JUDICIARY OF
ENGLAND AND WALES

"The New Model Judiciary and the other two branches of the State"

The Right Hon. Sir Jack Beatson FBA*

I have been told that the phrase "New Model" in my title sounds a bit Cromwellian. But it is meant only to reflect the changes in the judiciary in the decade since the abolition of the historic office of Lord Chancellor and its re-creation as an office with a dual aspect and functions as both Lord Chancellor and a Secretary of State, which some have said are incompatible.[1]

The relationship of the judiciary and Parliament and the question of whether there should be dialogue and if so, on what basis, are live issues. On 13 October 2014, Sir Robert Rogers (now Lord Lisvane), until recently the Clerk of the House of Commons, spoke at Middle Temple on *The Courts and Parliament*. On 1 December, the Lord Chief Justice spoke at the Institute for Government on *The Judiciary, the Executive*

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* Based on talks given at the Hart Judicial Review Conference, Friday 12 December 2014 and at the University of York Law School, 1 May 2015.

1 See the discussions in the HL Select Committee on the Constitution's 6th Report of Session 2006-07, HL 151 (26 July 2007) §§57 and 63 ff., especially 68, the 13th Report of the Joint Committee on Human Rights HL 174 HC 868 (30 April 2013) §§18 – 19 and 22 – 23; and the HL Select Committee on the Constitution's 6th Report of Session 2014-15 HL 75 (11 December 2014). The duality existed from the outset, but in retrospect the first three years when the new office was as Secretary of State in a Department for Constitutional Affairs can be seen as the chrysalis stage of the transformation, from which a Secretary of State in a Ministry of Justice emerged in 2007. It is important to continue to describe the Secretary of State for Justice as the Lord Chancellor because of the constitutional and statutory responsibilities that only attach to the latter office.

and Parliament: Relationships and the Rule of Law.[2]

Lord Thomas discussed the framework and mechanisms for engagement with the other two branches of the state that have been developed since 2004 and the constitutional boundaries within which such engagement must operate. The boundaries stem from the need to ensure the institutional independence of the judiciary and the public's perception that it is independent and impartial. His thesis is that, provided those boundaries are respected, engagement does not inappropriately erode the separation of powers which the 2005 reforms were designed to achieve, and is likely to be beneficial. The fundamental distinction he drew was between engagement in the form of technical and procedural advice to the legislature and the executive about the practical consequences of proposals, and engagement about policy. He stated that the former is desirable so that if a proposal goes ahead it will work as well as it possibly can. But policy is a matter for politicians and about which judges cannot comment lest their apparent impartiality be prejudiced.

In *the Guardian*, Joshua Rozenberg summarised what Lord Thomas said, approved of the creation of the framework but made the perceptive point that the boundaries and limits between technical and procedural advice and policy "may be difficult to pin down".[3] After the lecture, he asked Lord Thomas about this, giving the example of advice about the scope of judicial review. In the light of the proposed legislation then being considered by Parliament, and the difference

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2 http://www.judiciary.gov.uk/wp-content/uploads/2014/12/institute-for-government.pdf

3 2 December 2014, http://www.theguardian.com/law/2014/dec/02/judges-politics-independence

between the two Houses, Lord Thomas made it clear that this example was one on which he could not comment, although the three branches of State needed to return to the question when the time is right.

The exchange between the LCJ and Joshua Rozenberg provides my starting point. As public lawyers well know, see eg the *Gillan* line of cases,[4] absolute certainty is a chimera, particularly in a common law country with a common law constitution.[5] The challenges in this context are to ensure that the framework for the engagement of the judiciary and the two other branches of the state enables wider appreciation and understanding of the constitutional fundamentals but does not morph into a sort of corporatism which will put strains on the institutional independence of the judiciary and on what may, in a media driven age, be more important, the public's perception of that independence.

I do not want to understate the challenge. But our experience suggests that the boundaries of engagement can be made more certain. Indeed, as far as the development and management of the relationship between the judiciary and Parliament since 2004 in relation to appearances by judges before Select Committees, they have been. I hope it is not over-optimistic to say that flesh can be put on the skeleton in a way that assists the development of a practical relationship without imperilling the constitutional fundamentals. The experience derived from

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4 *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307; *Gillan v United Kingdom* (2010) 50 EHRR 1105 at [76] – [77]; *R (T) v Secretary of State for the Home Department* [2014] UKSC 35, [2014] 2 WLR 96 at [100] – [116]; App 24629/07 *MM v United Kingdom* 13 November 2012. See also *Percy v Hall* [1997] QB 924 at 931 and 942 on the height of the threshold for finding a byelaw is invalid on the ground of uncertainty.

5 On this, see my 2009 Blackstone Lecture, "Reforming an Unwritten Constitution" (2010) 126 LQR 48, the 2009 Blackstone Lecture.

that relationship is instructive because in that area there are guidelines and a body of experience. Provided all parties continue to proceed cautiously and incrementally in that area, we should not be unduly worried about a penumbra of doubt in relation to borderline cases and circumstances.[6]

It is important that the constitutional conventions and limits which underlie the arrangements between the judiciary and the other two branches of the state have been underpinned by the provisions of the Constitutional Reform Act 2005 guaranteeing "continued judicial independence" and "the existing constitutional principle of the rule of law".[7] It is also good that those conventions and limits have been more openly articulated in the last ten years. The aim should be the further development of these constitutional conventions within the constitutional fundamentals. The Supreme Court of Canada has stated that the main purpose of constitutional conventions is to ensure that the legal framework of the constitution is operated in accordance with the prevailing constitutional values of the period.[8] If care is taken, the way those conventions develop should be no less certain than the conventions which have evolved in the almost 200 years since the Great Reform Act in 1832 began our progress to a democracy, and which in

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6 Such uncertainty is also not problematic for the purposes of the ECHR: see e.g. *Cantoni v France* [1996] ECHR Application 17862/91.

7 Sections 3 and 5. See also section 20 which excludes the functions of the Lord Chancellor that are within Schedule 7 to the CRA 2005 from the functions of ministers which can be transferred by Order in Council pursuant to the Ministers of the Crown Act 1975. Note, however, that could not and did not prevent the creation of the Ministry of Justice and the conferment of functions and powers on a new Secretary of State, the Secretary of State for Justice, which are seen by some as not sitting easily with the functions, powers and responsibilities of the Lord Chancellor. Concerns about the need consequent to preserve the due and independent administration of justice on the part of the judiciary led to them pressing for what became the *Framework Document* (2008) Cm 7350 which embodied an agreement on a "partnership" between the Lord Chancellor and the Lord Chief Justice.

8 *Re Objection by Quebec to a Resolution to Amend the Constitution* [1982] 2 SCR 791, 803.

different ways have constrained those operating in the three branches of the state since then. This experience also suggests the way forward in the context of engagement between the judiciary and the executive, an area without a clear framework and which is less developed, and to which I will return.

Before turning to all that, I should summarise what the LCJ said. At present engagement by the judiciary happens within a framework established at the time of the reforms contained in the concordat between the LCJ and the LC, the statutory duties of the LCJ to represent the views of the judiciary to the other two branches of the State,[9] and his power to lay before Parliament representations about matters relating to the judiciary or the administration of justice. The LCJ gave two recent examples of the way engagement has worked well. One was between the judiciary and the executive concerning the way criminal justice legislation dealt with crediting the time spent on remand against the sentence of imprisonment imposed.[10] The other was between the judiciary and Parliament and concerned the evidence to the Committee considering the Children and Families Bill given by the PFD about the practical feasibility of a proposal for a 26 week timetable in care and supervision cases.[11]

The LCJ considered that it is important for the two other branches of the State to be proactive in "consulting the judiciary on matters which go to the heart of the proper administration of justice while also respecting the constitutional limits of [the

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9 CRA s 7(1)(a)

10 The way that previous legislation (CJA 2003, s.240) had created errors in the calculation of credit for time served on remand "usually as a result of inaccurate or incomplete information being given to the judge" had been corrected by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (s 108, creating a new s 240ZA in the CJA 2003).

11 See the evidence in 2013 of Sir James Munby PFD to the House of Commons Committee considering the Children and Families Bill about the proposal to amend section 32 of the Children Act 1989 by introducing this timetable.

judiciary] to contribute". He considered that, provided those limits are respected, the judiciary should welcome this because "when it comes to upholding justice and the rule of law there are no "silent partners" of the constitution.

What does our experience over the last decade tell us about whether this is achievable without undermining the existing position of the judiciary in this jurisdiction, and, if so, how? First, I should note that I am acutely conscious that judges are increasingly giving talks and lectures (which, aping politicians, are increasingly being called speeches). In the last three months of 2014 interrogation of the relevant websites revealed that Supreme Court justices, judges of the Court of Appeal and High Court judges gave 25 lectures, almost three a week![12] I appreciate that for judges, the end of the second decade of post Kilmuir Rules era is, in terms of their freedom of expression, a sort of Garden of Eden. But, just as there has to be a convention about what it is appropriate for ministers and legislators to ask judges to do and say, so judges need to respect the conventions about what they should and should not deal with in their lectures and speeches. If a judge comments on a particular case or a legislative policy or any other matter in a lecture, there can be no reason in principle why he or she should not answer questions on that matter in Parliament. Moreover, where one judge has opined on a sensitive topic in this way, another judge who is asked to give evidence on it may find it difficult to mount a compelling case based on constitutional propriety for refusing.

[12] 13 by Supreme Court Justices (Lord Neuberger 5, Lady Hale and Lord Carnwarth 2, and Lords Wilson, Reed, Sumption and Toulson one each), 8 by members of the CA (the LCJ 3, Jackson LJ 2, and the MR, PFD and myself one each), and 4 by members of the High Court (Mostyn J 2, Foskett and Green JJ one each).

I turn to the concrete examples of how boundaries can become clearer. Appearances by judges before Parliamentary Committees are a relatively recent phenomenon. Before the last quarter of the twentieth century there were virtually no such appearances, and I would trace the change to the late 1990s. Between 2004 and 2006 the requests for judges grew, initially because those in Parliament considering the effect of the abolition of the old-style Lord Chancellorship and the Bill that became the CRA 2005 wished to hear the judiciary's perspective. On other topics such as extradition, sentencing and various aspects of the family justice system, the growth in the number of requests for judges was probably linked to the growing influence of Select Committees and willingness after 1997 to question traditional ways of proceeding when considering legislation and policy about the administration of justice.

As far as English and Welsh judges are concerned, between May 2006 and January 2008 there were 20 occasions on which judges at all levels of seniority gave evidence to 11 committees. There were 30 appearances by 25 judges.[13] After May 2008, there was a reduction in the number of requests, with almost none in 2009, and in the period to the 2010 election. In the four years of this Parliament there have been 31 occasions on which judges have given evidence to 18 committees, again in some

[13] The Lord Chief Justice's Review of the Administration of Justice in the Courts (March 2008), pp 78 – 79: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/report_lordchiefjustice_review_2008.pdf

more than one judge appeared. The total is 47 appearances.[14]

From the judiciary's point of view in the early days it appeared that committees were not approaching requests in a consistent way. There seemed to be an element of serendipity as to whether the senior judiciary was informed of requests before the judge was approached and whether the judge approached was the appropriate person to give evidence on the topic. There was a tendency for the clerks of committees to make direct approaches to judges whose evidence committee members wished to hear. This tended to mean that they sometimes approached a judge who had made a decision in a case on the relevant area which had received publicity in the media, who had expressed views in a lecture or at a conference, or who was known to a member of the committee. Where a direct approach was made, the office of the relevant Head of Division or the LCJ might only know about it if informed by the judge who had been invited. Sometimes, particularly on a sensitive topic, the judge invited was one who had taken a particular position in a decision or in a lecture but there was more than one judicial view on the topic. If the judge approached had no particular responsibility for an area or expertise in it he or she would, moreover, not be in a position to give a representative (or a particularly expert) view. But what that person said to the committee was likely to be taken as representing the views of the judiciary. Where the committee had not identified a particular judge, there was a tendency to ask for the LCJ or a senior judge in an area, a Head of Division, or the President of the relevant Tribunal.

[14] The figures have been derived by adding the appearances for the period between 13 October and 31 December 2014 to those given by Lord Lisvane in his lecture on "*The Courts and Parliament*".

There were also different expectations of what assistance a judge might be able to give. The Justice and the Home Affairs Committees which were most familiar with judicial witnesses had a better understanding of the constraints governing what a judicial witness could say, although, even in those committees there was variation in the approach of chairs and members. On occasion, not often it must be said, it appeared that more liberties with the conventions were taken when less senior judges were appearing. This was unfortunate because on some topics, such as what was happening at the "front line" up and down the country, the experience of circuit and district judges made them the most appropriate judge to appear. But it was those judges who were most likely to be asked about a particular case or about their view of the policy of the legislation.

Before the changes in 2004 the Lord Chancellor's Department had developed guidance for judges asked to appear. Shortly after the January 2004 "Concordat" between the judiciary and the Government, when it became clear that the LCJ would become head of the judiciary, I was asked by the Judicial Executive Board ("JEB") to bring the guidance up to date. The preparation of the guidance was done in consultation with the Parliamentary authorities, first in 2008 and again in October 2012.[15] Once the document was agreed by the JEB, it was published on the judiciary's website and brought to the attention of judges in leadership roles who were likely to be invited to appear before committees. I was also asked, together

[15] Judicial Executive Board, *Guidance to Judges on Appearances before Select Committees* (October 2012), http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/select_committee_guidance.pdf

with the private office of the relevant Head of Division, to advise whether what was sought from a judge in a particular case was within what was permitted by the conventions. The consideration of particular cases is now generally handled by the relevant private office.

Paragraph 1 of the guidance states that "such appearances should be regarded as exceptional". In terms of identifying the boundaries of what it is proper for judges to say, it has proved valuable without being unduly prescriptive. It sets out the longstanding conventions governing the appropriate parameters of judicial comment which have been important in safeguarding the independence of the judiciary. It is stated that these "are likely" to prevent commenting on the merits of individual cases, the personalities or merits of serving judges, politicians or other public figures or the quality of appointments, the merits meaning or likely effect of provisions in any Bill and the merits of government policy, and issues which are subject to government consultation on which the judiciary intend to make a formal institutional response. Although couched in general terms, it has enabled a wider appreciation of the conventions and the reasons for them.

Wider appreciation of the constitutional ground rules is important. A telling example is Charles Clarke's exasperation in 2005 with the unwillingness of the judges who decided that the detention without trial under the Anti-terrorism, Crime and Security Act 2001 was incompatible with the ECHR[16] to meet him and advise how those suspected of being terrorists could effectively be dealt with without such

[16] *A v Secretary of State for the Home Department* [2004] UKHL 56, the first of many cases called *A v SSHD*, more readily identifiable as "*Belmarsh A*".

incompatibility. He said "I have been frustrated at the inability to have general conversations of principle with law lords … because of their sense of propriety. … I think there is a view that it is not appropriate to meet in terms of their integrity. I'm not sure I agree".[17] He also said that "the judiciary bear not the slightest responsibility for protecting the public and sometimes seem utterly unaware of the implications of their decisions for our society" and "it is now time for the senior judiciary to engage in a serious and considered debate as to how best legally to confront terrorism in modern circumstances".[18] In one sense, his frustration was understandable. The reason may have been that he had not thought through the implications of discussing a particular policy that would almost inevitably be subsequently contested in the courts with the very judges who had previously ruled against the government when considering a policy designed to deal with precisely the same problem. Alternatively, he may not have appreciated the constitutional fundamentals and the reason for them.

The JEB decided to address the deficits in co-ordination and information by creating a single point of contact within the judicial system to handle requests by Select Committees and giving guidance as to procedure. The guidance contains a section on the "practicalities of giving evidence" which sets out the procedure which the LCJ hopes will be followed by the committee and the judge.[19] Where a select

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17 Interviewed by Mary Riddell in the *New Statesman* 26 September 2005, http://www.newstatesman.com/node/151599, and discussed by Marcel Berlins in the *Guardian*, see http://www.theguardian.com/uk/2005/sep/26/politics.labour

18 Evidence to Select Committee on the Constitution, 17 January 2007, answer to Q 123 http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/7011702.htm

19 JEB *Guidance to Judges on Appearances before Select Committees*, pp. 6 -8: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/select_committee_guidance.pdf

committee feels it requires a judge to appear before it, the normal process is for the committee to contact the LCJ's office. The involvement of the LCJ's private office is for administrative convenience and to enable centralised record-keeping and support for judges. It is not intended to compromise the independence of individual judges or to prevent committees hearing from particular judges. The request may thus either ask for an appropriate judge to be identified, or ask for a particular judge. Consideration can be given to the nature of the issue which the committee is addressing, whether there is a risk that the judge will be asked questions which it would be inappropriate for him or her to answer given the conventions, and what options there are for answering questions in a way which limits the risk of conflict with the judge's legitimate and proper judicial role. It also enables consideration to be given to the extent to which the judge feels able to provide evidence on the particular subject-matter, and whether the judge is being asked to appear in an individual or representative capacity.

The new arrangements have a number of advantages, to the Committee in question, to the judiciary in general, and to the judge who is asked to appear. The liaison between the clerk to the committee and the LCJ's office assists in identifying the appropriate judge or, where there is a range of judicial views or different perceptions at different points in the hierarchy, how to ensure that the committee is informed about that range. On example concerns the extent to which family proceedings involving children could and should be heard and decided in public where, as a result of discussion, three judges at different levels

appeared.[20] The second is domestic violence, where Lord Justice Wall and DJ Mornington appeared.[21] It also helps an assessment of whether oral evidence is needed, whether written evidence will or is likely to provide the committee with what it needs, or where, even if oral evidence will ultimately be needed, written evidence in advance of that will assist.

An important advantage of the liaison is to identify "no go" areas, where no judge will be able to assist, and sensitive areas where there will be limits on what can be said, but where recasting the focus of likely questions might enable the judge appearing to say more. There have been several examples of the to-ing and fro-ing between the clerks and the LCJ's private office, leading to clarification of what is and what is not possible. One example of what is not possible arose as a result of the request by Committee on the Draft Constitutional Renewal Bill for evidence from a judge on the proposals in the Governance of Great Britain White Paper.[22] The political nature of the topic meant it was not appropriate for a judge to give evidence and, in any event, the judiciary had no particular technical expertise to contribute to the matters concerning the Bill. Outright refusal is rare. What is more common is a refining of the area. Two examples of this are the Home Affairs Committee's interest in bail in murder cases during the inquiry which resulted in its 7th Report for 2007-08, *Policing in the 21st century* and the invitation to the President of the Family Division and other family judges to give evidence to the Public

[20] Sir Mark Potter PFD, Munby J and DJ Crichton, evidence to the HC Constitutional Affairs Select Committee inquiry on Family Justice 2 May 2006: http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1086/6050205.htm

[21] HC Home Affairs Committee inquiry on Domestic Violence, 22 January 2008: http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/263/8012204.htm

[22] July 2007 (CM 7170).

Accounts Committee about the work of CAFCASS.

The Home Affairs committee became interested in how judges make decisions on awarding bail to those suspected of murder as a result of a case which attracted considerable publicity. Before the hearing, the parameters of questioning were agreed and maintained. Questions about the recent case were to be avoided, as was duplication with matters covered by a government consultation on bail then in progress to which the judiciary planned to make an institutional response.[23]

In the case of the Public Accounts Committee, there was a concern that judicial witnesses would be drawn into questions of the adequacy of CAFCASS's funding and whether the services it provided were good value for the taxpayer.[24] As Lord Lisvane has stated, questioning judges about public expenditure is sensitive and can be what he described as a "rubbing-point".[25] The House of Commons and its committees will naturally expect to be able to pursue the expenditure of public money and the value for the taxpayer. In this case, as a result of the pre-hearing exchanges, it proved possible for the judges to assist the committee on the sort of benefit CAFCASS provides to the family justice system while steering clear of dangerous territory. The co-operation of the committee meant that there were very few questions which the judges felt they were unable to answer.

Another example of how the line is drawn is seen from the evidence in December

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23 See evidence of Mr Justice Fulford, 15 July 2008, in *Policing in the 21st Century*, HC 364-II, pp. 139 – 141.

24 Evidence of Sir Nicholas Wall PFD and Hedley J 12 October 2010: http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpubacc/439/10101202.htm

25 13 October 2014.

2014 by Lord Dyson MR, Sir James Munby PFD and Sir Jeremy Sullivan SPT about the effect of withdrawal of legal aid and assistance. Lord Dyson's evidence in particular illustrates the distinction made between challenging or questioning a policy, which a judge will not do, and identifying with real examples the practical consequences of adopting a policy.[26]

In setting the boundaries in these cases, the judges in question had the assistance of the guidance and, if they wished it, the assistance of officials in the Judicial Office and perhaps other judges before the hearing. They were also likely to know that the way they had identified where the line was in the particular circumstances of the topic on which they were to be questioned and the particular purpose for which their evidence was sought that they would have the support of the very senior judiciary. These are examples of the way that, even in a sensitive area, incremental steps taken cautiously, with goodwill on both sides, can avoid eroding the constitutional fundamentals. A step too far can also be followed by a careful retreat on the next occasion. The position may be less straightforward where a judge has administrative responsibilities involving significant public expenditure, such as judges who serve on the board of the Courts and Tribunals Service, "HMCTS".

Delineating the boundaries in advance does not always work. There is an example in 2008 of a Lord Justice invited to give evidence to the Joint Home Affairs and Constitutional Affairs Committee as to whether there should be legislative changes

[26] Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, HC 311 (1 December 2014). Especially QQ 263 and 264 (Lord Dyson MR), QQ 258 and 269 (Sir James Munby PFD).

to the Human Rights Act[27] and whether improvements could be made to the judicial appointments process. The pre-hearing exchanges indicated that the Lord Justice might have to decline to discuss possible future legislation, including what the role of the judiciary should be. He considered he would be unable to comment on judicial appointments because he was not a member of the JAC and was at that time participating in an appointments exercise which was in progress, and considered it inappropriate to say anything during the course of it in public about particular categories of candidate. Notwithstanding that, questions were asked and he reiterated the points that he had made. This also happened in the sentencing example I gave. The judge stood firm and the committee, while disappointed, did not press the matter.

More recently, a retired Court of Appeal judge, Sir Scott Baker, was asked to give evidence to the Home Affairs Committee's Inquiry into Extradition in the light of his review of the operation of the Extradition Act.[28] This was an example of where, despite careful exploration of the limits of what a judge could say and the fact that his views were fully expressed in his report, he was asked challenging questions. Some of these came close to impugning the *bona fides* of his panel and its independence from the Home Office. There was also a general refusal to accept that the report spoke for itself. Reading the transcript, part of the problem may have been that the judge got caught in crossfire between different views held by

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27 About which bodies qualify as "public authorities" under the Human Rights Act in the light of the decision in *YL v Birmingham CC* [2007] UKHL 27 (Lord Bingham and Baroness Hale dissenting) that a private residential home was not a "public authority.

28 The US-UK Extradition Treaty, 20th Report of Session 2010-12 HC 644, 30 March 2012: http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/644/644.pdf

members of the committee. Similar problems arose when Sir Brian Leveson PQBD gave evidence to the Culture and Media Committee about his inquiry into the press.[29]

Even these examples are instructive in showing how incremental development can work. This is because although the judges were forced to assert the boundaries at the hearing, they did so and the Committees, with a certain reluctance in the case of Sir Scott Baker and Sir Brian Leveson, had to accept this. This is one way a convention develops.[30] Parliament and government may expect what I could call "full accountability" and the opportunity to question the judicial chair of an inquiry freely because (paradoxically in the case of government which chose to appoint a judge) it does not accept that in chairing an inquiry he or she is performing a judicial function. I suggested in written evidence to the House of Lords Select Committee on the Inquiries Act last year, that unless an inquiry directly concerns the administration of justice or where there has been prior agreement about this at the times when the terms of reference are settled, a judge should not be asked to comment on the recommendations in his report or to take part in their implementation.[31]

The recent experience of Sir Scott and Sir Brian are illustrations of the emergence of a principle, whereby judges who have chaired an inquiry treat the report at the end of the process in the same way as they would treat a judgment at the end of

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29 10 October 2013: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcumeds/uc143-iv/uc14301.htm

30 See Dicey, *The Law of the Constitution* 23-24; Jennings, *The Law and the Constitution* 5th ed 1959 103-136; Marshall and Moodie, *Some Problems of the Constitution* 5th ed 1971, Ch 28-34.

31 The evidence is available at http://www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf and this point is made at §18 page 24.

litigation. While perhaps being willing to explain the procedure used, they have by and large been unwilling to be drawn into discussion of the merits of the substantive proposals or conclusions drawn. There are three good reasons of principle for adopting this as a rule. Those reasons were spelled out in the exchanges before Sir Brian's appearance and during it. First, the judge may be asked to give an opinion on a variation on a recommendation without hearing evidence, as he did when conducting the inquiry. Secondly, the judge may be drawn into political debate with accompanying risks to the perception of impartiality. In the case of the inquiries on the media and extradition, this was a clear risk. Thirdly, implementation of proposals is the shared responsibility and domain of the other two branches of the state.

Finally, I turn to engagement with the executive. In his IFG lecture the Lord Chief Justice stated that the judiciary proposes to prepare guidance for this. The Guidance is likely to cover the situation in which the judiciary might advise the executive about policy and draft Bills. It is difficult to see that there will be any material change to the basic principle. The judiciary should only express views on government policy (whether set out in consultation papers of otherwise) and legislation and draft legislation which relates to or is likely to affect the operation of the courts. In those areas the judiciary can use its institutional and individual experience not to support or challenge the policy, but to try and ensure that proposals to implement policy are as well formulated as possible and can work in practice.[32]

The basic principle suggests a constitutional boundary at the point where comment

[32] See Lord Chief Justice's Review of the Administration of Justice in the Courts, 2008 para 4.6.

moves beyond the operational, the likely effect of a proposal, and is seen as expressing views on the broad policy. And that is the rub. The boundary between broad policy and operational policy is, of course, (as those who followed the saga of the scope of tortious liability of public authorities starting with *Anns v Merton LBC*[33] know full well) notoriously difficult to pin down.

In 2008 Lord Phillips stated that "it is desirable that constructive engagement is within a clear understanding of the respective roles and responsibilities of the judiciary and of government, and that there is transparency in the sense that all the formal responses by the judiciary to consultation papers are made on terms that they can be published. The additional responsibilities given to the judiciary by the reforms in 2004 and 2005, including the responsibilities in relation to the Court Service, which was the subject of a framework agreement between the Lord Chief Justice and the Lord Chancellor, underpin the need for such engagement. As the judiciary has been given greater and more direct responsibility for its part of the state, there is a good case for it giving advice or expressing views to the executive on matters relating to its operation. By that I mean the operation of the judicial branch of the state, including court administration.

This is not revolutionary. The judiciary has regularly responded to consultations about such matters. Robert Hazell's Constitution Unit's research has identified some 20 bills and draft bills in the last 35 years on which the judiciary or individual judges

[33] [1978] AC 728. *Anns* was overruled in *Murphy v Brentwood DC* [1991] 1 AC 398.

have submitted evidence.[34] They have sometimes done so even in cases where the matter is, as are the government's proposals about judicial review, acutely controversial.[35] The response last year to those proposals stated that it is of paramount importance to avoid introducing measures that would have the effect of preventing meritorious challenges and that the government's proposals with regard to standing and legal aid caused particular concern. Timing and context are, however, fundamental. It would be wrong for the judiciary to intervene or to comment while a matter is being hotly debated in Parliament. The responses have been public, and I cannot at present see circumstances where it would be appropriate to respond in private, although it is possible that a case could be made for an "exceptional circumstances" exception. I share Lord Phillips' view that it is difficult to justify giving advice to the executive that is looked on as private, or what justification there can be for the judiciary, as an independent branch of the state, giving such advice to the executive but not being prepared to give it to a Parliamentary Select Committee. There may be no reason in principle to treat draft bills differently. It must, however, be recognised that there is a special sensitivity about the involvement at the draft bill stage of those who may later have to adjudicate on aspects of the legislation that is the result of those draft bills. There is also a need to try to identify the boundary of what can be done without imperilling the constitutional fundamentals as clearly as possible.

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34 Private communication.

35 1 November 2013: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf

All these matters will be the subject of the guidance. It will be prepared in consultation with others interested. I anticipate that it will, like the parliamentary guidance, be published. Any guidance will have to take care that the future impartiality of the judiciary, or the perception of it, is not prejudiced. But if the experience of engagement with Parliament is any indication, although there will be rocky parts, an incremental and cautious approach, leaving the opportunity to retreat if something does not work, is likely to enable greater engagement without imperilling the constitutional fundamentals.
