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**JUDICIAL INDEPENDENCE AND ACCOUNTABILITY: PRESSURES AND
OPPORTUNITIES**

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A quiet constitutional upheaval has been occurring in this country since 1998. That year saw the enactment of the Human Rights Act and the devolution legislation for Scotland, Northern Ireland and to a lesser degree, Wales. These developments have led to new interest in the judiciary. Today, however, I am primarily concerned with events since June 2003 when the government announced the abolition of the office of Lord Chancellor, bringing to an end a position in which a senior member of the Cabinet was also a judge, Head of the Judiciary, and Speaker of the House of Lords. The government also announced the replacement of the Judicial Committee of the House of Lords by a United Kingdom Supreme Court. These events led to the Constitutional Reform Act 2005 (hereafter “CRA”) and to the Lord Chief Justice becoming Head of the Judiciary of England and Wales.

The 2003 changes and the new responsibilities given to the Lord Chief Justice necessitated a certain amount of re-examination of the relationship between the judiciary and the two stronger branches of the state --- the executive and the legislature. Moreover, in the atmosphere of reform and change, branded as “modernisation”, not all have always remembered the long accepted rules and understandings about what judges can appropriately say and do outside their courts. Others have asked whether the rules and understandings remain justified in modern conditions. The “pressures” to which my title refers arise because of the view of some that judges should be more engaged with the public, the government, and the legislature than they have been in the past. The “Opportunities” arise from

the need to develop constitutionally appropriate rules for such engagement. But before turning to these I must say something about the constitutional importance of the rule of law and the independence of the judiciary.

The Senior Law Lord, Lord Bingham, described the rule of law in the following words: "... all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts."¹ He recognised that this statement of general principle cannot be applied without exception or qualification, and referred to the fact that there are, some proceedings in which justice can only be done if they are not in public.

The primary duty of the judiciary to uphold the rule of law is well understood. So is the precondition for the ability to do it, namely the independence of each judge. The vital importance of this independence follows from the judiciary's core responsibility. It is the branch of the state responsible for providing the fair and impartial resolution of disputes between citizens and between citizens and the state or state entities in accordance with the prevailing rules of statute and case law.

Those last words are important. The "rule of law" must be distinguished from the "rule of judges". The judges are not free to do what they wish. They are subject to the laws as enacted by Parliament. It is well understood by judges that matters such as the formulation of policy at national and local level, and the regulation of the economy are for government not judges. The independence of the judiciary is thus, as Sir Igor Judge has observed, not a privilege of the judges themselves.² It is necessary for the public in a democratic state. It is necessary to ensure that people are able to live securely, and that their liberty is safeguarded and only interfered with when the law permits it. It is necessary for all of us, but perhaps particularly so for those who espouse unpopular causes or upset the powerful.

The need for judges to be impartial limits what they can say outside the courtroom. This brings me to the long-standing rules and understandings about the judiciary.

¹ "The Rule of Law" [2007] Cambridge Law Journal 67, 69.

² Evidence to House of Commons Select Committee on the Constitution, 1 May 2007, answer to Q 379

In December 1955 Viscount Kilmuir, then Lord Chancellor, wrote to the Director General of the BBC. He stated that "the importance of keeping the judiciary insulated from the controversies of the day" meant that it was as a general rule, undesirable for judges to take part in wireless or TV broadcasts. His reason was that, "so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism". This reason is not restricted to the broadcasting media and the Kilmuir Rules, as they were known, had a wider application, and were defended by subsequent Lord Chancellors on the ground that they protected impartiality.³

But judges have always had a public side, even during the time of the Kilmuir Rules. One example is Lord Scarman's 1974 Hamlyn lectures calling for the incorporation of the European Convention of Human Rights into our law. Another is the use of judges to chair public inquiries. For example, in 1963 Lord Denning chaired an inquiry into the security implications of a Minister of Defence being involved with a call girl who was also involved with an official at the Soviet embassy.

The Kilmuir rules were abolished by Lord Mackay of Clashfern in November 1987. He saw them as difficult to reconcile with the independence of individual judges. Lord Mackay did not favour a free-for-all. He said that judges "must avoid public statements either on general issues or particular cases which cast any doubt on their complete impartiality, and above all, they should avoid any involvement, either direct or indirect, in issues which are or might become politically controversial". But his view was that those who are fit to hold judicial office should have the judgment to decide such matters for themselves. Clear understandings as to what it was appropriate for judges to speak about remained. These clear understandings reflect general principle. However, the line between what is or is not appropriate can be a fine one, and difficult to maintain. I will return to this difficulty and its consequences.

³ Eg by Lord Hailsham, see Lord Woolf's RTE/UCD Lecture 22 October 2003, http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/lcj221003.htm

There is a strong conventional rule (reflected in the House of Commons' *sub judice* rule) that judges do not discuss the merits of individual cases or decisions where cases are pending or ongoing. Judges generally do not do so even where the case has been finally concluded, save possibly as an example of practice when discussing general principles of law.

Judges do not comment on the merits, meaning or likely effect of provisions in any Bill or other prospective legislation, or on the merits of Government policy, save in very limited circumstances. To do so could be seen to call into question their impartiality in the event of subsequently being called upon to apply or interpret those provisions in a court case. What are those limited circumstances? One might be where government or a Parliamentary Committee has sought comment from a particular judge when the policy in question affects the administration of justice within the area of judicial responsibility of that judge. The recent meeting of the President of the Family Division with the Lord Chancellor about concerns as to effect in practice of changes in domestic violence legislation is an example.

But even in such cases, there are dangers. Concerns about the effect of public utterances by judges are not unfounded. Speaking out has risks, particularly if the general atmosphere is more "political", and others put a "spin" on what is said. Judges are professional experts charged with a task of interpretation, in Lord Bingham's words, "auditors of legality", but they have no independent authority to rule on what would best serve the public interest. They lack the democratic credentials to perform such a task, and they lack the resources and processes conducive to good law-making.⁴

Even lectures can lead to difficulties. The Home Office considered that lectures given by Lord Steyn about detention without trial at Guantanamo Bay precluded him sitting in *A v Home Secretary*,⁵ where the compatibility of Part 4 of the Anti-Terrorist Crime and Security Act 2001 empowering the detention without trial of non-citizens suspected of involvement in terrorism, was considered by the House of Lords, and he did not do so.

⁴ Bingham, "*The Judges: Active or Passive*", Maccabean Lecture 2005. This was said in the context of when and how judges should develop the non-statutory law in their decisions but it is of relevance in this context too.

⁵ [2004] UKHL 56

In the case of inquiries, a distinction should be drawn between accident inquiries and inquiries on politically charged issues. The experiences of Lord Scott and Lord Hutton who chaired inquiries in 1996 and 2003 into the sale of arms to Iraq and the death of Dr David Kelly, show the risks when judges chair the second type of inquiry. The appointment of a judge does not depoliticise an inherently political issue. The report is non-binding, unenforceable and not subject to appeal. Those disagreeing with it will seek to discredit its findings by criticising the judge.⁶ If the government or institution has been cleared, the dissenters will describe the judge as an establishment lackey. This happened to Lord Hutton. If the government or the institution is criticised, the judge will be described as naïve and unfamiliar with the reality of government. This happened to Lord Scott.

I have referred to the risks where the judiciary comment on proposals for legislation or the terms of draft Bills. There may be real benefits to the government in obtaining the views of those who are involved in the courts on a daily basis. There may be real benefits to the judiciary in sharing their experience so as to avoid an impractical or unworkable piece of legislation. But doing so can also be risky to both government and the judiciary. The risk to the government is that comment by the judiciary will be used by its political opponents. And it is precisely that possibility which is the risk to the judiciary.

Say that the government asks the Lord Chief Justice or a Head of Division about the impact of a proposed policy it is considering about the work of the courts. Can the judiciary provide technical assistance? If so, in what circumstances, and can it be in private or must it be in public? Can such assistance ever be given without risking making the judiciary just another “player” in the political/policy process with policy preferences? If there is such a risk, there are obvious implications for the perception that the judiciary is impartial.

The judiciary has always stated that it will not comment on Government policy. Its position is that its role in any pre-legislative scrutiny exercise is to comment only

⁶ See generally, Beatson (2005) 121 LQR 221. Lord Morris of Aberavon QC, a former Attorney-General, discussing the Scarman and MacPherson inquiries, said: “[w]hen a judge enters the market place of public affairs outside his court and throws coconuts he is likely to have the coconuts thrown back at him. If one values the standing of the judiciary ... the less they are used the better it will be” : 648 HL Deb. Col 883; 21 May 2003.

on the practicality of the drafting and the workability of policy for the Courts. This was reiterated by the Lord Chief Justice in the press conference he held about his *Review of the Administration of Justice in the Courts* published at the end of March.⁷ He was asked about the statement in paragraph 14.6 of the Review that "the judiciary is willing, if consulted, to advise on the practical implications for the administration of justice of proposed legislation". He was asked whether he had advised on the length of pre-charge detention for suspected terrorists. Lord Phillips said that he would advise the government whether there were sufficient Judges available to do the scrutinising task contemplated by the proposals for pre-charge detention. He would also advise whether it was necessary to have a High Court Judge or whether one could use an experienced Circuit Judge. However, he would not advise or comment on the broader implications of particular legislation, including this, because that relates to policy. Again, however, it may be hard to recognise where to draw the line between appropriate comment on the practicality of the drafting and workability of a scheme, and inappropriate comment on policy.

For example, consider proposals to introduce a radically different form of procedure in courts, say restricting information given to those charged with criminal offences. One obvious question would be as to the compatibility of the proposals with the right to a fair trial before an independent tribunal enshrined in Article 6 of the ECHR. If a judge is asked to comment and indicates that the proposals are or may be contrary to Article 6, is that improper comment on Government policy or is it something affecting the workability of a policy in the courts? What happens if the legislation subsequently comes before the judge who has commented on this issue? What happens if the judge who has commented is the Lord Chief Justice or the Head of one of the three divisions of the High Court?

This is an area in which thought must be given to whether, in the new constitutional climate, adjustments should be made or a different approach is needed. Once judges provide any comment, the risk arises of them and the government wishing to draw the line in different places. There is also the risk that the public will believe that judges have entered the political arena. Moreover, once judges comment on some matters, it may be understandable that on occasion

⁷ HC448 (31 March 2008)

government Ministers find it difficult to appreciate the proper boundaries of judicial comment. A striking example was the frustration of Charles Clarke, the then Home Secretary, at Lord Bingham's unwillingness to discuss the government's proposals for control orders after the House of Lords held that the provisions for detaining non-citizens without trial in Part 4 of the Anti-Terrorist Crime and Security Act 2001 were incompatible with the European Convention of Human Rights.

I return to the impact of the changes initiated in 2003 on long-standing understandings of the relationship between the different branches of the state. One of these concerns reactions to adverse decisions. Even before 2003, the number of occasions on which individual judges were criticised by government ministers who had lost cases or where legislation had been interpreted in a way different from that which they wanted had increased. It intensified afterwards.

The consequent tension is an inevitable feature of the relationship between an independent judiciary and the executive. Lord Bingham has said the tension is "entirely proper" because, particularly at times of perceived threats to national security:

"governments understandably go to the very limit of what they believe to be their lawful powers to protect the public, and the duty of the judges to require that they go no further must be performed if the rule of law is to be observed"

Notwithstanding this understandable tension, however, the executive, legislative and judicial branches of the state should show appropriate respect for the different positions occupied by the other branches when fulfilling their respective constitutional roles.⁸

The constitutional changes have also been accompanied by an increasing wish by Parliamentary Select Committees to have judges giving evidence on a wide number of topics. Judges were called to do so on 20 occasions in the eighteen months from April 2006 (when the Lord Chief Justice became Head of the Judiciary) to

⁸ See eg., the Commonwealth (Latimer House), *Principles on the Accountability of and the relationship between the Three Branches of Government*, agreed by Commonwealth Law Ministers and Heads of Government in 2003

December 2007, and on three occasions this year. Overall this is about once a month.

To understand the impact of the changes it is also necessary to consider the process of reform. Reforming an unwritten constitution is an interesting activity. It can be rather like pulling on a loose thread of wool on a pullover. You do not know whether you are going to remove a blemish and tidy things up or whether you are going to end up with no pullover. This is particularly so where the reform is driven by political events and without the benefit of careful study and consultation. These were features of both the 2003 decision to abolish the post of Lord Chancellor and the 2007 decision to create a Ministry of Justice. The first was presented as about increasing the separation of powers. But the immediate motivation was the removal of a powerful Lord Chancellor who was a thorn in the flesh of a more powerful Home Secretary. The second – for which there were a number of good reasons– was undertaken to rid another powerful Home Secretary of part of his empire --- prisons --- to enable him to concentrate on other parts --- immigration and terrorism.

The government made and announced its decisions in 2003 and 2007. It then discovered that major issues of principle had not been considered and remained unresolved. For example, despite the announcement made in June, it found that the office of Lord Chancellor could not be abolished by the fiat of the Prime Minister. The office was referred to in over 300 statutory provisions and an Act of Parliament was required. Most of these provisions related to the courts, but the Lord Chancellor's roles as Speaker of the House of Lords, visitor to many educational institutions, and his ecclesiastical role also appeared to have been overlooked. The government found that what it had started resulted in an outcome it had not anticipated and led to a destination that was not identified at the outset.

In 2003 the government ended up negotiating with Lord Woolf, then Lord Chief Justice, and a small number of senior judges. The judiciary, led by Lord Woolf who postponed his retirement, stepped in to ensure the essential attributes of judicial independence were articulated and preserved. These attributes had, for the 125

years since the great reforms of the late 1800s, generally been well guarded by constitutional culture rather than by constitutional law.

The process after the 2003 announcement involved three stages. The first was an analysis (initiated by the judiciary) of all the responsibilities of the Lord Chancellor to identify which were attributes of his judicial role and which were part of his role as a government minister. The second was the historic Concordat between Lord Woolf and the new Lord Chancellor, Lord Falconer, as to the allocation of the principal responsibilities between the Lord Chancellor and the Lord Chief Justice. The third was the translation of the Concordat into statute form. This was only completed two years later, when, after further significant negotiations during the passage of the Bill, the CRA was enacted in 2005. These three stages produced an outcome with four features unanticipated and perhaps undesired by government at the outset.

The first was the recognition in section 7(1) of the CRA of the Lord Chief Justice as the head of the judiciary. The Bill as originally introduced to Parliament indicated that the government had wanted a less defined and more fragmented outcome. The second was that the responsibilities of the Lord Chancellor identified as attributes of his judicial role were formally transferred to the Lord Chief Justice or his delegates by the CRA or by the Concordat.

The third was a statutory guarantee of “continued” judicial independence in section 3(1) of the CRA. The need for a statutory guarantee showed that culture no longer sufficed to protect judicial independence. Also, while the use of “continued” signified that there was to be nothing new, this was fine. The common law provided a sound basis for judicial independence, particularly when coupled with the statutory recognition in section 1 of the CRA of the rule of law as an existing constitutional principle and its relationship with the independence of the judiciary.⁹ The fourth was the creation of a formal and public channel of communication between the Lord Chief Justice and Parliament. Section 5(1) of the CRA provides that:-

⁹ See *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin) at [64].

“The chief justice of any part of the United Kingdom may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.”

I turn to the announcement in January 2007 that there was to be a Ministry of Justice. The process after that announcement led to the completion of one matter not properly dealt with by the Concordat or the CRA. This concerned responsibility for the administration of the courts. The Ministry of Justice was announced and envisaged by the government as a change in the machinery of government – not as another constitutional change. There was no consultation. The Lord Chief Justice first learned about the proposal from an article in a Sunday newspaper. This was less than a year after the reforms in the CRA came into effect.

The judges had no objection in principle to the creation of the new ministry. But they saw it as a constitutional change. They did so because having an adequate number of courts and an adequate number of judges, both adequately resourced, is a prerequisite for the rule of law. The judiciary had two concerns. The first was that bringing together the political responsibility for prisons and courts under one ministry and one ministerial budget could lead to a conflict of interest which might prejudice judicial impartiality or lead to a perception by the public that it was compromised. The potential conflict identified was between the resource needs of the courts and those of the prisons. What was the risk to impartiality or the perception that the judiciary was impartial? This was seen to arise because the decisions of the courts in applying the law would have a financial impact upon other parts of the Ministry of Justice’s budget. For example, sending people to prison in accordance with legislation would increase the prison population with significant financial consequences. The judiciary considered that steps had to be taken to protect court resources from demands from other parts of the Ministry of Justice.

The second concern arose from the fact that the courts are administered by Her Majesty’s Court Service (“HMCS”). In the past HMCS was in effect the creature of the Minister and had no independent existence. A court administration solely

responsible to the government minister was tenable when that minister was also a judge and head of the judiciary. Since the Lord Chancellor was neither, this position was considered no longer acceptable. Other models were available. For example, in Ireland where there is a Ministry of Justice, there is an autonomous court administration responsible to the judiciary alone. The Scottish Executive favours a similar arrangement and in January placed a Bill before the Scottish Parliament (the Judiciary and Courts (Scotland) Bill 2008).

In England and Wales, the announcement of the creation of a Ministry of Justice was followed by a year of negotiation. Some of it was brought into the public domain because of evidence given to Parliamentary Committees. On 23 January 2008 the Lord Chief Justice and the Lord Chancellor announced a new partnership regarding the operation of HMCS with effect from the beginning of April. The details of the agreement were published when the Lord Chancellor presented the new HMCS Framework Document to Parliament.¹⁰ The arrangement is not as far reaching as the Irish and Scottish models. But budgets will be set by a transparent process. One of the objectives of HMCS is to support an independent judiciary in the administration of justice. Part 7 of the Framework Agreement provides that all court staff owe a joint duty both to the Lord Chancellor and the Lord Chief Justice for the efficient and effective operation of the courts. Staff are subject to the direction of the judiciary when they are supporting the judiciary in the conduct of matters for which the judiciary is responsible, such as listing and case management. Most importantly, there will be a Board, chaired by an independent person – neither a judge nor a civil servant – accountable to both the Lord Chief Justice and the Lord Chancellor.

Some functions (such as training) had always been seen as judicial. The consequences of the changes are that other functions where the position was less clear are now clearly judicial. Resources are provided by the Lord Chancellor. The Lord Chief Justice is responsible for deployment of individual judges, the allocation of work within the courts (“listing” of cases), and the well-being, training and guidance of serving (full and part-time) judges. This means that the judiciary is responsible for:-

¹⁰ Cm 7350 (April 2008)

- “ i An effective judicial system, including the correction of errors;
- ii Training judges in the light of changes in law and practice; and
- iii Identifying and dealing with pastoral, equality, and health and safety issues concerning serving judges.”¹¹

Some functions are shared. These include discipline, the effective and efficient operation of the courts through the Court Service, and the protection of the image of justice. In the last of these the judiciary is assisted by the Judicial Communications Office, but the Lord Chancellor has a statutory role under section 3(6)(a) of the CRA.

The result of all this is that the judiciary has had to take an institutional position on the matters for which it is responsible. Since 2003 it has been developing governance mechanisms through the Judicial Executive Board (JEB) and a revived and reinvigorated Judges Council with representatives from all ranks of judges.¹² There is thus an increased awareness of and focus on the judiciary as an institution as opposed to a group of individual judges. As yet there has been less awareness of the effect of the emergence of a judiciary with stronger institutional attributes on the concept of the independence of individual judges. There is much work to be done on this topic; often referred to as the internal independence of the judiciary.

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The need for such an institutional position will increase under the rules in the new framework agreement about HMCS. This is because the Lord Chancellor and Lord Chief Justice will jointly see how they can improve the performance and efficiency of the courts, while respecting the principle of the independence of the judiciary. The judiciary will make a contribution to this.

So the question arises as to what can judges do without prejudicing their constitutional independence. Section 11 of the framework agreement draws a distinction between policy about operational guidance to the courts, which will be

¹¹ “The Accountability of the Judiciary” para 13(d), see <http://www.judiciary.gov.uk/docs/accountability.pdf>.

¹² See Lord Justice Thomas, *The position of the judiciaries of the UK in the constitutional changes*, Address to the Scottish Sheriffs' Association 8 March 2008.

¹³ Montreal Declaration § 2.03.

developed by HMCS's Board, on which judges sit, and policy and legislative proposals that the Ministry of Justice is developing. The distinction between "policy" and "operational" matters can be difficult to draw at the margin but it is suggested that, provided care is taken, it can provide a satisfactory touchstone in this context. Where policy and legislative proposals have an operational impact on the courts, the agreement provides that HMCS must be consulted. Where such proposals raise significant issues they must be reported to HMCS's Board. Section 11, however, states that it does "not affect the operation of the convention under which the Government may consult the judiciary on legislative proposals".

A further consequence of the new arrangements is the question of accountability for matters for which the judiciary is now responsible where in the past government ministers were responsible. Consideration has been given as to how to provide a measure of accountability which is consistent with the principle of judicial independence.

Accountability was once seen as part of a command and control relationship: a person may be "accountable to" another person or institution, which may sack him or her. Today, however, the concept is more fluid and includes a number of practices which explain, justify and open the area in question to public dialogue and scrutiny. A person may be "accountable for" certain matters. The difference is more graphically captured by Professor Vernon Bogdanor's distinction between "sacrificial" and "explanatory" accountability.¹⁴ The former involves taking the blame for what goes wrong, and forfeiting one's job if something goes seriously wrong. The latter involves giving an account of stewardship, for instance, in the case of ministers to Parliament and to the electorate.

It is often said, particularly by politicians, that our judges are not accountable. What they often mean is that our judges are not elected, as some state judges in the USA are, and that the government cannot fire a judge it does not like, in the way that last year the President of Pakistan fired the Chief Justice and a number of

¹⁴ Bogdanor, *Parliament and the Judiciary: The Problem of Accountability*, (Third Sunningdale Accountability Lecture 2006); Le Sueur, in *Independence, Accountability and the Judiciary* (BIICL 2006), eds. Andeanas & Fairgrieve, 49-50.

other judges in Pakistan's highest court. But judges are in fact subject to a number of forms of accountability. These are, however, not always understood. Nor are the necessary limits to judicial accountability. Neither individual judges nor the judiciary as a body should be subject to forms of accountability prejudicing their core responsibility as the branch of the state responsible for providing the fair and impartial resolution of disputes between citizens, and between citizens and the state in accordance with the prevailing rules of statutory and common law.

The nature and form of the accountability of the judiciary depends on their responsibilities and conduct. It is generally accepted that, save in accordance with the Act of Settlement 1701, senior judges cannot be held accountable either to Parliament or to the executive in the sacrificial sense, and that they cannot be externally accountable for their decisions in cases heard by them. Such accountability would be incompatible with the principle of the independence of the judiciary.

So how are judges accountable? Save for the House of Lords, individual judges are held to account by higher courts hearing appeals from their decisions. Complaints about their personal conduct are investigated by the Office for Judicial Complaints acting on behalf of the Lord Chancellor and the Lord Chief Justice who are jointly responsible for considering and determining such complaints. You will also be aware of accountability by scrutiny – sometimes harsh scrutiny -- by the media. Contempt type powers have given way to the consequences of a more broadly based principle of the freedom of the press.

It is worth dwelling on the depth of accountability by way of appeal. The decisions of appellate courts are fully reasoned, widely available and they do not always pull their punches. So, in rejecting the approach taken by the Court of Appeal to the legality of the Denbigh High School in not allowing a Muslim pupil to wear the Jilbab, Lord Bingham said this was an example of a retreat to procedure as a way of avoiding questions which the court must confront, however difficult they are.¹⁵ Lord Hoffmann stated that the Court of Appeal would have failed the examination

¹⁵ *R (on the application of Begum) v Denbigh HS*, [2006] UKHL 15 at [27]-[31].

it had set the school by giving the wrong answer to one of the questions of law.¹⁶ Appellate courts can be less gentle, as the CA was when describing a High Court judge's handling of a hearing as "intemperate" and as impugning in the strongest terms the good faith of an application for him not to sit in the case when there was "no shred of evidence to suggest some ulterior or improper motive" behind the application.¹⁷

Another form of accountability over court decisions arises from the fact that, except where the issue is one of EU law, it is open to Parliament to legislate in order to reverse the effect of a single decision or a body of doctrine distilled from a number of cases. Moreover, the duty to give reasons for decisions is a clear example of "explanatory" accountability which assists transparency and scrutiny by the other branches of the state and the public (as well as facilitating appeals).

Some consider that a judge cannot be both independent and externally accountable, and that even "explanatory" accountability is incompatible with, or a danger to, judicial independence. The late Lord Cooke of Thorndon argued that "... [j]udicial accountability has to be mainly a matter of self-policing; otherwise, the very purpose of entrusting some decisions to judges is jeopardised".¹⁸

The judiciary recognised that the changes introduced by the CRA raised issues of accountability. While some of their long-standing practices could be understood as forms of accountability in one or other of the senses of that term, the new situation justified further steps. The first happened during 2005, as part of the preparations for the Lord Chief Justice to become Head of the Judiciary. The Judicial website, a major new website, was created. The aim was to increase public understanding of the role of judges in our democracy by providing information about what we do and our constitutional position. It provides the public with direct access to such information without it being filtered by the media. It gives access to the full text of

¹⁶ Ibid., at [66] - [68].

¹⁷ *Howell v Lees Millais* REF. See also *Baignet v Random House Ltd* 2007 EWCA Civ 207 at [3] and [121] and *Jameel v Wall St Journal* [2006] UKHL 44, at [56] - [57].

¹⁸ Robin Cooke, 'Empowerment and Accountability: the Quest for Administrative Justice' (1992) 18 Commonwealth Law Bulletin 1326.

important judgments and speeches by the Lord Chief Justice and the senior judiciary.

The second step was that, in the spring of 2006, I was asked by the Lord Chief Justice and the JEB to take on the role of Judge in Charge of Parliamentary Relations, with a responsibility which later included advising the Lord Chief Justice and the JEB about how to develop our position on accountability. After work had started on this, the House of Lords Constitution Committee commenced an inquiry into the relationship of the Executive, Judiciary and Parliament. This led us to prioritise our own work. Policy was formed and, in May 2007, the JEB and the Judges' Council approved a paper setting out the principles of accountability and a recommendation that, as part of enhanced explanatory accountability, the Lord Chief Justice should publish a review of the Administration of Justice in the Courts.

In October 2007 (at the same time as the Lord Chief Justice and the JEB responded to the House of Lords' Constitution Committee which had reported in July 2007) ,¹⁹ a document authorised by the JEB was published on the judiciary's website discussing the forms of judicial accountability and their limits..²⁰ What I summarise here is set out in more detail in that document. It is premised on the proposition that some practices can be understood as forms of accountability that are consistent with judicial independence. It is also premised on the proposition that the limits upon accountability are those inherent in the principle of judicial independence. We had earlier published modern guidance to judges asked to give evidence to Parliamentary Committees. That deals with the boundaries of what it may be appropriate for a judge to say when "the High Court of Parliament" asks him or her to give evidence. Its contents reflect the clear understandings and conventional rules about what judges can and cannot say.

I have referred to the Lord Chief Justice's *Review of the Administration of Justice in the Courts* which he sent to the Queen and laid before Parliament pursuant to section 5 of the CRA in March 2008. It is a strategic addition to the annual reports and reviews of the operation of particular jurisdictions, such as the Crown and

¹⁹ www.judiciary.gov.uk/docs/const_committee_response.pdf. The Committee's report is Sixth Report of Session 2006-07, HL 151 (26 July 2007)

²⁰ http://www.judiciary.gov.uk/about_judiciary/judges_and_the_constitution/judicial_independence/acc_jud.htm.

County Courts, the Court of Appeal and the Commercial Court by judges and HMCS. It deals with the matters that, in the words of section 5 of the CRA, appeared to him to be important to the judiciary and to the administration of justice in England and Wales.

The court reports and the Lord Chief Justice's Review are valuable tools for external scrutiny of the system. To furnish information about court process, delays, workloads, training, appeals, complaints, lack of integrity and misconduct and equality issues to Parliament and the public is an appropriate way of explaining, justifying and opening these areas to public examination and scrutiny. It can also identify the boundary between the respective responsibilities of the judiciary (for the business of the courts) and of the Lord Chancellor (for resourcing the courts) and HMCS (for providing court buildings and court staff). To voluntarily offer a form of "explanatory" accountability for the matters that are the responsibility of the judiciary is not inconsistent with the requirements of judicial independence.

What about appearances at committees by judges? The constitutional orthodoxy in the past, when there was less separation of powers than there is now, has been that Parliament, as the High Court of Parliament, has the *power to summon* judges. Whatever the legal position, Parliament generally invites rather than summons judges. It is doing so more frequently. Select Committees can represent an appropriate and helpful forum for the Lord Chief Justice or other senior judges. They can explain or state their views on aspects of the administration of justice that are of general interest and concern and upon which it is appropriate for judges to comment.

I have referred to the increasing number of invitations by Parliamentary Committees to judges to appear before them. The judiciary and the Lord Chief Justice have concerns about this, again because judges who comment on an issue might, at a later date, find that they have to adjudicate on that issue. The difficulties which arise when judges give views on the operation of the law or on proposals for new legislation to which I have referred earlier apply here too. It is difficult for judges to comment on certain topics concerned with the court system without risking prejudicing the public perception of their impartiality. We must

also not forget that judges may have to adjudicate on disputes involving Parliament or MPs. The recent appeal from the decision of the Information Commissioner about MPs' expenses is an example.²¹

These concerns were expressed in the judiciary's response to the House of Lords' Constitution Committee and by the Lord Chief Justice in his Review. It is noteworthy that appearances by judges before Parliamentary Committees in other Commonwealth common law countries which share our legal and judicial traditions, but where there has been a greater separation of powers, are much less frequent. In Canada they are almost unknown. It is up to judges not to allow themselves to be lured into dangerous territory, territory which members of the legislature might wish to tempt them into. A request for judicial assistance from the House of Lords' Constitution Committee when it was inquiring into relations between the executive, the judiciary and Parliament was appropriate. So was one from the House of Commons' Select Committee on Constitutional Affairs when it was inquiring into the creation of the Ministry of Justice. Requests for views on the scope of the Human Rights Act and whether it needs amendment are not appropriate.

I have referred to the fact that a stated aim of the changes introduced by the CRA was to increase the separation of powers in our constitutional arrangements. There has, however, as yet been little consideration of the implications of this on the matters upon which it is appropriate for judges to comment to Parliamentary Committees or the powers of such Committees *vis a vis* judges. Do the changes in the 2005 Act and the increasingly partisan nature of matters connected with the administration of justice mean that the boundary of what is constitutionally appropriate and permissible must be revisited? If so, will the constitutional changes mean that the boundary must be redrawn? The increase in the separation of powers and in the partisan nature of debates about the administration of justice tends to suggest that it may not be appropriate for judges to comment on certain matters upon which they have done so in the past. The administrative responsibilities of the Lord Chief Justice under the CRA and role of the judiciary in

²¹ The decision was given on 16 May 2008: *Corporate Officer of the House of Commons v The Information Commissioner & Ors* [2008] EWHC 1084 (Admin)

the administration of the court system within the partnership between the Lord Chief Justice and the Lord Chancellor about the operation of HMCS mean that matters upon which comment by the Lord Chief Justice or his delegates would have been inappropriate in the past, are now appropriate, in part because of the legitimate interest in explanatory accountability for the judiciary's part in the new partnership.

Finally, I return to the point from which I started. In the new constitutional structure, do judges need to be more circumspect in what they say, whether in lectures, to Parliamentary Committees, or in advice and comment to government? I suggest that careful attention needs to be given to the questions I asked earlier. In summary, how does the judiciary play an appropriate role in the modern state without risking the impartiality that is fundamental to its core responsibility of resolving disputes between citizens and between citizens and the state? The risk is that the judiciary will be seen by others, in particular a media used to painting issues in stark rather than nuanced colours, as having policy preferences. If so the judiciary will be seen as just another "player" in the political and policy-formation processes. I do not have an answer to the question save to say that any role which puts at risk the public perception that the judiciary is impartial, and that it will approach any legal question on which it has to adjudicate impartially and in accordance with the rules of statute and common law, is inappropriate. The pressure on the judiciary is to behave in ways which risk making it just another player in the political process. The opportunity is to fashion a constitutional role that is appropriate in a modern democracy.

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