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FOR ENGLAND AND WALES

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SENIOR PRESIDING JUDGE FOR ENGLAND AND WALES

DICEY REVISITED: SEPARATION OF POWERS FOR THE 21ST CENTURY

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Can I start by saying what a privilege and pleasure that it is to be speaking at Liverpool University where my parents, sister and brother studied and where, for nine years at what was then the Faculty of Law, I taught part time. It is an even greater pleasure to recognise a few faces among you who, having listened to me 37 years ago, are prepared to listen again!

On to a quotation relevant to many of us today both in this country and in many foreign countries: *"It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage."*[1]

This concern was formulated in 1690, some 318 years ago, by an Englishman, John Locke. It is recognised to be the first espousal of the principle of the separation of powers in modern times. Yet the concept was known to Aristotle and its relevance has been debated during the years ever since. In particular, it was adopted by Montesquieu, whose writings were in turn

[1] John Locke, *Second Treatise of Civil Government.*

embraced by those who, in 1787, drew up the constitution of the United States of America, and by those who fought the French Revolution.

My constitutional law came from England's own constitutional jurist, Professor A.V. Dicey, who gave Montesquieu's theory short shrift. He recognised that the term "separation of powers" was capable of bearing different connotations. In his book *"The Law and the Constitution"* he defined it as the idea of *"preventing the government, the legislature and the court from encroaching on one another's province."*[2] He thought that Montesquieu had misunderstood the principles and practices of the English constitution on this point. The French understood it to mean that whilst the ordinary judge ought to be irremovable and thus independent of the executive, the government and its officials ought to be independent of and to a great extent free from the jurisdiction of the ordinary courts. The English, Dicey thought, understood it in a far narrower sense; it related only to the independence of the judges.

The separation of powers is the theme of today's lecture. I should also like to touch upon the Rule of Law and its relevance to the judiciary. This lecture shall not be an academic treatise. Rather, I hope to give you a judicial perspective on the recent attempts to establish a more purist separation of powers in the United Kingdom. I shall also give some thought to why this separation was thought necessary.

As students and academics, some of the recent changes to the constitution will be well known to you. Others may be less so. Many have come out of the blue with bewildering rapidity. They range from the Human Rights Act 1998 which provides that the rights set out in the European Convention on Human Rights and Fundamental Freedoms may be enforced in the domestic courts and allow the courts to declare primary legislation incompatible with the convention to the creation of a new Ministry of Justice and a Partnership Agreement, known as the framework document, reached between the Executive and the Judiciary in relation to the running of Her Majesty's Courts Service. Still to come, in twelve months, is the creation of the Supreme Court of the United Kingdom.

Many of these changes have had very real implications for the judiciary although I do not mean new laws to be taken account of during the adjudicative process. Rather, I refer to changes in the relationship between the judiciary and the Executive, and to the way in which two of the three pillars of the state relate to one another.

[2] The Law of the Constitution, Chaper 12

How did all this come about? Let me start with the background and show how the passage of the centuries developed our unwritten constitution in relation to its pivotal figure, the Lord High Chancellor.

The office of the Lord Chancellor is one of the oldest positions in government. By medieval times he had become one of the monarch's closest advisors. He was the Keeper of the Great Seal and the chief royal chaplain; so important was his position that it became an offence of high treason to slay the Lord Chancellor[3] although that does not appear to have discouraged a number of monarchs from doing just that.

As one of the King's ministers the Lord Chancellor attended the *Curia Regis,* or Royal Court. The *Curia Regis* later evolved into Parliament, and the Lord Chancellor became the prolocutor of its upper house. The Lord Chancellor became a member of the Privy Council and the Cabinet in more modern times; his role both in the Executive arm of government as a Minister and member of the Government and in the Legislature as Speaker of the House of Lords survived to the modern day.

In addition, the Lord Chancellor also gained a judicial role and so was responsible for the third branch of the state, the judiciary. In 1280 Edward I instructed his justices to examine and deal with petitions to the King. These justices formed the Court of the King's Bench. By the start of the fourteenth century the Lord Chancellor had developed his own tribunal. He would decide cases according to fairness or equity, rather than the strict principles of the common law. Thus was the High Court of Chancery created.

The Lord Chancellor also sat in the Judicial Committee of the House of Lords. He was a member of the Privy Council, the court of last resort for the British Empire, and later, the highest court for parts of the Commonwealth. He was President of the Supreme Court of England and Wales and supervised the Court of Appeal, the High Court and the Crown Court. He was President of the Chancery Division and an *ex officio* judge of the Court of Appeal. As head of the judiciary, he was responsible, personally, for every single appointment to the bench: this was a task which every Lord Chancellor undertook with great care but which was frequently criticised as lacking in transparency.

I ought to add that it was not only the Lord Chancellor that had a responsibility which over-arched more than one branch of the state. The unwritten constitution of the United Kingdom also lacks the rigid separation of powers embraced by nations such as the United

[3] Treason Act 1351

States of America in other ways. Here the legislature may confer its own powers on executive bodies such as ministers, government departments and local authorities. There is no formal limit on the powers which may be so conferred, and recent reforms mean that the judiciary is empowered to make statutory instruments, albeit with the consent of the Lord Chancellor. The European Communities Act 1972 allows European institutions to legislate in respect of the United Kingdom; the Queen retains some residual law-making powers.

On the other hand, it worked. Why then change a system which seemed to be operating smoothly? The impetus was the position of the Lord Chancellor. By 2003 the government considered him to be an historical anomaly. Operating in all three branches of state, as Speaker of the House of Lords, member of the Cabinet and judge, there was concern that the exercise of his adjudicative function could render proceedings in contravention of the European Convention on Human Rights, although I personally doubt that the British draftsmen of the Convention would have ever imagined that this might be the effect of the document which emerged from the ashes of the second World War.

And so, by press release on 12th June 2003, the Government announced that the post of Lord Chancellor would be abolished: Lord Irvine of Lairg was retiring and the new Minister, to be Secretary of State for Constitutional Affairs, would be Lord Falconer of Thoroton. Let me make it clear: the anomalous position of the Lord Chancellor had formed part of academic discussions for many years. Yet no-one was aware that the government was considering, seriously, the abolition of the office and there was no consultation around that possibility. I understand that the Queen was not asked for her views on the abolition of the monarch's closest advisor. Neither was the then Lord Chief Justice, Lord Woolf notwithstanding that it would have profound implications on his role and responsibilities.

I add a personal anecdote. On that day, I was driving home listening to the 6.00 pm news when the announcement was made. I was so shocked that I had to stop the car to think about it. My immediate reaction was that the Government simply could not alter our constitution in that way without legislation. The following day, the same realisation struck home to others and so it was that Lord Falconer became Secretary of State for Constitutional Affairs and Lord Chancellor on the basis that the latter title would be abolished by legislation; this legislation became the Constitutional Reform Act 2005.

What, then, brought about this profound change? In a statement to the House of Lords, Lord Falconer, said that the purpose of the Constitutional Reform Bill was to *"modernise and redefine the relationship between the executive, the legislature and the judiciary."* He

went on "*We want to protect and indeed enhance judicial independence, to clarify the roles of the government and the judiciary and to set out the relationship between us on an explicit and transparent basis.*"

The judiciary then embarked on a long and problematic negotiation with the government over the content of the Bill and in relation to the mechanics of the changes that would follow. So that the government would not have the opportunity to appoint a new Lord Chief Justice during this period of negotiation, Lord Woolf delayed his retirement to complete the work. In part, there was no issue. The judiciary recognised that a transparent system for judicial appointments and discipline was urgently required and long overdue. Such a system needed to be non-contentious and modern in approach. But there were other problems, including in relation to the financing of the court system. And so the judiciary and executive agreed to set out the principles of greatest importance in a joint document, now known as *"Constitutional Reform – the Lord Chancellor's judicially-related functions: Proposals",* more generally referred to as *"The Concordat".*

This document, which has no legislative effect, sets out the basic principles under which the judges and executive will relate to each other. It was conceived as an essential tool to govern relations between the executive and the judiciary, and was designed to supplement the provisions of the Act. It reflects that which Lord Falconer and Lord Woolf said in parliament, on 26 January 2004, to the effect that there needed to be a partnership (with a small 'p') between the department, the courts service (answerable to the Lord Chancellor), and the judiciary. It is the forerunner to what eventually emerged four years later. The government and the judiciary turn to it when the Act is silent.

I ought to add that the government maintained the proposal that the post of Lord Chancellor should be abolished. This did not succeed. The House of Lords tabled a successful amendment to the Bill, which had the effect of retaining the ancient title of the post, albeit with greatly reduced functions and responsibilities.

The abolition of the Lord Chancellor was resisted for many and varied reasons. Some opponents resisted the abolition of an office older than democracy, older than Parliament, older than Magna Carta and older than the Norman Conquest[4]. Others thought that the Lord Chancellor was needed to speak on the judiciary's behalf in government. Others, more practically, identified that the ancient office was enshrined in centuries of statute. Under the Regency Act of 1937, for example, the Lord Chancellor is one of five people who participate

[4] R.F.V. Heuston *"Lives of the Lord Chancellors 1940-1970"*

in determining the capacity of the Sovereign to discharge his or her duties. This could only be changed by primary legislation.

In the end the Lord Chancellor survived but with the loss of many of his powers. He is prevented from sitting in the Appellate Committees of the House of Lords[5] and the Privy Council, and he will not qualify as of right to sit in the new Supreme Court of the United Kingdom when it is created in October of next year.

Many of the leadership functions for the judiciary now belong to the Lord Chief Justice. Many of those that he still possesses are exercised, in broad terms, in conjunction with the Lord Chief. He is no longer President of the Courts of England and Wales, nor speaker of the House of Lords.

Instead, the Lord Chancellor is recommended for appointment only when the Prime Minister finds him to be "qualified by experience". This phrase is defined in the Constitutional Reform Act 2005[6] and was the subject of long debate in the House of Lords. Many of their Lordships believed that the Lord Chancellor should be a qualified legal practitioner, preferably with many years of experience at the top of his profession. This would enable him or her to constrain the government when it proposed legislation which threatened the rule of law. He or she would do this by strength of argument at the Cabinet table. Lord Cooke of Thorndon expressed his views most eloquently, saying *"[The Lord Chancellor] embodied the law of England. His – and it could be her – high status has been an enduring symbol of the commitment of the United Kingdom of the rule of law and the independence of the judiciary...[that was because] he was a senior member of the House of Lords and of Cabinet – an illustrious and universally respected lawyer who was able to speak with authority for all that the law represents."*[7]

These arguments did not carry the day. The Constitutional Reform Act did not require that the Lord Chancellor be a qualified legal practitioner. Instead, he or she may be a person who has experience as a Minister of the Crown, a member of either of the Houses of Parliament, a qualifying legal practitioner, or a teacher of law at a university. In a catch-all provision, the Prime Minister is also entitled to appoint anyone who he believes has the relevant experience[8].

[5] The Appellate Jurisdiction Act 1876 was amended by the Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No 2) 2006/1016.

[6] Section 2, Constitutional Reform Act 2005

[7] Hansard, 11th October 2004.

[8] Section 2(2)(e) of the Constitutional Reform Act 2005.

The attempted abolition of the Lord Chancellor was not the only controversial aspect of the Constitutional Reform Bill. The government also proposed the creation of a Supreme Court of the United Kingdom. This should not to be confused with the current Supreme Court which is composed of the Court of Appeal, the High Court of Justice and the Crown Court.

Conscientious students and academics will know that the ultimate judicial authority in England and Wales is the Appellate Committee of the House of Lords. Historically, the House of Lords dealt with adjudicative business as part of the ordinary sittings of the House. It was not until 1844 that a convention developed which prevented lay peers taking part in appellate work. There was, however, an isolated incident in 1883 when a lay peer, Lord Denman, gave judgement in a case concerning the recovery of penalties provided for in statute. There is no record that I have been able to find which explains why he took the highly unusual step of acting in such a way, but he did, and in fact, accorded with the dissenting opinion of Lord Blackburn[9].

The adjudicative work of the House was then carried on by those peers who held or had previously held high judicial office. Progress being progress, however, it quickly appeared that there were insufficient peers able to meet the adjudicative needs of the nation. And so in 1876 the Appellate Jurisdiction Act provided for the appointment of two Lords of Appeal in Ordinary. This statute was amended over the years to provide for the appointment of 12 Lords of Appeal in Ordinary. Other qualified peers continued to sit voluntarily.

Like the position of the Lord Chancellor, it was contended that this offended the principle of the separation of powers. In theory, Lords of Appeal in Ordinary were entitled to participate in the legislative programme of the House of Lord. The separation of powers rested on a constitutional convention that judges would not participate in the activities of the legislature, and members of the legislature would not participate in the adjudicative functions of the house.

These constitutional conventions were thought to grant insufficient protection in modern times. The Constitutional Reform Act 2005 provided for the statutory separation of the highest court from the legislature. In doing so the Supreme Court of the United Kingdom was created.

[9] *Bradlaugh v Clarke* (1883) 8 App Cas 354

Thus in October of 2009 the government will bring Part 3 of the Constitutional Reform Act 2005 into force. The Appellate Committee of the House of Lords will be abolished. Its functions will be transferred to the new Supreme Court. The most senior judges will no longer sit, albeit nominally, as part of the Legislative but will be situated at the apex of the judicial branch of state.

After all this wrangling, one might have expected that the government had fulfilled its constitutional ambitions or at least to have done so without prior consultation with those likely to be interested or affected. Not so, however. In 2007 it announced that a new Ministry of Justice was to be created, subsuming the responsibilities of the Department for Constitutional Affairs. This had been on the political agenda since 2004 when David Blunkett, then Home Secretary, had proposed splitting the Home Office. The proposals put forward in 2007 suggested that the new Ministry would deal with constitutional affairs, civil and administrative justice, the judiciary, the courts, legal aid, prisons, criminal justice, the judiciary and the administration of justice.

The judiciary were concerned that this was a constitutionally significant change to the machinery of government. The Department would have one pot of money from which to fund the court system, and the prisons. Would the Department be able to prioritise the administration of justice whilst dealing with criminal justice policy? Could it be "tough on crime and the causes of crime" as well as protecting judicial discretion in the adjudicative process?

The judiciary was put on notice of these proposals on Sunday, 21st January 2007. Lord Phillips, then the Lord Chief Justice, learnt of them in the Sunday Telegraph. There had been no consultation on a key constitutional change and no subsequent acknowledgement that this was a change with constitutional implications. Although ministerial commitment to the independence of the judiciary had been spelt out in the Constitutional Reform Act, early discussions did not produce any sufficient guarantee that the competing demands of the prison service would not impact on the duty to protect the administration of justice within the new Department.

The judiciary therefore embarked on more protracted negotiations with the government. By that time, I was the Senior Presiding Judge and represented the Lord Chief Justice on various government bodies, sitting on the Ministerial Board of the Department of Constitutional Affairs. The judicial team was led by my predecessor as Senior Presiding Judge, Lord Justice Thomas, but I was also heavily involved and I admit that my Dicey,

which had been left untouched for nearly 40 years, again became compulsory reading. The negotiations remained on-going at the time the Ministry of Justice came into being on the 9th May 2007 on which date, I resigned from the new Board of the Ministry on the basis that membership of a board responsible for prisons was not compatible with judicial office.

Over the following months long and difficult negotiations continued. Such was the vigour with which the judiciary pursued their concerns that the Select Committee on the Constitution of the House of Lords spent much of its time considering the dispute. When called before the committee to give evidence, Lord Phillips, at that time the Lord Chief Justice, warned that the new Ministry would face a situation of recurrent crisis if the judiciary's concerns were not met. Lord Justice Thomas gave evidence and said that *"Our constitution is based both on statute law and on constitutional understandings and conventions. Those understandings and conventions include reliance upon full and appropriate respect for the different positions occupied by the three branches of government...[there should always be] a proper and detailed examination, so that you come to a solution that is acceptable across the board to the executive, to the legislature and to the judiciary."*

The Select Committee on the constitution concluded that the Ministry of Justice was a major constitutional change. It noted that the creation of the Ministry of Justice had important implications for the judiciary and scolded the government for failing to "*treat the judiciary as partners, not merely as subjects of change."*[10] The Committee endorsed the views of Professor Terence Daintith, who said that the Government had *"move[d] ahead as if it was simply in a pre-2003 situation and nothing more needed to be done other than to tell people what it was going to do".*

Two working papers were put to the government as part of the negotiations on the creation of the Ministry of Justice. These covered resources, sentencing and the operation of Her Majesty's Courts Service, or HMCS. The later of these led to the agreement, in April of this year, of *"Her Majesty's Courts Service Framework Document".* This set out a partnership model for the operation of HMCS, which in April 2005 had become responsible for the administration of the Magistrates' Court, County and Supreme Courts i.e. the Crown Court, the Crown Court and the Court of Appeal.

[10] House of Lords Select Committee on the Constitution *"Relations between the Executive, the judiciary and Parliament" at page 26.*

I was heavily involved in the negotiation of this document, the final clause of which was agreed literally as the printing process was starting. The Framework Document recognises that the courts are by their very nature a shared endeavour between the judiciary and the executive. It is the judiciary who are responsible for delivering justice independently, whilst the government has overall responsibility for the justice system. HMCS is at the heart of that endeavour, enabling both parties to fulfil their side of the bargain.

The Framework Document draws on the 2004 Concordat and sets in place new structural arrangements for HMCS. These new arrangements reflect, in the Constitutional Reform Act 2005, the position of the Lord Chief Justice as Head of the Judiciary. He is now responsible for the deployment, training, welfare and guidance of the judiciary. With the Lord Chancellor he takes decisions regarding the appointment and disciplining of judicial office holders. The Lord Chancellor remains responsible to Parliament for the courts and the justice system. This includes, of course, the need to ensure that there is an efficient and effective system to support the carrying on of the business of the courts.

An effective partnership at the head of HMCS requires an open, equal and constructive dialogue between the Lord Chancellor and the Lord Chief Justice. The new structure places their relationship at the centre of that dialogue. They do not have an active role to play in the day-to-day running of HMCS, but have instead placed the leadership and broad direction of HMCS in the hands of the HMCS Board.

This new Board (which has an independent non executive Chairman) is constituted of 11 members. This includes three judicial representatives; the Senior Presiding Judge is appointed ex officio and two others are appointed by the Lord Chief Justice. The role of the judicial members of the HMCS Board is to represent the interests of the judiciary when the business of HMCS is conducted, as well as ensuring that there is appropriate judicial input insofar as the determination of HMCS policy and decision-making is concerned.

The remainder of the Board is composed of a representative of the Ministry of Justice, two non-executive directors and four executive directors, including the Chief Executive who has day-to-day responsibility for the running of HMCS. It operates by consensus with any fundamental disagreement being resolved by the Lord Chancellor and the Lord Chief Justice: so far, that mechanism has not been triggered.

Significantly, HMCS employees now have a joint responsibility to the Lord Chancellor and Lord Chief Justice for the effective and efficient running of the courts. There is a new, open

and transparent system for settling the budget for HMCS. This requires greater judicial engagement in the allocation of resources to run the courts. There is increased opportunity for the Lord Chief Justice to communicate with the government on the financial settlement for the courts made during Spending Reviews. Ultimately, however, the allocation of resources to HMCS is decided by the Lord Chancellor, although paragraph 9.4 of the Framework makes it clear that if the Lord Chief Justice has cncerns about the allocation – on the basis that he does not accept that it is sufficient to meet the Lord Chancellor's statutory duty to maintain an efficient and effective court service, he may record his position in writing to the Lord Chancellor and, if he so wishes, to Parliament.

The crux of this Partnership Agreement is the principle of joint endeavour. The efficient running of the courts service requires joint endeavour between the judiciary and the government, and this is formally recognised for the first time in the Partnership Agreement. It is the judicial office holder who administers justice at the coalface, handing out community sentences, terms of imprisonment or judgement in civil cases. The quality of adjudication is central to the administration of justice in this country. Yet it is also essential that each judicial office holder has the necessary resources to enable them to administer justice. They need the court rooms, the ushers, the clerks, the computer systems and the many hundreds of other resources which enable adjudication to take place.

It can only be right that the judiciary contributes to the leadership and direction of HMCS. Sometimes the judiciary is best placed to identify where additional resources are needed. But it requires a channel through which those needs can be communicated at the appropriate time and in the appropriate manner. The judiciary, the government and the civil service are each in favour of improving performance and efficiency across all aspects of the courts service. The HMCS Framework Agreement is the key to delivering both joint and joined-up decision-making at the administrative centre of the system.

This, however, must not come at the price of judicial independence. If I may return to Dicey, he took it as a given, an irrefutable tenet of the English constitution, that the judiciary is separate from the Executive and from Parliament. This separation has been given a statutory footing in the Constitutional Reform Act 2005, which, as I have said, now requires the Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or the administration of justice to uphold the continued independence of the judiciary[11].

[11] Section 3, Constitutional Reform Act 2005.

I must mention at this point the principle of the rule of law, for it goes hand-in-hand with the need to establish and maintain an independent judiciary. The Constitutional Reform Act 2005 states in its very first section that the Act does not adversely affect the existing constitutional principle of the rule of law, or the existing constitutional role of the Lord Chancellor in relation that principle. The Act does not define the rule of law, nor does it explain what is meant by an "adverse" effect on that principle.

Let me turn shortly to the rule of law. I promised at the start that this should not be an academic treatise. I will not analyse, therefore, what this principle means, or may be taken to mean. Instead I shall rely on Dicey, who said that the rule of law *"means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power…a man may with us be punished for a breach of law, but he can be punished for nothing else."*[12] He went on to say that the rule of law means *"equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts."*

There are myriad examples of the judiciary upholding this principle, not least the decision of the House of Lords in *A v Secretary of the State for the Home Department*[13]. It was held there that the provisions of the Anti-Terrorism, Crime and Security Act 2001 were incompatible with the European Convention on Human Rights as they permitted the detention of suspects in such a way that discriminated on grounds of nationality or immigration status. It was observed that *"Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law."*[14]

Parliament was debating the Constitutional Reform Bill at around the same time that this decision was handed down. The sentiments expressed by the Appellate Committee of the House of Lords were repeated on its floor. Peers felt very strongly that *"the rule of law… upholds the right of the minority against the majority. It upholds the right of the individual against the state."*[15]

The former Home Secretary, Charles Clarke, found this difficult to accept. In his evidence before the Select Committee he was highly critical of the approach of the Law Lords on the matter of terrorism legislation. He did not accept that the rule of law was threatened by collusion between the legislature and the judiciary. Instead, he advocated that senior judicial

[12] A.V. Dicey, Introduction to the Study of the Law of the Constitution, 1885.
[13] [2004] UKHL 56
[14] As per Lord Birkenhead
[15] Lord Kingsland, Hansard, 15th March 2005

figures should give a formal opinion on the extent to which proposed legislation complies with the European Convention on Human Rights. This should include a detailed consideration of whether the statement of compatibility, given by the Minister in support of the legislation, was valid. These two things should occur before Parliament debated that legislation, with the aim of only enacting legislation which was compliant with principles of human rights law. To do otherwise, he thought, would result in public disagreements between the three branches of state and an erosion of public confidence in the ability of the state to uphold the rule of law.

He said, and I hope that you will forgive me for the length of this quote - *"The judiciary bears not the slightest responsibility for protecting the public, and sometimes seems utterly unaware of the implications of their decisions for our security. I regard it as disgraceful that no Law Lord is prepared to discuss in any forum with the Home Secretary of the day the issues of principle involved in these matters. The idea that their independence would be corrupted by such discussions is risible...I strongly believe that the attitude of the Law Lords has to change. It fuels the dangerously confused and ill informed debate which challenges Britain's adherence to the European Convention on Human Rights. It is now time for the judiciary to engage in a serious and considered debate about how best to legally confront terrorism in modern circumstances."*[16]

There are many arguments which can be put against Charles Clarke's idea. This procedure would involve the judiciary in the legislative process in a way not previously imagined. Any Law Lord who participated in such a venture would have to excuse themself from the determination of any case which subsequently arose on this point. What would then happen to the remaining Law Lords? Would they be required to abide by the decision of the earlier Law Lords – which would surely be a breach of the right to a fair hearing before an independent and impartial tribunal, or would they depart from the earlier decision, making that determination in itself without useful purpose?

It is, of course, impossible for judges to collude with the executive on issues on which they are likely to be required to adjudicate. The Select Committee agreed with the position of the Law Lords, and said in its report that a meeting between the Home Secretary and the Law Lords *"risks an unacceptable breach of the principle of judicial independence."*

[16] Report of the Select Committee of the House of Lords *"Relations between the executive, the judiciary and Parliament" page 26 of evidence.*

I now wish to move to a slightly different topic, that of the experiences of the judiciary in exercising its new responsibilities and consequent powers. In law a Minister's powers may be exercised by civil servants without any need to establish a formal delegation of authority. This doctrine, set out in *Carltona v Commissioners for Works*[17] is wide in scope and allows nearly all types of decision-making to be undertaken by a civil servant on behalf of a Minister.

There is no equivalent doctrine for judges. The Constitutional Reform Act 2005 bestows the Lord Chief Justice with many statutory functions which were previously exercised by the Lord Chancellor. The Lord Chief Justice is entitled to delegate many of his statutory functions to other judicial office holders. Once delegated, however, that judicial office holder cannot delegate the exercise of that function to a civil servant. Despite being supported by around 100 civil servants who are based in the Royal Courts of Justice, the Lord Chief Justice and the senior members of the judiciary find that they are still required personally to exercise the functions which have been delegated to them.

Some, but not all, of these burdens belong to the judiciary for the very first time. The appointment of a Senior Presiding Judge for England and Wales is now prescribed by s. 72(2) of the Courts and Legal Services Act 1990. By that office, I am responsible to the Lord Chief Justice for the judicial management of all Crown, County and Magistrates Courts in England and Wales and of the High Court out of London: you will doubtless be relieved that I exercise that responsibility through 14 Presiding Judges each of whom is a High Court Judge. I sit as a judicial representative or observer on a number of government bodies, liaising as appropriate, with Ministers and civil servants of the Ministry of Justice and others whose work touches upon the courts. As Chairman of the Criminal Justice Council, I sit on the National Criminal Justice Board and meet regularly with the professions, the CPS and others involved in the work of the court. As Chief of Staff to the Lord Chief Justice, I sit on the Judicial Executive Board and the Judges Council both of which are chaired by the Lord Chief although I chair the Judges Council Executive Committee. I have identified my duties as a director of HMCS and, in that capacity, am particularly concerned about the financing of the courts: you do not have to be a very assiduous follower of the news to appreciate that this is a particularly challenging role at the moment. I am also the first point of contact for all matters relating to the Magistracy in England and Wales, and in my spare time, I sit as a judge of the Court of Appeal. These leadership functions are entirely new for someone who has been used to being self-employed, and self-sufficient, at the Bar. I think it fair to say that

[17] [1943] 2 All ER 560

it has taken some little time for the judiciary as a whole to become accustomed to exercising their new powers.

These new powers and responsibilities make the judiciary visible and responsible in a way which they have never been before. The administration of justice is quite properly of interest to the public, the media, parliament and the government. The public scrutinises the work of individual judges, with hearings and decisions generally open to the public, and may appeal against decisions to the appropriate higher courts.

I recognise that there is also a legitimate interest in their scrutinising our other duties. Thus, a degree of accountability for the exercise of the leadership functions of the judiciary is expected. The previous Lord Chief Justice therefore published a review of the administration of justice in March of this year, setting out the matters which are of importance to the judiciary and the administration of justice. Judges appear before Committees of the Houses of Parliament on a regular basis although the extent to which it is appropriate to do so is a matter of constant concern. Underpinning all of this is the desire to increase the public's understanding of the role of judges and the way in which we do our work.

But, and it is a big but, the judiciary must maintain and protect its independence. We are fortunate that this principle has been recognised by the Common Law of this country for many hundreds of years. Since the Act of Settlement in 1700, judges have held office during good behaviour and not at the pleasure of the Executive. More recent legislation has drawn on this ancient statute to provide that judges of the High Court and Court of Appeal continuing to hold office during good behaviour. This is subject to a power of removal exercisable by the Queen on an address presented by both Houses of Parliament[18]; this has only ever happened once and absolutely not in recent times. Judicial salaries are governed by statute[19] and protected from government cuts so that judges may not be penalised for making unpopular decisions. This may seem to be an unnecessary safeguard in modern times, but it is these precautionary principles which protect and strengthen judicial independence.

I will return now, if I may, to the theme of today's lecture, the separation of powers and its relevance to the judiciary. Whether you believe that the principle is an *"antique and rickety*

[18] Supreme Court Act 1981 section 11(3)
[19] Judges' Remuneration Act 1965.

chariot..., so long the favourite vehicle ..... for the conveyance of fallacious ideas"[20], or *"a necessary condition for the rule of law in modern society and therefore for democratic government itself,"*[21] it is irrefutable that the judiciary cannot be controlled by the Executive. The role of the judiciary has changed but it must still operate within the bounds of the constitution, however much that constitution might have been amended by statute or otherwise. The judicial arm of the state must be, and remain, independent of the Executive. As Lord Justice Nolan said, *"The proper constitutional relationship of the Executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the Executive will respect all decisions of the courts as to what its lawful province is."*[22]

This may sound like a constitutional nicety, a sop to the purists who advocate a complete separation of powers at the heart of each state. But it is as relevant today as it was in the 1700's when it was the theory of choice for Montesquieu and Locke. It is the principle which protects us from tyranny and suppression and I can only endorse Montesquieu's view that without it, *"There would be an end to everything, were the same man or the same body, whether of the nobles or the people, to exercise those three powers."*[23] The 21st century has already seen many constitutional changes and it would be foolish to pretend that the road along which we are travelling has necessarily come to an end. We must still work hard to ensure that the necessary day-to-day consultation that is required by the Framework Document, as judges consider the strategic direction of HMCS, does not blur the clear dividing line between the Executive and the Judiciary and, in particular, does not impact on judicial independence. I can only hope that Dicey would approve.

Thank you.

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[20] Robson, *Justice and Administrative Law*
[21] Henderson, *Foundation of English Administrative Law*
[22] *M v Home Office* [1992] QB 270 at 314
[23] *The Spirit of Laws* 1748