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"JUDGES - ON AND OFF THE BENCH"

LOWRY LECTURE, BELFAST

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Introduction

1. It is a great honour to have been asked to give this year's Lord Lowry lecture here in Belfast, and to add my name to the very distinguished list of individuals who have given it previously. I have taken as my theme what it means to be a judge. A straightforward account might focus on what judges do in court. It might, for example, emphasise the judicial role in upholding the rule of law, in vindicating rights. To put it simply, in doing justice according to law. The 'day job'.

2. It is evident that Lord Lowry exemplified this both as Lord Chief Justice of Northern Ireland and as a Law Lord. But he well knew that the judicial role went further. The judicial oath focuses our minds on doing right by all who come before the courts without fear or favour. It says nothing about how else we judges serve. But Lord Lowry, like many other judges over the centuries, knew that there was more to being a judge than adjudication. Perhaps he reflected on that point when, nearly fifty years ago now, he was asked to chair the short-lived Northern Ireland Constitutional Commission.

3. My subject today then is not what judges do on the Bench. It is what they have done, and do, off the Bench.

4. If we take the long view, we can see judges taking on three such roles. Historically, judges were as much politicians as they were anything else. My ultimate predecessor, Roger of Salisbury – England's first Chief Justiciar – was more politician than he was judge, as were his immediate successors. That, of course, was the Middle Ages, a time that can properly be said to epitomise the foreign country where they did things differently. Doing things differently did not just stop then, however. I return to this in a moment.

5. From looking at the judge as a politician, I want to turn to the second role that judges have taken on in the past, and which they still take on today. That is the judge as adviser. It is a role we recognise easily in current times – with judges being asked to conduct Inquiries and to make recommendations for reform. Finally, I want to consider the judge as administrator. Again, this is a role that we can trace back to the origins of the judiciary. It is one that remains to the present, not least given judicial engagement, both here in Northern Ireland and in England and Wales, with the administration of the courts and tribunals.

Judges as politicians – second from the King

6. My starting point then is judges as politicians. Today, the very idea of mixing judicial and political functions is accepted as being contrary to the separation of powers and the rule of law. Yet until recently, the UK's uncodified constitution maintained a less than purist approach to this. My predecessors and the Law Lords sitting and occasionally voting in Parliament certainly posed a challenge to Locke and Montesquieu on this point. As, of course, did the Lord Chancellor; an office that used to exemplify fusion or unity of powers, rather than their separation. Then the Constitutional Reform Act 2005 arrived: it barred serving judges from sitting in the House of Lords and left the Lord Chancellor solely with

their role in the Cabinet, albeit with the statutory duty to uphold the rule of law and secure adequate funding for the efficient and effective running of the justice system;[1] it moved the Law Lords into the UK Supreme Court. All in all a state of affairs much more consistent with a commitment to formal separation of powers.

7. Historically, however, fusion of powers where the judiciary was concerned was, if not the general rule, then much more prominent a feature of our constitutional arrangements. It is telling that even Locke, while he elaborated the doctrine of separation of powers, only referred to two branches of government: the executive and the legislature. For him, as was generally understood to be the case, judges, as servants of the Crown, could be said to form part of the executive.[2]

8. We can see this form of fusion of power from the beginnings of the English and Welsh judiciary in the Norman era, when litigation was said to be no more certain a means to deliver justice than a game of dice.[3] A forerunner of John Rawls might have suggested that this was a good thing, as it meant that litigation delivered a form of pure procedural justice.[4] If they had, they would – as we all know – have missed the point: that justice according to law requires more than simply following the rules of the game. It requires judges to secure substantive justice as well as procedural justice; something that Lord Lowry well knew throughout his distinguished career.

9. The Norman era saw the creation of the office of Chief Justiciar in England; the ultimate ancestor of my office as Lady Chief Justice. Roger of Salisbury first held the office, albeit apparently unofficially, from 1107 to 1139. No modern Chief Justice would now serve for so long.... As I am sure Dame Siobhan would agree, we might well expect some time off for good behaviour. The office held by Roger was not merely judicial. It was as much, if not more, of a political role, which saw him occupy a position more akin to the King's Viceroy, Regent or, at the least, medieval Prime Minister. It was such a powerful position that it was an office known to be *secundus a rege*: second to the King. He was head of the Royal Household, of the Curia Regis – the King's Court -, the nascent government departments, as well as the Exchequer. It was an office that saw him and his successor, establish what is today the Treasury on a secure footing. Put another way, they ensured the development of revenue collection focused round a central Exchequer.[5]

10. In the years that followed, we can see the evolution of the Treasury and also the Court of Exchequer, which split off from the Curia Regis in the 1190s. The Court of Exchequer survived as a court until 26 December 1880, when, in the aftermath of the Judicature Act reforms, it became part of what is now the High Court's King's Bench Division. Not only was the Chancellor of the Exchequer a judge of the Court until those reforms - another mixing of the judicial and the political[6] - but on several occasions in the 1700 and 1800s, the Lord Chief Justice – the Chief Justiciar's successor - occupied the office of Chancellor of the Exchequer on an interim basis when the office was otherwise vacant. John Pratt held both

[1] Constitutional Reform Act 2005, s. 1; Courts Act 2003, s1.
[2] J. Locke *Two Treatise of Government* (1690), (CUP, 1994), s.91
[3] *Lege Henrici Primi* cited in J. Baker, *An Introduction to English Legal History*, (2019) at 16.
[4] J. Rawls, *A Theory of Justice*, (Harvard,1999) at 73 – 75.
[5] J. Baker at 18-19.
[6] F. W. Maitland, *The Constitutional History of England*, (CUP, 1908) at 135.

offices in 1721. William Lee followed suit in 1754. Lord Mansfield did so in 1757, before Lord Ellenborough in 1806.

11. Chief Justices thankfully do not now take up the office of Chancellor of the Exchequer, nor does the Chancellor of the Exchequer sit in court. The latter's ability to do so was abolished in 1873.[7] Separation of powers was achieved to that extent then 150 years ago. We can, however, see a shadow of the historical fusion in the continuing role played by the King's Remembrancer in the Trial of the Pyx. The King's Remembrancer is the oldest continuous judicial office in England and Wales. It is today held by the Senior Master of the King's Bench Division. Historically, the office was the Chief Clerk of the Exchequer. It too was a judicial and executive office. The Trial of the Pyx is held annually in February in the Goldsmiths' Hall in London. The King's Remembrancer presides over a trial, where newly minted coins are formally tested to ensure that they are fit to enter circulation; the Pyx refers to the wooden box in which the coins are kept. The trial is an unusual one as it blends the judicial and the administrative; judicial, as there is a judge and jury, the latter of which include assayers; administrative, as it is a regulatory exercise, which if we created it today would be conducted by the Executive.

12. There is a final, more modern in legal terms, shadow of the mixing of judicial and executive functions concerning the Exchequer. Since 1880 both the Lord Chief Justice and the Master of the Rolls, the former as successor to the Chief Baron of the Court of Exchequer on its abolition, have been National Debt Commissioners. The Master of the Rolls was one of the original six Commissioners under the National Debt Reduction Act 1786. From 1860 to 2016 the Commissioners did not, however, meet to transact business. They did, however, reconvene in February 2016, to appoint the Chief Executive of the Debt Management Office as the Government Broker.[8] We have not been called into action since then. Again though, it could be questioned whether in the post-2005 Act world the maintenance of a judicial presence on the Commission strictly satisfies the separation of powers.

13. One of the problems identified with fusion of powers was that it can lead to the abuse of power. Even where it does not do so in practice, a holder of such authority could well and properly be viewed as being too powerful within the state. That, of course, was what happened to the office of Chief Justiciar. So powerful was the office, that, as Baker has it, during the troubled reign of King Stephen it threatened the monarchy. And the office was superseded ultimately by separate political, administrative and judicial offices.[9] By the time that Edward I was on the throne, the judicial functions of the role were assumed by the Chief Justices of the Court of Common Pleas and of the King's Bench and the Chief Baron of the Court of Exchequer.

14. The new Chief Justices and, by then, other judges of the courts, may not have held offices that expressly demonstrated fusion of power, but they were a long way from demonstrating a commitment to separation of powers. And it would be some considerable time before the Lord Chancellor, as head of the Court of Chancery, and his deputy, the Master of the Rolls, ceased to have multi-faceted roles. Judges could be removed from office at the sovereign's pleasure. Something which, whatever could be said for judicial independence at the time,

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[7] Supreme Court of Judicature Act 1873, s.96.

[8] See Commissioners for the Reduction of the National Debt - National Debt Commissioners, <https://www.dmo.gov.uk/responsibilities/public-sector-funds-crnd/national-debt-commissioners/>

[9] J. Baker at 19.

placed it on shifting sands. A judge who feared removal from office was one who would be more likely to yield to political instructions, coded or express. Unsurprisingly, this aspect of the judiciary as servants of the Crown was not unusual during the reign of Henry VIII. There were plenty of examples of what might happen if the King were displeased. No doubt Thomas Cromwell, who was Master of the Rolls for a period under Henry, could have served as an example " *pour encourager les autres*". The height of this trend, as might be expected, arose during the reigns of the Stuarts. Charles I dismissed several Chief Justices for not complying with government policy. Charles II forced judges into retirement and James II, amongst other dismissals, sacked one Chief Justice in order to appoint a court favourite as his successor.[10]

15. The 18th century saw a significant step away from this soft form of fusion with the introduction of security of judicial tenure through the Act of Settlement 1701 and then the Commissions and Salaries of Judges Act 1760. The latter removed the demise of the Crown's role in determining judicial office – until then the new monarch was able to choose whether to reappoint judges or to choose someone more to their liking. It did not, however put a complete stop to judges engaging in politics. Three examples are illustrative.

16. First, the Master of the Rolls. It might have been thought that being the Lord Chancellor's sole deputy in the Chancery Court and keeper of the rolls and records of the Chancery of England would be enough to keep a person busy. Until 1873, Masters of the Rolls could, however, also sit as Members of Parliament. Many Master of the Rolls took the opportunity to do so. Some went a step further. They were also appointed as Speakers of the House of Commons. In a way then they mirrored the Lord Chancellor; the Speaker in the House of Lords. The Judicature Act reforms put a stop to this practice as it barred judges, including the Master of the Rolls, from sitting in the House of Commons.[11]

17. The most notorious example of this practice is that of Sir John Trevor. He was Master of the Rolls twice. From 1685 to 1689. He resumed the office from 1683 to 1717. He held the office of Speaker from 1685 to 1687 and then again from 1689 to 1695. One of the central underpinnings of effective justice systems is public confidence in the judiciary. Confidence in a judge's integrity. In their incorruptibility. Sir John's conduct as Speaker of the House exposed one reason why judges should be far removed from politics. He was removed from office as speaker and MP in 1695. His offence? He had been impeached for high crimes and misdemeanours. He had accepted 1,000 guineas from the Corporation of London as a bribe to help ease the passage of a Bill through Parliament. Today a judge found guilty of corruption would not remain in office for long. But lucky old Sir John managed to retain office as Master of the Rolls for a further 22 years!

18. Today judges in England and Wales and Northern Ireland are quite properly insulated from political matters. We can neither sit in either House of Parliament nor can we engage in political commentary or debate. There is, however, one crucial exception to that. Section 5 of the Constitutional Reform Act 2005 provides the Lady Chief Justices of England and Wales and of Northern Ireland, the Lord President of Scotland and the President of the UK Supreme Court the power to '*lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the*

[10] J. Baker at 178-179.

[11] Supreme Court of Judicature Act 1873, s.9; Supreme Court of Judicature Act 1875, s.5; House of Commons Disqualification Act 1975, s.1 and First Schedule.

administration of justice'. The power is generally exercised by providing Parliament with annual reports on the functioning of the courts and judiciary. It is not, however, so limited.

19. If necessary, it could be exercised by a Lady Chief Justice to make representations on matters of importance arising from Bills before Parliament having a potential impact on the judiciary or the administration of justice. It could be used to raise matters of constitutional importance or to raise issues concerning action being taken by the Executive that satisfy the criteria specified in the Act. It is a power that my predecessors and I have not used to date. It is there, however, to enable Chief Justices to protect the rule of law and judicial independence where necessary. In doing so it may draw them into political questions. It does so not because the judges are politicians, but rather as President of the courts and head of the judiciary. It is a means by which one branch of the State can formally raise its concerns with another, and do so in a way that does not infringe separation of powers.

20. My final two examples focus on Lords Mansfield and Ellenborough, to whom I referred earlier. Lord Mansfield was perhaps as close as we get to a Lord Chief Justice as Chief Justiciar after the abolition of the latter office. During his term of office as Lord Chief Justice he also held the position of Chancellor of the Exchequer, albeit for three days in April 1757, and was Speaker of the House of Lords for eleven months in 1783. Perhaps more substantively, it is said that he was for some time de facto Prime Minister.[12] Lord Ellenborough while Lord Chief Justice was also, for an equally short period, Chancellor of the Exchequer. More substantively, in 1806 he served in the Cabinet of Lord Grenville; the so-called Ministry of All the Talents. That short-lived government was the last time that a judge has been a member of the Cabinet.

21. Lord Ellenborough's appointment was criticised at the time as it drew him into party politics. As Lobban explains, the substance of the criticism was acute. As he put it,

> '*His appointment caused a furore . . . since many felt it unconstitutional to have the chief criminal judge present at deliberations regarding public prosecutions. Although he received entreaties from numerous friends not to accept, Ellenborough was convinced that there was no impropriety, since he saw no constitutional distinction between being a privy councillor and a member of the cabinet, and dismissed any opposition to his appointment as being motivated by mere party bias.*'[13]

It is perhaps telling that the Grenville Government's response to such criticism was to note that it did not take its '*principles of the English constitution from the theories of Montesquieu and Blackstone.*'[14] It was, so Government Ministers put it,

> '*. . . idle to talk of the separation of the legislative, executive, and judiciary powers in England, where one of the branches of the legislature was the supreme court of law, and had usually for its speaker the first law-officer of the kingdom; where the servants of the crown sat in both houses of parliament, and chief justices were privy counsellors and sworn advisers of the crown, in all matters relating to the honour of the king and to the good of the people.*'[15]

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[12] N. Poser, *Lord Mansfield: Justice in the Age of Reason*, (McGill) (2013).
[13] M. Lobban, *Law, Edward, First Baron Ellenborough*, (Dictionary of National Biography, OUP)
[14] Cited in J. Baker at 180.
[15] S. Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Judges*, The American Journal of Legal History, Apr., 1994, Vol. 38, No. 2 (Apr., 1994) 117 at 118-119.

22. So Blackstone, it would seem, did not carry the weight with the then government as he would come to enjoy more generally. Party bias may well have motivated some of the criticisms of his views. That party bias could do so ought perhaps to have told both Lords Ellenborough and Grenville that the appointment was improper. It is fair to say, though, that Lord Ellenborough later regretted having accepted the position and taken the judiciary into politics.[16] I say regret, but he only did so as far as being a member of the government was concerned. He continued to contribute to Parliamentary debates as a member of the House of Lords. In doing so he continued to mix politics and the judiciary. He was, for instance, strongly opposed to attempts to reform the criminal law so as to abolish capital punishment for stealing goods from shops. Not only did he do so in Parliament, but he was believed to have encouraged the judiciary to apply the existing law all the more rigorously.[17] Whether that is true or not, that a judge could be thought to have attempted to influence judicial decision-making – to undermine a judge's decisional independence – to promote their own political views is more than sufficient to undermine public confidence in the judiciary and the rule of law. All the more reason for judges to be and remain apart from politics.

23. By the early 18th century, the idea that separation of powers was just idle talk was in reality untenable. That no chief Justice was invited to sit in the Cabinet after Lord Ellenborough makes that plain. Equally, Lord Tenterden in 1827 and Lord Denman in 1834 were the last Chief Justices to take office as Chancellor of the Exchequer. Even as a temporary appointment, it was by that time understood to be inappropriate for a judge to occupy it.

24. Judges were, as I have noted already, barred from sitting in the House of Commons by the 1880s. Judicial independence from Parliament and the Executive, at least post-appointment, was established by at least the time the High Court and Court of Appeal were created. And with the passing of Lord Halsbury as Lord Chancellor in 1905, political appointments as judges ceased to occur. Judges were judges appointed for their legal knowledge, and of course since 2005, appointed via an open application process that explicitly focuses on merit.

25. The evolution of judicial office has come a significant way since the time of the Chief Justiciar. It is safe to say that the rule of law depends upon maintaining the approach that sets judges apart from politics, the government and Parliament. Only if we do can we say, as Lord Lowry did in 1987, that the rule of law can secure '*impartial justice*' and can '*protect the weak against the strong and the individual against the state.*'[18] A judge who is simultaneously a politician is one who is unable to do so, and one who cannot secure the rule of law.

Judges as Advisers

26. I want now to turn to the second of the three roles that judges have taken historically. That of judge as adviser. It is a part that they continue to play today.

27. It ought to be apparent that, as a result of the fusion of judge and politician, judges up to the time of Lord Ellenborough were advisers both to government and, in Lord Mansfield's case when he was de facto Prime Minister, the King himself. The judge as adviser has a wider

[16] J. Baker at 180.
[17] Ibid.
[18] Lord Lowry, *Child & Co lecture (1987)* cited in *Lowry Lectures 2011-2022, 100 Years of Law in Northern* Ireland, (Judiciary of Northern Ireland, 2022), foreword.

history than this, however. From the earliest days of the post-Norman judiciary, advisory work formed part of a judge's repertoire. Today, judges are prohibited by statute from continuing in private practice.[19] The same was true of medieval judges.[20] With one difference. Medieval judges could continue to give private advice. They could also sit freely as arbitrators. They were also able to receive fees for doing both; fees that were in addition to the judicial salaries, the income that they received from court fees, and other sinecures that came with their offices.

28. Today we receive no more than a judicial salary; fee income was abolished in 1826.[21] And the sinecures are also long gone. Today judges cannot give private advice and can only sit as arbitrators if permitted under section 93 of the Arbitration Act 1996. And even then any fee is payable to the High Court rather than the judge.

29. Advice to private parties was not the only form of advice that judges used to be able to give. Judges were often summoned by Parliament and the King to give legal advice and their opinions on the law. Some would refuse to do so. Sir William Hussey CJ (or Huse), for instance, declined to provide the young Henry VII with a preliminary opinion on a treason case in 1485. He took the view, as he put it, that the matter '*would come before the King's Bench judicially; and then they would do what by right they ought to do.*'[22] It is to be hoped that he would have been as robust if the summons to give advice had been made by a late era Henry VIII. No doubt Henry VII was unhappy that his Chief Justice – at the time understood to be a servant of the Crown holding office at its pleasure – had declined to accommodate him.

30. Hussey CJ's approach was not, however, always the order of the day. James I famously - or rather, infamously - required advice from all of his judges on a question of whether a suit could be stayed if ordered by the King. No doubt he had forgotten the prohibition on delaying justice contained in Magna Carta. All but one of his judges provided the requested advice. The one who refused: Coke CJ. For maintaining a principled approach that judges ought not to provide advice on questions upon which they could be called upon to adjudicate, he was removed from office. No reasons were given, but it does not take much to read between the lines.[23] Notwithstanding Hussey CJ's approach it remained a common practice until the 19th century for Parliament to seek legal advice from the judiciary.[24]

31. A more recent example of a judge who was prepared to provide the government with advice is Lord Reading CJ. He had a career that spanned the Bar, politics and judicial office. During his time as Lord Chief Justice he was also the UK's ambassador to the United States. He also attended Cabinet meetings, although was not a member of the Cabinet. No doubt in both roles he provided the Prime Minister, Lloyd-George, and the government with a range of advice, both formal and informal. It is probably fair to say that he was a reluctant judge and Lord Chief Justice. He returned to politics after his resignation as Chief Justice in 1919, becoming first Viceroy of India and then for a short period Foreign Secretary and Leader of the House of Lords. It would be unthinkable today that a judge, never mind a Chief Justice,

[19] Courts and Legal Services Act 1990, s.75.
[20] J. Baker at 177.
[21] Judges' Pensions Act 1825.
[22] Cited in J. Baker at 178.
[23] J. Baker at 178. Coke CJ's approach provided an opening for his great rival Sir Francis Bacon to engineer the dismissal.
[24] For a detailed account see, S. Jay (1994) at 124 and following.

would take on such roles whilst in office or would do so after they left office. Law Lords and retired Chief Justices sit as cross-bench peers rather than take a party whip. It would not be until 1957, however, before the Law Lords would unequivocally state in *Attorney-General for Australia v The Queen and Boiler Makers' Society of Australia*, that giving extra-judicial advice or legal opinions to Parliament or the government was impermissible.[25] Impermissible because it would undermine judicial independence and impartiality.

32. A modern echo of the issue can be seen in the debate that arose from the suggestion of the then Home Secretary, Charles Clarke, that, rather than the Law Lords simply ruling on control orders made under the Prevention of Terrorism Act 2005 and overturning them, the '*Lords should meet with the Home Secretary to discuss the broad issues of principle involved, in either a formal or informal setting*.'[26] The reason: to provide the government with advice on how such orders could be issued legally. Lord Bingham, echoing Chief Justice Hussey's approach, declined the invitation. Lord Phillips, the then Lord Chief Justice, would go on to explain that, as frustrating as the refusal must be for the government, '*judges must be careful not even to appear to be colluding with the executive when they are likely later to have to adjudicate on challenges of action taken by the executive*'.[27] In other words, to give such advice would compromise judicial independence and impartiality. No doubt Hussey CJ and the 1957 Law Lords would have concurred.

33. It might be thought, in the light of this, that judges cannot and ought not to provide advice at all. The Constitution Committee in 2007, for instance, considered the question whether a system of abstract judicial review should be introduced, in common with approaches taken in some other jurisdictions. Abstract review would be a means by which a party could seek a ruling on the meaning of newly enacted legislation. The Committee concluded that such an approach would tend to undermine judicial impartiality.[28] Echoes again of Hussey CJ.

34. That being said, others, such as Rodney Brazier, the doyen of constitutional scholars, has suggested that the giving of public advisory opinions by judges would arguably not threaten judicial impartiality.[29] He prays in aid section 4 of the Judicial Committee Act 1833, which permits the Judicial Committee of the Privy Council to provide advisory opinions to His Majesty when asked to do so. Since the start of the 20th century, thirteen such opinions have been given. Three of the most recent provided advice on whether DNA evidence was admissible to determine the question of who was the Baronet of Pringle of Stichill, advice on whether the Privy Council could determine questions raised in a petition to The Queen concerning a dispute between the Chief Justice and the Governor of the Cayman Islands, and advice on whether the Chief Justice of Gibraltar should be removed from office.[30]

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[25] *Attorney-General for Australia v The Queen and Boiler Makers' Society of Australia* 2 W.L.R. [1957] 607 at 619.

[26] Constitution Committee, *Constitution – Sixth Report*, (2007) at [93]-[96] <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15102.htm>.

[27] Lord Phillips CJ, Speech to the Cardiff Business Club (26 February 2007) <https://www.bailii.org/uk/other/speeches/2007/1JCN1.html>

[28] Constitution Committee (2007) at [98]-[106].

[29] S. de Smith & R. Brazier, *Constitutional and Administrative Law*, (1998) at 376.

[30] *Re Baronetcy of Pringle of Stichill* [2016] UKPC 16; [2016] 1 W.L.R. 2870, *Chief Justice of the Cayman Islands v Governor of the Cayman Islands* [2012] UKPC 39 [2014] A.C. 198; [2013] 3 W.L.R. 457, *Re Chief Justice of Gibraltar* [2009] UKPC 43.

35. A broader advisory power is set out in section 36 of the Criminal Justice Act 1972, which enables the Attorney-General to refer a point of law to the Court of Appeal upon an acquittal on indictment. He may do so if '*he desires the opinion of the Court of Appeal'* on the point. Both this, and the Privy Council's power to provide an advisory opinion, differ markedly from the nature of private opinions given to the Crown in previous centuries. Not only are they given in public following a public hearing, they are given by serving judges as part of a formal judicial process. As such they do not call into question either judicial independence or impartiality in the way that would have been the case for Hussey CJ, Coke CJ and Lord Phillips CJ. It may not be permissible for judges to give legal advice privately, but within clear statutory authority, through judicial processes that respect independence and impartiality, it is apparent that limited forms of judicial advisory opinions are and remain well-established. They are confirmed though, only when judges are firmly on the Bench rather than off it.

36. Advisory opinions are not the only methods by which judges have provided and continue to provide advice to government and Parliament in a constitutionally acceptable manner. As I have already noted, Lord Lowry was familiar with one of these, since he was appointed to chair the Northern Ireland Constitutional Commission. From the 19th century, judges have been called upon by government to conduct inquiries and to make reform recommendations, where appropriate. The first judges to be appointed to chair an Inquiry, were '*Sir James Hannen, at the time the President of the High Court's Probate, Divorce and Admiralty Division and future Law Lord, A.L. Smith J., future Master of the Rolls, and Day J.*' They were appointed to chair the Parnell Inquiry.

37. Two reasons can be seen to underpin their appointment. The broad rationale was that '*judges as great officers of state [were] seen as susceptible of performing broader constitutional functions.*'[31] That was a rationale of general application. The narrower rationale was that Parliament did not consider that a normal parliamentary inquiry would be appropriate. The inquiry needed to be judicial, calling upon judicial experience and skills. Whatever the validity today of the broader rationale, the narrower one can be seen to have underpinned the approach taken, for example, to the appointment of Sir Brian Leveson to chair the Leveson Inquiry into media practices, and Lady Hallett's appointment to chair the current Covid Inquiry. Such examples can be multiplied.[32]

38. There is a further road. One of the innovations that stemmed from the Woolf reforms of the late 1990s was the creation of the Civil Justice Council in England and Wales. It is a statutory, non-departmental body, responsible for providing advice to the Lord Chancellor and the judiciary on the civil courts.[33] The Family and Administrative Justice Councils, whilst non-statutory, play similar roles for the family courts and the Tribunals, respectively. These various bodies are chaired by members of the senior judiciary and have judicial and non-judicial members.

39. In taking on these roles, the judiciary are not providing advice or opinions in the way deprecated by Hussey CJ. They are providing advice to government and the judiciary on broader questions concerning the administration of justice. On the operation of the courts. On questions concerning their accessibility. They do so drawing on their experience as

[31] Lord Thomas, *The Future of Public Inquiries*, Public Law (2015) 225 at 228.
[32] For a discussion of the development of the judicial role in public inquiries see, Lord Thomas (2015).
[33] Civil Procedure Act 1997, s.6.

judges. They are not, however, acting as judges or giving legal opinions or advice on discrete legal questions or on matters of statutory interpretation.

40. Here is perhaps the key point. Members of the judiciary can, in limited circumstances, provide advice and opinions. They can do so where they are able to draw on their judicial experience. That may be in the management and weighing up of evidence, as is often the case where judicial inquiries are concerned. It may be where they are called upon to advise on matters concerning the administration of justice, whether as members of statutory or non-statutory advisory bodies, or, as was also the case in the past, as members of Royal Commissions. And they may do so on specific legal issues where there is a public, constitutionally approved way of doing so, such as under the 1834 or 1972 Acts. These provide limited areas where judges can be drawn upon to apply their knowledge and expertise off the Bench.

41. What they cannot do is, informally or in private, offer their advice on how matters might be adjudicated in court. That would not only undermine their independence, it would and would be seen to be a means to undermine their impartiality and contrary to the rule of law.

Judges as Administrators

42. Finally, I want to turn to the judge as, in a broad sense, administrator. This is perhaps the most significant aspect of the work of judges off the Bench. As with their other "off the Bench" roles, this can also be traced back to the origins of judicial office. The most significant example of the judge as administrator is that of the Master of the Rolls. Today, the office is that of the most senior civil court judge in England and Wales; the President of the Court of Appeal's Civil Division.

43. At the outset, however, it was an administrative rather than a judicial office. The Master of the Rolls was the most senior clerk in the Court of Chancery. For that reason he was the keeper of the rolls of the Court of Chancery. The office became a de facto judicial one, with the Master of the Rolls deputising for the Lord Chancellor as judge in the Court of Chancery, from around the time of Edward I. It was not until 1729 that the office was formally recognised to be a judicial one. That did not reduce its administrative functions. Over the centuries the Master of the Rolls has accrued a vast range of them. He is, for instance, responsible for manorial documents. As Keeper of the Records, he is responsible for determining where the Chancery records are deposited. Through this he is responsible for the National Archives.[34] That latter role saw the present Master of the Rolls, Vos LJ, lead the creation of the National Judgments Database; England and Wales' first official judgment database, which was established in 2022. Its continuing administrative role is one that is very much concerned with securing the proper administration of justice.

44. The position of the Master of the Rolls also exemplifies the extension of administrative roles to the judiciary. Originally, rules of court were prepared by the judiciary. More recently, they are the province of various Rule Committees. Invariably judges are members of those committees, each one of which is chaired by a member of the senior judiciary. The Master of the Rolls chairs both the Civil Procedure Rule Committee and the more recently created Online Procedure Rule Committee. Again, the focus here is on ensuring that the rules

[34] Law of Property Act 1922, s.144A; Public Records Act 1958, s7(1).

drafted facilitate the efficient and effective administration of justice. Even off the Bench the judiciary work to promote effective working from the Bench.

45. A similar approach can be seen with the Sentencing Council. It plays a similar, albeit more focused role, where criminal justice is concerned. The spotlight here is on sentencing guidelines – developing them, monitoring their use and reviewing a wide range of sentencing decisions. As Lady Chief Justice, I am President of the Council. William Davis LJ chairs it. And as with the other Councils, it has other judicial and non-judicial members. Again all of the Council members, including its judicial members, are there to draw on their experience of the criminal justice system to ensure that the guidelines are current and promote consistency, whilst maintaining the independence of the judiciary. Again this administrative role is one designed to ensure that the proper administration of justice can be achieved effectively and transparently.

46. The most significant administrative roles are ones that the Lady Chief Justice of Northern Ireland and I know well. It is that focused on the effective leadership of the judiciaries of Northern Ireland and England and Wales, respectively. A role that came to the Chief Justices as a consequence of the Constitutional Reform Act 2005, which placed various duties upon us to provide for the welfare, training, guidance and deployment of our judiciaries.[35] Of course, no single judge could carry out such a role on their own. Effective management systems need to be put in place, and are in place. Training, for instance, requires effective provision for and management of the Judicial College in England and Wales. It requires judges to both be trained and to be trainers. Effective deployment equally requires effective systems, which are overseen in England and Wales by the Senior Presiding Judge and the Circuits' Presiding Judges. A detailed, dare I say, intricate web of delegation of powers is also required, to enable judges to exercise powers on behalf of the Lady Chief Justice.[36] And, such systems require judges to work with and be supported by experienced and expert civil servants. In England and Wales, we are supported excellently by the Judicial Office for England and Wales.

47. In addition to the administrative management of the judiciary, there is the administration of the courts through His Majesty's Courts and Tribunals Service. In England and Wales we have had several different approaches to managing the courts. Before the early 1970s, court management was generally entrusted to the judiciary, supported by court staff. Following the Beeching Report (the other report, not the one about the railways), responsibility for administration was taken over by the Lord Chancellor's Department. Greater systemic efficiency than could be provided by individual court management was the aim. Equally, individual management could always undermine equal access to justice, as different courts could on such an approach be managed to different standards. Since 2011, HMCTS has taken the form of a partnership between the government and the judiciary; one that is set out in the HMCTS Framework Agreement.

48. On one level, it might be thought that engaging the judiciary in court administration would be problematic. It might be said that it could draw the judiciary into politics, which would be inconsistent with the position outlined above. The contrary is very much the case. It is well-established that the optimum approaches to court administration are either a partnership

[35] Constitutional Reform Act 2005, ss.7 and 11.

[36] See, for instance, the Lord Chief Justice's Statutory Delegations No. 1 of 2020 <https://www.judiciary.uk/guidance-and-resources/lord-chief-justices-statutory-delegations/>

approach or one which places responsibility for administration solely with the judiciary. As the Mount Scopus International Standards of Judicial Independence put it,

> '*The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.*'[37]

The UK Supreme Court provides an example of one where the responsibility for judicial administration is vested in the judiciary.[38] In both cases, as long as the administrative arrangements, such as judges sitting on HMCTS' Board, do not undermine either institutional independence or individual judge's decisional independence, they pose no problem.[39]

49. It is fair to say that management of the judiciary and the role that judges play in the administration of HMCTS, as well as the other administrative roles judges take, are considerable, as is the commitment required to carry them out effectively. That is a commitment, however, that cannot but be carried out. It is necessary for the proper administration of justice to be carried out effectively. In this sense, what we do today would be understand by those early Masters of the Rolls. Today we strive to ensure the courts and tribunals are able to run effectively, just as they strove to ensure that the administration of the nascent Court of Chancery ran effectively. In both cases, without working off the Bench, it would not be possible for judges to work on the Bench.

And where does this leave us?

50. Where then does this leave us? Judges at different times have been politicians, advisers and administrators. Each of these roles has followed on from their appointment as a judge. They were and are roles accepted by the judiciary, and in many cases, still accepted. They are roles that are carried out in addition to the 'day job'. These roles – what judges do off the Bench – are often complementary to the work of the judges on the Bench. The responsibility for the administration of the courts and tribunals, both in England and Wales and here in Northern Ireland, is one that the Lady Chief Justice and I take very seriously. Sound administration is a fundamental pre-requisite of what it is to do justice. Without it, judges would not be able to carry out their work on the Bench effectively. Justice would be delayed. Justice would be denied.

51. The same can equally be said for the work that judges do on rule committees, on advisory bodies. The work done there in scrutinising the operation of the courts and tribunals, on ensuring that sentencing guidelines are kept up to date, and most recently in developing new digital procedures, is just as important to maintaining the effective administration of justice. They are the means by which the judiciary can help secure equal access to justice; something which Lord Lowry was at pains to secure during his time as Lord Chief Justice of Northern Ireland.[40] The rule of law applies equally to all or it does not apply at all. It is not a pick and mix. These aspects of our extra-judicial work are a key means by which the judiciary fulfils its duty to do justice without fear or favour.

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[37] Mount Scopus International Standards of Judicial Independence, principle 2.13.
[38] Constitutional Reform Act 2005, ss. 48-51.
[39] On which see, for instance, *R v Valente* [1985] 2 RCS 673 at 708 and following.
[40] Lord Hutton in *Lowry Lectures 2011-2022, 100 Years of Law in Northern* Ireland at 6, where the importance to Lord Lowry of upholding the rule of law irrespective of the status of the parties before the court is emphasised.

52. And the eschewing of politics is the other means by which judges support the rule of law. A judge who expresses political opinions or who takes on a political role, as was done historically, is a judge who places judicial impartiality in jeopardy; they are a judge who places public confidence in the judiciary at risk. A judge who has or who gives the appearance of taking sides in political matters is one who undermines the administration of justice. The 19th century retreat from politics, as an aspect of judicial independence from the other branches of the State, is a key means by which judicial impartiality and the rule of law is maintained. That the government supports this both as a matter of Constitutional Convention, and further to the duty placed on the Lord Chancellor, UK Ministers and Northern Ireland Ministers under the Constitutional Reform Act 2005,[41] is one of the ways in which it too promotes the effective administration of justice.

53. The touchstone then for what judges do both on and off the Bench can be put simply. Do nothing to harm judicial independence and the proper administration of justice. The work that we do today off the Bench is intended to do both. That is something of which I am sure Lord Lowry would have approved.

54. Thank you[42].

[41] Constitutional Reform Act, ss. 3 and 4.

[42] My grateful thanks go to Dr John Sorabji for his assistance in the preparation of this lecture.