The Decline of the Judicial Retirement Convention, 1950-2020

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Abstract
What do judges do after they retire? Until recently, UK judges were subject to the judicial retirement convention which governed their behaviour in retirement. This convention had two parts. Firstly, it prevented judges from returning to legal practice after the bench, and from speaking publicly about the details of their past work as judges. Secondly, it required them to be cautious in speaking about matters of politics and public controversy.

This article draws on an 18-month BA/Leverhulme-funded project into judicial retirement (which included a database of 585 judges between 1950 and 2020; and 21 interviews) to show that the retirement convention is now ineffective, if not completely dead. Judges now return to some form of legal practice in large numbers, and are so confused and sceptical about the convention that it exerts little influence on post-bench behaviour. At the same time, the relevant professional or institutional regulators – the judiciary, the government and (in England and Wales) the Bar Standards Board and Law Society – have all withdrawn from this aspect of legal and judicial practice. The result is that judicial retirement is now completely unregulated.

We suggest this is a retrograde development. The retirement convention mattered: it addressed problems of impartiality and integrity; and bolstered public confidence in the judiciary. But it also balanced these matters of public interest with the private rights of individual judges. We recommend in its absence a mixture of voluntary guidance and professional regulation. In the vast majority of situations, former judges should not need regulation or guidance. In a limited set of situations – particularly where they contemplate public roles or speaking on politics – voluntary guidance is appropriate. In a still more limited set of professional legal service roles, targeted professional regulation emanating from the Bar and the Law Society should be considered.

Introduction

What do judges do after they retire? What constraints have they traditionally been under, and do these constraints remain? Until recently, UK judges were subject to a convention that governed their behaviour in retirement. This convention—the judicial retirement convention—had two parts. Firstly, it prevented judges from returning to legal practice after the bench, and from speaking publicly about the details of their past work as judges. Secondly, it required them to be cautious in speaking about matters of politics and public controversy. This article

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draws on an 18-month BA/Leverhulme-funded project into judicial retirement to show that the retirement convention is now ineffective, if not completely dead.[1] Judges now return to some form of legal practice in large numbers, and are so confused and sceptical about the convention that it exerts little influence on post-bench behaviour. At the same time, the relevant professional or institutional regulators—the judiciary, the government and (in England and Wales) the Bar Standards Board and Law Society—have all withdrawn from this aspect of legal and judicial practice. The result is that judicial retirement is now completely unregulated.

Our view is that this is a retrograde development. The retirement convention performed an important role in defending courts and the judiciary. It addressed problems of impartiality and integrity, and maintained public confidence in the judiciary. As a voluntary honour code, the retirement convention neatly balanced these considerations with the rights of retired judges who are, after all, private citizens and owe no formal public duties to anyone. We suggest revitalising the convention. In the vast majority of situations, former judges should not need regulation or guidance, but in some limited circumstances voluntary guidance or targeted professional regulation should be considered.

As part of our research, we created a database of 585 United Kingdom judges who retired at High Court (or equivalent) level and above between 1950 and 2020. As far as we are aware, this database is the first of its kind, and we have made it publicly available for future researchers. We also conducted 21 interviews with judges, retired judges, barristers[2] and officials.[3] The project is primarily focussed on judges of the High Court and appellate courts. Resource limitations have prevented us from conducting systematic research on judicial retirement from courts below the High Court. The same limitations, coupled with early findings that disclosed significantly more activity by retired judges from England and Wales and the Supreme Court, have led us to focus on former judges from those jurisdictions.

The article is divided into four parts. In Part I, we set out the judicial retirement convention, its justifications and historical context, and how the convention has changed over time. In Part II, we describe the changing statistical patterns of judicial retirement during our research period (1950-2020). In Part III, we draw on our interviews with judges and suggest there are two models of judges in retirement: the priest and the contractor. The priest takes a traditional view of judges in retirement, is close-lipped about controversy and careful about employment. The contractor, on the other hand, is more relaxed about talking publicly, and post-bench employment. In Part IV, we return to the question of regulation, and suggest, in effect, a revitalisation of the judicial retirement convention, modified to meet the very different circumstances in which retired judges now operate.

Part I. The Judicial Retirement Convention

In 1970, Sir Henry Fisher resigned from the Court of Appeal to become a director of Schroder and Wragg, a merchant bank in the City of London. He was barely three years in post, but he was bored and had concluded that the job of judge was not for him. His resignation caused a minor scandal. The Lord Chancellor, Lord Hailsham, objected that judges should approach the bench "as if the priesthood"—as a lifetime commitment.[4]

There had long been a convention—more accurately, a set of conventions—which provided that judges could not, once appointed, return to legal practice. For ease of reference,

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[1] British Academy/Leverhulme Small Research Grant (grant no. SRG2021\210049).

[2] In this article we have focussed primarily on barristers, the Bar and the Bar Standards Board (as opposed to solicitors and the Solicitors' Regulation Authority). The solicitors' profession appears not to have had any historic rule governing the behaviour retired judges, and (as discussed below) expressed no objection to judges returning to practice as solicitors in consultations.

[3] We provide more details about both in Parts II and III of this article.

[4] Hansard HL debs 19 November 1970, vol. 312, col. 1314.

we will refer to this set of conventions as *the judicial retirement convention*. Much of the convention would later be summarised by the *Guide to Judicial Conduct* (published by the Judicial Council for England and Wales):

> "The conditions of appointment to judicial office provide that judges accept appointment on the understanding that following the termination of their appointment they will not return to private practice as a barrister or a solicitor and will not provide services, on whatever basis, as an advocate in any court or tribunal in England and Wales or elsewhere, including any international court or tribunal, in return for remuneration of any kind, or offer or provide legal advice to any person."[5]

As is often the case with conventions, the reasoning behind this rule was opaque. Judges and judicial independence were historically protected "by tradition,"[6] and the convention formed part of an honour and status culture that tended to express itself symbolically rather than formally. In this article we excavate two important goals that we believe were served by the retirement convention. Firstly, it addressed problems of impartiality and integrity. Where serving judges engage in negotiations about post-retirement work, and where retired judges take paid legal work, an appearance of bias may be created. Although this risk will normally be trivial, there are some scenarios in which it will give rise to genuine concern.[7] Secondly, the retirement convention bolstered public confidence in the judiciary. Even after retirement, former judges are normally still considered to be "judges" in the public mind. This connection creates an inevitable impression in the public mind that when former judges speak on matters of public controversy—and especially from a legal perspective—that they or their views are representative of serving judges.

For much of our research period (1950-2020), however, the convention was essentially informal and unstated: "It was commonly understood, and we didn't have to talk about it … They were expected to just, kind of, retire to the country and keep quiet, really."[8] Judges were also expected to refrain from bringing the judiciary into disrepute, from speaking about cases they had sat on, and to be circumspect about politics.[9] Though informal, the convention sometimes had practical force. One interviewee recalled a judge who wished to return to

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[5] This wording is taken from the 2008 edition. Judicial Council, *Guide to Judicial Conduct*, 2nd edn (2008), 48, extracted in Mary Clark, "Judicial Retirement and Return to Practice" (2011) 60 Cath. U. L. Rev. 841, 877. As we discuss below, the Bar Council, the Judicial Council and the UK Supreme Court do not publish guidance that addresses the situation of retired judges today (although the UKSC does publish guidance on the conduct of judges who sit on a supplementary panel—and who will have retired): see United Kingdom Supreme Court, *Guide to Conduct for Members of the Supplementary Panel* (August 2021) *https://www.supremecourt.uk/docs/guide-to-conduct-for-members-of-the-supplementary-panel-final.pdf*.

[6] Robert Stevens, "A Loss of Innocence? Judicial Independence and the Separation of Powers" (1999) 19 O.J.L.S 365, 376.

[7] For example, Peter Smith J's refusal to recuse himself from a case involving the law firm Addleshaw Goddard, with which he had unsuccessful negotiations about a post-bench role. This recusal was immediately and successfully appealed: *Howell & Ors v. Lees Millais & Ors* [2007] EWCA Civ 720. See also Tabby Kinder, "Revealed: Peter Smith J banned from hearing Addleshaws cases in historic bias row", *The Lawyer* (18 May 2016), *www.thelawyer.com/revealed-peter-smith-j-banned-from-hearing-addleshaws-cases-in-historic-bias-row/*.

[8] Interviewee 4 (retired official).

[9] This paraphrases the conventions described in the Judicial Office's 2012 *Guidance to Judges on appearances before Select Committees*, 2, which applied to both serving and retired judges. Many of these conventions were, of course, subject to significant exceptions. The most senior judges—the Lord Chancellor and Law Lords—were members of the House of Lords and (in the Lord Chancellor's case) the Government. One of us has written about the political behaviour of the Law Lords and retired judges in Parliament: see Patrick O'Brien, "Judges and Politics: The "Parliamentary Contributions of the Law Lords 1876-2009" (2016) 79 M.L.R. 786.

practice being warned by the Lord Chancellor that they would never be instructed by any public body if they did so.[10]

Serving judges were similarly regulated by convention.[11] Though they could in law be dismissed by the Lord Chancellor (below High Court level) or by the address procedure in Parliament (High Court and above), there was little in the way of disciplinary rules or process for judges. A great deal was settled by informal social pressure to conform or, ultimately, to resign. The primary basis of regulating both serving and retired judges was trust in their capacity to understand the conventions and to do the right thing, reinforced by social bonds amongst judges and lawyers.

Had he stayed in post, Fisher would have been entitled to serve until the age of 75. Judicial retirement was not a significant phenomenon prior to the 1960s. Prior to 1959 judges could serve for life. The Judicial Pensions Act 1959 introduced mandatory retirement at 75, applying to judges appointed after its enactment. This began to have an effect from the 1970s onwards. An Advisory Group on judicial pensions noted in 1974 that:

> "On retirement, judges are strongly discouraged from entering commerce or industry. No member of the Higher Judiciary has returned to the Bar after retirement for nearly three-hundred years and they may no longer do so."[12]

This illustrates the censorious attitude to retirement in the early part of our research period. The Bar took a similar attitude. Until 1989, the Bar Council *Code of Conduct* stated that: "The Bar Council does not approve as a matter of principle of former Judges in England and Wales returning to practise at the Bar in any capacity."[13]

Attitudes began to change from the 1980s onwards. Judges began to be more active in retirement, beginning with activities like arbitration and mediation. Writing in 1993, Stevens noted that it was at that time "not uncommon" for senior judges to return to their chambers after retirement, and to take on arbitration practice as well as giving affidavits on English law in foreign courts. "What makes everyone nervous is the prospect of salaried employment after the bench."[14] From the mid-1990s onwards there was a significant increase in paid activity by retired judges. Two policy decisions around this time appear to explain this. Firstly, in the early 1990s the Bar Council removed its prohibition on judges returning to practise at the bar. It appears that this change in policy was a response to legal advice that the previous position could be an illegal restraint of trade.[15] Secondly, and arguably more significantly, the judicial retirement age was reduced from 75 to 70 by s.26 of the Judicial Pensions and Retirement Act 1993.[16] This provision entered into force for judges appointed after 31 March 1995. The effect of the reduction in retirement age, coupled with improvements in healthcare and lifespan, was to create a new cohort of active and able retired judges. Over time, this cohort began to push the boundaries. For instance, Sir Hugh Laddie retired early from the High Court in 2005, citing boredom and isolation. Unlike Fisher, Laddie returned to the law, taking on a consultancy role

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[10] Interviewee 20 (retired judge).

[11] This point is also made by Gabrielle Appleby and Alysia Blackham, "The Growing Imperative to Reform Ethical Regulation of Former Judges" (2018) 67 I.C.L.Q. 505. Appleby and Blackham's article is perhaps the leading work in this area, though we disagree with a number of the authors' conclusions.

[12] Review Body on Top Salaries, *Report No 6* (1976) Cmnd 5846, 28, cited in R. Stevens, *Judicial Independence: The View from the Lord Chancellor's Office* (Oxford: Oxford University Press, 1993), p.136.

[13] Bar Council, *Bar Council Code of Conduct,* 3 ed (1981), Annex 8 para 3. See also Bar Council, *Response to the Consultation on Return to Practice by Former Salaried Judges* (2006).

[14] Stevens, *Judicial Independence*, pp.136-7, n.56.

[15] Bar Council, *Response* (2006), n.13.

[16] Though s.26(5) allowed for a government minister to extend a senior judge's period in office by a year at a time until they reached the age of 75, where it was in the public interest to do so.

with a City law firm.[17] This was a matter of comment in legal news, but did not attract anything like the criticism Fisher received for his much more trivial breach of the convention.[18]

Though the evidence suggests that the practice of judges in retirement began to change earlier, the government and the judiciary appear, at an official level, to have been committed to the convention until well into the 2000s. From around 2000 onwards, newly appointed judges accepted judicial appointment on the understanding that it is "intended for the remainder of a person's professional life" and that they would not return to private practice as a barrister or solicitor.[19] At this time, the official attitude of the judiciary was one of scepticism about work in retirement. In 2005 the Department of Constitutional Affairs began a consultation on a plan to remove the restriction on return to practice for former judges. This was primarily done with a view to enhance the diversity of the judiciary. The consultation paper defined the retirement convention as

> "a prohibition on providing services, on whatever basis, as an advocate (whether by way of oral submissions or written submissions) in any court of tribunal in England and Wales. It also prevents them from providing legal advice to any person in return for remuneration of any kind. Former judges are however allowed to provide services as an independent arbitrator or mediator and may receive remuneration for lectures, talks or articles."[20]

The response from the judiciary of England and Wales to the consultation was negative. Not one but two working parties of judges were convened, and both made submissions to the consultation. Judges were opposed to a return to practice (especially commercial practice). The core of their position was pithily and loftily put: "The track record of being a judge is commercially saleable, but should not be on the market."[21] Notwithstanding this clear opposition to the practice, the Judges' Council was equally clear that there was no legal obstacle to a judge who might wish to return to practice:

> "We do not accept that there is any current prohibition on return to practice by former judges, although some consider that there should be such a prohibition. We do accept that currently there is an unwritten convention by which many perhaps most full time judges regard themselves as bound … We do not however accept that that convention represents an enforceable obligation."[22]

The legal professions, for their part, split on the matter. The Law Society, on behalf of solicitors, found nothing objectionable in judges returning to practise after retirement—although it

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[17] Appleby and Blackham, "The Growing Imperative to Reform Ethical Regulation of Former Judges", 523. They also note statistics from judicial attitude survey 2015—c. 55% of judges would consider returning to practice if permitted.

[18] See e.g. Frances Gibb, "Definitely no regrets: there is life beyond the High Court", *The Times,* 16 May 2006. A reviewer has also directed us to additional examples. Lord Devlin also retired early as a Law Lord, citing boredom, though only after completing the 15 years required to qualify for his full pension. In addition, Ted Bowen QC returned to practice as a solicitor in 1990 after a time working as Sheriff of Dundee, before later returning to the judiciary as a Sheriff Principal in 1997.

[19] Extracted portions contained in the Department of Constitutional Affairs, "Return to Practice by Former Salaried Judges", 12 September 2006, 7.

[20] Department of Constitutional Affairs, "Return to Practice by Former Salaried Judges".

[21] Judges' Council, *Response of the Judges' Council to the Right Honourable Lord Falconer of Thoroton* (Jan 2006), 6.

[22] Judges' Council, *Response of the Judges' Council to the Right Honourable Lord Falconer of Thoroton*, 4.

appears that the historic retirement convention did not apply to solicitors in any case.[23] The Bar Council, on the other hand, agreed with the Judiciary: it wanted retention of the convention, but saw no means to enforce it.[24] The proposal was eventually abandoned.

The judges' position has softened over time. Although earlier editions of the *Guide to Judicial Conduct* specifically noted the bar on return to private practice,[25] in 2019 the *Guide* was reorganised and this material was removed. The most recent edition of the *Guide* (July 2023) offers retired judges only general guidance:

> "A retired judge may still be regarded by the general public as a representative of the judiciary. Retired judges should exercise caution and are encouraged therefore to refer to this guidance so as to avoid any activity that may tarnish the reputation of the judiciary."[26]

This change coincides with a period of turbulent relations between the judiciary and the Government. From 2010 onwards, changes to the terms and conditions of judicial pensions caused serious discontent amongst the judiciary. Some of our interviewees expressed the view that the "bargain"—forbearance on the part of retired judges in return for a decent pension, protected from the date of a judge's appointment—had been broken by the Ministry of Justice.[27] Workload, too, became a source of serious discontent. One very senior judge recalled a very tough period during which they considered leaving the law entirely, and "wondered about stacking shelves in Morrison's."[28] In the 2020 Judicial Attitudes Survey, 26-39% of senior judges in England and Wales,[29] 35% in Scotland[30] and 42% in Northern Ireland[31] reported that they "would consider leaving the judiciary if this was a viable option." Previous surveys had recorded even higher proportions in answer to these questions in all three jurisdictions.[32] Discontent amongst the judiciary about their terms and conditions may have contributed to changes to the way in which the retirement convention was regarded. Most senior judges we spoke to appeared relaxed about post-retirement legal work.

The judiciary are not alone in having withdrawn from this regulatory space. The undertaking given by new judges on appointment is regarded as unenforceable and is, in fact, unenforced. The Bar Standards Board ("BSB") does not regard retired judges as a significant

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[23] Law Society, *Response to the Consultation on Return to Practice by Former Salaried Judges* (15 December 2006)

[24] Bar Council, *Response to the Consultation on Return to Practice by Former Salaried Judges*.

[25] See e.g. Judicial Council, *Guide to Judicial Conduct*, 2nd edn (2008).

[26] Judicial Council, *Guide to Judicial Conduct* (July 2023), 6. The *Guide* also contains a very short passage on politics at p.16, noting that retired judges are free to engage in politics and public debate, but restating the caution not to tarnish the reputation of the judiciary. For completeness we note that the United Kingdom Supreme Court's *Guide to Judicial Conduct* (2019) (*www.supremecourt.uk/docs/guide-to-judicial-conduct.pdf*) also makes no provision for retired judges, although the *Guide to Conduct for Members of the Supplementary Panel* (August 2021) will in effect apply to judges who had retired but have returned to sit on a supplementary panel of the UKSC.

[27] Interviews and comments from judges and retired judges. Our attention was drawn in particular to s.34 of the Pensions Act 2011 which, in a break from a past constitutional convention, changed the terms and conditions of judicial pensions to the detriment of serving judges.

[28] Interviewee 7 (retired judge).

[29] Cheryl Thomas, *Judicial Attitude Survey 2020 (England and Wales)* (UCL, 2020), 42. The Survey specifies that the question "If I felt that leaving the judiciary was a viable option I would consider doing so" is asked in the unique context that judges in England and Wales are prevented "from returning to legal practice once they have taken up a salaried judicial position".

[30] Cheryl Thomas, *Judicial Attitude Survey 2020 (Scotland)* (UCL, 2020), 23.

[31] Cheryl Thomas, *Judicial Attitude Survey 2020 (Northern Ireland)* (UCL, 2020), 19.

[32] See *Judicial Attitude Survey 2020 (England and Wales)*, 42; *Judicial Attitude Survey 2020 (Scotland)*, 23. *Judicial Attitude Survey 2020 (Northern Ireland)*, 19.

regulatory risk for the profession, and issues retired judges with practising certificates on the same basis as any other barrister.[33] At least *some* former judges are engaged in all of the practices that the former convention ruled out. Some retired judges hold practising certificates; although because the BSB does not record whether or not a barrister has previously been a judge, identifying this requires prior knowledge. Sir Peter Smith (a former High Court judge), for example, is listed by the BSB website as holding a current valid practising certificate with (as the BSB website describes it) "full rights of audience."[34] So too is former Circuit Judge Tom Crowther KC (listed on his Chambers website as the only serving judge to have returned to practise at the bar). In 2011 another Circuit Judge, Gerald Price QC, was given a practising certificate following his resignation from the bench.[35]

In March 2022 the mandatory retirement age was restored to 75 for all judges (including those already serving).[36] This was done at least in part to retain staff and to preserve expertise in a court system that had (especially in criminal trials) become increasingly reliant on fee-paid work by retired judges.[37] The increase in post-bench work from the 1990s to 2020 that we describe in the next section may therefore prove to be an aberration, as judges who might have otherwise stayed on the bench found alternative forms of legal work to occupy themselves. It may, however, be that this period has changed the culture around judicial retirement for good. In the future we may see a cohort of judges who retire early from the bench but continue to do some form of legal work.[38]

What is striking about Sir Henry Fisher's post-retirement career is how conventional it was for a judge of that time. With the exception of his directorship at Schroder and Wragg, Fisher took on exactly the kind of establishment roles one associates with an eminent retired judge. He was elected head of an Oxford college and later became Chairman of Imperial College. He was chairman of the Panel on Takeover and Mergers (a role often taken by a retired Law Lord) and headed a number of public inquiries. He had significant charitable involvements and was president of the Howard League for Penal Reform.[39] Few would bat an eyelid at Fisher's foray into commercial banking today. Contemporary retired judges now come much closer to legal practice than their predecessors, and in far greater numbers. There is, in effect, no bar to them doing so.

Part II. Judges in retirement: 1950-2020

[33] BSB correspondence with the authors. The BSB notes that this approach does not, however, rule out addressing the behaviour of a former judge within the context of the general rules of the *BSB Handbook*.

[34] "Sir Peter Winston Smith", *www.barstandardsboard.org.uk/barristers-register/9BC2D850DC7275817B369B63AF54B33F.html*.

[35] A news report at the time included a statement from the BSB policy statement with content analogous to that outlined above. It is not clear whether Price did in fact practise following the grant of the certificate. See "Judge shamed in 'rentboy' allegations bids to work as barrister" *Walesonline* (22 March 2012), *www.walesonline.co.uk/news/wales-news/judge-shamed-rentboy-allegations-bids-1831952*.

[36] One of the quirks of this change of policy was that a Supreme Court justice who reached mandatory retirement age in January 2022, Lord Lloyd-Jones, applied for and was appointed to the vacant position created by his own retirement in August 2022.

[37] See Ministry of Justice, *Judicial Mandatory Retirement Age: Response to Consultation* (8 March 2021), *https://consult.justice.gov.uk/digital-communications/judicial-mandatory-retirement-age/results/judicial-mandatory-retirement-age-consultation-response.pdf*.

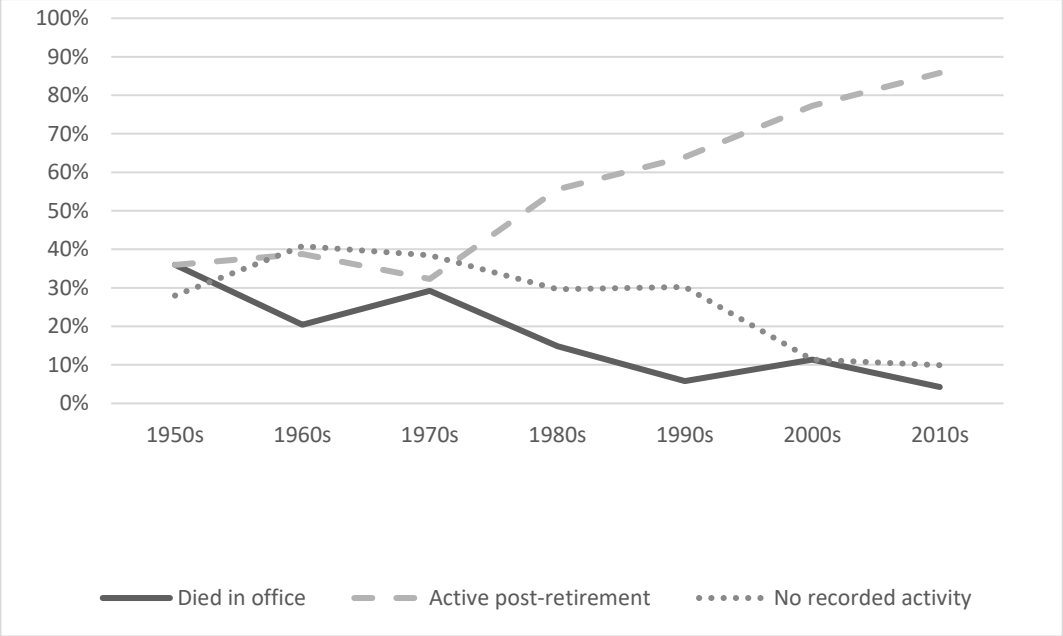
[38] A possibility raised by B. Opeskin, *Future-Proofing the Judiciary: Preparing for Demographic Change* (London: Palgrave Macmillan, 2021), pp.161-162.

[39] "Sir Henry Fisher" *The Independent* (14 April 2005) *www.independent.co.uk/news/obituaries/sir-henry-fisher-489723.html*.

We constructed a database of the post-retirement activities of every UK judge at High Court or Court of Session level or above who left office between 1950 and 2020: a total of 585 people.[40] To our knowledge, this database is the first to bring together biographical and career information about all senior members of the judiciary in the four jurisdictions of the UK. Of these judges, an extraordinary 564 (96%) were male. By far the largest number (452; 77%) were judges of the courts of England and Wales, with 31 (5%) from Northern Ireland and 97 (17%) from Scotland. An additional four judges were appointed directly to the Appellate Committee of the House of Lords or UK Supreme Court without having previously served on another court.

Figure 1 tracks three categories of judge leaving office during each decade between 1950-2020: those who died in office; those who were active; and those for whom we can find no record of activity. At the beginning of our research period, these three categories are split more or less evenly: roughly a third each of judges died, were active, or not recorded as active in retirement. These figures are likely to be accounted for by longevity in post and by the mandatory retirement rule. Judges at the beginning of the cohort could serve for life, and sometimes did so. Those who retired will often have been at the end of their active life, which may explain the gradually declining figures for "no recorded activity".

Figure 1: Judges leaving office, 1950-2020



[40] A redacted version of the database is publicly available: *https://sites.google.com/brookes.ac.uk/the-judicial-afterlife*. It includes all judges who left office in England and Wales, Scotland, and Northern Ireland, and from the Appellate Committee of the House of Lords and the Supreme Court. The primary sources used for the database were: law reports of relevant jurisdictions dating back to 1930 (which contain memoranda pages with information about appointments, promotions and retirements or deaths of serving judges; *Who's Who* and *Oxford Dictionary of National Biography* guides; newspaper archives; judges' own writings; and barrister's chambers websites. We found that there was a dearth of information about judges from Scotland and particularly Northern Ireland compared to that available for judges from England and Wales. This may distort the results for Northern Ireland, though we believe that our overall conclusion from the data (that Northern Irish judges have not engaged significantly in work after retirement) is reliable and supported by the evidence from our interviewees, which suggests that proximity to the City of London has been a driving force in the changing culture surrounding post-retirement work.

From the 1970s onwards the proportions start to change, reflecting in part the fact that the mandatory retirement age of 75 (introduced for judges appointed from 1959) had begun to take effect. From then on, the number of judges who died in office, or for whom no record of post-retirement activity can be found, declines significantly. At the end of the period—the 2010s—over 85% of judges have some form of traceable activity in retirement. As the number of judges in each jurisdiction has grown significantly since 1950, this means that there have been significant increases in both the proportion and the absolute number of judges who are active in retirement. By the 2010s, 135 judges lived on into retirement and 121 of those—90% of those who did not die in office—took on some form of post-retirement activity. This seems logical given societal changes. At the end of our research period, judges were living longer, retiring earlier and were more likely to be physically fit for post-retirement work than past generations of judges.

Table 1: Breakdown of judicial retirement by decade

Decade	Number leaving office	Died in office (%)	Active post-retirement (%)
1950s	25	9 (36%)	9 (36%)
1960s	49	10 (20%)	19 (39%)
1970s	65	19 (29%)	21 (32%)
1980s	81	12 (15%)	45 (56%)
1990s	86	5 (6%)	55 (68%)
2000s	123	14 (11%)	95 (77%)
2010s	141	6 (4%)	121 (86%)

The nature of the increase in activity after retirement is made clearer if we look at the *kinds* of activity retired judges engaged in. In analysing the data, we broke post-retirement activity into three very broad categories: voluntary activity, paid public work, and paid private work.[41] The first is least consequential from a policy perspective. Voluntary activity takes a wide variety of forms: honorary academic posts feature prominently here, increasing dramatically from the 1970s onwards. Roughly 70% of the cohorts retiring in the 2000s and 2010s had some form of academic affiliation. This category also includes charitable posts and similar voluntary affiliations. These forms of post-retirement activities are longstanding and would have fallen outside the retirement convention.

We also include political activity under this category. Despite significant public interest in political behaviour by retired judges in recent years, we found no evidence that retired judges at the end of our research period were more politically active than those at the beginning. Only six judges in the entire cohort who took a highly active role in public discussions about a controversial issue, and these were spread throughout the period of study. Activity in the House of Lords appears in these statistics only if the judge was ennobled after retirement (three judges in the database) or if a judge holding a peerage engaged in political behaviour (for example, convening a parliamentary group). Activity by judicial peers in the Lords was *sui generis*: it was not restricted by the retirement convention.[42] The phenomenon of retired judges engaging in politics was never traditionally seen as quite so problematic as engagement with professional practice. Shetreet and Turenne attribute this to an assumption that political engagement by

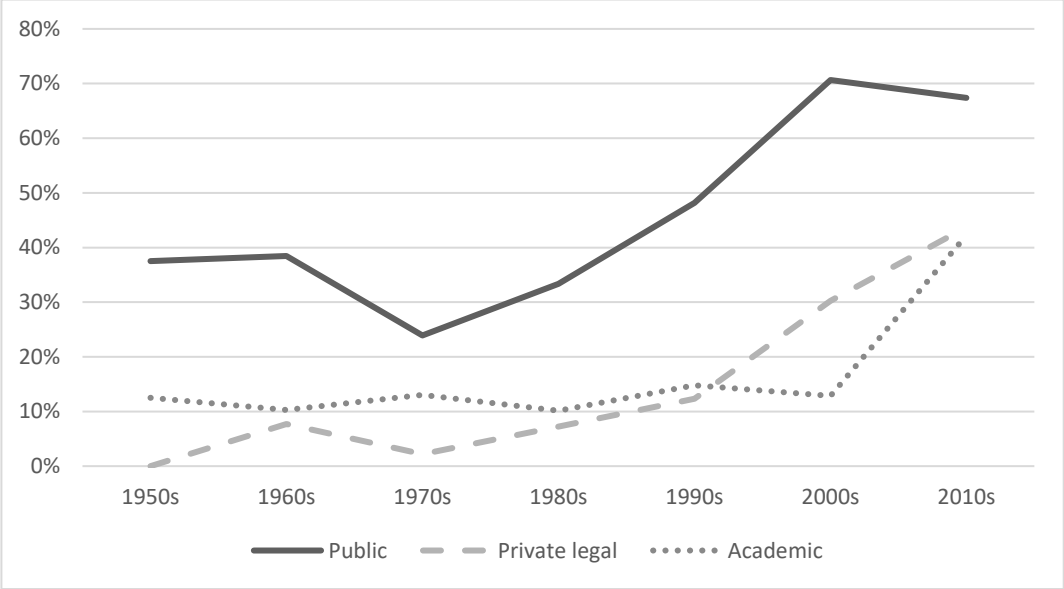
[41] When categorising the activities undertaken in retirement, we established an inductive coding scheme based on initial investigation of a small number of retired judges over the whole time period. Small adjustments were then made throughout the coding process, where sustained patterns of activity had not been captured by the initial scheme were found.

[42] Although it is often argued that serving judicial peers were restricted by a similar convention in their contributions to debates in the Lords, evidence for such a convention is poor at best. See O'Brien, "Judges and Politics: The "Parliamentary Contributions of the Law Lords 1876-2009".

retired judges was likely to be in the public interest.[43] Given the existence of the Law Lords and the historic overlaps between the senior judiciary and politics, this was perhaps inevitable. An arrangement in which serving Lord Chancellors and Law Lords were permitted to speak in Parliament, but retired judges could not speak outside it would have been difficult to defend.

Far more significant from a policy perspective is the phenomenon of paid legal work undertaken by judges in retirement. Figure 2 gives a sense of how these categories of work have developed over time, alongside academic affiliation (the most common voluntary activity). Whilst judges have always engaged in public work—they have always been in demand to head government inquiries, for example—there has been a significant and consistent increase in this work by retired judges from the 1980s onwards. Private work—that is, non-governmental work or work in the private sector—is a later development. Only a very small number of retired judges engaged in paid private work between the 1950s and the 1980s. There is a dramatic inflection point in these figures in the 1990s, which we attribute to the reduction of the retirement age to 70 in 1995. The figures for paid private legal work have increased consistently since that time.

Figure 2: Judicial Activity after Retirement



To track the development of these two categories of work, we have also tracked the number of roles judges have taken on within these categories (described in Table 2) to examine how many roles each judge was taking on in retirement. Using the roles defined in Table 2, the maximum possible score for each judge was six private roles and four public roles. Most of these are, we hope, self-explanatory, but the "other" label was used for unusual forms of work that nonetheless clearly counted for our purposes as either public or private. Sir Hugh Hallett (a High Court judge who retired in 1957) served, for example, as Electoral Boundaries Commissioner for British Guiana and was coded as "public, other". Sir Maurice Kay of the Court of Appeal (who retired in 2014) served in retirement as a member of the Premier League Judicial Panel and was coded as "private, other". Our methodology does not capture *intensity* of work—thus a judge who conducted one arbitration will appear the same in these figures as another judge who conducts one hundred. It is not possible to track the actual amount of work done because there is no public record to go on: that a retired judge holds herself out as

[43] S. Shetreet and S. Turenne, *Judges on Trial*, 2nd edn (Cambridge: Cambridge University Press, 2013), pp.268.

available for consultancy, for example, gives no reliable information about how often or for how many hours she may engage in such work. However, we believe that average number of roles taken can function as a meaningful (albeit partial) *proxy* for the amount of work.

Table 2: Kinds of legal role in retirement	
Public Legal Work	**Private Legal Work**
Fee-paid or temporary sitting as UK judge	Arbitration and mediation
Chairing an inquiry	International arbitration courts
Sitting on a tribunal	Consultancy
Sitting as a judge in a non-UK jurisdiction	Other
National security role	
Other	

Figure 3 draws on the role descriptions in Table 2 to track the average number of public and private roles taken on by judges over time, grouping judges by decade of retirement.

Figure 3: Average Numbers of Legal Roles in Retirement

Public legal work has been present in the activity of retired judges for much longer than private legal work, which becomes significant only in the 1990s. Nonetheless, judges are now taking on significantly more roles under both categories. Judges retiring after 2000 took (on average) at least one public legal role after retirement: over three times more than those who retired in the 1980s. A significant part of this increase is attributable to the shortage of criminal judges in recent decades. Many retired criminal judges take fee-paid criminal work. Increases in public work are also driven by politics. The increase in demand for judges as politically neutral chairs of inquiries and tribunals is a noted feature of modern politics and administration.[44] We also see activity in two relatively new categories for these later cohorts: sitting in non-UK jurisdiction courts and national security oversight roles. The growth of national security roles

[44] Matthew Flinders and Jim Buller, "Depoliticisation: Principles, Tactic and Tools" 2006(1) *British Politics* 293.

coincides with the development of statutory national security apparatus and associated oversight roles developed under the Regulation of Investigatory Powers Act.[45]

We observe similar trends for private legal work. The percentage of retirees taking on an arbitration or mediation role in recent years jumped from 11% in the 1990s to 38% in the 2010s.[46] This work is dominated by retired judges from England and Wales, and by those who served on the House of Lords and Supreme Court. We attribute this effect in large part to the proximity and familiarity these judges will have had with the City of London, and because of their senior status, with the prestige that that brings. We also see a significant distinction between senior judges and others. A third of High Court judges and a third of Court of Appeal judges who retired in the 2010s took on arbitration and mediation roles, compared with two-thirds of those who retired from the Supreme Court. Senior judges also sit on international commercial arbitration courts (e.g. the Singapore International Arbitration Centre) more than their more junior colleagues: in the 2010s, 29% of Supreme Court judges and only 17% of Court of Appeal judges sat in one of these courts. Consultant roles are a newer development and still appear to be relatively insignificant. Consultancy includes a wide variety of activities, from providing opinions on the law, to guidance on arguments, and mock hearings to coach counsel on style and strategy. Our final category of "other" includes judges who advised private litigation funding companies, or legal charity litigation committees.

Overall, as with public work, there has been a significant increase in demand for retired judges. Our interviewees suggest that this demand is, in turn, driven significantly by innovation in commercial legal practice.[47] Change to the retirement convention may thus follow from broader changes to the legal profession and to the nature of legal services. Many of the roles we describe above have been created or popularised in the last 30 years, and so it is unsurprising that these do not feature significantly in earlier statistics. It also appears that the work judges undertake after retirement is heavily influenced by what they did *before* retirement. Supreme Court and (England and Wales) Court of Appeal judges dominate post-retirement work, and judges who had commercial practices at the bar tend to take on private work in retirement. Conversely, High Court and Court of Appeal judges with criminal trial experience dominate fee-paid criminal work in retirement.

Part III. Priests and Contractors: What do judges think about work in retirement?

We conducted sixteen structured confidential interviews with UK judges and retired judges; another five with lawyers and officials.[48] The retired judges we interviewed were primarily judges from England and Wales. Based on these interviews, we identified two ideal types for judges in retirement: the priest and the contractor. These ideal types are Weberian:[49] that is, they have been constructed to bring out and exaggerate particular features held by two opposing views of post-bench work and conduct; and have been purified of any inconsistencies of thought. Almost everyone we spoke to agreed that there was some form of convention restricting judges from returning to practise at the bar, but priests and contractors interpreted

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[45] Lorna Woods, Lawrence McNamara and Judith Townend, "Executive Accountability and National Security" (2021) 84(3) M.L.R. 553.

[46] Some of the patterns show above will be driven by availability of data for more recent retirements. Considerable evidence for these roles was drawn specifically from websites of Chambers that a retired judge may have returned to after leaving the bench, which was obviously not available for earlier judges. Our analysis is also reliant on *Who's Who* entries, which are primarily compiled using information provided by the subject.

[47] A number of interviewees described these innovations as coming from American corporate legal practice.

[48] We were refused permission by the then Lord Chief Justice of England and Wales and the Lady Chief Justice of Northern Ireland to speak to serving judges in those jurisdictions (although this did not, and could not, extend to retired judges).

[49] Richard Swedberg and Olga Agevall, *The Max Weber Dictionary*, 2nd ed (Standford, CA: Stanford University Press, 2016), pp.156-58.

the scope and significance of this rule quite differently. Priests were sceptical about paid work in retirement. Their views echo those of Lord Hailsham: the judicial role is treated as a vocation which leaves its mark on the judge for life. For priests, the bar on returning to practice is interpreted broadly, and as a defence of the integrity of the judiciary.

> "I think the basic concern that one must have is the standing of the judiciary, the public acceptance of the role of the judge, and a lot depends on the legitimacy of the system. … I think one should accept appointment because you are accepting a very privileged role. The other side of that coin is that you have to accept these limitations."[50]

They are sceptical about all forms of legal work in retirement, and especially those that bring the retired judge close to practice (such as consultant and litigation advice roles). Whilst some "priest" interviewees had taken roles in chambers, they were careful about the work that they would take:

> "I made it quite clear to the chambers … I won't give legal advice. … Some ex-judges do give expert opinions on the law … Again, I have said I don't want to do that, but that is more a matter of preference than prohibit[ion]."[51]

Priests are circumspect about political involvement. Although one interviewee felt "completely gagged by the fact that I was a judge", most of our more priestly interviewees felt that less circumspection was required than during their judicial careers:

> "I would be very reluctant to engage in any kind of political debate in any sense whatsoever. And, you know, unless I was with close friends, I'd be very careful about probably what I said about the government."[52]

> "Not that I really entered into public debate before, but I wouldn't give a public opinion on a politically sensitive matter."[53]

A small minority of judges and retired judges that we spoke to were priest-like—although it is impossible to extrapolate conclusions for the judiciary as a whole from this. The much greater part were closer to contractors. Contractors are much more open to paid legal work (though we must of course bear in mind that they have concrete incentives to justify the practice). They treat the role of judge (and retired judge) as akin to a contractual relationship and interpret the prohibition on the return to practice narrowly.[54] This was most evident in two areas: work and politics. In terms of politics, most contractors felt that political activity and comment was essentially harmless:

> "Frankly, I think everything, once a judge has retired—once I've retired—what I say on social media and what I do is a matter for me."[55]

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[50] Interviewee 1 (retired judge).
[51] Interviewee 1 (retired judge).
[52] Interviewee 15 (retired judge).
[53] Interviewee 20 (retired judge).
[54] Judges are not in fact contractors, but instead hold a Crown appointment: see eg *Gilham v Ministry of Justice* [2019] UKSC 44. The contract metaphor was, however used by a number of our interviewees and we use it here as a convenient shorthand to underpin the point.
[55] Interviewee 11 (retired judge).

> "I wouldn't have any problem about putting my head above the parapet on any political issue that I felt strongly about now."[56]

> "Some people like to have their 15 minutes of fame … I don't think it does any harm."[57]

There was a clearer distinction between priests and contractors on paid legal work. Some were frank about the commercial opportunities open to retired judges:

> "[Y]ou could multiply your earnings by seven if you went back into practice. So, if you've got no more ambitions left on the bench and, you know, you're a bit fed up with the routine of it, you can understand, the temptation's obvious."[58]

In this context some retired judges were motivated by disappointment that they had been unsuccessful in applications for more senior roles (or could not be successful because they were too close to the mandatory retirement age): "I thought—well, expletive deleted—'sod that'. If they don't think I've got enough time to do useful work, I'm going to get out now and go and do something lucrative."[59]

For contractors, the convention is reduced to a bar on courtroom advocacy and direct involvement in litigation (for example, attaching one's name to legal pleadings). They see no harm in other forms of legal work and are often enthusiastic about working in legal roles in retirement: as a diversion from boredom; as a way to keep active later in life; or for the money on offer. A few described falling into post-retirement work without much thought, having been approached by friends. Less tangibly, for many of our interviewees and those they spoke about, post-bench work appears to be a means to avoid giving up an important part of their identity as members of the legal world.

If judges break down into these two ideal types, we were struck by how inconsistent and atomistic individuals from both groups were about these views. There appear to be no informal rules (social or otherwise) governing post-retirement behaviour, and a great deal of scepticism about the validity and the enforceability of a conventional rule:

> "I think it's just possibly a kind of unspoken convention … I'm not aware of any actual rules. I mean, a rule is something that I would have thought would be written down."[60]

> "I think everybody is a little uncertain about whether there is actually a rule. It was a sort of 'Gentleman's Agreement' or a convention I think."[61]

> "I think there is a much more transactional approach and less deferential … 'if I do this, then what?' rather than 'this is the way we've always done it'."[62]

Judges from both camps struggled to articulate a clear basis even for the very core—and generally accepted—prohibition on return to courtroom advocacy. Some felt that even that rule required revisiting. Some engaged quite heavily in private legal work, yet ruled out particular forms as off limits:

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[56] Interviewee 5 (retired judge).
[57] Interviewee 12 (retired judge).
[58] Interviewee 9 (judge).
[59] Interviewee 6 (retired judge).
[60] Interviewee 15 (retired judge).
[61] Interviewee 2 (retired judge).
[62] Interviewee 14 (senior barrister).

> "I would feel very nervous indeed about going back to a City law firm or become part of one, because of the risk of giving what I would regard as the kind of advice I'm not allowed to give. But I don't want to be thought to be criticising those who feel able to do that … There may be things you do which are not part of giving legal advice."[63]

These red lines were inconsistent as between interviewees however, and our overall impression was that our interview cohort were confused both about the content of the rules and their rationale.

For the vast majority of judges we spoke to, retirement is solely a matter for the individual and doubts must be kept private. Priests who expressed distaste or concern to us about colleagues who engaged in legal work after retirement felt very strongly that this was nonetheless a matter for individual conscience: "I don't think it's something that should be prohibited ethically. I just think it's something that I would hope they wouldn't have done."[64] Contractors were equally adamant that the behaviour of judges in retirement was their own business:

> "Maybe they do still feel they've got to bring in the hundreds of thousands of pounds a year to keep themselves and their family in the style to which they've become accustomed … I wouldn't criticise people for doing anything."[65]

Both groups were highly sceptical about the possibility of regulation of judges in retirement and pointed to the absence of any contractual or other legal basis for such regulation: "I gave an undertaking, I think … I think it's probably unenforceable as being a restricted practice, because why shouldn't I return to appear as a barrister?"[66] No one we interviewed went so far as to echo the 2006 submission of the judges on return to practice.

In short, the vast majority of our interviewees disagreed on core aspects of the convention; and denied the possibility of enforcement (either by formal or informal means). But a convention requires some agreement on core matters, and some means of effective enforcement to maintain it. Given this, and the rise in post-bench work (as seen in Part II), we suggest that the judicial retirement convention has become a "zombie" convention—key actors acknowledge its existence, but for all intents and purposes, it is dead.

Part IV. A Return to the Judicial Retirement Convention?

> "I'm terrified at the thought that you're introducing sanctions against retired judges!"[67]

We asked all of our interviewees if retired judges would be open to regulation. It quickly became clear that they would not. There was a deep vein of scepticism, running through both serving and retired judges, about any form of regulation of judicial retirement. Sometimes, this scepticism amounted to outright hostility: "Do I think there should be regulation? No, because I hate rules."[68]

More commonly, judges and retired judges expressed the view that rules were unnecessary, that judges would not welcome them, or that judges already knew how to behave.

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[63] Interviewee 3 (retired judge).
[64] Interviewee 5 (retired judge).
[65] Interviewee 12 (judge).
[66] Interviewee 6 (retired judge).
[67] Interviewee 17 (judge).
[68] Interviewee 6 (retired judge).

> "My experience is that just trying to give guidance to judges is quite a tricky operation. Sometimes they bristle at the idea that should think they're not responsible enough to behave properly anyway."[69]

> "What judges need to be told how to behave themselves properly? For goodness' sake."[70]

Despite the clearly expressed views of most of our interviewees, our conclusion is that some form of regulation of judicial retirement *is* required. It is clear, firstly, that there has been a retreat from judicial retirement as a "regulatory space". The judiciary now offer only very general guidance to retired judges; the Ministry of Justice and the legal professional regulators no longer take an active role in this area. Pre-existing institutional and semi-formal support for the convention have thus been removed. At the same time, judges either reject the retirement convention or are so unclear about its content and rationale that it is unworkable. There is thus no social pressure to conform with it and so it is, in effect, extinct.

A significant proportion of former judges of High Court level and above (three-quarters of those retiring in the decade 2010-2020) now offer paid legal services of various kinds (see part II). A former judge who wishes to return to any form of practice, up to and including advocacy in court, faces no obstacle. The UK jurisdictions (and England and Wales in particular) have moved from one of the strictest common law positions on legal work in retirement (albeit one that was rooted in informal convention and an honour code rather than in formal rules) to one in which there is no effective regulation at all.

This rapid and total deregulation of judicial retirement goes against the direction of travel in two other major common law jurisdictions. In recent years both the Canadian judiciary and the Council of Chief Justices of Australasia (covering Australian states and New Zealand) have introduced more robust—though informal—guidance for retired judges.[71] In both cases, the rules offer guidance to serving judges approaching retirement and considering work, and to retired judges on topics like work and conflicts of interest. These rules are influenced by increases in activity by retired judges of a similar kind to those we have observed in the UK. In Canada, in particular, activity by former Supreme Court judges has been a source of public discontent for a number of years.[72] This discontent was focussed by the involvement of a number of retired Supreme Court judges as legal advisors on the fringes of a high-profile political corruption scandal in 2019.[73]

In proposing regulation we are deeply conscious of the fact that retired judges are just that: retired. For the most part they are private individuals, holding no public office and drawing no salary. They do not and should not expect conduct rules to intrude into their private lives after the bench. We share the view of our many interviewees that the prospect of regulation of former judges for life, irrespective of role or activity, is intrusive and illiberal. We identify this

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[69] Interviewee 3 (retired judge).
[70] Interviewee 13 (judge).
[71] Canadian Judicial Council, *Ethical Principles for Judges* (2021 revision), Chapter V. Impartiality, Principle E, p.38 and sections 5.E.1-5.E.5 ("Post-Judicial Careers"), pp.57-58, *https://cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual_Final.pdf*; and Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd revised edn (2023), Chapter 7, *https://aija.org.au/wp-content/uploads/2023/02/Guide-to-Judicial-Conduct-Third-Edition-revised-Feb-2023.pdf*.
[72] See eg Kathleen Harris, "Canadians want limits on post-retirement work for judges, survey finds" CBC News (17 August 2019), *www.cbc.ca/news/politics/judges-post-retirement-1.5248512*.
[73] This scandal was associated with the prosecution of a construction company, SNC-Lavalin for fraud and corruption. The sequence of events is too complex to present here, but is usefully summarised in Mark Mancini and Geoffrey Sigalet, "Justice(s) Out of Office: Principles for Former Judges" (2021) 46(2) Queens L.J. 243.

objection as the *retirement hurdle*, and we take the view that weighty reasons are required to justify crossing it. Against this, we recognise the fact that the behaviour of judges in retirement is—in the limited cases we describe below—a matter of legitimate public interest and therefore an appropriate object of formal professional regulation. We believe this to be the case for some categories of paid legal work in retirement.

The retirement convention was a shorthand for a bundle of prohibitions around professional and personal behaviour. In a more complex legal environment, we take the view that a more complex response is required, combining voluntary guidance issued by the judiciary with limited professional regulation. Whilst we offer concrete proposals for regulation below, these are intended as the beginning of a conversation about regulation, not as its end point. Our interviewees were overwhelmingly of the view that retired judges would not welcome new regulation of their behaviour. For this reason, it is important that any new proposals for additional guidance or regulation take on board the concerns of retired judges and, so far as possible, proceeds with their consent. New rules for judicial retirement should be put to a consultation process involving judges, retired judges, regulators and officials.

We believe that regulation of former judges should, for the most part, take the form of non-binding rules issued by the judiciary.[74] In thinking about the behaviour of former judges in retirement, we have found it helpful to identify three tiers of risk. Our rule of thumb in thinking about these tiers (and about proposals for regulation) is simple: the closer judges come to serving judges or to litigation in their retirement (or in their plans for retirement), the more care they should take to avoid the appearance of bias, inappropriate association, or reputational damage to serving judges and the courts.

Table 3: Classifying activity by former judges by risk and kind

Tier 1 risks **Public Perception of judges**	**Tier 2 risks** **Political or reputational association with judiciary**	**Tier 3 risks** **Behaving as a solicitor or barrister**
Legal education Academia Charitable work or leadership Non-legal commercial activity	Political commentary Commentary on private or confidential aspects of life on the bench International courts Arbitration Mediation	Legal advocacy Conduct of litigation Negotiating work after retirement while still on the bench

In classifying activities according to risk, we do not take account the beneficial effects some of these activities may have, though the details of guidance on this topic should do. The three tiers set up rough and flexible categories rather than closely defined ones, and readers may disagree with our placement of activities within these three tiers. Nonetheless, we believe that the analytical structure is helpful. Bearing in mind the retirement hurdle, the first two tiers can in our view justify only voluntary conduct rules. The third tier, however, raises more substantial concerns and should be regulated through voluntary conduct rules, supplemented in limited cases by professional conduct rules administered by the Bar Standards Board and the Solicitors Regulation Authority. In assessing the level of risk associated with these tiers we adopt a modified version of the legal test for apparent bias: would reasonable members of the public

[74] We have drafted sample regulations, which can be found in the appendices of our online report: Patrick O'Brien and Ben Yong, *Work in Judicial Retirement: A Policy Report* (2023), *https://sites.google.com/brookes.ac.uk/the-judicial-afterlife.*

believe that behaviour by former judges raises non-trivial doubts about the honesty or integrity of the judiciary or the courts?[75]

The first tier of risk is the most remote and, in most circumstances, the most trivial. Activities in this tier may give rise to a loose association in the public mind that the behaviour of former judges on non-legal matters in some way represents or is tolerated by the judiciary. This category would such matters as working for a charity, working in academia and paid activity unrelated to the law. The second tier of risk arises where the former judge is behaving *as a judge* in functional or symbolic terms, and in doing so draws on the standing and reputation of the judiciary. Here we include roles that are typically "judicial" in nature, such as appointments to chair Royal Commissions, tribunals of inquiry and international courts. We also include conspicuous engagement in politics or public controversy. These activities create a risk to the legitimacy or reputation of the judiciary by association. To take one concrete example: in summer 2022 there was a brief controversy in Ireland when the recently retired Chief Justice, Frank Clarke, accepted an appointment to the Dubai International Financial Centre Courts, alongside another retired judge, former Court of Appeal judge Peter Kelly. The leader of the Labour Party, Ivana Bacik, expressed concern that Clarke and Kelly were being used as "a mechanism to support an oppressive regime".[76] Both judges resigned within a week of appointment. The value of appointments of this kind to a regime with a problematic human rights record may be in a kind of "law-washing": drawing on the reputation of judges, or of their home jurisdiction, to enhance legitimacy. By the same token, this may damage the legitimacy of the judiciary in their home jurisdiction. Though uncontroversial, we also include in this second tier work by former judges in recognisably judicial roles—for example, as an enquiry chair. Former judges in these positions are acting as judges (both in practice and in terms of public perception) and our view is that while in post they should voluntarily abide by relevant parts of the *Guide to Judicial Conduct*. We therefore recommend that a chapter on Former Judges should be added to the *Guide to Judicial Conduct*. This chapter should include advice to former judges on their conduct if they take on judicial roles.

Similar issues arise when former judges are identified as "former" or "retired" judges in taking public positions, especially where those positions are politically controversial. In those circumstances the former judge draws on the authority of the judiciary in speaking. As some of our interviewees put it:

> "I don't think you should be using your position as a judge to try to add weight to your voice in the public square … it hurts the court. I think the public then see a judge displaying their views in a very clear and obvious way. I think that the inference is that the court is more political than it really is."[77]

> "[I]f on retirement you were suddenly to come out with very strong or extreme political views, the natural conclusion would be that you'd held them the whole time. That's not a very good idea to hold them, and it's certainly not a very good idea to tell everyone that you hold them."[78]

The risks here, like those in the first tier, are primarily risks to the public perception of the judiciary. In drawing directly on the "judicial" status of the former judge, however, they are more substantial. It is possible for reasonable members of the public to conclude that, for

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[75] Drawing on *Locabail (UK) v Bayfield Properties Ltd* [2000] Q.B. 451 and *Porter v Magill* [2002] 2 A.C. 357.
[76] Mary Carolan, "Frank Clarke's resignation as judge of Dubai financial courts 'sensible and appropriate'—Labour Party leader", *The Irish Times* 31 July 2022.
[77] Interviewee 10 (judge).
[78] Interviewee 20 (retired judge).

example, the views of a judge who makes public statements about a government policy are shared by many of their former colleagues. The risks here remain diffuse, however, and in light of the retirement hurdle can justify only non-binding guidance. The current advice in the *Guide to Judicial Conduct* provides that retired judges are free to engage in political activity and public debate, but that "they should take care to avoid any activity which may tarnish the reputation of the judiciary and the perception of its independence."[79] A revised *Guide* should elaborate on this and provide more detailed guidance to former judges.

In the third and final tier of risk we include legal professional activities: those that take judges close to the courts or to litigation, and thereby raise concerns about bias. Here we include two related retirement activities; firstly, judges seeking post-retirement work. A number of our interviewees described being approached about work after retirement whilst they were still on the bench, and noted that these approaches often came informally from friends and former colleagues. An extreme example of this, and the negative consequences that may follow, arises out of various bias applications connected with Mr Justice Peter Smith from around 2006 onwards.[80] The second scenario arises where a former judge *has* returned to practice. When asked about what, if anything, the retirement convention prohibited judges from doing, the majority of our interviewees drew a bright line distinction between advocacy in court and other forms of legal service: for example, legal advice and consultancy. We respectfully disagree. Retired judges typically offer legal services of similar kinds and in similar venues (chambers, law firms) as practising lawyers. Solicitors and barristers, too, offer arbitration, mediation and legal advice (to cite three examples of non-regulated legal services). In the words of one interviewee:

> "In any real sense, they've gone back to practice. Look, they've got their names outside chambers. You ring their clerk if you want them. How is that not going back to practice?"[81]

We share this view. Former judges who offer legal services in this way, and thereby behave as a barrister or a solicitor, have in fact "returned to practice" in any meaningful socially understood sense of that term.[82] Moreover, they will be *perceived* as having done so by reasonable members of the public. Whilst there is an internal professional and functional logic to ringfencing advocacy from other legal services, from an external perspective judges have been returning to practise for quite some time. There is nothing inherently wrong with this, but it is anomalous that former judges can do so without any form of regulation specific to their situation.

The legal test for apparent bias is that a reasonable person would perceive a non-trivial risk of bias.[83] We take the view that there are risks of apparent bias in a number of situations: where judges seek to negotiate post-retirement work; where they engage in advocacy; and where they give paid legal advice and written opinions. Risks also arise where, more loosely, they draw on "insider information" in post-retirement work, for example providing training or

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[79] United Kingdom Supreme Court, *Guide to Judicial Conduct* (2023), 16.

[80] See *Howell & Ors v. Lees Millais & Ors;* Tabby Kinder, "Revealed: Peter Smith J banned from hearing Addleshaws cases in historic bias row".

[81] Interviewee 19 (barrister).

[82] See eg paragraph 172 of the Commentary to the Bangalore Principles of Judicial Conduct, which adopts a broad definition of the "practice of law", including legal advice and, in some jurisdictions, arbitration and mediation. We are grateful to the seminar participant who drew this point to our attention. UN Office on Drugs & Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007). See *www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf*.

[83] See *Locabail*; *Porter v Magill*.

mock trials in connection with litigation that is likely to come before former colleagues. In all of these cases, a reasonable person may perceive a risk—an unlikely and unintended outcome, undoubtedly, but nonetheless an identifiable and non-trivial risk—that former judges who have returned to practice may exercise inappropriate or disproportionate influence over judges and the judicial process, or that private information may be used inappropriately. An example, albeit an extreme one, can be seen in the Canadian case of *Vavilov*, in which the former Supreme Court Justice Michel Bastarache co-signed written submissions aimed at overturning an earlier decision that he had co-authored whilst still on the Supreme Court bench.[84]

The risk is, therefore, that *serving* judges may appear to be biased because of the third tier activities of retired ones—because retired judges are behaving as practising lawyers. Many (though by no means all) of our interviewees were sanguine about these third tier activities. Judges and lawyers are closely connected by social and professional ties—through the Inns of Court, through education and training, and through the ordinary ties of friendship and family that will exist in any profession—and an appeal to pure public perception would, we agree, stigmatise perfectly innocuous everyday interactions. The scenarios described above, however, involve more than this. In relation to this third tier of risk, we recommend three regulatory responses. Firstly, we recommend that the *Guide to Judicial Conduct* should prohibit judges from entering into negotiations or agreements about paid post-retirement work whilst still in office. In addition, either the *Guide* or a supplementary document should contain specific non-binding guidance for former judges considering returning to forms of legal practice. Secondly, the Ministry of Justice "understanding" signed by new judges upon appointment should be revised. Both the "understanding" and the *Guide to Judicial Conduct* should make it clear that it is acceptable for judges to return to legal practice, but that they are expected to obtain a practising certificate from the BSB or from the Law Society if they do so. Thirdly, the rules of the *BSB Handbook*[85] and the Solicitors Regulation Authority's *Standards and Regulations*[86] should take specific account of barristers and solicitors who are former judges, and provide for appropriate practice restrictions on former judges.

While the attitude of the Lord Chancellor and the judiciary was important to the historic retirement convention, the retirement convention was in large part a rule *of the Bar*, and it is the Bar that has abandoned it.[87] Although the Bar did so on the basis of concerns about restraint of trade (a number of our interviewees noted this point), we are not convinced that this argument survives scrutiny. Restraint of trade is a contractual doctrine and judges are not employed pursuant to a contract.[88] Some rules in the *BSB Handbook* apply to specific cohorts who have not volunteered to be so bound (notably, rules preventing unregistered barristers from offering certain legal services or describing themselves as barristers).[89] These are not restraints on trade: they are part and parcel of professional regulation.

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[84] *Canada (Minister of Citizenship and Immigration) v Vavilov* [2019] 4 S.C.R. 653. The written brief can be found here: *https://cippic.ca/sites/default/files/File/37748_37896_37897-Vavilov_Bell_NFL-CIPPIC-FACTUM-SUITABLE-FOR-POSTING.pdf*. The case Bastarache had participated in as a judge was *Dunsmuir v New Brunswick* [2008] 1 S.C.R. 190.

[85] Bar Standards Board, *The BSB Handbook*, v4.7 (2023), *https://www.barstandardsboard.org.uk/the-bsb-handbook.html.*

[86] Solicitors Regulation Authority, *Standards and Regulations*, https://www.sra.org.uk/solicitors/standards-regulations/. For completeness' sake, we note that the *Standards and Regulations* make no specific reference to retired judges.

[87] The Bar Council Code of Conduct formerly contained an Annex that dealt specifically with conflicts of interest arising out of a 'connection with court or tribunal', including rules for former and fee-paid judges. As discussed above, this appears to have been removed in the early 1990s: Bar Council, *Bar Council Code of Conduct,* Annex 8 para 3.

[88] See e.g. *Gilham*.

[89] E.g., Bar Standards Board, *BSB Handbook*, rC144.

The absence of specific regulation on former judges from the current *BSB Handbook* has a different explanation: the BSB adopts a risk-based approach in its work, and does not regard former judges as a regulatory risk to the profession.[90] Although we cannot say that retired judges constitute a risk *to the profession*, narrowly defined, we take the view that the unique position of former judges gives rise to more general risks to the justice system. It is the norm in other common law jurisdictions that legal professional regulators take some specific account of these in their rules.[91] The current situation in England and Wales, in which the BSB permits former judges to obtain unrestricted practising certificates, and professional rules are silent on the matter, is an outlier, and in our view unacceptably so.

The regulatory approach we propose effectively reintroduces a modified form of the retirement convention: non-binding but robust guidance that former judges who wish to provide legal services should opt into professional regulation. This is the approach taken by the former Irish Chief Justice, Frank Clarke, who recently returned to the Irish bar to take arbitration and mediation work but accepts a practice restriction that he may not appear before any Irish court.[92] This mechanism allows for former judges to return to practice, but with conditions placed on their legal practice as appropriate. We would expect common conditions to include restrictions on advocacy and prohibitions on accepting instructions in relation to matters that came before the former judge during their judicial career. This approach steers a middle course between the old total prohibition and the current situation of no specific regulation at all.[93]

We do not believe that it is possible to compel former judges to subject themselves to regulation, for unregulated legal services at least, but insofar as possible the *Guide to Judicial Conduct* and the "understanding" should make it clear that they are expected to do so. No convention can, of course, be sustained without the agreement and participation of those involved—a convention that is consciously rejected by those whom it purports to bind is not convention at all. For this reason, we recommend that a new convention to this effect should be agreed by the stakeholders. In effect, judges offering legal services should opt into professional regulation. How this operates will be a matter for discussion, but our recommendation is that regulation of this kind should take account of the nature of the legal service provided and the status of the former judge.

Firstly, courtroom advocacy by former judges. This presents the most acute risk of apparent bias, and is still seen by many as the core of the old retirement convention. Here we

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[90] Though we note that *non*-specific regulations in the *Handbook* could be applied to barristers who are former or part-time judges where relevant. We are grateful to the BSB for highlighting this point.

[91] Practice varies significantly. The model code for Canadian Law Societies suggests a cooling-off period of three years before a former judge can appear as a lawyer before a court of inferior jurisdiction (rule 7.7-1; Federation of Law Societies of Canada, *Model Code of Professional Conduct* (October 2022), *https://flsc-s3-storage-pub.s3.ca-central-1.amazonaws.com/Model%20Code%20Oct%202022%20-%20Blacklined.pdf*. Rule 5.32 of the Code of Conduct for the Bar of Ireland provides for a permanent restriction. The former judge may not appear before a court "of equal or lesser jurisdiction than the court of which they were a judge", *www.lawlibrary.ie/app/uploads/securepdfs/2021/07/Code-of-Conduct-Amended-by-AGM-26.7.21.pdf*. Rule 1.12 of the American Bar Association *Model Rules of Professional Conduct* provides simply that a lawyer "shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge …": *www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_12_former_judge_arbitrator_mediator_or_other_third_party_neutral/*.

[92] Conor Gallagher, "Retired chief justice Frank Clarke to resume work as a barrister" *The Irish Times* (4 December 2021), *https://www.irishtimes.com/news/crime-and-law/retired-chief-justice-frank-clarke-to-resume-work-as-a-barrister-1.4746297*.

[93] We are conscious of the comment made to us by a judge at our seminar that clarifying the rules in this way may have the unintended consequence of encouraging more former judges to return to practice. We agree that this is a possibility, but for all of the reasons outlined in this article we take the view that allowing judges to return to practice, subject to appropriate regulation, is a sensible middle ground.

draw a distinction based on former judicial status. The focus in our discussion and in our examples has been on senior judges: those who sat on the High Court or above. It is with these judges, we believe, that the risks of apparent bias are most acute. A senior appellate judge is likely to be viewed as exercising inappropriate influence on the bench if they conduct advocacy in the High Court, for example. The same concerns do not apply to judges who have served below High Court level, or to tribunal judges. These courts do not set reported precedents, and their judges do not hold the same level of seniority and public status as High Court judges. In our view it is inappropriate for former judges of High Court level and above to conduct advocacy in courts of equivalent or lower jurisdiction. For former judges below High Court level, we believe a territorial prohibition might be better: former judges should only be prohibited from conducting advocacy in the jurisdiction(s) in which they sat.

Whilst many of the other legal services provided by retired judges are unregulated, in our view the provision of legal advice and legal opinions raise sufficient concerns about apparent bias and public perception that former judges who wish to engage in them should only do so if they hold a practising certificate and accept professional regulation. The use of legal advice provided by Lord Neuberger as part of a submission during the Post Office Horizon litigation is an example of the difficulties such advice can lead to.[94] This submission was expressly raised by counsel as an opinion from a "very senior person" that the trial judge was under an obligation to recuse himself. Another example of a different kind comes (once again) from Canada. After retired Supreme Court judge Ian Binnie provided advice to the Canadian government on a controversial judicial appointment he publicly regretted it: "it turned out what they wanted was a letter that the government could wave around".[95] This was clearly a political attempt to draw on the authority of Binnie's former status as a Supreme Court judge—and by extension on the Supreme Court itself—rather than out of respect for the quality of Binnie's personal legal view.

Other forms of legal practice raise fewer concerns, and should consequently (in our review) attract only voluntary guidance. Arbitration and mediation are longstanding activities by former judges that appear to be nearly universally regarded as innocuous (they are, for example, cited as permissible in the 2008 *Guide to Judicial Conduct*), and as they engage the former judge in a "judge-like" function we have placed them in Tier 2 in our table above.[96]

Professional regulation and guidance of the kinds we propose would not simply be a restriction on former judges, but would also be capable of providing a source of guidance to them on where the boundaries should properly lie. Our interviews with former judges revealed that—on points like this—they are essentially atomised; left to their own devices to formulate a personal professional ethic of being "a retired judge". Many judges should, we believe, never need to encounter regulation in their work after the bench. For those that do, however, we hope that they would come to value an independent source of ethical and regulatory guidance.

Conclusion

When we began our project we did not expect to find that judicial retirement was unregulated. Nonetheless, the empirical evidence is clear. The judicial retirement convention in the UK is now ineffective and judges cannot agree on what it is supposed to prohibit. Institutional regulators—the judiciary, the professions, the government—no longer engage with the issue.

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[94] Paul Marshall, "The Post Office and Lord Neuberger—Going Upstairs", *Legal Futures* (4 March 2022), *www.legalfutures.co.uk/blog/the-post-office-and-lord-neuberger-going-upstairs*.

[95] Olivia Stefanovich, "New draft ethics guidelines for judges caution them about post-bench work" *CBC News* (15 December 2019), *www.cbc.ca/news/politics/stefanovich-post-judicial-employment-draft-revisions-1.5392594*.

[96] It is possible—albeit rare—for arbitral awards to be brought before the courts on a point of law. See Arbitration Act 1996, s.69.

More and more retired judges are returning to forms of legal practice, including courtroom advocacy. Judicial retirement is a regulatory black hole. We think some regulation of judicial retirement is necessary in the public interest: to protect the integrity of the judiciary and the processes of the courts. In this article we have suggested a number of approaches which would, if taken together, reconstitute a version of the former retirement convention. To paraphrase the judges themselves, if the track record of a judge is to be saleable,[97] its sale should at least be regulated.

[97] Judges' Council, *Response of the Judges' Council to the Right Honourable Lord Falconer of Thoroton*.