that balancing judicial independence and public accountability in this context is extremely delicate; how much information should be made public, and at what stages of the process, can be a difficult judgment call. Further, both complainants and judges have an interest in seeing that complaints are processed promptly and in a manner that is fair to both. Lay members should also be included in the discipline process to prevent it from seeming unduly protective of judges. Like any other administrative scheme, the CJC's discipline process would benefit from regular, independent audits. Finally, it is widely acknowledged that the judicial irascibility and routine discourtesy to advocates, parties or their witnesses is nowadays a relative rarity.

40 Canadian Judicial Council, *A Strong, Effective and Efficient Judiciary: Annual Report 2010-2011*, Canadian Judicial Council, Ottawa 2011, <www.cjc-ccm.gc.ca>.

4. Conclusion

As the above examples show, it is never easy to achieve the right balance between judicial independence and accountability. In some situations, judicial independence can be underweighted and in others, it is given too much importance. In order to achieve an appropriate balance regular review and recalibration is required.

Judges and the Executive in Britain: An Unequal Partnership?

*Robert Hazell**

1. Introduction

The judiciary is often characterised as the least dangerous branch of government; with the implicit (and sometimes explicit) corollary that the executive is the most dangerous branch – especially to the judiciary.[1] Depicting relations between them might be expected to be a tale of tensions and recurrent conflict. But in practice the development of judicial policy and the running of the judicial system in the UK has long been managed as a partnership between government and the judiciary, which works because of mutual respect and understanding for each other's roles.

Those roles have changed significantly following the greater separation of powers introduced by the Constitutional Reform Act 2005. The purpose of this chapter is to explore how this changed the nature of the partnership between the executive and judiciary, and what impact it has had on their respective responsibilities for upholding judicial independence and ensuring proper judicial accountability. Both in upholding judicial independence and in ensuring judicial accountability, the executive will be found to play a stronger role than most lawyers and judges might have expected.

No country has a complete separation of powers. But the phrase is simplistic and not particularly helpful. (Even in the United States, Supreme Court Justices are dependent on the Executive for their appointment and Congress for their funding). It may be more useful to think in terms of division of powers and functions between the different branches of government; and also to be aware of shared responsibilities and overlapping functions, as implied by the 'partnership' proclaimed between the Lord Chancellor and Lord Chief Justice.[2]

* Prof. R. Hazell is Professor of Government and the Constitution, School of Public Policy, University College London, England.

1 In *The Federalist* no. 78, Alexander Hamilton suggested that the judiciary would always be the "least dangerous branch" of the federal government, since it had "no influence over either the sword or the purse" and had "neither force nor will, but merely judgment".

2 Para 1.1 of the 2011 Framework Document for HM Courts and Tribunals Service; but for other references to partnership, *see e.g. para.* 28 of the 2004 Concordat between the Lord Chancellor and Lord Chief Justice.

The UK flouted the separation of powers particularly badly, until big constitutional reforms in 2005 which created much greater separation between the Judges and the Executive. The Judiciary are now a more separate branch of government, and senior judges have more direct responsibility for the leadership and management of the Judiciary. This chapter will describe and analyse those reforms, and will ask:

– How much separation has there actually been? Who does what in the new division of powers and functions?
– Does the new system strengthen or weaken judicial independence, and judicial accountability?
– Have the Judges become more powerful? In what ways? And has the executive become less powerful as a result?

The chapter is primarily about the greater separation of powers in England and Wales, which is the main legal system in the UK: there are separate legal systems in Scotland and Northern Ireland. It focuses on the changed relationship between the mainstream judiciary and the Executive, not the new Supreme Court.

2. The 'old' Lord Chancellor

Until 2005 the Head of the Judiciary in the UK was a Cabinet minister, the Lord Chancellor. The Lord Chancellor was responsible for the judicial appointments system, and appointed the judiciary; he determined their pay and pensions; he was responsible for investigating complaints against judges, and imposing discipline; he could dismiss junior judges; he provided and managed the Courts Service. In an extraordinary breach of separation of powers, he could also sit as a judge in the highest court: the last Lord Chancellor to do so was Lord Irvine, in 2001.[3] And, equally extraordinarily, he presided over the second chamber of Parliament, the House of Lords. He was a senior member of all three branches of government. The judiciary accepted this state of affairs, because they liked the head of the judiciary being a senior member of the government, who was able to defend their interests in Cabinet.

3. Greater Separation of Powers in 2005

In June 2003 Lord Irvine was dismissed by the Prime Minister Tony Blair. Blair also announced plans to abolish the office of Lord Chancellor, establish an independent Judicial Appointments Commission, and a new Supreme Court. The Lord Chancellor was to be replaced by a Secretary of State for Constitutional Affairs, who need not be a lawyer, and could sit (like most government ministers) in the House of Commons. The sudden announcement of these reforms, and in particular the proposal to abolish the ancient office of Lord Chancellor, with no

3 In the case: *Uratemp Ventures Ltd v Collins [2001] UKHL 43*.

consultation, caused the Judges great alarm. The Lord Chief Justice Lord Woolf postponed his retirement to moderate the proposals and negotiate a new settlement, and the result of his negotiations with Lord Falconer (the new Secretary of State for Constitutional Affairs) was published in a document known as the *Concordat* in January 2004.[4]

The *Concordat* set out the key responsibilities of the new Secretary of State and the Lord Chief Justice. Its contents and coverage can be judged by the headings of its different sections: Judicial Independence; Judicial Posts held by the Lord Chancellor; Leadership of the Judiciary in England and Wales; Oath-taking; Provision of Resources; Deployment of Judges; Judicial 'Leadership' Posts; Appointments to Committees, and Similar Bodies; The Making of Procedural Rules for Judicial Fora; Rule Committee Appointments; Practice Directions; Education and Training; Judicial Complaints and Discipline; Judicial Appointments Commission – Process, and Membership.

One half of the Concordat was devoted just to the last two headings: the process for handling judicial complaints, and the new process for judicial appointments were covered in great detail.[5] The rest was dealt with more succinctly. Under each heading the *Concordat* stated a general principle, and then explained how that principle would be applied in practice. For example:

Judicial Independence
Principle:

5. The new arrangements should reinforce the independence of the judiciary.

Application:

6. A general statutory duty will be imposed on the Government, all those involved in the administration of justice and all those involved in the appointment of judges to respect and maintain judicial independence.
7. In addition, there will be a specific statutory duty falling on the Secretary of State for Constitutional Affairs to defend and uphold the continuing independence of the judiciary.

The *Concordat* provided the basis for the subsequent legislation enacted as the Constitutional Reform Act 2005. It was in effect the White Paper which preceded the legislation. The only change was that the office of Lord Chancellor survived in attenuated form. The Act removed the roles of the Lord Chancellor as head of the judiciary and Speaker of the House of Lords, but otherwise left the office in being, albeit reduced by the transfer of functions to the Lord Chief Justice. The Act set out in detail the functions to be transferred to the Judiciary, implementing the agreement struck in the *Concordat*. The Act came into force in 2006, together

4 *The Lord Chancellor's judiciary-related functions: Proposals*, commonly referred to as 'the Concordat'.

5 40 paragraphs are devoted to judicial complaints and discipline (paras. 73-113), and 30 to judicial appointments (paras. 114-144).

with the independent Judicial Appointments Commission created by the Act. The new Supreme Court (also created by the Act) came into being in 2009, when their new building was ready. The division of powers between the Executive and Judiciary was further refined in 2008 in a Framework Document for the management of the Courts Service (revised and updated in 2011 to incorporate the Tribunals Service). The *Concordat*, the 2005 Act and the 2011 Framework Document are the main documents setting out the new relationship between the Judges and the Executive.

4. Division of Powers between the Executive and the Judiciary

Under the *Concordat* and the Constitutional Reform Act 2005, the division of powers is as follows. The *Lord Chancellor*[6] is responsible for providing the courts system, and is accountable to Parliament for the efficiency and effectiveness of the system. He sets the framework for the organisation of the courts system, such as geographical and jurisdictional boundaries.[7] He determines the overall number of judges, after consulting the Lord Chief Justice, including the number required for each region and at each level of the judiciary.[8] He is also responsible for supporting the judiciary in enabling them to fulfil their functions; and he provides the staff and resources for the Courts Service, and for the Lord Chief Justice. He sets the pay, pensions and terms and conditions of the judiciary.

The *Lord Chief Justice*[9] is responsible for the deployment of the judiciary, the roles of individual judges, and the allocation of work within the courts. After consulting the Lord Chancellor, he decides which individual judges should be assigned to which region, district or court; and he can authorise judges to sit in levels of court other than their usual level.[10] He nominates judges to posts which provide judicial leadership, again in consultation with the Lord Chancellor. The judges are responsible for deciding on the assignment of cases before particular courts, and the listing of those cases before particular judges.[11] The Lord Chief Justice also has a general responsibility for the well-being and training and providing guidance for the judiciary.[12]

6 The Lord Chancellor's responsibilities are set out in paragraph 4(a) of the Concordat, Part II of the CRA 2005 & paragraph 1.3 of the 2011 Framework Document.
7 Concordat para. 26.
8 Concordat para. 29.
9 The Lord Chief Justice's responsibilities are set out in paragraph 4(c) of the Concordat, Section 7 CRA 2005 & paragraph 1.2 2011 Framework Document.
10 The Lord Chief Justice's allocation responsibilities were first laid out in paragraphs 29 – 33 of the Concordat ,and further in Section 7 (2) & Schedule 4 Part 1 paragraph 129 CRA 2005.
11 Concordat para. 36 & Schedule 2 Part 2 paragraph 6(6)(a) CRA 2005.
12 Section 7(2) CRA 2005.

5. Complaints and Discipline

Responsibility for judicial complaints and discipline is a joint responsibility of the Lord Chief Justice and the Lord Chancellor.[13] They are supported by a complaints secretariat (the Office for Judicial Complaints, staffed by civil servants), and the Lord Chancellor is accountable to Parliament for the effective and efficient operation of the complaints and discipline system. The OJC may filter out complaints, but refer serious ones to a nominated judge, who is a further filter; then an investigating judge. If the Lord Chief Justice and Lord Chancellor are considering disciplinary action, they must refer the case to a review body, composed of two judges and two lay members. They must decide jointly on any disciplinary sanction,[14] but cannot take disciplinary action more severe than that recommended by the review body. If the sanction is removal from office, the Lord Chancellor will invite both Houses of Parliament to approve dismissal of High Court judges and above. Judges below this level can be removed by the Lord Chancellor. Complainants or judges can complain about the handling of a complaint to the Judicial Appointments and Conduct Ombudsman, but he can only review the process, not the merits of the decision.[15]

6. Judicial Appointments Commission

Judicial appointments used to be a field in which the Lord Chancellor had complete discretion. He was restricted only by the statutory criteria specifying the minimum level of experience for each post; and the strong convention that he would consult the senior judiciary before making any appointment. Now he has almost no discretion. Judicial appointments are regulated by an independent Judicial Appointments Commission (JAC),[16] which has 15 members, of whom six are lay members, and five are judges, plus a magistrate, barrister, solicitor, and tribunal member.[17]

The JAC runs competitions for judicial vacancies, and submits a single name to the Lord Chancellor.[18] The Lord Chancellor can appoint, request reconsideration, or reject the JAC's candidate. But the grounds on which he can reject or request reconsideration are strictly limited by statute, and he must give reasons in writing. He is also strictly limited in the number of times he can reject or request

13 Concordat para. 73 & Section 115 CRA 2005.
14 Concordat para. 80 & Section 108(2) CRA 2005.
15 Section 102 of CRA 2005.
16 Established by Section 61 CRA 2005.
17 This membership composition is set out in Concordat para. 132 & Schedule 12 Part 1 para. 2 CRA 2005.
18 The 'single name' rule applies to all levels of judicial appointments, for example see Section 70(3) CRA 2005 (in relation to appointing Lord Justices of Appeal).

reconsideration (a maximum of twice for each appointment).[19] In practice, in the 2,500 or so judicial appointments made between 2006 and 2012, the Lord Chancellor rejected just one nomination, and requested reconsideration twice.

The judiciary are closely involved in judicial appointments. They have five members on the JAC, whose views carry disproportionate weight. Judicial members are included in all the JAC's selection panels. For appointments to the Supreme Court there is a special selection committee, composed of the Court's President and Deputy President, and the chairs of the JACs for England, Scotland and Northern Ireland.[20] For appointments to the Court of Appeal the selection panel is the Lord Chief Justice, another senior Court of Appeal judge, the chair and a lay member of the JAC.[21] The Lord Chief Justice must be consulted before any selection process is initiated, and he must be consulted before any name is submitted to the Lord Chancellor. So the judiciary have a very strong input. When we interviewed members of the JAC, none could recall any appointment being made against the wishes of the Lord Chief Justice. Indeed, Ken Clarke as Lord Chancellor would not accept a recommendation from the JAC unless it had been approved by the Lord Chief Justice.[22]

7. Management of the Courts Service

The judiciary also have stronger input into the management of the Courts Service. Under its 2011 Framework Document the Courts Service 'operates on the basis of a partnership between the Lord Chancellor and the Lord Chief Justice'.[23] The Lord Chancellor remains responsible to Parliament for the efficiency and effectiveness of the courts,[24] tribunals and the justice system. Staff of the Courts Service are civil servants, but they have a joint responsibility to the Lord Chancellor and the Lord Chief Justice for the effective, efficient and speedy operation of the courts and tribunals.[25] All members of the judiciary have a similar responsibility to work with the staff to deliver these objectives. Staff work subject to the directions of the judiciary in matters such as listing, case allocation and case management.[26]

The Framework Document provides that the Lord Chancellor and Lord Chief Justice will not intervene in the day-to-day operations of the Courts Service. They have placed responsibility for overseeing the leadership and direction of the Courts Service in the hands of its Board, and the Chief Executive is responsible

19 Again the Lord Chancellor's power to accept/reject/request reconsideration applies to other levels, for example see Sections 73-75 CRA 2005.
20 Schedule 8 CRA 2005.
21 Section 71 CRA 2005.
22 Interviews with MoJ officials.
23 Para. 1.1 Framework Document.
24 Para. 1.2 Framework Document.
25 Para. 2.4 Framework Document.
26 Para. 2.5 Framework Document.

for day-to-day operations and administration.[27] Three senior judges are on the Board, which has ten members,[28] and the selection panel for the Chief Executive includes a senior judge.[29] The judicial members are accountable to the Lord Chief Justice for their conduct as members of the Board,[30] and the other members are accountable to the Lord Chancellor;[31] but the Board have agreed to act collegiately, and not in representative capacities.[32]

For determining the budget of the Courts Service, the Framework Document provides that the Lord Chancellor must keep the Lord Chief Justice informed about his department's resourcing discussions with the Treasury. The Lord Chief Justice may write to the Lord Chancellor representing the views of the judiciary, and the Lord Chancellor must forward any letter to the Treasury.[33] If the Lord Chief Justice has concerns about the budget allocated to the Courts Service, he may record his position to the Lord Chancellor, and to Parliament.[34]

The Courts Service produces monthly performance data for the Board on the workload and efficiency of each court centre. The judicial members of the Board take this data back to the Lord Chief Justice, and he or his deputies can talk to judges about improving the performance of their courts. This may involve talking to individual judges about their performance in terms of case management, delays etc. The Judiciary do not feel that this trespasses on judicial independence, so long as it is senior judges managing judicial performance, not court administrators. The Framework Document provides: "Performance measures that have an impact upon the judiciary only bind the judiciary when the Lord Chief Justice has expressly agreed that they do so. No performance measure fetters the exercise of judicial discretion or the interests of justice in any individual case".[35]

8. The Executive Works to Uphold Judicial Independence

Lawyers tend to view the Executive as a threat to judicial independence; but this account shows how the Executive works systematically to support and uphold judicial independence, in a range of different ways.

First, the Lord Chancellor, all government Ministers and everyone with responsibility for the administration of justice is under a statutory duty to uphold judicial

27 Para. 1.6 Framework Document.
28 Para. 4.5 Framework Document.
29 Para. 3.5 Framework Document.
30 Para. 4.11 Framework Document.
31 Para. 4.12 Framework Document.
32 Foreword from the Chairman to Annual Report of HM Courts and Tribunals Service 2011-12.
33 Para. 7.1 Framework Document.
34 Para. 7.2 Framework Document.
35 Para. 7.17 Framework Document.

independence.[36] Ministers are specifically enjoined not seek to influence particular judicial decisions through any special access to the judiciary.[37] Other guardians of the rule of law and judicial independence within the Executive include the Attorney General, as the government's senior Law Officer; Parliamentary Counsel, in their drafting of legislation; and the Government Legal Service, who will remind Ministers if they risk crossing the line.

The Lord Chancellor has additional duties to have regard to the need to defend judicial independence, and the need for the judiciary to have the support necessary to enable them to exercise their functions.[38] 'Defending' judicial independence means defending the judges and their role when they come under attack, from the media or from ministerial colleagues who publicly criticise a judicial decision. The defence can be in public or in private. The Lord Chancellor's officials will be alert to forthcoming court decisions which might embarrass the government, and seek to dissuade ministers in other departments from venting their frustration in public. If they fail, the Lord Chancellor will privately have a word with the minister, to discourage a repeat offence; he will not reprimand a minister in public. A difficulty arises when the offending minister is the Prime Minister, as has happened with both Tony Blair and David Cameron. The Lord Chancellor can still try, and has done so; but it is difficult to admonish a political superior.

Second, the Executive has designed and introduced a new system for judicial appointments which removes any scope for political patronage. The Lord Chancellor's discretion is extremely limited, and although he is nominally still the decision maker, when presented with a single name he effectively has very little choice. [*insert Ken Clarke quote ?to Lords Const Cttee*] The judges have a lot of involvement, and influence, by being directly involved in devising the selection processes and sitting on the selection panels which produce the single name. Judges have criticised the cumbersome and slow nature of the new process, but they all recognise how the independence of the Judicial Appointments Commission helps to underpin the independence of the judiciary. Critics on the other side say that the new system has tilted power too far towards the judges, who are now dominant in the selection process; and that the Executive has lost the ability to take effective action to promote more diversity in the judiciary.[39]

Third, there are stronger systems in place to ensure that the courts and the judicial system will be adequately resourced, that the judges are consulted about resourcing, and involved in the allocation of resources through their involvement in the management of the Courts Service. The Lord Chancellor is under multiple

36 Concordat paras. 5, 6, 7, Section 3(1) CRA 2005 & Paras. 1.2, 2.3 Framework Document.

37 Section 3(5) CRA 2005.

38 See Section 3(6)(a) & (b) CRA 2005. The Lord Chancellor also swears this as part of an oath, see s17(1) CRA 2005.

39 Alan Paterson & Chris Paterson, *Guarding the Guardians? Towards an independent, accountable and diverse senior judiciary*. CentreForum, London, 2012.

statutory duties to ensure that there is an effective system of courts and tribunals, and that the judges have the support they need.[40] Under the Framework Document, he must keep the Lord Chief Justice fully informed about his discussions with the Treasury. This does not mean that the courts are immune from budget cuts; but the judges have the opportunity to spell out in advance any adverse consequences for judicial independence, and through their representatives on the Board of the Courts Service they have the opportunity to minimise the damage.

Fourth, the independence of the judiciary is reinforced by the creation of new bodies whose function is to help protect judicial independence. That is clearly the role of the Judicial Appointments Commission, which is required to select candidates solely on merit. That is clearly the role of the Judicial Appointments Commission, which is required to select candidates solely on merit. It is also the role of the Office for Judicial Complaints, with its three stage process, each stage involving an independent judge, to ensure that judges judge the conduct of other judges, and ensure that judicial independence is preserved. And it is also in part the role of the Judicial Appointments and Conduct Ombudsman. Disappointed candidates can complain to the Ombudsman; and judges who have been unfairly complained against, or unfairly disciplined, can also complain. In all these cases the independence of the new body helps to buttress the independence of the judiciary.

9. The Executive Helps to Ensure the Accountability of the Judiciary

The Executive also plays an important role in ensuring the accountability of the Judiciary. The judiciary is not purely self-regulating, but is held to account by the other two branches of government. The role of the Executive in checking the judiciary is recognised in statute. The same section which requires the Lord Chancellor to defend judicial independence and provide the judiciary with adequate support, goes on to require him to have regard to the public interest in decisions affecting the judiciary or the administration of justice.[41] The statute does not spell it out, but the public interest is different from the interests of the judiciary: in terms of pay and pensions, it includes what the nation can afford, as well as what the judges might want to have. Similarly with the programme of court closures: the courts exist for the convenience of the public, not the judges. In terms of judicial recruitment, it includes the need for greater diversity, as well as appointment on merit. The Lord Chancellor is the ultimate judge of the public interest, and accountable to Parliament for his decisions on where the public interest lies.

Accountability involves giving an account (explanatory accountability), and being held to account, and possibly paying a penalty (sacrificial accountability). The judiciary give an account of their work through publishing annual reports, which the

40 Section 1 Courts Act 2003, Section 3(6)(b) of the Constitutional Reform Act 2005, Section 39 of the Tribunals, Courts and Enforcement Act 2007.

41 Section 3(6)(c) CRA 2005.

Lord Chancellor lays before Parliament. So the Supreme Court produces an annual report for the Lord Chancellor, which also goes to the First Ministers in Scotland, Wales and Northern Ireland (whose governments help to fund the court).[42] Below that level the annual reporting has become more ragged since the Lord Chief Justice became head of the judiciary. Whereas there used to be annual reports by the Civil and Criminal Divisions of the Court of Appeal, by the Commercial and Admiralty Courts, and the Technology and Construction Court, together with regional reports by the Crown, County, Family and Magistrates Courts, now only two of those produce an annual report.[43] The Lord Chief Justice produces a review of the administration of justice every two years or so, but it is a selective, high level account, and the irregular basis makes it impossible to compare performance with earlier periods.[44] The annual report of HM Courts and Tribunals Service does not bridge the gap, being mainly financial.[45] For detailed information on the workload of the courts, the reader must turn to the Judicial and Court Statistics produced by the Ministry of Justice. They reveal the management challenge from changing workloads: whereas the number of cases in the Crown Court in 2011 was little different from 2001, in the country court the number of claims brought fell by 25% between 2006 and 2011.

The Judicial Statistics and Courts Service reports are important tools for external scrutiny, with data on waiting times, costs per sitting day, etc. They provide essential information for the Executive to work with the judges in seeking to improve the efficiency of the courts, and judicial performance. Court performance and judicial performance are closely linked; but to preserve judicial independence, improving judicial performance is seen as the judiciary's business. The Executive acts as constructive critic, and coach, and there are many different forums in which it can make suggestions and put its point of view across, from the formal Board meetings of the Courts Service to the informal meetings which take place every month between the Lord Chancellor and Lord Chief Justice. The Executive can also offer help and advice, as it has done recently over introducing appraisal systems for evaluating individual judicial performance; and developing more systematic succession planning for recruitment to the senior levels of the judiciary. These are matters where the judiciary have no experience, but the Executive have valuable expertise.

In terms of regulating misconduct in the judiciary, the Executive still plays a central role. The Lord Chancellor used to be solely responsible for investigating complaints and imposing discipline. He now shares that responsibility jointly with

42 Section 54 CRA 2005.

43 Court of Appeal (Criminal Division), and Technology and Construction Court.

44 There have been three such reports, covering the periods April 2006 to March 2008; April 2008 to February 2010; January 2010 to June 2012. The intention is to bring these onto an annual basis, perhaps matching the annual Business Plan produced by the Judicial Office.

45 The budget of HMCTS was reduced by 9 per cent in 2011-12. The annual report contains five pages on Workload and Performance Summary, and six on Performance Review; with over a hundred on the annual accounts, and notes to the accounts.

the Lord Chief Justice, under detailed procedures set out in the *Concordat*[46] and implemented in the Judicial Discipline (Prescribed Procedure) Regulations 2006. Under those procedures all decisions on complaints and discipline have to be taken jointly. But at the end of the process only the Lord Chancellor may formally remove a judge from office[47] (and only Circuit judges or equivalent and below: High Court judges and above are removable only by resolution of both Houses of Parliament). And as the new head of the judiciary, the Lord Chief Justice can impose lesser penalties: suspension, or a formal warning, reprimand or advice. The Lord Chief Justice may do this only with the agreement of the Lord Chancellor.[48] Agreement is not merely formal: the Lord Chancellor has adjusted penalties both upwards and downwards.[49] So in terms of complaints and discipline, the judiciary is more self-regulating than it used to be; but the system operates under the close eye of the Lord Chancellor, who must agree to any disciplinary sanction, and only he can impose the ultimate sanction of removal from office.

Finally brief mention should be made of the accountability of the Judges to Parliament. That is not the focus of this chapter, but again it is more than just a formality. Parliament has shown a lot of interest in the work of judges and the courts: especially the House of Commons Justice Committee, and the House of Lords Constitution Committee. The Lord Chief Justice regularly appears before those two committees, but that is not all. Since 2003, eight different Select Committees have heard oral evidence from judges on some 80 different occasions, and from around 80 different judges. The topics covered include judicial appointments, human rights legislation, the family justice system, asylum and immigration, delays, and sentencing policy.

10. Have the Judges Become More Powerful? In what Respects?

The final part of this chapter considers whether the judges have become more powerful as a result of the constitutional changes described above. It is widely accepted that British judges have become more powerful as a result of other factors: the relentless growth of judicial review, the introduction of EU law, the Human Rights Act 1998. But this analysis focuses just on the changes flowing from the Constitutional Reform Act 2005, and the establishment of the judiciary as a more separate and autonomous branch of government.

Asking whether the judges have become more powerful requires a conceptual definition of power. It is a complex concept, much debated in the politics literature. Power was originally related to concepts of authority and the use of force, and

46 Concordat paras. 73-113 & Section 115 CRA 2005.
47 Concordat para. 81 & Section 108(1) CRA 2005.
48 Section 108 CRA 2005.
49 Information from interviews.

defined as the ability to carry out one's will.[50] But it has since been understood in more subtle ways. Steven Lukes identified three faces of power: the ability of governments to make decisions; to set and control the agenda; and to influence people's thinking.[51] The last two are forms of what Nye has called soft power.[52]

These more subtle definitions provide a better framework for understanding judicial power. But to apply them empirically, we need something with a sharper edge. That can be supplied by Rhodes' resource-dependency model of power.[53] In Rhodes' model power is a function of the resources available to the different actors: but building on the earlier definitions, he uses 'resources' in a wide sense to include authority, information etc. His model also involves a concept closely related to power, that of autonomy: a party possesses autonomy if it is able to exercise power in relation to its own functions without requiring the support of the other party in doing so.[54] Weaving together these different models, power can be said to consist of the following main elements:

Constitutional autonomy. (a) Autonomy from interference by another branch of government; (b) power to alter internal arrangements without reference to another branch of government.

Legal and hierarchical authority. The ability to set the agenda; initiate and make policy; issue directions or guidance to others; and make final decisions.

Resources. Having sufficient finance and staff to discharge core functions; the ability to adjust resources between functions; and to select and direct staff.

Informational power. Understanding the thinking of other branches of government; and having the ability to shape their thinking, and influence public debate.

Each element of power will be considered in turn, asking how much power is possessed by the Judiciary, and how much by the Executive, in determining judicial policy, running the justice system, and upholding judicial independence and accountability. In terms of *constitutional autonomy*, the Judges are clearly more autonomous now that the Lord Chancellor is no longer head of the Judiciary. The Lord Chief Justice is their head,[55] and exercises internal and external leadership. He leads the judiciary with the advice of the Judicial Executive Board, selected by him, and supported by the Judicial Office, which in 2012 had grown to 200 staff. But he has little power to alter the internal structures or arrangements of the

50 M. Weber, *The Theory of Social and Economic Organisations* (T. Parsons ed.), Free Press, New York, 1947.
51 S. Lukes, *Power: A Radical View* (2nd ed.), Palgrave Macmillan, 2004.
52 J. Nye, *Soft Power: The Means to Success in World Politics*, PublicAffairs books, New York, 1974.
53 R.A.W. Rhodes, *Control and Power in Central-Local Government Relations*, Gower, Aldershot, 1981, chapter 5.
54 A. Trench, *Devolution and Power in the United Kingdom*. Manchester University Press, 2007, p. 17.
55 Para. 11 of the Concordat & Section 7(1) CRA 2005.

courts, or the judiciary. The Executive, through the Lord Chancellor, still determines the geographical distribution of the courts, and the jurisdiction of each court. The Executive determines the number of judges, and sets their terms and conditions. It is only over judicial appointments that the Judiciary has more power than the Executive: the Executive still formally makes the appointment, but the Judiciary now has a lot more influence over the selection process. And in future the Judiciary will itself make all appointments at the level of Circuit Judge and below.[56]

The size of the judiciary and the extent of its constitutional autonomy has been vastly extended by the creation of the Tribunals Service, and its incorporation into the Courts Service in 2011. This development is so recent that its implications have not yet been fully realised. The inclusion of the tribunals judiciary has increased the total size of the judiciary from 3575 to 5635.[57] And the inclusion of tribunals in the justice system has increased the total number of civil cases handled each year from 1,643k to 2,524k.[58]

The Executive by contrast has greater constitutional autonomy: as seen in the decision by the Executive to create the Tribunals Service, and then merge it into the Courts Service. The Prime Minister has full autonomy to alter the structure of the government, and to create, merge or close departments. That was vividly seen in the 2003 decision to abolish the office of Lord Chancellor, and the 2007 decision to bring responsibility for prisons and the criminal justice system into the new Ministry of Justice. The judges disliked both decisions, and succeeded in modifying the first; but they recognised the Prime Minister has the right to make such decisions.

Generally the Executive suffers from little interference by the Judiciary, save for the constant pinpricks of judicial review to ensure that it follows due process. The pinpricks clearlyhurt, to judge from the occasional howls of ministerial outrage; but they seldom prevent the Executive from doing what it planned to do – with rare high profile exceptions, like the court decisions after 2001 curbing the detention of terrorist suspects. Empirical research suggests that just under half of judicial review cases against central government are successful, but only a quarter to a third of successful cases call for changes in procedure or the government's approach to decision-making.[59]

In terms of *legal and hierarchical authority*, the Executive is also more powerful. The Judges are primarily reactive, both in their judicial work, in terms of the cases that come before them, and in terms of policy. Even on judicial matters,

56 Under the Crime and Courts Bill 2012 Part 2 clause 19.
57 Judicial Appointments for England and Wales by type, April 2012.
58 HMCTS Business Plan 2012, pp. 12-13.
59 Initial findings from Essex University/Public Law Project research on the effects of judgements of the Administrative Court 2010-12. Final results expected May 2013.

the lead on policy generally comes from the Executive. The Executive leads on macro policy, or policy involving other government departments or external stakeholders. So the 2010 Norgrove review of family justice was initiated by Jack Straw as Lord Chancellor, and confirmed by his successor Ken Clarke, and its central recommendation of a single Family Court was included by the government in the Crime and Courts Bill 2012. But some policy reviews are initiated by the judiciary, such as the 2009 Jackson review of civil litigation costs, which was ordered by the Master of the Rolls. But whatever the genesis of a review, the Executive will consult the judiciary, or *vice versa*, to ensure that a review will not be opposed, and that its results are likely to be implemented. And on small things like guidance for the courts, the majority of guidance comes from the Executive: the power to allow and disallow Court Rules rests with the Lord Chancellor.[60] The judiciary make final decisions in court cases; but under the UK doctrine of parliamentary sovereignty, it is always open to the Executive to reverse those decisions by passing amending legislation through Parliament.

By contrast the legal and hierarchical authority of the Executive is immense. It sets the agenda on most legal and judicial policy; it can make policy through legislation, as it has done through successive Courts Acts, restructuring the courts system; or by legislating in fields like family law; and it has wide authority to issue directions or guidance.

As for *resources*, here too the Executive is more powerful. The Lord Chancellor determines the budget for the courts system, not the Lord Chief Justice. The Lord Chief Justice can go public if he considers the budget insufficient, but that is recognised as a weapon of last resort. It is only in relation to the allocation of the budget within the Courts Service that the judges have an equal say, through their participation in the management and operation of the Courts Service as a partnership between the Lord Chancellor and Lord Chief Justice. The judges do not choose the staff of the Courts Service, and do not choose the staff working in the Judicial Office (save for the chief executive). All staff in the Judicial Office are civil servants, as are the staff working for independent bodies like the JAC, OJC and JACO. The Executive chooses the staff, and the Executive is responsible for their careers, deployment and promotion.

However once posted to the Judicial Office the staff's primary loyalty is to the judiciary. As more and more functions have been transferred across from the Ministry of Justice to the judiciary, the staffing of the Judicial Office has grown and grown. The 'old' Lord Chief Justice before 2005 had a private office of half a dozen people. In 2006 the Directorate of Judicial Offices serving the 'new' Lord Chief Justice opened with 145 staff; in 2012 it had over 200.

This gradual transfer of staffing and expertise has meant that in relation to power as *knowledge and information*, the playing field is a bit more even. In interviews

60 Paras. 50-55 of the Concordat.

some senior officials in the Ministry of Justice have acknowledged that their knowledge of the judges and judicial issues is not what it used to be, and this might sometimes place them at a disadvantage. As successive functions have transferred out of the Lord Chancellor's Department/Ministry of Justice, the 100 or more officials who supported the Lord Chancellor on judicial matters in 2005 have shrunk to just 15 or so in 2012 (the largest loss being the 90 staff who worked on judicial appointments, who went to the JAC). It is no surprise that the Ministry has lost some of its intelligence and expertise.

But informational power also includes the power to project information and ideas, to shape the thinking of others, and influence public debate. Here the Executive once again is dominant. Although judges give more speeches and lectures than they used to, and they now have a Judicial Communications Office, it is tiny by comparison with the much larger publicity machine available to the government. The Executive largely sets the terms of public debate about the judicial system and the criminal justice system.

11. Conclusion

This chapter has charted the greater separation of powers and functions flowing from the Constitutional Reform Act 2005, and evaluated the nature of the new partnership between the Executive and the Judiciary. Despite the greater formal separation, the partnership relies on close working between the two branches of government. In some areas (the Courts Service, judicial appointments, complaints and discipline) there is joint responsibility, with a mutual veto. But in other areas where one side or the other is formally in the lead, there is consultation and co-ordination before most important decisions are made.

But the situation is still evolving. Ken Clarke (Lord Chancellor 2010-12) was less interested in judicial matters as Lord Chancellor than Jack Straw (2007-10), and his officials found it hard to interest him in judicial appointments, discipline, postings and promotion. Chris Grayling, the new Lord Chancellor appointed in 2012, may be less interested still, having no background in the law or the legal profession. The direction of travel has been and continues to be all one way, with the Executive showing less and less interest. The risk to the judiciary, as the Executive also shrinks its capacity, is that the Executive becomes less capable of showing an intelligent interest, and its occasional interventions become clumsy and ill informed.

The Judiciary have become more powerful. They have acquired greater constitutional autonomy; they now have more resources under their control, in the Judicial Office; they have developed more informational power vis-a-vis the Executive. But much of this is soft power. In terms of hard power, and in particular the capacity to set the agenda on legal and judicial policy, and to change the law and the legal framework, the Executive is still dominant.

Finally, does the new system strengthen or weaken judicial independence, and judicial accountability? Formally judicial independence has been strengthened, through the multiple statutory duties laid on the Lord Chancellor and all ministers and those involved in the administration of justice to uphold it; and through the multiple independent bodies (HMCTS, JAC, OJC, JACO) which help in part to safeguard it. The judiciary still bemoan the passing of the old Lord Chancellor; but they would not wish any of these independent bodies to be abolished. As for judicial accountability, that also remains strong, not least because the Lord Chancellor still has to agree all important decisions about the financing, management and direction of the justice system. The one aspect of judicial accountability which has weakened is that the Lord Chief Justice no longer gives an adequate account of his leadership of the judiciary through his occasional reviews. But that is easily remedied, through making the reviews annual, and more systematic.