

Sweden's Contribution to Governance of the Judiciary

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The theme of this chapter is that Sweden has managed to create an approach to the governance of the judiciary which meets the contemporary need to secure accountability of the judiciary whilst respecting judicial independence. In the context of New Public Management, the English judiciary really has yet to develop a coherent view and to relate it in a sensible way to the notion of judicial independence.¹ Andrew Le Sueur² has described this as an 'emerging debate' and sees in the 2005 reforms potential lines for development, but the mechanisms are still underdeveloped. By contrast, Sweden already has systems both for the governance and the management of the judiciary which avoid some of the pitfalls of judges doing their own thing or of judges being too dominated by the short-term needs of the executive.

1 Introduction

1.1 *Tensions in the Governance of the Judiciary*

A major problem in designing an appropriate governance framework for the judiciary lies in the tension between competing conceptions of justice. There are two prevalent conceptions of justice as delivered by the judiciary. On the one hand, justice can be viewed as a human right. Each individual has a right to access justice and to receive an impartial determination of complaints according to law. These ideas are enshrined in the European Convention on Human Rights. As a right, justice is an entitlement that is owed to all, except in the face of the most imperative public interest requirements.³ If a person has a right, then it should not be denied. As a public service, justice is only one of the resources that the state makes available for the functioning of social life. It sits alongside services such as education and health, security and sanitation. It competes for the same resources and legislative time. In this context, it makes sense to say that the country will have less justice and more health. These two are competing conceptions. Legal professionals are likely to appeal to the first, rights conception. Concepts such as judicial independence are invoked to justify and support this idea.

These competing conceptions of justice lead to different answers to the key governance questions that need to be asked. The first question is the extent to which Government should take an active part in defining and managing the activity. Conceiving justice as one public service among many, the Government has the role at least as purchaser of this service on behalf of society at large. It can decide how much it wants and for what it can pay. By contrast, where justice is a right and rights are defined as specially protected interests that may conflict with the interests of the majority, then it is less clear that the Government, as

1 See P. Seago, C. Walker and D. Wall, 'The Development of the Professional Magistracy in England and Wales' [2000] *Crim. LR* 631, 650-1 and 640; G. Drewry, 'Judicial Independence in Britain' in R. Blackburn (ed.), *Constitutional Studies* (London 1992), 160.

2 A. Le Sueur, 'Developing mechanisms for judicial accountability in the UK' (2004) 24 *Legal Studies* 73.

3 R.M. Dworkin, *Taking Rights Seriously* (London 1978), ch 3.

representative of the majority, should define the service that is provided. In this context, it is argued that the judiciary, as independent guardians of rights, should play a significant role in determining how the service is run. So the governance questions also involve the extent to which the professionals should have a say in the way the service is designed. The argument would be that the professionals here are more than civil servants; they occupy a guardianship role in securing the social values that justice involves.

Depending on which conception of justice is adopted, then there are consequences for the kind of accountability that is required. If justice is a public service, then those who deliver the public service should be accountable in much the same way as any other person delivering a public service. If, on the other hand, justice has to be protected specially, then a special form of accountability will be appropriate. It seems to me that Sweden has (properly) adopted the public service model of justice and has set in place structures of governance that reflect this. By contrast, England is caught in a tension between the judiciary and legal professions, which adopt a rights-based model, and the Government, which adopts a public service model.

1.2 Management Issues

Apart from the high level of governance, there is also the question of management. To deliver justice in concrete situations requires organisation and planning. People need to be employed to service courts; buildings need to be constructed and so on. Bodies need to be set up and then be given authority and budgets to carry on their task, and they should be required to report on their performance.

The model that has become popular recently in England and Spain is that there should be two distinct organisations. On the one hand, there is an agency or body responsible for the judges, their appointment, education and training, as well as their careers. On the other hand, there is a service agency that is responsible for buildings, support services and other infrastructure.⁴ This dual agency model reflects the tension between justice as a right, dispensed by the judges, and the infrastructure of justice as a public service. In practice, the two are closely linked, but in theory, they can be kept separate. Judicial independence is respected by allowing the judges a significant say in the way in which fellow judges are appointed and their careers are managed. All the same judicial effectiveness is constrained by the resources placed at their disposal. Cases cannot be resolved if there are too few judges, too few courtrooms, or too few support staff to enable the courts to function. As a result, the role of judges as resource managers can be critical for the character of justice. There is a tension in resource terms between the two and a tension in accountability for the outcome. In Sweden, the two issues are seen as integrally connected through a single agency, Domstolsverket (DV).

4 See further J. Bell, *Judiciaries within Europe* (Cambridge 2006).

1.3 Accountability

Judicial accountability is also a difficult area. For the most part in relation to individual decisions, judges have relied on giving reasons predominantly in a way that is understood within the legal community. This protects the judges in relation to individual outcomes, but is less satisfactory in terms of the way in which justice in general is delivered. Accountability for the pattern of lawmaking that emerges from the higher courts and the effectiveness of routine decisions in the lower courts are both important matters. As justice becomes conceived less as an act of state authority and more as a public service, so the demands for accountability for the system grow. Many higher courts on the continent produce annual reports, justifying and opening to scrutiny their effectiveness and key decisions.⁵ In many systems, however, the information is gathered internally by the Ministry of Justice and produced as a set of annual statistics without a serious attempt to produce a publicly available narrative explanation and justification for what has been happening. This is most clearly the case in England. On the whole, systematic public accountability happens most explicitly in Spain and Sweden where an independent agency runs the judiciary. It has to operate within a framework set by a ministry or parliament and respond to it. In a sense, judicial independence is maintained by explicitness on both sides about what is expected and what is being delivered. Without an agency, there is often less explicitness both about expectations and delivery.

The freedom of judges to enforce justice as they see it within the mission that they have been given is a relatively recent area of controversy. In part, this is because the judicial system was seen in the past as one of the natural areas of government activity, like lawmaking, policing and the military, expenditure on which required little justification. As the judicial system has been reconceived as one public service competing with others for a finite pot for public expenditure, this automatic expenditure has come into question. At the same time, as justice has come under increasing demand from a variety of groups in society, so the judiciary has perceived the need to be more forceful in arguing for control over what it perceives to be its necessary share of that pot. The legal professionals have increased their demands, but the way of creating responsibility and accountability for expenditure has been more difficult to establish. The creation of agencies which are seen explicitly to be negotiating how resources are allocated is a feature that has become important in Sweden and Spain, but is less transparent in England.

2 Judicial Independence

Judicial independence is a widely cited principle, but in relation to the government and the management of the judiciary, it needs to be invoked with caution. In particular, the ideas of judicial independence and judicial self-

5 For example, the French Cour de cassation and the Conseil d'Etat both produce annual reports to the Minister of Justice, which contain both statistics and syntheses of major judicial decisions, as well as critical reflections on major legal issues.

government are often linked in contemporary discussions.⁶ For example, article 6 of the European Judges Charter provides that

The administration of the judiciary must be carried out by a body that is representative of the Judges and independent of any other authority.

The closest to this idea is the Italian Consiglio Nazionale della Magistratura, which is elected by the judiciary and manages judicial careers.⁷ This idea of judicial self-government is gaining ground in countries like Denmark, whose Courts Administration Agency is responsible to Parliament for the whole organisation of justice, within the budget given by the Parliament. It is an idea that has been voiced in England by leading judges, not least in the face of attempts by the Lord Chancellor to limit the cost of the provision of the court system.⁸ This has culminated in making a judge, the Lord Chief Justice, the person in charge of the judicial system. By contrast, in Sweden, the distinct agency responsible for the judicial system, including the recruitment and management of judges, is composed of non-government members, only some of whom are judges. It operates like any executive agency, with the Government setting a framework of principles and a budget. But then it can decide how it operates, subject to making an annual report. The agency is also involved in performance appraisal. Whether the agency is a constitutional body as in Spain or an administrative body as in Sweden, the emphasis is on judicial independence from the routine of ordinary politics. But in both cases, the agency responsible for the judiciary has members who are not judges and who are appointed by either parliament or by the government.

The problem with the appeal to 'judicial independence' is that the term is used to explain a number of different ideas. The first is freedom from political pressure on individual judges. Judges should be free in coming to their decisions. The idea of freedom from interference is the longest standing idea, but it involves a number of distinct issues. Interference in individual cases must be distinguished from interference in the judicial career, notably appointment and dismissal. In this latter area, political involvement in individual appointments has to be distinguished from political direction of the judicial and courts system as a whole. There are different levels of involvement here. Whilst no one would argue that the judge's decision should be dictated by politicians, and few would argue that a judge should owe his appointment simply to allegiance to a political party, there are fewer misgivings about the idea that the judiciary should be representative of a diversity of political opinions and that, therefore, political opinions should be a relevant factor in determining the composition of the judicial bench as a whole. In order to draw a relevant distinction between these situations, we should distinguish between the independence of individual judges, which should be strongly protected, and the freedom of the judiciary as a whole from political influence. At some level, many systems would accept political

6 See the German judges union's resolution of 15 November 2002 from its website: "www.drb.de/pages/html/texte/beschluss_sv.html". See also Lord Woolf, 'The Rules of Law and A Change in the Constitution' [2004] CLJ 317, 322-3.

7 See C. Guarnieri, *Magistratura e politica in Italia* (Il Mulino, Bologna 1993).

8 See Lord Browne-Wilkinson, below n. 37.

direction of the legal system as a whole. The Judges Charter appears to contradict this by asking for the judges to be managed by a body independent of politics.

Of course, the idea of sanctions or rewards given to individual judges in relation to their decisions would be particularly worrying. It leads potentially to a denial of justice where an individual has a concrete entitlement to an outcome, or at least to a due process. For similar reasons, countries are usually more insistent that the dismissal of judges be justified than their appointment. Institutions such as the Latin 'High Council of the Judiciary', started by giving judges and others control over the disciplining of judges, and extended by degrees into involvement in judicial appointments and promotions, to judicial dominance of all these procedures. The term was invented in France to describe the idea of an institution which would protect the independence of the judiciary by dealing with dismissals.⁹

But when it comes to managing the judicial service and setting its budgets, then we are not dealing with potential interference with individual cases, but with the setting of priorities between categories of legal activity, and this involves giving a direction to society, which is an inherently political activity. The suggestion that the judiciary should be given untrammelled authority in this area is seriously problematic.

3 Problems with the English Model

3.1 *The Constitutional Changes of 2003-2007*

Until 2003, the Lord Chancellor was both a senior judge (presiding judge of the House of Lords) and a government minister responsible for the courts system.¹⁰ The proposals to abolish the office of the Lord Chancellor were sprung on the judiciary (and the wider political community) in June 2003. Judicial criticism of the proposals, including the creation of a supreme court, led to discussions within the Judges' Council and between the Department for Constitutional Affairs (as the Lord Chancellor's Department had become) and senior judges. The result was a 'concordat' between Lord Woolf CJ on behalf of the judges and the Lord Chancellor in which the responsibilities of the judges and ministers was made clear, before the Constitutional Reform Bill was laid before Parliament.¹¹ The public image was of a deal brokered between a union leader and a minister to enable the latter to secure the safe passage of legislation. Indeed, when a former law lord successfully blocked the legislation by securing that it be

9 C. Guarnieri and P. Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy* (Oxford 2001), 21-2.

10 At one time the Home Office was responsible for the magistrates' courts, which deal with the majority of criminal cases, but these were transferred to the Lord Chancellor's Department in the 1990s.

11 See the statement of Lord Falconer, *Hansard HL*, 26 January 2004, cols 13-17.

referred to a select committee for further scrutiny, Lord Woolf spoke against the delay.¹²

Under the new arrangements of the Constitutional Reform Act 2005, the responsibility for the judiciary has moved from the Lord Chancellor to the Lord Chief Justice. Since April 2006, the Lord Chief Justice inherited some 400 statutory duties from the Lord Chancellor. His principal duties are representing, directing and managing the judiciary. As a *chief spokesperson*, he represents the views of the judiciary of England and Wales to Parliament and Government. Like the heads of the Scottish and Northern Irish judiciaries, he will have the right to make written representations on behalf of the judiciary to Parliament, the Lord Chancellor and ministers in general. These powers under ss. 5 and 7 formalise the practices of recent times, most notably illustrated by the Concordat of 2004. As *director of the judiciary service*, he is responsible for the welfare, training and guidance of the judiciary in England and Wales within resources made available by the Minister of Justice. In this capacity, the Lord Chief Justice discusses with Government the provision of resources for the judiciary. The budget comes through the Ministry of Justice (the former Department of Constitutional Affairs) and it determines the key performance indicators. Judicial salaries are determined by the Ministry of Justice in the light of a report by an independent body on senior salaries. The Lord Chief Justice shares responsibility with the Lord Chancellor for the Office for Judicial Complaints, the body which investigates complaints made against judicial office holders. As a *manager*, he oversees the deployment of judges and allocation of work in courts in England and Wales. The Lord Chief Justice is responsible for personnel management. Connected to him, but outside his control is the process for appointing judges (which is the province of the Judicial Appointments Commission) nor premises and support (Her Majesty's Court Service). Instead he is responsible for judicial work allocation, judicial training (delivered by another agency, the Judicial Studies Board). In addition to these executive roles, the Lord Chief Justice continues to be a *judge*. He is President of the Courts of England and Wales. He sits in important criminal, civil and family cases. He gives judgments and lays down practice directions in many of the most important appeal cases. He also chairs the Sentencing Guidelines Council, a public body designed to support sentencers in their decision-making, and encourage consistency in sentencing throughout the court system.

The Lord Chief Justice is constituted as a one person quango (a non-departmental executive body), supported by a body of civil servants located in the Law Courts in the Strand, the Judicial Office. All the powers vest in him and not in an agency as in Spain, Denmark or Sweden. The Lord Chief Justice has created, on his one initiative and without statutory authority, two advisory bodies, the Judicial Executive Board and the Judges' Council. To quote the description given on his website:

12 *The Times*, 9 March 2004.

The Lord Chief Justice primarily exercises through the Judicial Executive Board his executive responsibilities for:

- a. providing leadership, direction and support to the judiciary of England and Wales;
- b. determining the structure roles and responsibilities of the judiciary;
- c. developing policy and practice on judicial deployment, authorisations, appointment to non-judicial roles and general appointments policy;
- d. putting forward the requirements for new appointments of High Court Judges and Lords Justices of Appeal and holding discussions on specific appointments with the Judicial Appointments Commission and the Lord Chancellor;
- e. considering general policy on complaints;
- f. directing the judicial communications strategy through the Judicial Communications Office;
- g. managing the judiciary's overall relationship with the Executive branch of Government and Parliament, overseas relations and other jurisdictions and bodies, including the legal profession;
- h. considering and making recommendations on the spending review priorities, targets and plans as they affect the judiciary and the financing and resources for the court system;
- i. approving the annual budget for the Judicial Offices and approving the agreement with the Permanent Secretary on resources;
- j. setting clear objectives, priorities, and standards for the Judicial Office and monitoring its performance;
- k. overseeing the responsibilities of the Judicial Studies Board for training.¹³

But the members of the Judicial Executive Board are seven senior judges with no outsiders. He chairs the Judges' Council.¹⁴ In the past, this has had a variety of forms. From 1873 until 1981, there was a statutory Judges' Council, set up to review the implementation of the Judicature Act of 1873. From 1988 until 2002, there was an informal Judges' Council covering only senior judges. In 2002, this was dissolved and replaced by a body which included of all the judiciary, now including magistrates and tribunal members. It now together all the judges, but is dominated by the senior judges. It operates mainly through its executive, which has representatives of all levels of the judiciary. It nominates the judicial members of the Judicial Appointments Commission. The informal Judicial Councils have been convened to discuss matters of general interest, especially at moments of turmoil. Famously, the courts were shut for half a day while the judges debated the reforms proposed in Lord Mackay's Green Papers of 1988.¹⁵ The judges used this mechanism to make formal representations to the 2003

13 "www.judiciary.gov.uk/about_judiciary/governance_judiciary/organisation_judiciary/jeb.htm".

14 Lord Justice Thomas, 'The Judges' Council' [2005] PL 608.

15 R.L. Abel, *English Lawyers between Market and State* (London 2003), 57.

consultation on judicial appointments. In one sense, it operates as a collective voice of the judiciary, but in another it does not operate like a union in the same way that continental judicial unions work.

The problem is that there is no real external governance or accountability built into the model. In terms of governance, there is no independent body that tells the Lord Chief Justice what the policies for the judiciary should be. There is no specific group of people to be involved. The planning for judicial numbers, etc, as part of the Comprehensive Spending Review is conducted by the Ministry of Justice. The contribution of the Lord Chief Justice is significant, but not a matter of public record. The Lord Chief Justice can make representations to the Houses of Parliament, but this is not a very clear process.

In terms of accountability, there is no obvious accountability. As David Feldman has pointed out, the judiciary is accountable for the individual decisions it give by the reasons that are offered as justifications¹⁶. Judges have relied on giving reasons predominantly in a way that is understood within the legal community. This protects the judges in relation to individual outcomes, but is less satisfactory in terms of the way in which justice in general is delivered. Accountability for the pattern of lawmaking that emerges from the higher courts and the effectiveness of routine decisions in the lower courts are both important matters. As justice becomes conceived less as an act of state authority and more as a public service, so the demands for accountability for the system grow. Many higher courts on the continent produce annual reports, justifying and opening to scrutiny their effectiveness and key decisions. In many systems, however, the information is gathered internally by the Ministry of Justice and produced as a set of annual statistics without a serious attempt to produce a publicly available narrative explanation and justification for what has been happening. This is most clearly the case in France and Germany. On the whole, public accountability happens most explicitly in Spain and Sweden where an independent agency runs the judiciary. It has to operate within a framework set by a ministry or parliament and respond to it. In a sense, judicial independence is maintained by explicitness on both sides about what is expected and what is being delivered. Without an agency, there is often less explicitness both about expectations and delivery. The nearest that we have to this in England is s. 54 Constitutional Reform Act 2005 requiring an Annual Report of Supreme Court, but the content of this is still to be determined. The idea of a report giving an account in general terms of the way in which the courts have been making decisions would be a significant step in greater openness. Accountability for the use of resources would, I suppose, come through the Public Accounts Committee, but this has to be developed.

3.2 *Appointments and Dismissals*

Compared with the other countries in Europe, English judicial recruitment has traditionally been informal, unstructured and lacking in transparency. The system was designed for a period when there were 1000 barristers, 40 senior judges and 60 county court judges. The Lord Chancellor could become

16 D. Feldman, [2006] *Public Law*.

personally involved in appointments and records could be kept on individuals by his office. In the 1960s, Lord Gardiner LC said that he had interviewed every candidate before appointment to the Bench. This became impossible to sustain as both the numbers of judges and the numbers in the professions increased in the 1970s. But it has taken a very long time for a seriously professional approach to be adopted in relation to judicial recruitment and selection. Until the 1990s, the procedure was more like the election of members to a club than an appointment to a job. The Lord Chancellor's Department published its explanatory document 'Judicial Appointments: The Lord Chancellor's Policies and Procedures' in 1986. Under that procedure, it used to survey the field of qualified applicants and take soundings among senior judges who could be expected to have encountered the individuals at work. The individual was then invited to become a judge. The process of consultation and soundings applied to the top 150 posts, including those in the High Court, until 1997, when advertisements were made inviting applicants to the High Court. Advertisements for posts below the High Court had been introduced in 1994. This informal procedure attracted criticism in two respects. First, it depended on the visibility of individuals to leading judges. Not all suitable individuals would have a practice that brought them sufficiently to the attention of the consultees to enable sufficient comment to be made.¹⁷ Secondly, there has been consistent evidence that those consulted did not always respond in terms of the criteria for appointment set out by the Department. The questions asked were often insufficiently focused on the range of qualities needed for being a judge, as opposed to being an advocate.¹⁸ The creation of job descriptions did not fully achieve focused responses. In part this is because there has been a traditional view that success in the courtroom as an advocate is a good preparation for being a judge, a view that has been criticised.¹⁹

Progress in creating a formalised appointments process that reflected good public sector practice was hampered by the judges themselves. They clung to soundings and Lord Taylor rejected a Judicial Appointments Commission in 1996. But the procedures adopted in the past did not fit either the Nolan Principles on Appointments to public offices adopted generally in the mid-1990s, nor normal private sector practices, including those used within the legal professions. Many of the proposals of JUSTICE in 1992²⁰ have found their way into the Constitutional Reform Act 2005. As has been noted, this introduces a Judicial Appointments Commission composed of lay and judicial members, with a lay Chair. Its appointment process is likely to build on the most recent reforms: advertisement, job descriptions, interviews and formal references, rather than unstructured soundings. The process will resemble the external application

17 See *Report on Judicial Appointments and QC Selection, Main Report* (London 1999) (hereafter 'Peach'), 5 and JUSTICE, *The Judiciary in England and Wales* (London 1992) (hereafter 'JUSTICE'), 12.

18 JUSTICE, 12; Peach, 10; Commission for Judicial Appointments, *Annual Report 2004* (London 2005), § 3.23-24.

19 See D. Pannick, *Judges* (Oxford 1987), 52.

20 See JUSTICE, note 17.

routes in other systems, but it marks a significant extension of professionalism in judicial appointments, and a greater recognition of a career.

The most obvious evidence for suitability for appointments to the full-time judicial posts would include performance as part-time judges, e.g. as Recorders or Deputy District Judges. But, until the pilots in 2005, there was no formal system of appraisal of part-time office holders.²¹ Indeed, Lord Taylor rejected performance appraisal for judges in general as incompatible with judicial independence.²² This is an area in which the practices of the English judiciary lag behind continental judiciaries, such as that in Sweden.

In terms of discipline, the powers to remove senior judges remain with Parliament, upon an Address of both Houses. The powers of the Lord Chancellor in relation to other judges are transferred to the Lord Chief Justice. Under s. 115, Constitutional Reform Act 2005, in consultation with the Lord Chancellor, the Lord Chief Justice may make rules for the procedure to be followed in disciplinary matters, though the Act does not specify much about the content of such rules. A greater formality will be an essential improvement on the arrangements hitherto, which have lacked the formality expected in other countries.

Overall, the changes introduce a greater formality and professionalism into the processes of appointing, disciplining and managing judges. As the judiciary has grown in size and complexity, the existing informality of procedures has become inappropriate. The large size of a career judiciary cannot be managed on the procedures for the barristers appointed late in their professional lives.

3.3 *Independence and Governance*

The English conception of judicial independence is complex and it involves as much the status and ways of working of the judiciary as the formal mechanism by which they are appointed and removed.²³ Stevens²⁴ has suggested that

Perhaps the most acceptable way of characterising the role of judicial independence in England is to say that, while the independence of the judiciary is casual at best, the English have a strong commitment to the independence of individual judges.

I have argued elsewhere that judicial independence involves characteristics such as impartiality and political neutrality far more centrally than ideas such as irremovability.²⁵ Shetreet demonstrated that the formal guarantee of judicial irremovability contained in the Act of Settlement 1701 was merely intended to

21 Peach 16; JUSTICE, 12.

22 K. Malleon, *The New Judiciary* (Aldershot 1999), 64.

23 For a modern judicial restatement of this idea, see T. Bingham, *The Business of Judging* (Oxford 2000), 55.

24 R. Stevens, *The Independence of the Judiciary. The view from the Lord Chancellor's Office* (1993), 5.

25 J. Bell, 'The Judge as Bureaucrat' in J. Eekelaar and J. Bell, *Oxford Essays in Jurisprudence – Third Series* (1987), 51-53.

make judges independent of the King, not of Parliament, and certainly not to be a free actor as a third branch of government.²⁶ Indeed, it is a guarantee that does not apply to judges below the level of the High Court, who form the majority of judges. Judges also cannot be sued for their judicial acts, but this is an immunity that does not apply to magistrates.²⁷

The formal position is that judges of the High Court and Court of Appeal cannot be removed from office except by an Address from both Houses of Parliament. The process has never been successfully invoked against an English judge since it was created in 1701 (although it was successfully involved in relation to Irish judges in the early part of the nineteenth century). More commonly, public criticism of a judge in Parliament and outside may lead to fellow judges putting pressure on him to resign. A good example was Lord Denning who published criticisms of members of a jury which many read as racist in tone. Although he had been a very good judge, he was over 80 and he was persuaded to step down. Public criticism of Lord Lane, particularly over his handling of miscarriages of justice, was thought to have contributed to his decision to retire early as Lord Chief Justice in 1992. The ethos of 'doing the decent thing' predominates in the system.

Until the Constitutional Reform Act 2005 created a more formal procedure, all other judges were subject to removal by the Lord Chancellor for misconduct. In practice, the Lord Chancellor would give the person in question a hearing. The process was swift, but rarely involved. An example was when Judge Campbell was found smuggling whisky on his yacht from France to England. In other cases, the Lord Chancellor may issue a reprimand to a judge, sometimes publicly.²⁸

The concept of impartiality requires an honest decision, uninfluenced by personal relationships or prejudice, based on general, and not unique considerations, and appealing to standards that are representative, and which the judge would be willing to apply in similar circumstances in the future. The core feature is the appearance of impartiality. In the *Pinochet* case, the House of Lords had to set aside its own decision that had been reached with the participation of Lord Hoffman who was a member of the charitable board of one of the parties to the case. This was a classic common law conception.²⁹ The European Convention has pushed to a more formalist position, leading to the ending of the role of the Lord Chancellor as a sitting judge and of the participation of the Law Lords in the activity of the legislature. Such a formalist position is derived from a conception of the separation of powers in a more

26 S. Shetreet, *Judges on Trial. A Study of the Appointment and Accountability of the English Judiciary* (1976), 8.

27 See generally, A.A. Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Oxford 1993).

28 For illustrations, see Stevens, *Independence*, 166.

29 *R v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ungarte (N° 2)* [2001] 1 AC 119.

expansive form than the more 'casual' attitude, as Stevens put it,³⁰ than has prevailed hitherto.

The other connected component of judicial independence is political neutrality. This has been understood in different ways. In one sense, it has been understood as a requirement of disengagement from social activism.³¹ Abel-Smith and Stevens argued that the period from the 1890s up until 1955 or 1960 was marked by limited judicial creativity.³² The narrower judicial role reflected a greater legislative activity, often from left of centre governments who did not value judicial interference.

A particularly English view of the independence of the judiciary was stressed by the Judges' Council in its response to the consultation papers of 2003 on the abolition of the office of the Lord Chancellor. The judges were happy to make a clearer break between themselves and the Lord Chancellor as head of the judiciary, if he was to become increasingly an ordinary minister. This would fit into a model of the separation of powers, even if that model had not been a major feature of the English tradition, compared with that of other jurisdictions. The Judges' Council argued that

Judicial independence depends, not just on law or resources, but on the tradition of restraint that the stronger arms of the State exercise in their relationship with the judiciary.³³

In their view, the deployment of judges should be under the judges and adequate resources supplied.

The office of Lord Chancellor was becoming increasingly administrative.³⁴ Lord Mackay pointed out in 1995 that it had a staff of 11,000 and a budget of £2.3 billion.³⁵ The need to give directions about the proper administration of the system of justice clashed with the judges' own sense of their right to determine how they conducted cases, especially individual cases. This led to the President of the Employment Appeal Tribunal resigning over a clash with the Lord Chancellor about his courts failure to use sufficiently certain procedures in order to reduce the backlog of unmeritorious cases.³⁶

30 Stevens, *Independence*, 5.

31 For example, Sir Henry Slessor, a former Labour minister, wrote: 'When I became a judge, naturally I resigned from all political and semi-political associations, and even in church matters, I felt it right not to take part in any work of a markedly polemical nature, so my retirement from the world really took place in 1929. After that date my only public contacts or utterances were in court.' (*Judgment Reserved* (London 1941), 1.

32 B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (London 1967), ch. 5.

33 'Judges' Council Response to the Consultation Papers on Constitutional Reform' (November 2003) § 20 (www.dca.gov.uk/consult/supremecourt/responses.sc081.pdp).

34 See Lord Mackay, 'The Lord Chancellor's role within Government' (1995) *New Law Journal* 1650; D. Woodhouse, *The Office of Lord Chancellor* (Oxford 2001).

35 Mackay, *ibid*, 1651.

36 See F. Purchas, 'Lord Mackay and the judiciary' (1994) *NLJ* 527; Smith, Bailey and Gunn, 277-8.

The debates surrounding the Constitutional Reform Act 2005 threw into relief the issue of the relationship between the role of judges as managers of the judicial process and wider responsibilities for resources in a context of judicial independence. Lord Browne-Wilkinson had already complained of the increasing managerialism of the Lord Chancellor's Department and argued that the judges should have greater control over the disposal of the resources made available for the administration of justice.³⁷ The Judges' Council pointed to examples in the common law world where judges had been given responsibility for resources as a support for judicial independence, but comments 'It is recognised, however, that it may not at present be possible to adopt a system of that kind.'³⁸ But it then went on to press for particular measures to give judges an input into the decisions on resources. With the existence of Her Majesty's Courts Service (from 2005 as a unified administration including the magistrates courts) dealing as a Next Steps Agency with the operation of court facilities and the treatment of court users, the idea of a Judiciary Agency, would be a parallel institution, rather than the odd structure of the Judicial Office and the Lord Chief Justice.

4 The Swedish System of Judicial Governance

4.1 *Basic Principles of Governance*

Domstolsverket (DV) is directed by a board (*Domstolsverket styrelsen*) which consists of no more than ten members appointed by the Government, including the chief executive. Its membership represents judges, politicians and legal professions. It is a group which is not composed simply of service providers. Its chief executive appointed in 2005, Thomas Rolén, is a judge who had also worked for some time in an advokat firm and in Stockholm University, before joining the Ministry of Justice as an administrator in 1993.³⁹ He worked as legal secretary to the privatisation commission from 1992 to 1994. He thus epitomises the mix of administrative and judicial roles which leading judges can undertake.

DV is responsible for the overall management of the courts, its staffing levels and equipment. The chief judge of a court has only limited budgetary control. There is an annual round of local meetings to discuss the budget for each court. Apart from recurrent expenditure, there is money for special initiatives. The annual report comments on the improving competences of judges and collaboration between courts in order to enhance efficiency of courts.⁴⁰ DV is also concerned to improve the competences of judges and more generally the

37 N. Browne-Wilkinson, 'The Independence of the Judiciary in the 1980s' [1988] PL 44, 53-7. Cf. The views of Lord Mackay, *The Administration of Justice* (1994), 13-15 and 17-18, who distinguished between judicial decisions and administrative decisions, especially on resources.

38 'Judges' Council Response to the Consultation Papers on Constitutional Reform' (November 2003) § 43 (www.dca.gov.uk/consult/supremecourt/responses.sc081.pdp).

39 Ministry of Justice press release, 25 November 2004.

40 See *Årsredovisning 2004*, 20-1.

working conditions of all employees, e.g. in the management of stress.⁴¹ DV is charged by the Ministry of Justice not only to distribute the budget, but also to monitor the efficiency of the courts. It produces statistics on the efficiency of courts that look at the numbers of cases resolved, the time to judgment in different types of case, and the throughput of different courts (described in some sections of the report as 'productivity').⁴² The Public Administration Act 1985 departed from previous legislation in the field by introducing the idea of the citizen as client of the administration.⁴³ Many remaining parts of the public sector are governed by objectives set centrally. Rather than ministries directing what is done, agencies or franchisees are expected to performance against agreed targets (*målstyrning*).

This monitoring combined with control of the budget enables DV to play an active role in encouraging improvements in performance. Some of these are proposed by the courts themselves, and some come from working groups that they have set up. These efforts to change practices inevitably give rise to conflicts with the judges themselves who consider that DV is interfering with judicial independence.⁴⁴ But DV is not totally autonomous. It is a public sector agency that has to fit within the constraints of the public sector budget. In 1999, there was a particularly severe round of budget cuts that the DV had to administer (over 10%) and that obviously clashed with the judiciary's perception of its appropriate role and ways of working.⁴⁵ In the end, DV cannot insulate the judiciary from the general financial climate and give it special protection. All it can do is decide how the budget cuts are implemented.

The character of judicial independence is well illustrated by these governance arrangements. The governing organ, DV, is not an institution of judicial self-regulation, much as many judges would now like it to be. On the other hand, DV acts as a buffer between the Ministry of Justice and the judges as managers at court level. Central government seeks to exercise a strong influence over the direction of all branches of government, and this Swedish tradition of integrating judicial activity within social reform perhaps explains an absence of will to translate judicial independence in the application of the law into a strong version of judicial autonomy to decide how it should organise itself as a separate branch of government. Sweden is not unique in this regard, but its way of accommodating the tensions between steering judicial activity as a whole and respecting judicial independence is distinctive. On the whole, the model adopted has been that of other independent agencies of government, of which there are many in Sweden.

41 *Årsredovisning 2004*, 28. The report (p 107) sets out plans to create individual training development plans for all chief judges.

42 *See* *ibid*, ch. 2.

43 *See* J. Pierre, 'Legitimacy, Institutional Change, and the Politics of Public Administration in Sweden' (1993) 14 *International Political Science Review* 387, 393-4 and 397.

44 *See* for example, the article by judge T. Gregow, 'Domstolsverket lägger sig i vårt arbete', *Brännpunkt, Svenska Dagbladet*, 4 September 2000.

45 *See* the debate between the Minister of Justice and representatives of judges in 'Domstolen i framtiden' (1999) 4 *Tidskrift för Sveriges Domareförbund* 13.

4.2 *Management*

In more recent years, there have been moves to devolve more administration to the courts themselves, with the resultant need to improve the administrative abilities of judges as managers. In this, the Swedish system has a more explicit role for management than the current English system.

The traditional role of the presiding judge of a court was leadership in decision-making and in approach to work. He was to guide the development of the law and the way colleagues came to decisions. He would also recruit and train younger judges (notarie and fiskale). He would lead the court in activities such as producing *remisser* (responses) to committee reports. He was often involved in new developments in the courts, but was not responsible for the management of the court, nor for the career development of individuals.

The Swedish court system is now managed in a more specific way. Performance targets are set by the Ministry of Justice for the resolution of different categories of case. The job of the president is to monitor performance and to see how his court can achieve the target. In particular, there are targets for the timescales within which cases are to be decided. The main tool of management is encouragement, rather than orders. Performance is also enhanced by bidding for projects. These are supplements to the budget of the court for activities which the administration approves. Thus the Svea hovrätt obtained a rebuilding project and the Göta hovrätt obtained some additional posts to undertake an experimental re-organisation. The elaboration of such proposals is part of the role of the president. This involves both networking to discover the kinds of project likely to be supported.

The other aspect of management is personnel. The presiding judge has a responsibility to develop the careers of judges within his court. He has to produce reports on the progress of judges undergoing training (notarie and fiskaler). Promotions procedures also require him to provide references on members of his court (which the affected person can see).

DV has been responsible for developing training courses for managers and these are to be developed further under recent proposals.⁴⁶ The Hirschfeldt committee suggested that it is necessary to keep together both the management and the leadership aspects of the role of the chief judge in a court.⁴⁷ As a manager, the judge is responsible to external authorities, such as DV for meeting performance targets and for personnel and financial matters. He is also responsible to achieving developments. Among colleagues, the judge is internally responsible for providing leadership within the court, but as *primus inter pares*. He must, however, respect the independence of judges in coming to their decisions. The manager's concern is to avoid maladministration, but he cannot dictate how decisions should be reached.

46 See documents produced by working groups of DV: *Praktiska Ledningsfrågor och Ledarskap och Chefskap* (Jönköping, April 2000).

47 SOU 2000:99, *Domarutnämningar och domstolsledning - frågor om utnämning av högre domare och domstolschefens roll*, 398.

4.3 Appointment and Discipline

The Swedish selection system is based on a meritocratic competition,⁴⁸ which is open and transparent, and which is based on prior experience, predominantly university achievement in law. It is managed by independent bodies. The basic process of initial selection of notaries is controlled by DV. But further recruitment is governed by the *Tjänsteförslagsnämnden för domstolsväsendet* (TFN), an independent recruitment body. Particularly since the 1970s, there is scope for individuals to be recruited from outside the career judiciary to more senior posts. The advertising of posts makes this possible. In part this was introduced to have a greater range of experience, but it was also motivated by government concerns that the career judiciary was too conservative and out of tune with current legislation.⁴⁹ This open process has been able to deal with the traditional under-representation of women, which is a constant problem in England.⁵⁰ At lower levels, the application is examined by TFN, which will make a decision. The candidates are not interviewed. The committee of TFN is made up of senior judges with two employee representatives. As a result, one can say that it constitutes a degree of self-government at this stage. *Senior posts* remain within the control of the Ministry of Justice, as in the past. Traditionally, these have not gone only to career judges.

5 Justice as a Public Service

In modern public sector management, a public service focuses on delivery to the customer. The aim is to meet the legitimate needs of the customer but within both a determined level of service and within an agreed budget. Unlike many private services, the customer is not paying (directly at least) and is not able to define directly the kind of service that is required. The state pays and the state defines the required level of service on behalf of the ultimate users. Now the state does this for a range of services and they are in competition in terms of priority for action and resources. The state is also concerned to monitor performance. The accountability for this performance is provided in a number of ways through New Public Management. There are four elements of the techniques of management in this area. First, the service is typically defined through a public service agreement, a formal document in which the expected level of service is broadly defined. This is particularly necessary where you have the service provided by an agency separate from a ministry. The second aspect will be key performance indicators (KPIs) and closely connected a third aspect

48 See generally, DV, *Vägen till domaryrket* (Jönköping, 1999); *ibid*, *Det svenska domstolsväsendet – En kort introduction* (Jönköping 1999), 8; N.J. Baas, *Onderzoeknotities 2000/8: Rekrutering en (permanente) educatie van de rechtsprekende macht in vijf landen* (Ministry of Justice, Netherlands 2000) (hereafter 'Baas'), 102.

49 K. Å Modéer, *Den svenska domarkulturen – europeiska och nationella förebilder* (Lund 1994) (hereafter 'Modéer, *Domarkulturen*'), 58.

50 Thus, 60% of prosecutors under 40 are women, but 73% of those over 55 are men. Among judges, 65% of the icke ordinarie judges are women, but 72% of the ordinarie judges and 89% of the chief judges (average age 58) are men: DV, *Årsredovisning 2004*, 94.

of an obligation to report. Typically, there is a fourth element, a devolved administration, rather than in-house provision within a ministry. This ensures that the service delivery body remains focused on its task. Within this framework, there is clarity about what is to be provided, by whom and with what obligation to report on progress. Regulatory accountability replaces direct political accountability. Her Majesty's Court Service, Business Plan 2006-7, provides an illustration:

HMCS adopts a Balanced Scorecard approach to measuring its performance. This reflects the fact that, whilst our P[ublic] S[ervice] A[greement] and financial targets are very important, to build for the future we need to focus on more than just the current performance targets. We need to build our reputation with our customers and the wider community, we need to develop improved ways of working and we need to invest in our staff and their development.⁵¹

This is perhaps an extreme version of the use of New Public Management language, but it is replicated in the reports in other countries. The structures of New Public Management enable accountability for this kind of activity. It is noticeable that the Court Service has this form of accountability, but not the Judicial Office in England. The link between the two activities within DV enables the Swedish system to offer a more integrated approach in which judges play a part in delivering services and are accountable to DV for that, and DV is then accountable for its performance.

6 Justice as a Human Right

In the focus on human rights, we concentrate on entitlements, which are a strong interest. In a public service model, individuals may have interests or even legitimate expectations based on what the public body has done or promised, but in the area of human rights, then we get a much stronger claim backed by a duty on the public body to deliver. The service required is defined by the objective standards of what the right requires, rather than by the offering proposed by the service provider. The problem is that the content of this right to justice is ill-defined. It is, in French terms, a "droit-créance", rather than a liberty (such as freedom of association) or an immunity (such as the right not to be tortured). It is a right which is owed, but, rather like "the right to work", its content is neither obvious nor could it be unlimited. Rather than a defined right, it is a framework right whose content is determined by the state, with the proviso that it must genuinely try to implement the right. As a result, the definition of the right is an important part of its actual content. For that reason, a governance structure for the delivery of the right needs to recognise its inherent indeterminacy and contestability. In such a situation, the judges, even as guardians of justice, need to be put in dialogue with others. Whereas the Swedish governance structure for DV provides a clear forum for this to happen, the governance of the judiciary

⁵¹ *Her Majesty's Court Service Business Plan 2006/07*, p. 8.

around the Lord Chief Justice and the Judicial Office is too centred on the role of judges in defining their own agendas and ideas.

Judges tend to see themselves as guardians of access to justice and thus of the rights which protect this. But leaving the definition in the hands of these professionals risks transferring to them the budget, which others have to meet. As a result, governance structures are an essential part of the basic structure of justice. Judges can be guardians of justice of established principles, where these have been defined.

7 Conclusion

The issues of governing and managing the judiciary are issues that have become clearer in England as it has moved from a cosy relationship between the senior judges and the Lord Chancellor to a more distant relationship towards a Ministry of Justice. But the structures have been developed piecemeal and with more thought to achieving a quick resolution of conflicts with the judiciary than with developing a coherent strategy. In this respect, the development of DV in Sweden reflects a more measured and principled approach. It provides a clear response to the issues of how to conceive justice and how to deliver good quality public services. The Swedish model has avoided the excesses of the Italian system which gives too much power to the judiciary to regulate itself. It is by comparing the institutional systems in similar European countries such as Sweden that improvements in the English system can be achieved.

To a great extent, the tradition of a certain form of judicial independence and an important role for the judiciary outside (and to some extent above) politics has fostered a willingness to leave the judges to organise their own affairs in England. (In practice, there was a significant control exercised by the Lord Chancellor's Office over appointments, but the impact of this on judicial independence is often disregarded.⁵²) The focus has been on the senior judiciary, and this has failed to recognise the very large increase in numbers of judges at lower levels. The more systematic arrangements in Sweden reflect a willingness to review tradition and to develop an objective-oriented set of arrangements that fulfil policy needs. It has operated in a way which demonstrates that managerialism need not compromise the important values of judicial independence.

52 Robert Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (1993).