Should Judges conduct public inquiries?

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A. Introduction

I am honoured to have been invited to give the fifty-first Lionel Cohen lecture. My discussions with the Dean about a topic indicated that a public law subject was likely to be of more general interest than a private law one. Of the possibilities we discussed, his preference was for something on public inquiries, and this does indeed seem an appropriate subject for a Lionel Cohen Lecture.

Why is this so? First, both Britain and Israel have regularly had recourse to inquiries to address widespread public disquiet about a matter. In Israel notable ones are conducted by a judge and under the procedure established by the Commissions of Inquiry Act 1968. In Britain inquiries are conducted by retired civil servants, distinguished legal practitioners and academics as well as by judges, and may be statutory[1] or non-statutory. The Israeli Act, in part based on the United Kingdom's Tribunals of Inquiry Act 1921 and the 1966 Report of the Royal Commission chaired by Sir Cyril Salmon,[2] provides for such an inquiry when it appears to the Government that a matter of vital public importance requires clarification. In both countries the

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[1] As well as the Tribunals of Inquiry Act 1921, there are numerous specific statutory provisions for inquiries: e.g. Health and Safety at Work Act 1974, s 14; National Health Service Act 1977, ss. 2, 87; Merchant Shipping Act 1995, ss. 268-269; Police Act 1996, s. 49. For examples of non-statutory inquiries, see n 38 below.

[2] (1966) Cmnd. 3121. There was a supplementary report on contempt (1969) Cmnd. 4078. Sir Cyril, then a member of the English Court of Appeal, later became a Lord of Appeal in Ordinary. The explanatory notes to the Israeli Bill acknowledged the influence of the 1921 Act and the Salmon

aim of such inquiries is to find out what happened, to restore the confidence of the public in a service, an organisation, or the government, and thus to draw a line under a crisis. The idealised view of a public inquiry is that it restores order and legitimacy to institutions and serves as an extra-Parliamentary means of ensuring public accountability.

Secondly, in 1966, shortly before the publication of the report of his Royal Commission, Sir Cyril delivered his Lionel Cohen lecture on Tribunals of Inquiry.[3] He was primarily concerned with the procedures used at inquiries; about how to ensure efficiency and efficacy without imperilling fairness; about the extent to which inquiry procedure should be inquisitorial and the extent to which it should be adversarial. He also dealt briefly with "personnel" issues, stating *inter alia* that the chairman of a tribunal of inquiry must be a person holding high judicial office. He considered that "apart from assurance that having a judge as Chairman gives to the public that the inquiry is being conducted impartially and efficiently, it ensures that the powers of the Tribunal will be exercised judicially".[4]

I wish to consider the constitutional, functional and practical appropriateness of serving judges chairing or being members of such inquiries. Although not a new topic, it is a live one in Britain today. Reform is again in the air in Britain, and it may be that this time we should be looking to you for guidance. In any event British experience of how public inquiries in the last decade have been conducted and the reaction to them by legal, political and media circles, and by the public, may be of interest and possibly

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Report: see Segal, [1984] PL 206,208. Sir Cyril's Lionel Cohen lecture "Tribunals of Inquiry" (1967) 2 Israel Law Review 313 was no doubt also influential.

[3] (1967) 2 Israel Law Review 313.

[4] Ibid., at p. 323.

of some relevance to Israelis. The British experience since 1959 leads me to suggest that one should be more cautious about the use of judges for this extra-judicial task.

The constitutional and practical issues fall under five overlapping headings; "Skills and availability", "Independence and Impartiality", "Authority", "Structure and formality without the constraints of litigation", and "Achievement of Closure". Of these, "Independence and Impartiality" is the most important. Before turning to these, it is necessary to give some background about the context in which these issues fall to be considered, the different types of inquiry, and recent developments in Britain.

B. Context

In 1996 the then Lord Chancellor, Lord Mackay of Clashfern, stated that the British practice was to use judges "rather sparingly"[5] to conduct inquiries. The figures suggest otherwise, particularly in recent years. During the 20th century roughly 30% of the major Commissions and inquiries in Britain were conducted by a judge.[6] Of the 31 notable inquiries set up since 1990, 58% were chaired by a serving judge. If one includes those chaired by a retired judge the percentage goes up to 64.5%,[7] and this does not include other forms of extra-judicial activity, for example Lord Nolan's chairmanship of the Committee on Standards in Public Life.[8] I have no statistical information for Israel but Professor Shetreet states in his *Justice in Israel*[9] that judges

[5] [572] HL Deb col. 1310 (5 June 1996)
[6] 24 out of 150 Royal Commissions, 36 out of 192 Departmental Inquiries, 24 statutory inquiries under the 1921 Act. During the 20th century in Britain there have been some [366] major Commissions and inquiries, and (excluding land use planning inquiries) about 1,000 departmental inquiries on relatively narrow and limited matters: Sources: D & G Butler *20th Century Political Facts 1900-2000* updated by Claire Fox; DCA CP 12/04 "*Effective Inquiries"*Annex B.
[7] DCA CP 12/04 "*Effective Inquiries",* Annex B.
[8] His first report was produced in less than 6 months: 1995 Cmnd. 2850.
[9] (1994) Ch 22 The Judicial Role in Israeli Society, part 6.

are frequently appointed in Israel to investigate major public controversies and matters of the highest national importance.

Judges are also used for this purpose in several Commonwealth countries, but less so in the United States. In Australia, while judges have served on Commissions in the majority of States, they have not done so in Victoria because, since 1923, the judges of that state, following the view of the then Chief Justice, have refused to serve. It is their position that conducting an inquiry is not a judicial function, that it is mainly because judges have confined themselves to judicial functions that they have attained and retained a high reputation and the confidence of the people, and that judges must avoid being involved with matters which might subsequently come to them for judicial determination.[10]

In both England and Israel the position is different. Despite serious doctrinal objections to judges chairing inquiries at the centre of public debate and sometimes at the centre of intense political controversy,[11] there is a widespread belief that it can be appropriate for judges to chair inquiries because their experience and position make them particularly well suited to the role. There is no doubt that there are situations in which judges can appropriately be used to conduct an inquiry. There may be no institution other than the judiciary which can satisfactorily investigate a matter. It is undoubtedly the case that many of the judicial inquiries in Britain have succeeded in drawing a line under a crisis, in ascertaining the causes of a major accident, or in

[10] Hallett, *Royal Commissions and Boards of Inquiry* (1982) 22-25, 60-73; Barwick (1979) 53 ALJ 487, 490. Cf. Brennan (1978) 9 Fed L.Rev. 1, 10-13; Sherman, (1997) Public L. Rev. 5; Crawford & Opeskin, *Australian Courts of Law,* 4.6.

[11] Brazier, *Constitutional Practice* (1988); Drewry [1996] PL 368; Shetreet, *Judges on Trial* (1978) pp. 354-363; *Justice in Israel* (1994) Ch. 22, section 6; Stevens *The Independence of the Judiciary* (1993), *The English Judges* (2002).

making recommendations that have led to fundamental changes. One clear example is the impact of Dame Elizabeth Butler Sloss's inquiry into Child abuse in Cleveland[12] on child care law. Another, which had a significant effect on Britain's major spectator sport, was the decision, following Lord Taylor's inquiry into the Hillsborough disaster, in which 95 standing spectators at a football match were crushed to death and over 400 seriously injured, that all spectators at matches should have seats.[13]

Even in the United States[14] and Australia, where there is a constitutional bar on courts exercising non-judicial functions, there is no bar on an individual judge being appointed as a designated person to perform a non-judicial function such as conducting an inquiry. In Australia this is the case provided that it is not incompatible with judicial independence, including the exercise of that judge's judicial functions thereafter.[15] However, the frequency with which judges are so used in Britain and the reaction to certain inquiries raise questions. Has sufficient thought been given to the type of inquiry that should be conducted by a judge? Even if it is constitutionally permissible for them to be used in highly politicised situations, is it constitutionally appropriate? Can judges regularly be used in such situations without the risk of damage to the institution of the judiciary? Should judicial inquiries be used where there is a possibility of recourse to litigation or an alternative political or regulatory response?[16]

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[12] (1988) Cm. 412.
[13] Interim Report Cm. 765; Final Report Cm. 962 (1990).
[14] Slonim [1975] Connecticut Bar J. 391. See also Mason, (1953) 67 Harv. L.Rev 193.
[15] *Grollo v Palmer* (1995) 184 CLR 348*; Wilson v Minister for Aboriginal and Torres Straight Islander Affairs* (1996) 189 CLR 5 (appointing a judge to prepare a report for a Minister as a prerequisite for the exercise of a statutory discretion by the Minister was held to put the judge firmly in the echelons of administration and not sufficiently independent of the executive to be acceptable). See generally Brown (1992) 21 Fed. L.Rev. 48.
[16] Lord Hutton has stated that the question whether the issues before his inquiry (see below) should have been resolved by a defamation action and a coroner's inquest was not a matter for him: Evidence to the Public Administration Committee 13 May 2004, Q24.

Secondly, there is a practical question about the impact on the ordinary business of the courts, particularly that of our final court of appeal, the House of Lords. In recent years it has not been uncommon for two of the twelve Lords of Appeal to be engaged in inquiries at any one time and prevented from sitting judicially for very long periods, other than on rare occasions. A decade ago an official report estimated that the time of three High Court judges is taken up in extra-judicial work at any one time.[17]

At a point of crisis in Britain, almost no one except some academics,[18] questions the appropriateness of turning to a judge. Everything, however, changes in the immediate aftermath of a controversial inquiry. Debate erupts and spills far beyond the doors of the academy. This occurred in 1959 after the publication of the report of the inquiry chaired by Mr Justice Devlin (as he then was) into the way the British colonial administration in Nyasaland dealt with riots.[19] The questions asked about the fairness of the procedure used by Lord Denning in his 1963 inquiry into the Profumo affair[20] led to the establishment of the Salmon Royal Commission. In 1996 the report of Sir Richard Scott[21] into what was known as "the Arms for Iraq affair", which was critical of a number of Ministers and the Attorney-General, gave rise to an intense debate in legal, political and media circles. There was also a media frenzy after Lord Hutton published his report on 28 January 2004 into the circumstances surrounding the death

[17] Report of the Lord Chancellor's Department's Committee on the Deployment of High Court Judges, (1988).
[18] Robert Stevens has been the most prolific and iconoclastic: see *The Independence of the Judiciary* (1993), 97-101, 113-118; 170-171; *The English Judges* (2002) 28-29, 83-85; [2004] *Legal Studies* 1, 35. See also R. Brazier, *Constitutional Practice* (1988) pp. 244-5, 287; Drewry [1996] PL 368.
[19] Cmnd. 814 (1959). For a full account, see Simpson (2002) 22 OJLS 22.
[20] Cmnd. 2152 (1963), "The Security Service and Mr Profumo".
[21] February 1996 Cm 115

of Dr David Kelly,[22] the government arms expert caught up in the maelstrom between the British Government and the BBC that arose as the result of an unscripted live news broadcast about the government's dossier on Iraqi weapons of mass destruction. Lord Hutton concluded that an allegation in the broadcast that Downing Street ordered what was then rather a bland document to be "sexed up", and that the Government "probably knew" that a statement in it that Iraq could deploy its biological and chemical weapons within 45 minutes, was unfounded. Politicians, lawyers and journalists opined not only on his conclusions, but also on the appropriateness of a judge chairing such an inquiry at all or without assessors. Academics dusted off their notes or leafed through the literature and did the same.

In the past, the concerns expressed in the aftermath of an inquiry have been forgotten well before the next crisis calling for an inquiry. Will the debate rekindled in Britain by Lord Hutton's Report also die down leaving the system unchanged? Only two days after Lord Hutton reported, the government set up a new but private inquiry chaired by Lord Butler, a former Secretary to the Cabinet, to examine the intelligence evidence that led Britain into the war with Iraq. The government had previously said such an inquiry was not needed. Lord Hutton's inquiry, focussed as it was by its terms of reference on the circumstances surrounding the death of Dr David Kelly, has not drawn a line under the disquiet and the concerns about the way the government justified the war in Iraq.

Two weeks later the Public Administration Committee of the House of Commons instituted an inquiry into "Government by Inquiries", publishing a consultative "issues

[22] HC 247 (28 January 2004).

and questions paper" on 24 February. There are 23 questions, including: who should take the decision on calling an inquiry; its form and members; whether it is appropriate for judges to chair inquiries; whether the use of inquiries undermines the principle of ministerial accountability to Parliament; and whether there should be greater Parliamentary involvement. On the use of judges, the Committee asks whether the "judicial skills, required to weigh the evidence to determine guilt in the criminal court or liability in the civil court, transfer easily to inquiries". It comments that the courtroom usually requires a "black or white" answer which may not be appropriate in an inquiry.

On 6 May the Government published a document, entitled *"Effective Inquiries"*. Rather unusually, but by agreement with the Public Administration Committee, this states that it is both a response to the Committee and a consultation document in which the government seeks wider comment and discussion. The government states its position on many of the Committee's questions. For example it considers it is vital that government ministers can set up inquiries when they are needed, and that the responsible Minister should select the chairman and any other members.[23] But the paper also seeks the views of others on these matters.

On 13 May the Public Administration Committee questioned Lord Hutton about his report and its reception. This is, as far as I know, without precedent. The Committee agreed not to question him directly about his findings or to challenge his core judgment.[24] He was asked how his terms of reference had been formulated, why he had construed them as he did, why he had not considered the reliability of the

[23] DCA CP 12/04 "*Effective Inquiries",* paragraphs 12, 14, 27-33.

intelligence provided to the government, why he had not recalled the Prime Minister for further questioning, and many other probing questions. The Chairman of the Committee contrasted the press treatment before Lord Hutton reported with that afterwards. Before and during the inquiry he was seen as "sainted, a fearless forensic investigator"; afterwards he was "an Establishment lackey" unfamiliar with government or the media who had produced a "whitewash". Lord Hutton gave a robust defence to both the specific and the general criticisms.[25]

All this has been going on against a background in which the government had, on 12 June 2003, almost a month before the establishment of the Hutton Inquiry, announced a fundamental shake up at the apex of the justice system in England and Wales. It announced two reforms. The first is that the 1,400 year old office of Lord Chancellor[26] is to be abolished. The case for abolition is in part in the name of achieving a more appropriate separation of judicial power from executive and legislative power. In the background are the requirements of judicial independence from the executive and impartiality contained in Article 6(1) of the European Convention on Human Rights, which has been directly enforceable in Britain since the enactment of the Human Rights Act 1998. Secondly, also in the name of an increased separation of powers, but perhaps also as a result of the greater proportion of public law appeals, our final court of appeal is no longer to be the Judicial Committee of the House of Lords. A new Supreme Court is to be created. There is much to be said for both these reforms, although they were introduced with an awesome disregard for, and possibly even ignorance of the full implications of, what

[24] David Hencke and Michael White, *The Guardian* 4 March 2004.
[25] Evidence to the Public Administration Committee 13 May 2004, Q86;The Times 14 May 2004, p 7.

was proposed, both at the micro and the macro levels. They also exposed the fragility of Britain's constitutional arrangements.

If Britain is to have a greater separation of the judicial branch from the other two branches of government, are there implications for the use of judges in public inquiries? The government's recent consultation paper *"Effective Inquiries"* affirms its view that "it can be appropriate for judges to chair inquiries, because their experience and position make them particularly well-suited to the role."[27] But is this so in the new era? If judges are to be more separated from government and more independent, should they be less used for what can be, or can be seen to be, activity with a large political element? The consultation paper makes no reference to this issue.[28]

C. Types of Inquiry

The arguments for and against the use of judges vary and depend on the kind of inquiry involved. The subjects of inquiries vary enormously. At one end of the spectrum are factual inquiries into the causes of accidents and other disasters; "what happened" inquiries. There are also inquiries involving socio-legal policy, such as the Pearson Royal Commission on Civil Liability and Compensation, the Butler Sloss Inquiry into Child Abuse in Cleveland, and, in Israel the Tal Report on Military

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[26] This office combines the roles of Cabinet minister responsible for the Court system, legal aid, and significant parts of the justice system, Speaker of the second chamber of the legislature, the House of Lords, and Judge and Head of the Judiciary.

[27] DCA CP 12/04 "*Effective Inquiries",* para. 45

[28] The only reference to the implications of the reforms proposed in the Constitutional Reform Bill 2004 is in paragraph 28, where it is said that the requirement in the Ministerial Code that Ministers consult the Lord Chancellor about any proposals to appoint a judge to chair an inquiry will in future require the consultation of the Lord Chief Justice as part of the transfer of functions: See Schedules 1 and 2 to the Constitutional Reform Bill.

Service in Israeli Society.[29] The most famous or notorious inquiries have been those arising from alleged failures of government, the political system or organs of the state such as the army. They have come about because of public concern about the integrity of aspects of public life. In Israel notable examples are the Agranat Commission which led to the fall of the Government, the Kahan Commission into the events at the Shatilla and Sabra Refugee camps in Beirut, the Shamgar inquiry into the assassination of Prime Minister Rabin, and the Or Commission into the Israeli police force's treatment of Arab Israelis.[30]

I have noted that in Britain inquiries may be statutory or non-statutory. An inquiry under the 1921 Act must sit in public.[31] A non-statutory inquiry may sit in public as did the Scott and Hutton inquiries, but is also able to sit in private and may do so if it is considering sensitive intelligence or financial material. Lord Denning's inquiry into the Profumo affair and Sir Thomas Bingham's inquiry into the Bank of England's regulation of the Bank of Credit and Commerce were private inquiries, as is Lord Butler's inquiry into the intelligence that led Britain into the war with Iraq. But apart from this, the choice between the two does not appear to depend upon the matter to be examined.[32] Examples of notable statutory inquiries under the 1921 Act include the inquiries by Lord Widgery in 1972[33] and Lord Saville set up in 1998 into the deaths of

[29] (1978) Cmnd. 7054 (Pearson); (1988) Cm.412 (Butler Sloss). The Tal Commission reported in 2000.
[30] The Or Commission reported in September 2003.
[31] Witnesses may, however, in certain circumstances, be afforded anonymity: see Sir Ronald Waterhouse's inquiry into child abuse in North Wales (2000) HC 201 (witnesses who complained of abuse) and Lord Saville's inquiry into "Bloody Sunday" (former soldier and current and former members of the Royal Ulster Constabulary, witnesses, albeit following a judicial review, and former members of the Official and Provisional IRA).
[32] The reasons for using a non-statutory inquiry include: a desire to avoid the sub judice rule (which formally only applies to statutory inquiries); anticipation that power to summon witnesses and to certify for contempt will not be needed; the difficulties in subsequently prosecuting on the basis of evidence obtained under compulsory powers; and the procedural requirements resulting from the recommendations of the Salmon Commission.
[33] HC 220 (1972). It was set up in February and reported in April 1972.

republicans who were shot by paratroopers in Northern Ireland on Sunday 30 January 1972, a day commonly referred to as "Bloody Sunday"; and that by Lady Justice Janet Smith into the implications of the "Shipman" case in which a doctor was found guilty of murdering 15 of his patients and suspected by a Department of Health Audit of killing some 236 patients over a period of 24 years.

The Salmon Royal Commission was, as noted above, set up in part as a result of the questions asked about the fairness of the procedure used in Lord Denning's non-statutory and private inquiry into the Profumo affair.[34] The Salmon Commission recommended what can be described as an essentially "judicial" model for statutory inquiries. Its six cardinal principles for the protection of individuals gave those involved in the inquiry the right to be informed in advance of any allegations, and the substance of the evidence against them and any possible criticisms, and a full opportunity of testing such evidence with the assistance of lawyers, and of responding to criticisms which were communicated by what came to be known as "Salmon" letters.

Although some of the Salmon Commission's recommendations have been implemented administratively, in Britain, unlike Israel, there has been no legislation.[35] The reasons for this are complex, but primarily stem from a view that the procedures recommended were cumbersome, not suited to what is, essentially an inquisitorial process, and that no single procedural framework can be devised for all kinds of

[34] Cmnd. 2152 (1963).
[35] The Government's Response is in Cmnd. 5313 (1973)

inquiry.[36] As time passed this view hardened. After the report of the Inquiry into the Crown Agents in 1982,[37] statutory tribunals of inquiry under the 1921 Act were not used for 14 years. Non-statutory inquiries were increasingly used because it was thought they afforded greater flexibility and efficiency,[38] despite the fact that such inquiries have no power to compel the attendance of witnesses or to refer those obstructing them to the courts for contempt. Eleven of the thirty notable inquiries since 1990 (36%) have been non-statutory.[39] Of these non-statutory inquiries, seven (64%) were conduced by a single person, all but two by a judge. Since Sir Richard Scott's 1996 non-statutory inquiry into the "Arms for Iraq" affair, however, four statutory tribunals of inquiry have established.[40] Both the time taken by these inquiries and their cost has increased beyond expectation. Lord Denning conducted his 1963 Inquiry over the summer vacation; Sir Richard Scott took 4 years and cost over £7 million. Lord Saville has been going for 6 years so far and the estimated cost of the inquiry is £155 million.[41]

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[36] Council on Tribunals *Advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by Ministers* (July 1996) The Council was asked to examine the matter in the light of the Scott Report on the "Arms for Iraq" affair (1996) Cm. 115, on which see below.

[37] (1978) HC 48 "The extent to which the Crown Agents lapsed from accepted standards of commercial or professional conduct as financiers on their own account in the years 1967-74".

[38] Sir Richard Scott's inquiry into "Arms for Iraq" (1996) Cm. 115, set up in 1992 following the collapse of a criminal prosecution. Other examples include Lord Bingham's Inquiry into the Supervision of the Bank of Credit and Commerce International which reported in 1992; Lord Phillips' inquiry into BSE, the so-called Mad Cow Disease, which led to the slaughter of hundreds of thousands of cows and had appalling consequences for our farming industry which reported in October 2000 HC 1999-2000 No 887, and Lord Hutton's inquiry into the circumstances surrounding the death of Dr. David Kelly, HC 247 (28 January 2004).

[39] DCA CP 12/04 "*Effective Inquiries",* Annex B.

[40] Lord Cullen on the Dunblane School Massacre (1996) Cm 3386; Sir Ronald Waterhouse on Child Abuse in North Wales (2000) HC 201; Lord Saville on "Bloody Sunday"; Lady Justice Smith on the Implications of the Shipman case.

[41] Of the notable inquiries since 1990 listed in an Appendix to DCA 12/04, the time taken has varied from 3 months (Sierra Leone Arms Investigation) to 10 years (Mirror Group Newspapers, an inspection under the Companies Act, delayed *inter alia* by a substantial and protracted criminal prosecution), and the cost from £600,000 (Bingham) to an estimated £155 million (Saville Inquiry). The majority cost well over £1 million.

The recent scrutiny of inquiries by the media and the Public Administration Committee is not concerned with all types of inquiry but has tended to focus on those about alleged failures of government or the political system. The Public Administration Committee has stated that it will not consider accident inquiries or inquiries by Commissions or Committees of experts producing proposals for public policy reform. The Government's consultation paper has a broader concern, listing accidents, deaths that should not have occurred, outbreaks of disease, and allegations of misconduct as events that might trigger an inquiry.[42] Neither the government nor the Public Administration Committee, however, appear interested in the many inquiries that produce proposals for public policy reform.[43] The Government's consultation paper states that inquiries do not usually investigate broad government policy.[44] Perhaps this is because such inquiries have been used less frequently in the last twenty years.[45] It does not, however, address the fact that even inquiries into accidents and deaths may get into broad areas of policy because the underlying public disquiet may concern such policy. Two notable British examples are the Scarman Inquiry into riots in Brixton in 1981 and the MacPherson Inquiry into the police's investigation of the murder of a black teenager.[46] Both considered and dealt with issues of racism in the Metropolitan police.

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[42] Para 3.

[43] E.g. the Radcliffe Commission on Income Tax (1955), the Donovan Commission on Trade Unions (1968), the Finer Commission on the Press (1977), the Pearson Commission on Civil Liability and Compensation (1978), the Warnock Committee on the Fertilisation of human embryos (1984). For recent examples see n. 45 below.

[44] Para. 136.

[45] Such inquiries were often by Royal Commissions. None were set up while Margaret Thatcher was Prime Minister (1979-90). In 1991 her successor, John Major (1990-97), appointed one on Criminal Justice, chaired by Lord Runciman (1993, Cm 2263), and in 1997 Tony Blair (1997 -) appointed one to examine the system of long-term care for the elderly, chaired by Professor Sir Stewart Sutherland (1999) Cm. 4192-1, and one, chaired by Lord Jenkins of Hillhead, to recommend a new broadly proportional system of voting for elections to the Westminster Parliament (1998, Cm 4090). In 1999 a Royal Commission chaired by Lord Wakeham was established to report on the role, functions, composition and mode of selection of the second chamber of the legislature (2000, Cm. 4534).

[46] *The Scarman Report* (1986) Cmnd. 8427 (Pelican ed 1986); *The MacPherson Report* (1999) Cm. 4262.

D. Skills and availability

(i) Judges have the appropriate skills

The argument most often put is that Judges are experienced and skilled in the sifting and evaluation of evidence, and in analysing material in a rational way. Although inquiries require an inquisitorial approach, the difference between this and court procedure has been reduced since the introduction of the new civil procedure rules. There has been "a fundamental transfer in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts", so that case-management is now done by judges.[47] Moreover, the significant increase in public law work in the courts, whether by way of the judicial review of administrative action or otherwise, means that judges, and particularly appellate judges, are more familiar with the needs of, pressures upon, and strengths and weaknesses of the different parts of the public service.

The "skills" argument is strongest where the task of the inquiry is solely to find facts. It is less compelling where issues of social or economic policy with political implications are involved. Lord Wilberforce, whose 1972 inquiry into the pay dispute in the coal industry attracted much criticism as recommending an inflationary pay settlement, said that judges are not trained to handle these issues and may not have enough of a background to avoid pitfalls.[48] In retrospect he considered that it was naïve to have interpreted the terms of reference broadly and not to have thought out the political implications of any recommended award. Even in the context of fact-

[47] Lord Woolf's *Access to Justice Final Report* (1996) Chapter 1.
[48] (1972) Cmnd. 4903. See the discussion in Wilberforce, *Reflections on my Life* (2003) pp. 77 ff

finding, the "skills" argument is hardly conclusive. An experienced, senior lawyer will have the same forensic skills, as will a retired judge. There are many examples of significant inquiries in Britain that have been successfully chaired by others.[49] Academic lawyers may have the forensic skills, and also a greater familiarity with non-adversarial processes. Professor Sir Ian Kennedy's successful inquiry into the care of children receiving complex cardiac services at the Bristol Royal Infirmary developed new approaches including the reception of expert evidence from panels that` were able to discuss the matter, and using a series of seminars led by a facilitator on the key issues to develop its recommendations.[50]

In any case experience in the evaluation of evidence and in analysing material, does not immunise a person from criticism, particularly where that person has conducted the inquiry on his own. Both Sir Richard Scott and Lord Hutton were criticised for setting out the facts at great length but for weaknesses in the analysis. Sir Richard Scott's report was said to be "disappointingly scanty" on analysis.[51] The Guardian's legal correspondent stated that "the bulk of Lord Hutton's report consists of re-printing oral evidence to the inquiry, with little analysis".[52] Moreover, there has been criticism of the understanding and handling of wider constitutional issues by judges conducting inquiries.[53] Given the political nature of the British constitution, judicial

[49] See DCA CP 12/04 *"Effective Inquiries"* Annex B. Of the 30 notable inquiries set up since 1990, 6 have been chaired by non-lawyers and 7 by legal practitioners.
[50] See Mavis Maclean A Brief Note on the Working Methods of the Bristol Royal Infirmary Inquiry 2001 28 J Law & Soc 590. (Professor Maclean was one of the three Panel members who sat with Sir Ian).
[51] Leigh & Lustgarten "*Five volumes in Search of Accountability: The Scott Report"*, (1996) 59 MLR 695.
[52] The Guardian – 29 January 2004, p. 15 (Clare Dyer). See also Ferdinand Mount *The Sunday Times* 1 February 2004, p. 15 ("six scant pages of conclusions which often bear little relation to the drift of the voluminous evidence")
[53] Leigh & Lustgarten "*Five volumes in Search of Accountability: The Scott Report"*, (1996) 59 MLR 695, 710 ff (the role of Select Committees); Lord Lester QC, quoted in *The Guardian* 29 January 2004 p. 15.

skills may not necessarily be the most appropriate where an inquiry concerns the relationship between the government and Parliament.

One way of meeting this concern is by the use of a panel rather than a single person. A major difference between Israeli Commissions of Inquiry and British practice is that a single person conducted 32.5% of the notable British inquiries held between 1990 and 2003. In 1996 the Council on Tribunals in its advice to government following the Scott Report, stated that consideration be given to using a panel particularly if the inquiry involves consideration of broad policy issues, and to using assessors if it involves technical issues.[54] It stated that wing members could provide a breadth of relevant experience, enhance public confidence in the fairness of the inquiry, and both support the inquiry chairman and provide some protection against errors of judgment.[55] This has been one of the hobby-horses of Lord Howe, a former Solicitor-General, Chancellor of the Exchequer and Foreign Secretary, and a dissatisfied witness at the Scott Inquiry.[56] Lord Hutton was asked about this by the Public Administration Committee. He said it would be inappropriate for a judge sitting alone to go into intelligence matters but he did not consider that wingmen or assessors would have assisted him on the particular issue before him.[57] He chose to have a psychiatrist participate as an expert witness rather than as an assessor so that the psychiatrist's opinion would be expressed in public.[58] While Lord Hutton's view carries great weight in relation to his particular inquiry, taken more generally the position of the Council on Tribunals and Lord Howe has merit. Deprived of the

[54] Advice to the Lord Chancellor July 1996.
[55] Ibid., para 5.16.
[56] [1996] PL 445; 569 HL Deb., cols 1267-1273 (26 February 1996).
[57] Evidence to the Public Administration Committee 13 May 2004, QQ20, 122, 131, 133, 136. He stated the issue was whether the Government "probably knew" that the intelligence concerning "the 45 minute claim" was wrong .

protection of the court system, and unable to delegate either to counsel to the inquiry or to the lawyers serving it, the benefits of "wing-members" or expert assessors to a judicial or other chairman should not be underestimated.

(ii) Judges are available

Judges are available in the sense that they can be released from ordinary judicial duties. They are also cheap in that it costs the government no more to use a judge since he or she is already being paid a salary from public funds. In May 2000 the then Lord Chancellor, Lord Irvine, stated the government's policy regarding the appointment of appellate judges to chair or carry out inquiries or reviews. He said "judges are not obliged to accept the chairmanship of difficult inquiries" but "do so out of a strong sense of public duty".[59] The public interest in having judges of exceptional quality chairing these inquiries had to be balanced against some undoubted loss of judicial resources of very high quality. He considered that the loss was manageable and that the system coped well because retired judges were willing to sit and did so quite often.

The pressure is greatest on the judicial work of the House of Lords and Court of Appeal because, notwithstanding the recent appointments of first instance High Court Judges to investigate customs prosecutions and to investigate the death of an Asian prisoner,[60] in the case of inquiries of major national importance involving central government the trend has been to appoint judges from those courts. Historically, many

[58] Evidence to the Public Administration Committee 13 May 2004,QQ 101-102.
[59] HL Deb. 11 May 2000 cols. 1715-1717. See also the High Court of Australia in *Grollo v Palmer* (1995) 184 CLR at 364 (non-judicial functions cannot be conferred on a judge without consent).
[60] Mr Justice Butterfield and Mr Justice Keith.

major inquiries were chaired by High Court judges,[61] so the effect in the UK is something akin to the "grade inflation" which is said to have occurred in schools and universities. The reason may be a diminution in the authority of the High Court, perhaps as a result of its fourfold increase in numbers since 1950. Lord Chief Justice Parker's expressed preference for appellate judges in his evidence to the Salmon Royal Commission may have also played a part. He said that "[a] trial judge spends his time trying cases up and down the country and it is important that he should not become identified with the findings of the Tribunal to be labelled as somebody who has evinced some political inclination. A Law Lord or Judge of the Court of Appeal on the other hand is more remote from the public".[62] Would a Lord Chief Justice today see remoteness as a judicial virtue?

The counter-argument is that, save in extreme circumstances, scarce judicial resources should be preserved for judicial work.[63] In the United States Chief Justice Stone said that the service of Justice Roberts on the Commission into Pearl Harbor would "put a serious crimp" in the work of the Supreme Court, increase the burden of opinion writing on other Justices, and might lead to hung courts. He opposed the appointment of Justice Jackson as the American Prosecutor at the Nuremberg War Crime Trials on similar grounds and also on principle.[64]

[61] Tribunals of Inquiry were chaired by Porter J, Cd. 5184 (1936) (leak of budget secrets); Lynskey J Cd. 7616 (1948). (bribery of a junior Minister)
[62] Royal Commission on Tribunals of Inquiry, Minutes of Oral Evidence, p. 196
[63] Winterton (1979) 10 UNSWLJ 108, 110. See also Lord Windelsham HL Deb 11 May 2000, col. 1715.
[64] Mason (1953) 67 Harv. L. Rev. 193. Justice Byrnes resigned from the Supreme Court in 1942 to become Director of Economic Stabilisation and in Australia Stewart J resigned as a Judge when appointed chairman of the National Crime Commission (Winterton 1987 10 UNSWLJ 108).

In England in 1973 Lord Hailsham said that having judges conduct inquiries "inevitably interferes with the process of law"[65] and in 1996 Lord Woolf said that conducting inquiries is "a role the judiciary do not seek but has been thrust upon them".[66] The "thrusting" has been done either by the Lord Chancellor, or by another Minister after consulting the Lord Chancellor. In the case of Scottish judges it has been done by the Lord President of the Court of Session, the Head of the Scottish Judiciary, or after consulting the Lord President. It therefore appears that the appointments are made by or after consulting the Head of the Judiciary. In the case of England and Wales, however, the position is messy because the Lord Chancellor, while Head of the Judiciary is also a senior Cabinet Minister. At present he determines whether the public interest requires that a judge be released from normal duties to conduct an inquiry, or whether the needs of the court system preclude this. It has, of course, been completely unclear whether when doing the balancing he acts as Head of the Judiciary or as Minister. Nor do we know whether there are cases in which a Lord Chancellor has decided that in a particular case the needs of the court system should prevail and someone who is not a judge should conduct a particular inquiry. It does, however, seem that only by using retired judges or part time "Recorders" and "Deputy Judges" does the British system cope with the fact that full time tenured judges are taken away from their primary function.

This will all have to be rethought when the office of Lord Chancellor is abolished. The principled consequence of the abolition of the office is that Britain should adopt the Israeli position[67] so that it is the Head of the Judiciary and not the government that selects the judge who is to conduct a particular inquiry. This was the position

[65] The Times 18 July 1973 (Speech at Lord Mayor's Annual Dinner for the Judiciary).

favoured by Sir Cyril Salmon.[68] Unfortunately, the Constitutional Reform Bill does not address this question. The judiciary have not asked for the sole power to appoint. Lord Woolf has proposed that the power to appoint be exercised concurrently by the Head of the Judiciary and the relevant government minister.[69] The government, however, is of the view that all it should be required to do is to consult the Lord Chief Justice,[70] and that this obligation should not be a legal one contained in statute but merely in a Ministerial Code of Practice.[71]

E. Independence and Impartiality

The fundamental reason for using judges to conduct inquiries is that they are independent, in the sense of being absent from direction, and generally seen (in Britain since the early part of the twentieth century) as institutionally apolitical. They are also said to command respect and authority. My understanding is that the position is not significantly different in Israel. Until about the 1920s, in Britain many inquiries into alleged scandals were conducted by Parliamentary Committees. But the inability of such Committees to put aside political considerations when conducting inquiries brought them into disrepute.[72] The powers of Parliamentary Committees to question

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[66] 572 HL Deb. Col 1272 (5 June 1996).
[67] Israeli Commissions of Inquiry Law 1968, Section 4.
[68] (1967) 3 Israel L. Rev 313, 324. Cf the Salmon Commission Cmnd. 3121 (1966) para. 73.
[69] Evidence submitted by a working party of the Judges' Council to the House of Lords Committee on the Constitutional Reform Bill. See Evidence taken before The Select Committee on the Constitutional Reform Bill 4 May 2004 Q 731.
[70] Although the Department of Constitutional Affairs is a UK department responding to a Committee of the UK Parliament, DCA CP 12/04 para 28 does not address either the Scottish dimension (necessary because of Scotland's separate legal system and separate Head of its Judiciary), or, since the House of Lords is a UK, not an English court, as the proposed Supreme Court will be, the possibility that different considerations might apply when considering the appointment of a serving Law Lord.
[71] DCA CP 12/04 para 28; Questions 730-733 put by the present Lord Chancellor Lord Falconer to Lady Justice Arden when she was giving evidence to the House of Lords Select Committee on the Constitutional Reform Bill on 4 May 2004.
[72] H Montgomery Hyde, *Lord Reading* (1967) 121 ff; Donaldson, *The Marconi Scandal* .A summary is given by Salmon, (1967) 3 Israel L.Rev. 313, 314.

civil servants are also more limited than those of an inquiry.[73] Recent experience suggests that, given tight party discipline, it is doubtful whether Parliament has the will to exercise an appropriate level of regulation over government in politically controversial matters.[74] Judges are given the authority of the state to determine disputes between citizens and between citizens and the state, and have security of tenure until the retiring age. They "are appointed because they bring to such inquiries the symbolic qualities of independence and impartiality".[75] More crudely, while it is true that judges are and are seen to be part of "the establishment", they, especially those in the highest court, are considered less likely than others to be susceptible or to appear susceptible to the government or other interest groups because they do not depend on government or other groups for advancement.

The paradox is that the independence and impartiality of judges is also seen as a reason for them not conducting inquiries. It has often been said that there are potential dangers to judicial independence when matters of acute political controversy are referred to a judge for an impartial opinion. In the words of Lord Simon of Glaisdale, "every time that a judge is called to conduct [a difficult and controversial] inquiry, he is embroiled in a controversial issue and his detachment may be compromised. Indeed the reputation of the judiciary as a whole may be compromised".[76] There are five reasons for this view.

(i) The appointment of a judge does not depoliticise an inherently political issue

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[73] In particular because of the "Osmotherly rules": Leigh & Lustgarten 1996 59 MLR 695, 711-712; Diana Woodhouse 1997 50(1) Parliamentary Affairs 24, 28-36

[74] Leigh & Lustgarten 1996 59 MLR 695, 710 ff; Woodhouse 1997 50(1) Parliamentary Affairs 24, 33ff. On Parliamentary regulation of members and its approach to the findings of the Commissioner on Standards in Public Life, see Woodhouse, [2003] PL 511, esp. 515, 522.

[75] Thompson, (1997) 50(1) Parliamentary Affairs 182, 183.

[76] [572] HL Deb Col 1282 (5 June 1996).

The involvement of a judge will not depoliticise an inherently controversial matter, and it is a mistake to raise false expectations that it will do so. Political issues cannot be resolved by the application of judicial standards and court-like procedures. In the words of Justice Blackmun in a leading decision of the United States Supreme Court, "[t]he legitimacy of the judicial branch depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action".[77] Lord Devlin, possibly scarred by the government's response to his inquiry into the riots in Nyasaland, had earlier said that in Britain "the reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it".[78] Harold Wilson considered that the appointment of Lord Denning's inquiry and Report into the Profumo affair "blurr[ed] the edge which marks the sharp definition of the functions of the judiciary, on the one hand, and the Executive and the Legislature, on the other".[79] Conducting an inquiry in the Royal Courts of Justice in the Strand or in another Court may further blur this edge.[80]

(ii) (a) Those disagreeing with a report which is non-binding, unenforceable and not subject to appeal will seek to discredit its findings by criticising the judge:

[77] *Mistretta v United States* 488 US 361, 407 (1989), cited with approval by the High Court of Australia in *Grollo v Palmer* (1995) 184 CLR at 364, n. 15 above.
[78] *The Judge* (1979), 9. (1959) Cmnd. 814. The Government rejected his findings of fact: Cmnd. 815.
[79] Quoted in DGT Williams, *Not In the Public Interest* (1965) 190. See also Wilson *The Times* 16 September 1963; Shetreet, *Judges on Trial* 359 citing Lord Gardiner (while in Opposition) and Mr Enoch Powell MP.
[80] The RCJ was used for the Hutton Inquiry and will (Times 26 May 2004, p 29) be used for Keith J's inquiry into the murder of a young Asian offender beaten to death in his prison cell by his racist cellmate. The Scott Inquiry sat in the National Liberal Club. One of the Commissions conducted by President Shamgar was held at the Israeli Supreme Court.

Conducting an inquiry does not require the judge to act as a judge because he or she does not reach a binding and enforceable decision. The process is fact finding by inquisition, unconstrained by the rules of evidence, resulting in advice or recommendations. The report is not dispositive, and there is no appeal from it.

Where a topic is politically controversial and the report is neither a binding enforceable decision nor correctable by an appeal, those disagreeing with it may be unable to resist the temptation of seeking to discredit its findings by fierce criticism of the judge. If the government or institution has been cleared the dissenters will describe the judge as an establishment lackey, as happened to Lord Hutton. If government or the institution is criticised, the judge will be described as naïve and unfamiliar with the reality of government, as happened to Sir Richard Scott and also to Sir Patrick Devlin. Lord Nolan, who chaired the Commission on Standards in Public Life, while not accepting that there is a risk of a loss of judicial independence, has stated that the danger is exposure to much wider range of attack than that to which judges carrying out normal role are subject.[81] It is said that if judges are frequently used and frequently face such criticism over time the reputation of the judiciary will be corroded. Lord Woolf has stated that since judges accept the invitations of the government to conduct inquiries on the government's behalf, notwithstanding that this means they are sometimes drawn into positions of public debate, restraint needs to be exercised by those in the executive or in the legislature who wish to criticise the judge.[82] He suggested that absent such restraint it might be necessary to dispense with what he regarded as an important public service by the judiciary, voluntarily undertaken out of a sense of public duty, because judges recognise that it is thought to

[81] "The Role of the Judge in Judicial Inquiries" [1999] Denning Law Journal 147, 156.

be in the public interest that they should do so.[83] Recent experience suggests that the appropriate restraint is exercised less frequently.

What is involved can be illustrated by the Scott inquiry. Throughout the inquiry there was press speculation about its outcome. Before publication there were many press stories about Sir Richard. He was depicted as "out of touch". After publication, in Parliament Roy Jenkins stated the inquiry was the longest running of the Whitehall farces.[84] The length of Sir Richard's report (4 volumes) was said to be shocking and Sir Richard's failure to publish a summary of his recommendations was said to be naïve.[85] Leigh and Lustgarten state that the report is **"**written so impenetrably as to be inaccessible even to well-educated people" and that "its length is excessive in that many sections could have been sharply cut with no loss of clarity or impact".[86] The procedure Sir Richard adopted was criticised as unfair, notably by Lord Howe, the Foreign Secretary at the relevant time.[87] A distinguished retired Law Lord, Lord Wilberforce, suggested that part of the problem with the report might have been that Sir Richard had not had a period in the upper reaches of the civil service and was thus unfamiliar with the way in which government works.[88] On the other side of the debate, Sir Stephen Sedley has remarked that "every step [Sir Richard] took in an endeavour to be as open as possible in completing and presenting his report became

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[82] 572 HL Deb. Col 1272 (5 June 1996). Lord Woolf is reported as See also Lord McNair in relation to Mr Justice Devlin's inquiry into the riots in Nyasaland: Simpson (2002) 22 OJLS 22, 30.
[83] 572 HL Deb. Col 1272 (5 June 1996). See above.
[84] Lord Jenkins of Hillhead: 569 HL Deb. 26 February 1996, col. 1240.
[85] R. Stevens, *The English Judges* 2002 p. 55. See also Leigh &Lustgarten (1996) "Five volumes in Search of Accountability: The Scott Report" (1996) 59 MLR 695, 713.
[86] Leigh & Lustgarten, ibid n 83 at 723; Tomkins, *The Constitution after Scott: Government Unwrapped* (1998) 12.
[87] [1996] PL 445. 569 HL Deb., cols 1267-1273 (26 February 1996).
[88] 569 HL Deb. 26 February 1996, col. 1298. John Major considered he "did not have the grasp of the workings of government necessary to put the issue at stake – the collapse of the Matrix Churchill trial - into context": *The Autobiography* (1999) 561.

the source of pre-emptive counter strikes designed to undermine it".[89] Lord Williams of Mostyn QC said there was "an officially orchestrated, mischievous, wilful campaign to undermine the judge who had done no more than his public duty",[90] and the handling of the publication of the report by the government and its Parliamentary response (on a motion to adjourn the House of Commons the government won by only one vote) was said to be "grossly partisan".[91] As to substance, Thompson observed that "Scott does indict people but he does it carefully after considering arguments for and against".[92]

(ii) (b) Those disagreeing with the limitations resulting from the terms of reference and the practice of not making findings as to civil or criminal responsibility will seek to discredit it by criticising the judge:

Criticism will also come from those dissatisfied by the limitations that result from the terms of reference of an inquiry. The families of the victims of a disaster or their lawyers will often be critical of a failure to make findings of civil liability or to deal with allegations of professional misconduct or criminal liability, even though in general British inquiries do not make findings as to legal responsibility. The government's recent consultation paper supports this general rule. It has been powerfully argued that, practice aside, as a matter of law an inquiry is precluded from

[89] In Nolan and Sedley, *The Remaking of the British Constitution* (1997) p. 28
[90] [572] HL Deb Col 1307 (5 June 1996).
[91] 569 HL Deb. 26 February 1996, cols. 1241, 1243 (Lord Jenkins of Hillhead). See also Leigh & Lustgarten (1996) 59 MLR 695, 700-701; Tomkins, *The Constitution after Scott: Government Unwrapped* (1998) 11; "Ministers accused of discrediting arms to Iraq report" The Times 8 February 1996; Scott letters The Guardian 23 February 1996 (including one from the Secretary to the Inquiry.
[92] 1997 50(1) Parliamentary Affairs 182, 185

ascribing criminal responsibility,[93] although the contrary has been held in Australia[94] and in Ireland.[95] One of the reasons for the Australian position is that the "inquiry and report are sterile of legal effect".[96] The effect of this reasoning has the curious consequence of giving an inquiry *de facto* power to attribute liability, perhaps in the absence of evidence admissible in a court, without the concurrent legal consequences. The matter may fall to be tested in an English court since there have been discussions before the Saville Inquiry as to whether it should make findings as to criminal responsibility.

(iii) Risks to independence from the fact that it is the government which sets up an inquiry, determines its terms of reference and chooses the person or persons to conduct it:

The third danger to judicial independence and impartiality is said to come from the fact that the initiative in setting up and proposing the terms of reference of such inquiries lies with government, as it does in both Britain and Israel. Given the reasons for which inquiries are established it is inevitable that the initiative should lie with government. However, as mentioned above, the fact that, in Britain, unlike in Israel, it is a government minister who selects the individual judge (albeit sometimes after consulting the Lord Chief Justice) may be seen as undermining independence, because the appointment in a sense "links" the judge with the government which

[93] Mummery (1981) 97 LQR 287. See also Murphy J's dissent in *State of Victoria v Australian Building Construction Employees and Building Labourers' Federation* (1982) 152 CLR 25, 106-110. Evidence that is inadmissible in civil or criminal proceedings may have been given to the inquiry.
[94] *State of Victoria v Australian Building Construction Employees and Building Labourers' Federation* (1982) 152 CLR 25. See also *McGuiness v Attorney-General (Vict.)* (1940) 63 CLR 73
[95] *Goodman International v Mr Justice Hamilton* [1992] 2 IR 542.
[96] *State of Victoria v Australian Building Construction Employees and Building Labourers' Federation* (1982) 152 CLR 25 at 152 (Brennan J).

made the appointment. Often government is deeply involved in the subject of the inquiry and it is not usual for one of the players to select the referee.

The determination of the terms of reference by government can also have a potential impact on judicial independence, either because to conduct an inquiry with those terms of reference has implications for the exercise of the judge's judicial functions thereafter, or for some other reason. Clearly the terms of reference are primarily for government to decide, but if judges are not obliged to conduct inquiries it is proper to expect both the Head of the Judiciary and the judge concerned to have some input into their determination. British practice varies.[97] Mr Justice Holland does not recall having a say in drafting the terms of his inquiry into an outbreak of legionnaires disease; Lord Justice Sedley, who while a Queens Counsel conducted an inquiry into the death of Tyra Henry, said he had some input but "not enough". Lord Phillips, who conducted the BSE inquiry, considers that the person conducting the inquiry ought to be involved in agreeing the terms of reference. Lord Hutton has said that he was not handed the terms of reference on a plate. They evolved: the Lord Chancellor formulated them, told Lord Hutton what he was proposing, and Lord Hutton agreed because they seemed to him to be appropriate and natural in the circumstances.[98]

(iv) Risks of perceived partiality because of the discretion as to the procedure to be adopted by an inquiry:

Fourthly, court proceedings are conducted within a clear procedural framework. Inquiries are not so conducted, although the procedure must be "fair". They are,

moreover, conducted without the support of the judicial system, its clear structure, and provision for the correction of error on appeal. I have referred to the fact that the reasons for departing from the Salmon Commission's proposals stem from a view that the procedures recommended were not suited to what is essentially an inquisitorial process, were cumbersome and that no single procedural framework can be devised for all kinds of inquiry.[99] The consequent discretion left to the judge as to the procedure to be adopted can leave those who are deprived of the protections they would have had in a court feeling, as Lord Howe did, that they have been treated unfairly.[100] Such dissatisfaction is directed at the person conducting the inquiry. Perceived deficiencies in a report, whether procedural or substantive, will follow a judge back to the bench.

(v) Risks arising from increasing recourse to judicial review during an inquiry:

Finally, there is the effect of judicial review. Inquiries are subject to control by the courts by way of judicial review, and dissatisfied participants increasingly are applying for judicial review during the course of the inquiry.[101] The fact that an inquiry is not determining issues between parties but conducting a thorough investigation into a matter has in the past meant that courts have been reluctant to

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[97] The views of the judges set out below are derived from their response to a questionnaire by S Hawthorne: see *Counsel* October 2003 page 8.
[98] Evidence to the Public Administration Committee 13 May 2004, HC 606-I, QQ. 12, 30.
[99] See Section C text at nn. 35-38 above.
[100] [1996] PL 445; 569 HL Deb., cols 1267-1273 (26 February 1996). See also the discussion of the judicial reviews of the Mahon and Saville Inquiries in section E(v) below.
[101] Sir Roy Beldam's Report on Inquiries and Overlapping Procedures (2002), set out in Appendix C to DCA CP 12/04, states that judicial review is increasingly being sought in respect of decisions taken in the course of setting up an inquiry and during it. See *R (Persey) v Secretary of State for the Environment etc.* EWHC (Admin.) 15 March 2002.

intervene.[102] Although this reluctance can still be seen,[103] recently there have been some notable successful challenges. The effect of the increasing deployment of judicial review on inquiries raises wider questions about how to balance fairness to an individual involved in an inquiry and fairness to society, i.e. the public interest,[104] but in the present context, it is said to damage the perception that the judge conducting an inquiry so challenged is impartial or that the process is fair.

There have been three successful judicial reviews of the Saville Inquiry in England[105] and one (in relation to fees) in Northern Ireland. Lord Saville sits with two distinguished retired judges from Canada and Australia.[106] The decisions that were challenged were that former soldier witnesses be identified by their surnames only, that they be identified by their full names, and that they be required to give their evidence in Londonderry. These cases concerned the personal safety of the soldiers and the courts examined the Inquiry's decisions particularly closely leaving only a very narrow margin of appreciation to the inquiry, even though the first two cases were decided on the basis of the common law rather than the right to life under Article 2 of the European Convention on Human Rights. So far sixteen judges have reviewed procedural decisions made by the Saville Inquiry and fifteen have found them wanting. The effect of the third judicial review was that the Inquiry had to move to London at great additional expense. The extent to which these judicial reviews

[102] In *Re Pergamon Press* [1971] Ch. 388, 400 Lord Denning MR stated that those conducting inquiries "must be masters of their own procedure. They should be subject to no rules save this: they must be fair". See also *Douglas v Pindling* [1996] AC 890; *Ross v Costigan* (1982) 41 ALR 319, 334 (Fed. Court of Australia).
[103] *Mount Murray Country Club Ltd v Macleod* [2003] UKPC 53.
[104] Hadfield [1999] PL 663; Blom-Cooper [2000] PL 1; [2003] PL579.
[105] *R v Lord Saville of Newdigate, ex p.B, O, U & V Times* 15 April 1999; *R v Lord Saville of Newdigate, ex p..A* [2000] 1 WLR 1855; *Lord Saville of Newdigate v Widgery Soldiers* [2001] EWCA 2048.

delayed the inquiry is not clear, but they must have had some impact. Nevertheless it is proceeding and hopes to report within the next year.[107] But what happened following an inquiry in New Zealand into an air disaster shows the devastating effect that judicial review can have on the inquiry judge. In a notable case, Mr Justice Mahon, resigned from the bench following a successful, but strongly criticised,[108] judicial review of his inquiry's finding that certain employees of Air New Zealand had engaged in a predetermined plan to deceive his inquiry into the Mt Erebus air disaster. The Privy Council, affirming the New Zealand Court of Appeal, held the finding was made without probative evidence and in breach of the rules of natural justice.[109] Sir Robin Cooke, who gave one of the judgments in the New Zealand Court of Appeal, described what occurred as "the strange and sad events on the judicial scene that followed the case, adding something akin to a Greek tragedy to that of the disaster itself."[110] However sad, the outcome was not altogether surprising. One newspaper called for Lord Saville to resign after the Court of Appeal allowed the application in the second judicial review case.[111]

(vi) Analysis of the objections based on the risks to independence and impartiality

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[106] Sir William Hoyt (Chief Justice of New Brunswick 1993-1998) and Sir John Toohey (a Justice of the High Court of Australia 1987-1998). Sir John was appointed in September 2000,replacing Sir Edward Somers, a former Justice of the New Zealand Court of Appeal who resigned.

[107] There will be horrendous time implications for the Saville Inquiry if the Court of Appeal's decision in *Three Rivers DC v Bank of England (No 6)* [2004] 2 WLR 1065 (on appeal to the House of Lords) that communications between those participating in a non-statutory inquiry and their lawyers are not privileged applies to a statutory inquiry and the Saville inquiry calls for such papers.

[108] Beck (1987) 103 LQR 461.

[109] *Mahon v Air New Zealand* [1984] AC 808, affirming [1981] 1 NZLR 618 (a decision in which all 5 members of the New Zealand Court of Appeal participated. See Black, (1982) NZLJ 37; Cato, (1982) NZLJ 94.

[110] (1983) 5 Otago LR 357, 365.

[111] *The Daily Telegraph,* quoted in Stevens *The English Judges* 2002 p. 121 n.1.

How strong are these objections? The first objection is substantially met if the government does not have the power to appoint the judge who is to undertake a particular inquiry as is the position in Israel. The second and third objections rely in part on a rather narrow and private law orientated view of the judicial function and a view of judges as a more cloistered and isolated people than they have been in recent times. There are many who do not see the process of judging on public law and constitutional issues as "neutral". Withdrawal from inquiries will not protect judges from scrutiny by those concerned that they should display the correct balance of "activism" and "deference" to the political branches of government.[112] Moreover, in the exercise of its power to review governmental and administrative action, the court's decision is dispositive only in the sense that it determines the legality of what occurred in the past. It may not be dispositive for the future. When the matter is remitted to the public body for reconsideration in the light of the decision that it did not act fairly or proportionately, the public body may be able to achieve its desired objective, the same result, by a lawful exercise its powers.[113]

The fact that there will be criticism, even sharp criticism, cannot in itself be a danger to the reputation of the judiciary. Judges cannot expect "to avoid an unpleasant assignment because of the possibility of criticism".[114] Decisions in controversial cases are increasingly criticised, and as both press and political reactions to decisions of the English Courts in immigration and sentencing matters show, the criticism is often in unmeasured and intemperate language.[115]

[112] Griffith, *The Politics of the Judiciary.*
[113] Harlow [1976] PL 116.
[114] Sir John Latham, (1955) ALJ 268.
[115] D. Oulton (1994) 21 JLS 569; R. Stevens *The English Judges* (2002) 107-110, 129-136.

These arguments also ignore the fact that in any event judges these days do much more than just sit in court. They write books, and they occasionally give interviews to members of the press. They may even give lectures. These activities are not "judging", but while there can be dangers even from a lecture – because of the risk of being seen to have prejudged an issue[116] – they are not seen as necessarily improper, or as necessarily prejudicing judicial independence or impartiality. Serving the state and its citizens by conducting an inquiry into an important public matter is equally not necessarily improper. Moreover, as Justice Brennan of the High Court of Australia has said "an undue timorousness in drawing upon judicial skills leads to the development of problem-solving machinery that is less satisfactory than it should be, and to a sense that the judiciary is unduly irrelevant to many issues of community concern".[117]

The last two arguments, the discretion as to procedure and the increasing use of judicial review against public inquiries run together. The experience in Britain since the procedural shortcomings of the Denning Inquiry into the Profumo affair led to the Salmon Royal Commission suggests that it is not possible to avoid flexibility as to procedure, and indeed such flexibility has been seen as a positive virtue. Does this and the increasing use of judicial review and its widening scope affect the reputation of the individual judge or the judiciary? A perception, let alone a finding, that a judge has not proceeded fairly or has exceeded his jurisdiction cannot do much for the reputation of that judge and inferentially that of the judiciary, particularly when painted in the bright colours of the tabloid press. But is this so different from strongly

[116] There have been reports in the Press that the Home Office considers that lectures given by Lord Steyn preclude him sitting in the in the pending appeal to the HL from *A v Home Secretary* [2003] 2 WLR 564 on the derogation from the ECHR and lawfulness of the detention without trial regime under the Anti-terrorism, Crime and Security Act 2001.

worded judgments by an appellate court when overruling the decision of a trial judge or an intermediate appellate court? In theory it may not be, but the greater visibility of inquiries and the fact that they occur outside the protective framework of the court system means that in practice it is.

Taken individually, the arguments deployed in support of the proposition that conducting inquiries will undermine the independence of the judiciary and the confidence of the public in it can be answered. Cumulatively, however, they may have force, particularly if one also takes into account the questions concerning the authority of the judge and the report. I now turn to these.

F. Authority

The authority of the report of a judicial inquiry comes from the office of the judge and his or her individual and institutional reputation for independence.[118] The non-dispositive character of an inquiry report together with the fact that there is no appeal from it within the judicial system, means that, although Lord Wilberforce considered that the findings of fact are usually "pretty invulnerable", the authority of a judicial inquiry can be undermined, and with it the authority of the judge.[119] If the authority of reports and their judicial authors is regularly undermined, the risk of damage to the authority of the judiciary itself is more than fanciful.

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[117] [1978] 9 Fed. L. Rev. 1, 3.

[118] Sedley "Inquiries: A Cure or a Disease" (1989) 52 MLR 469 ("…in areas of high controversy a judge offers a seal of credibility"). In a passage Sedley describes as heavily idealised Lord Scarman, *The Scarman Report* Pelican 1986, Introduction states that judges "have an instinctive understanding of the causes of injustice" and "a passion for uncovering injustice".

[119] See text above nn. 59-61 above for discussion of the fact that pusine judges are less likely to be appointed to conduct inquiries of major national importance than in the past and the suggestion that this may be indicative of a diminution in the authority of the High Court.

The fact that an inquiry report is not dispositive means it can be rejected by the Government or by the court of public opinion. I understand that in Israel, although the public has always accepted the facts stated in the reports, their recommendations are subject to heated public debate. Professor Shetreet suggests that an important recommendation of the Kahan Commission was in substance rejected by the government. He considers that while it was clear that the natural meaning of the Commission's recommendation was that the relevant Minister be dismissed from the Cabinet, to avoid a situation where its recommendation would be flagrantly disregarded, the Commission did not explicitly so recommend.[120]

In Britain reports have also generally been accepted by a majority of the public, the institutions scrutinized, and by the government. I have mentioned the important changes to child law and football stadia following the Butler Sloss and Taylor Reports. Following Lord Cullen's report into the Dunblane shootings, it is no longer possible legally to possess a handgun. There are, however, exceptions.

Opinion polls suggest that, notwithstanding the resignation of the Chairman and Director-General of the BBC after Lord Hutton's report, the public still trust the BBC over the Government to tell the truth by a factor of 3:1; one poll indicated that 54% of the public believed that the Government had "sexed up" the dossier on Iraq's weapons.[121] The Widgery Report on "Bloody Sunday" was regarded as unpersuasive

[120] See Shetreet, *Justice in Israel,* 485 He states that the natural meaning of the recommendation was clear.
[121] Observer, 1 February 2004, page 15; YOUGOV poll, Sunday Times, 1 February 2004.

by significant sections of opinion both in Northern Ireland and in Britain,[122] and as a result the Saville Inquiry was set up. Concerns about the way the police evidence had been prepared following the Hillsborough Stadium Football Disaster and the way it was presented to the Taylor Inquiry led to a further inquiry nine years later in which Lord Justice Stuart Smith examined whether the full facts had emerged at the earlier inquiry and concluded that any alteration to the police statements had been irrelevant to the outcome of the earlier inquiry.[123]

The role of the media in all this is crucial. But increasingly so is the role of technology. Marcel Berlins states that since all the evidence before Lord Hutton's inquiry was put on the internet the public had access to just about everything that Lord Hutton had on which to base his decision. That resulted in his findings being immediately opened up to informed criticism.[124] The public's reaction to a report may also in part depend on its perception of whom the judge is "talking" to. So it has been suggested that the Scott report was primarily addressed to the political and legal elite, and not accessible.[125] Lord Scarman, by contrast, was thought to be engaging with the public about an important social problem, and Lord Denning's Profumo Report was written in a direct way that was accessible to and understood by the public. The result was that, despite what are widely recognised to be serious procedural flaws,[126] the

[122] See Bingham, *The Business of Judging* (2000) p. 64; Boyle, Hadden, Hillyard, *Law and the State: The Case of Northern Ireland* (1975) 125; Alan Watkins, *New Statesman* 14 July 1972, p. 38; *Independent Magazine* 18 January 1992, p. 20.
[123] *Taylor Inquiry into Hillsborough* 1989 Cm 765; *Stuart Smith Inquiry* 1998 Cm 3878. See P Scraton "From Deceit to Disclosure: The Politics of Official Inquiries in the UK" (in G. Gilligan & J. Pratt eds *Crime Truth and Justice: Official Inquiry, discourse, knowledge*) Willan 2003
[124] The Guardian G2, 3 February 2004, p 9.
[125] Leigh & Lustgarten "Five volumes in Search of Accountability: The Scott Report" 1996 59 MLR 695, 723.
[126] E.g. Salmon, (1967) 2 Israel LR 313, 321-323. Cf. Nolan [1999] Denning Law Journal 147, 153-155

Profumo report was generally accepted. It may be doubted whether the reaction to it in that more deferential age would be repeated today.

Governments rejected the highly critical reports by Lord Devlin on the Riots in Nysasaland in 1959[127] - including the findings of fact adverse to the government, and Lord Radcliffe on "D" Notices in 1967.[128] A Conservative government rejected the first; a Labour government the second. A number of Sir Richard Scott's findings of fact and recommendations were rejected or finessed in the way that the Kahan Commission's recommendation was. His finding that, on sales of non-lethal arms to Iraq, there had been a change either in government policy or in its interpretation, was rejected. The implications of his conclusion that Ministers failed to inform Parliament about current policy, and that the failure "was deliberate" and the result of an agreement between the relevant ministers that no publicity would be given to the decision to adopt a more liberal policy[129] were finessed by government and by the votes of MPs, albeit subject to strict party discipline. This was because, perhaps for reasons similar to those attributed to the Kahan Commission by Shetreet, he also concluded that the ministers had not "intentionally" misled Parliament.

Where rejection is based on disagreement with an inquiry's approach to a matter of social policy or where the social implications or the cost implications of the recommendations are considered to be unacceptable, there will probably be little damage to the authority or the reputation of either the judge or the judiciary. But if, as in the case of the Devlin and Scott inquiries, a finding of primary fact or a recommendation as to personal responsibility is rejected by government or

[127] Cmnd. 814 (1959). For the Government's response, see (1959) Cmnd. 815.

Parliament, the position is different. I understand that in Israel the position in the light of an opinion of Izhak Zamir when he was Attorney-General, is that the Government can only depart from the recommendation of a Commission as to a subject of the inquiry if its decision not to do so is justified under the general principles of administrative law but that its discretion to do so is significantly wider in the case of policy recommendations.[130] In Britain, while in principle the position should be the same,[131] we have not yet had to consider the legal legitimacy of a rejection of an inquiry's recommendation, or the distinction between factual issues, personal recommendations, and policy questions. This issue is not considered in the Government's recent consultation paper. Nor is it addressed directly in the Public Administration Committee's "Issues and Questions" paper, although one question asks whether there should be a formal system for following up the recommendations of inquiries and their impact. The difficulties created by rejection have, however, been recognised for many years. In 1964 Lord Gardiner, then an opposition spokesman, suggested that if a judge is to conduct an inquiry "it ought to be upon the footing that all the political parties agree beforehand … that his findings of fact will be accepted".[132] Three years later, however, he was the Lord Chancellor in the government which rejected Lord Radcliffe's findings on "D" Notices.

Apart from rejection, a Report can be forestalled before publication either by media manipulation or spin, as occurred in the case of the Scott report, or by taking action before its publication, as is said by some to have occurred when Mr John Scarlett, a person at the centre of the post-Hutton Butler inquiry into the intelligence evidence

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[128] The Government's response is in its White Paper (1967) Cmnd. 3312.
[129] The Ministers feared that there would be strong public opposition and detriment to trading interests.
[130] Shetreet, *Justice in Israel* (1994) 486.
[131] See *Peters v Davison* [1999] 2 NZLR 164.
[132] 258 HL Deb 835 (9 June 1964)

that led Britain into the war with Iraq, was appointed head of M16 before the Butler inquiry had reported.

Another danger to authority may occur where a report or a recommendation is based on a view of the law that is not shared. In such a case there is a danger of dissenting views, which, may diminish the authority of the report and of the judge. I understand that in Israel very few disputes about the law as stated in a report have arisen following a report by a Commission of Inquiry.[133] The position differs in Britain. Some of our most senior judges and lawyers disagreed with Sir Richard Scott's statement of what the law governing public interest immunity was at the time the certificates in the Matrix-Churchill case were issued.[134] Several leading practitioners have criticised Lord Hutton's treatment of media law and in particular his interpretation of the decision in *Reynolds v Times Newspapers*.[135] Lord Lester QC has been quoted as stating that as Lord Hutton was not sitting as a Judge his comments cannot be taken as an authorative statement of existing law. He is also quoted as saying that Lord Hutton failed to state the rights and duties of broadcasters correctly, that two of the extracts quoted from *Reynolds v Times Newspapers* were inconsistent with the leading speech by Lord Nicholls, and that the more liberal speeches by Lord Steyn and Lord Hope are not referred to.[136] David Pannick QC said "there is a real

[133] The Landau Commission's conclusion about the interrogation techniques permitted for suspected terrorists is an exception.
[134] See 569 HL Deb., (26 February 1996) cols 1245 (Lord Lloyd of Berwick), 1269 (Lord Slynn of Hadley) . For Lord Bingham's view see *Makanjuola v Metropolitan Police Commissioner* [992] 3 All ER 617, 623. Retired Law Lords also expressed their views, see 569 HL Deb., cols 1265 (Lord Simon of Glaisdale), 1298 (Lord Wilberforce). The Attorney-General's advice, which Sir Richard Scott criticised, had been based on a widely held view of the law based on several CA decisions which were overruled during the course of the Scott Inquiry by *R v Chief Constable of the W Midlands Police, ex p Wiley* [1995] 1 AC 171.
[135] [2001] 2 AC 127.
[136] *Sunday Times*, 1 February 2004, p. 2; Clare Dyer in *The Guardian* 31 January 2004, p. 3. See also *The Observer* 1 February 2004: Richard Parks QC ("Hutton was unrealistic in the standard of responsible journalism he appears to set"); Anthony Scrivener QC ("he misunderstood completely media law and the law of defamation") Cf. Jonathan Caplin QC *The Times* 29 January 2004 ("a disciplined careful and objective analysis of the evidence").

danger that the report will inhibit freedom of expression and proper enquiries by the media".[137]

G. Structure and formality without the constraints of litigation

As well as authority, it is sometimes said that the use of a judge brings "dignity" to the proceedings".[138] Sir Stephen Sedley comments that a judicial inquiry can bridge the gap between government and governed, between authority and liberty, in situations where those sides have pulled apart to an extent which could damage the body politic."[139] Its "public" status borrows one of the strengths of the legal system and helps to get away from the anarchy and subjectivity of public debate without being subject to the constrictions of litigation. Pressure for an inquiry is likely to be particularly strong where there is no possibility of recourse to litigation and no ready political response.

While Sedley's argument is attractive, the discretion now left to the judge as to the procedure to be adopted means it should not be pressed too far. Since 1982 the majority view in Britain is that the Salmon Commission's six cardinal principles for the protection of individuals introduced significant and often inappropriate features of adversarial proceedings to statutory inquiries, a view that has been reinforced by the expense and length of a number of recent inquiries. The Government's recent consultation paper states that it "strongly believes" that inquiries should be investigatory, and that "the introduction of adversarial elements" which are likely to

[137] Quoted by Frances Gibb in *The Times*, 29 January 2004, p. 17.
[138] Diana Woodhouse, "Matrix Churchill: A Case Study in Judicial Inquiries" 1997 50(1) Parliamentary Affairs 24, 25
[139] Sedley, "Public Inquiries: A Cure or a Disease" (1989) 52 MLR 469, 473.

increase costs and can cause delays "should be avoided wherever possible".[140] In this respect the government would not wish there to be a return to Salmon. I have noted that the discretion left to the judge as to the procedure to be adopted can leave people feeling they have been treated unfairly. The discretion is also problematic because it gives the process an ad hoc character which can detract from the qualities commended by Sir Stephen Sedley.

The way the discretion is exercised may reflect but also mask differences of view as to the nature of inquiries and the extent to which adversarial elements should be allowed to shape procedure. In this context it is interesting to note that the Saville Inquiry has in one respect taken what can be seen as a more adversarial stance. No Salmon letters have been sent to those who may be criticised. But those involved in the inquiry – I hesitate to call them parties – have been allowed to make accusations which, if there is an evidential basis for them, will be put to those who are so accused.[141] This is a variant of the procedure, described by Sir Louis Blom-Cooper QC as sending "Smoked Salmon" letters, which he refused to permit in his inquiry into complaints about Ashford Hospital.[142] This element to some extent loosens the control of those conducting the inquiry. It may simply be an example of procedural flexibility and reflect the nature of that particular inquiry. The fact is that there are adversaries before it: those sympathetic to the demonstrators, and those sympathetic to the position of the army and police.

There are, however, indications that some restriction on the existing discretion may now be favoured. For example, the government's consultation paper asks whether the

[140] DCA CP 12/04 "*Effective Inquiries",* para.82.

limited provision for procedural rules in inquiries dealing with technical evidence should be supplemented by statutory rules of procedure on the taking of evidence, participation and representation. It states that any procedural rules would need sufficient flexibility to allow the person conducting the inquiry to do so effectively, whatever its size, form and content.[143] Neither the Salmon Report nor the Council on Tribunal's 1996 advice are, however, mentioned in the Consultation Paper and it is to be hoped that the lessons of recent history will not be forgotten.

That recent history can be summarised as follows. The statutory inquiry into the Crown Agents which deliberated for 4 years and reported in 1982 stated that its adherence to the Salmon principles did nothing to shorten an inquiry and introduced elements of adversarial litigation into a process whose purpose was to dig deep to establish the facts and the truth, rather than a contest between two sides. They believed that Sir Cyril's Commission could not have had in mind an inquiry as "wide-ranging and complex" as theirs and the nature of their inquiry caused them to depart from some of the Salmon principles. Sir Louis Blom-Cooper QC's inquiry into mistreatment of patients detained at the Ashford Mental Hospital also considered that the process of sending out what are now generally known as "Salmon letters" to those against whom allegations have been made before they give evidence was cumbersome and not appropriate in an inquisitorial inquiry. The inquiry saw some positive virtue in not using such letters at all on the ground that everyone involved should regard

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[141] Accusations have been made against many persons, including former soldiers.
[142] (1992) Cm. 2028-1, page 9.
[143] DCA CP 12/04 paras 107-110. Sir Roy Beldam had reported in 2002 that rules "could potentially be of great assistance to inquiry chairmen" Annex C to CP 12/04, para. 18 and James Dingemans QC, Counsel to the Hutton Inquiry, is reported to believe that there could be many advantages in having an over-arching statute on inquiries, setting out what the legal powers of each inquiry would be but retaining the flexibility and the distinctions between statutory and non-statutory inquiries": Times Newspaper Law Supplement, 25 May 2004 p. 5. For a succinct statement of the basic requirement for a public inquiry, see the Cory Collusion Inquiry Reports HC 470-473 1 April 2004.

themselves as potentially vulnerable to criticism. The report considered that it might be unwise for an inquiry to formulate the precise nature of potential criticisms before it has fully digested the documentary material and heard evidence. Moreover, legal representatives were increasingly arguing that satisfying this requirement required the detail and precision appropriate for proceedings in court, which in fact distorted the purpose of "Salmon" letters. [144]

Although the procedural model favoured by the Salmon Royal Commission has been strongly criticised by many, it also has passionate defenders.[145] Given the criticisms, it was not surprising that not only was there no legislative implementation of the recommendations of the Royal Commission, but that the non-statutory inquiry became the fashionable and preferred tool, despite the fact that such inquiries had no power to compel the attendance of witnesses or to refer those obstructing them to the courts for contempt. Non-statutory inquiries were thought to afford greater flexibility and efficiency.[146] Non-co-operation can, however, be a problem. A member of the government actuary's department walked out of Lord Penrose's recent inquiry into the financial affairs of the Equitable Life Assurance Company.[147] Sir Louis Blom-Cooper QC's inquiry started without statutory powers but, following non-co-operation by the prison officers union, sought and obtained them. Mr Justice Keith opened his Inquiry into the murder of a young Asian offender beaten to death in his prison cell by his

[144] (1992) Cm. 2028-1, pp. 8- 9.
[145] In particular Lord Howe of Aberavon QC. See [1996] PL 445; 569 HL Deb., cols 1267-1273 (26 February 1996).
[146] See text above nn. 35-38 above. On the practical reasons for using a non-statutory inquiry, see n. 32 above.
[147] Times 16 March 2004 (Ian Rice)

racist cellmate by stating that if the inquiry was undermined he would seek statutory powers. The Times headline was "Judge may be 'helpless' in cell murder inquiry".[148]

The Scott inquiry abandoned some of the Salmon principles, including the need to inform witnesses before they gave evidence of allegations against them and the substance of evidential support for the allegations, and the opportunity to be examined by one's lawyers and for the lawyers to cross-examine others. Sir Richard Scott's substantial qualification of the Salmon principles was based on his view that it was inappropriate to take procedures devised for adversarial process to an inquiry because an inquiry was "inquisitorial" and there were no "adversarial parties" to it. Those to be criticised in the report were, however, given the opportunity of seeing drafts in advance of publication but after the evidence had been taken. This approach reflects the doubts of the Blom-Cooper inquiry and this procedure was used in both the Macpherson Inquiry and the Companies Act Inspection into the floatation of Mirror Group Newspapers. It was in substance supported by the Council on Tribunals. It is also supported by the call for flexibility in the government's consultation paper. It is, however, difficult to see how one can preserve flexibility while providing procedural rules . The Salmon principles were meant to be guidelines and to be applied flexibly, but departure from them in the Scott inquiry attracted sharp criticism.

H. Achievement of Closure: drawing a line

The capacity of a judicial inquiry to draw a line under a crisis depends on a number of factors. The first is the extent to which the authority, independence and impartiality of

[148] The Times 26 May 2004, p, 29.

the judge conducting it remains unimpaired. This in turn depends on the questions addressed in sections D and E above.

Unless the public accepts the findings and recommendations of a report, there is a risk that the issues that led to the inquiry will continue to fester. We have seen that in Britain on occasion a report has not been accepted by a significant section of the public. Sometimes this will be the result of a perception that the judge did not address the right questions. This may be because of the terms of reference. It may be because the report is perceived to be a vehicle behind which government ministers are sheltering at the expense of others.[149] A report may also not achieve finality if it furnishes the instruments or the factual material for parliamentary and political accountability, but the political system does not take up the baton, as it has been argued it did not in the case of the Devlin and Scott Reports.

I. Conclusion

Lord Howe, adapting the words of Dennis Healey, another former Foreign Secretary, has said that the risk is that the seriously misjudged shape of the Hutton inquiry following as it did on the Scott experience, may have done for public or judicial inquiries in Britain what the Boston Strangler did for doorstep selling in Boston. He saw that as a serious loss from the British Constitutional Armoury.[150]

Lord Howe's criticism of these two inquiries is overblown and the tone of his remarks unwarranted. Judges are not obliged to accept an invitation to conduct an inquiry, but,

[149] Diana Woodhouse (1997(50(1) Parliamentary Affairs 24 suggests this was so in the case of the report on Vehicle & General Insurance, HC 133 (1972). In the case of the Penrose Report on Equitable Life HC 290 (8 March 2004), the view that no compensation was payable because there was "a regulatory system failure" rather than "failure by the regulator or individuals" was seen as sheltering the FSA and the government: see *The Times* 16-17 March 2004.

as Lord Woolf has said, have voluntarily undertaken what is regarded as an important public service out of a sense of public duty.[151] It has been argued that there are real risks to the reputation of the individual judge and the judiciary for independence and impartiality and to their authority. The cumulative weight of the arguments suggests that judges should only be asked to conduct inquiries with a strong political flavour where, as Sir Cyril Salmon suggested, and the Israeli Commissions of Inquiries Act provides, the matter is of vital public importance, and where there is really no alternative. The alternative may lie in regular legal process in courts or a coroner's inquest. Where this is not so and an inquiry is needed, the many inquiries successfully conducted by legal practitioners, and others, including retired civil servants, and academics show there will often be a good alternative to a judge.[152]

If the government nevertheless proposes that a judge be used there should be some check that this is appropriate in the circumstances of the particular inquiry. While the initiative will naturally lie with government, perhaps with the participation of the legislature, it should not be for government alone to choose the judge who is to chair the inquiry or to determine its terms of reference. The Head of the Judiciary should either, as happens in Israel, appoint the judge who is to serve, or there should be a requirement that the Head of the Judiciary and the relevant government minister concur in the appointment. While the terms of reference are primarily for government, there should also be a real opportunity for the Head of the Judiciary and the individual judge to have some input into the terms of reference. Moreover, the "managerial" fashion for "one-person" inquiries needs rethinking, particularly in the case of

[150] The Times 5 February 2004.
[151] See text above n. 82 above.
[152] Lord Woolf is reported as stating that in the future American-style non-judicial inquiries may be a better way of proceeding: Mary Riddell, *The Observer* 26 June 2004, p. 24.

politically sensitive inquiries. On this it seems there are lessons to be learnt from the Israeli experience since "one person" inquiries are hardly used.

Another area in which Britain could usefully learn from the Israeli experience is the treatment of a report once it has been delivered. One check on the risk to judicial independence that arises from the rejection of a report might be for guidance to be given as to the circumstances in which the findings of fact and recommendations of an inquiry may legitimately be rejected. This could be reinforced by a duty to give reasons for such rejection. Findings of fact and personal recommendations differ from policy recommendations and should be treated differently. In the case of policy recommendations it is perfectly reasonable for a government to have a wide discretion as to whether they should be adopted. Even for policy recommendations, however, a duty to give reasons would be useful.

A common theme in Biblical stories dealing with the period before the conduct of trials passed from God to humans is characterised by Dan Friedmann in the following way. First, a disaster occurs. The people then approach a deity for assistance. The diety informs them the disaster has been inflicted as a punishment for wrongdoing; the wrongdoer is punished (sometimes by being stoned to death). Order and legitimacy are then restored to the world.[153] Judges are certainly far from divine; sometimes they are seen as barely human. But apart from that fundamental difference Friedmann's thematic characterisation has similarities to the idealised version of the story of a judicial inquiry. However, we all know that life is far from ideal. The reality has perhaps been best characterised by John Morris QC, a former Attorney-General.

[153] *To Kill and Take Possession: Law, Morality, and Society in Biblical Stories* (2002) 11.

Discussing the Scarman and MacPherson inquiries he 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."[154] Judges should only be used to conduct inquiries where there is a vital public interest in them doing so and if they are given appropriate protective clothing against coconuts and other missiles. The protective clothing needed is not anything that would stifle wide debate about and close examination of a report by government, the media, and the public. It is provided by creating the institutional framework of an appropriate system for appointing the judicial members of inquiries, and a more structured and measured approach by government and other public bodies affected by an inquiry to its findings of fact and personal and policy recommendations.

[154] Lord Morris of Aberavon QC 648 HL Deb. Col 883 (21 May 2003), discussing the Scarman and MacPherson inquiries.