



LORD CHIEF JUSTICE  
OF ENGLAND AND WALES

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LORD CHIEF JUSTICE OF ENGLAND AND WALES**

**“JUDICIAL INDEPENDENCE ”**

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## **Introduction**

The topic I have chosen for this address is judicial independence.

Last year I had the pleasure of spending a few days with some of you at the Commonwealth Magistrates and Judges Association meeting in Toronto. I spoke then about the changes brought about by our Constitutional Reform Act 2005 and the Concordat between the judiciary and the Lord Chancellor that had resulted in the Lord Chief Justice replacing the Lord Chancellor as the head of the judiciary of England and Wales. These changes had been introduced six months before that meeting. I little thought that before the next year was out I would see the Lord Chancellor transformed into a Minister of Justice.

On 29 March of this year the Prime Minister, Tony Blair, announced that responsibility for the prisons and offender management would be moved from the Home Office to the Department for Constitutional Affairs, headed by the Lord Chancellor, turning that Department into the Ministry of Justice. These dramatic changes have had important implications for the independence of the judiciary, and have been the subject of comment in reports of Parliamentary Committees both the Commons and in the Lords.

Both have been critical of the way that the judges have been treated by the Government and they focus on a number of areas of significance to judicial independence. So I am going to refer in this talk to recent experience in my jurisdiction.

I am, of course, aware that any problems that we face in the United Kingdom are as nothing to the challenges faced by the judiciary in other parts of the Commonwealth. In December 2003 there was a Commonwealth Heads of Government meeting in Abuja, Nigeria, at which they endorsed the so-called Latimer House Guidelines on the relationship between the three branches of state and I am going to adopt these as the framework for this speech.

The Commonwealths Fundamental Values are expressed in the following terms:

‘We believe in the liberty of the individual under the law; in equal rights for all citizens regardless of gender, race, colour, creed or political belief; and in the individual’s inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives.’

These values can only be secured by a rigorous application of the rule of law. The rule of law is the bedrock of a democratic society. It is the only basis upon which individuals, private corporations, public bodies and the executive can order their lives and activities. And if the rule of law is to be upheld it is essential that there should be an independent judiciary.

What are the requirements of an independent judiciary?

All English judges swear an oath to administer justice ‘without fear of favour, affection or ill-will’ and I suspect that this or a similar oath is sworn by judges throughout the Commonwealth. Judicial independence requires that judges should be true to that oath. And if the rule of law is really to prevail, the individual citizen must be confident that the judge will apply the law to them without fear or favour, affection or ill-will.

They will not have that confidence, very probably with good reason, if judges are subjected to influences, pressures or inducements to decide a case one way rather than the other. A Constitution will not be satisfactory unless it contains safeguards that protect the judges against influences, pressures and inducements such as these.

This is how these principles were expressed at Latimer House:

‘An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country’.

I would add this. The rule of law will not fully prevail unless the domestic law of a country permits judges to review the legitimacy of executive action. This is increasingly becoming the single most important function of the judge in the field of civil law, at least in my jurisdiction.

At Latimer House it was stated:

‘Best democratic principles require that the actions of governments are open to scrutiny by the courts...’

I would put it even more strongly. It is not simply a matter of best practice. The rule of law requires that the courts have jurisdiction to scrutinise the actions of government to ensure that they are lawful. In modern society the individual citizen is subject to controls imposed and enforced by the executive in every aspect of life. The authority to impose most of these controls comes, directly or indirectly, from the legislature. The citizen must be able to challenge the legitimacy of executive action before an independent judiciary.

Because it is the executive that exercises the power of the State and because it is the executive, in one form or another, that is the most frequent litigator in the courts,

it is from executive pressure or influence that judges require particularly to be protected.

### **The appointment of judges**

This is the obvious place to start consideration of judicial independence. The Latimer House Guidelines require an 'appropriate independent process for judicial appointments' that will

'guarantee the quality and independence of mind of those appointed... Appointments at all levels should be made on merit, with appropriate provisions for the progressive removal of gender imbalance and other historic factors of discrimination.'

We are not told what those appropriate provisions are, which is a pity because this goal is not easily achieved.

Before our constitutional changes it could certainly not be said that we had an appropriate independent process for judicial appointments. Our process was neither appropriate nor independent. Appointments were made on the recommendation of the Lord Chancellor, who was a Government Minister. The process, at least as far as appointments of the senior judiciary were concerned, was not transparent. The Lord Chancellor's Department made its own enquiries as to the most eligible candidates. Often these had not even applied to go on the Bench, in which case the Lord Chancellor did his best to persuade them to do so.

This unconventional method of appointment in fact worked rather well. Candidates were selected on merit, there was no question of any political considerations being involved, and the Lord Chancellor usually acted on the advice of the senior judiciary, who were in a position to identify able practitioners. Selection was, however, from a rather narrow pool and this did nothing for the diversity of the judiciary.

I believe that, if we are to have a judiciary that has the confidence of the citizens, it is essential that this judiciary fairly represents all sections of society that are in a position to provide candidates of the requisite ability. Our system of selection must encourage such candidates to come forward. It is also essential that it should, in practice, be as easy for a woman both to become and to serve as a judge as it is for a man.

Under the Constitutional Reform Act we now have an independent Judicial Appointments Commission. The judiciary is well represented on the Commission, but does not provide a majority or the Chair. All appointments are made by open competition. The Commission recommends candidates to the Lord Chancellor, who has a very limited power of veto. The Commission has a specific statutory duty to "encourage diversity in the range of persons available for selection for appointments". I consider this to be a significant aspect of the legislation.

We cannot, however, leave encouragement of diversity to the Appointments Commission. The Commission can properly expect help from all involved in the justice system in performing this duty.

The Commission, independently appointed, is of very high calibre, but the process of selection from vacancy notice to appointment has proved over-bureaucratic and far too slow. We are confident that we shall be able to put that right. My understanding is that, so far as judicial appointments are concerned, we are catching up with the rest of the Commonwealth in that most members have transparent appointment

systems that are protected from political influence, although there are one or two notable exceptions.

Although in general I can see no role for the executive in selecting judges, there is a case for a limited power of veto in relation to the most senior appointments. The senior judiciary today have, to some extent, to work in partnership with government. It would, I think, be unfortunate if a Chief Justice were appointed in whose integrity and abilities the Government had no confidence.

There is a growing tendency to challenge the mandate of the judge. Some say that our decisions are not legitimate, because we have not been elected. They point to the United States where some judges are elected and where, at the highest level in the Federal system, candidates are subjected to confirmation hearings. No sooner had it been created than our new Ministry of Justice published a Green Paper on *The Governance of Britain*. This made the following comment about judicial appointments:

‘The Government is willing to look at the future of its role in judicial appointments: to consider going further than the present arrangement, including conceivably a role for Parliament itself, after consultation with the judiciary, Parliament and the public if it is felt that there is a need’.

I am only aware of one Commonwealth country where Parliament is involved in judicial appointments, and that is Mozambique. I, for one, can see no need for such an innovation in the United Kingdom.

### **Terms of Service**

The next comment that I have to make will, I know, receive general acclamation. Judges should be properly paid. That means that judges should be well paid. There are at least two reasons for this. In most Commonwealth jurisdictions the judiciary is recruited from practising lawyers. Practising lawyers tend to earn quite a lot. Public service can never hope to compete in pay with the private sector, but if the disparity between the two is too great, recruiting able lawyers to the Bench becomes difficult. The other reason for paying judges well is that a good salary makes it easier to resist corruption.

It is an unfortunate fact that in some of the newer democracies there is a long tradition of litigants, and indeed others, expecting to pay for what should be provided free.

I am fortunate in coming from a jurisdiction where it is inconceivable that a litigant should even attempt to bribe a judge. I have told this to visiting judges from some of the new Central and Eastern European democracies and it was quite obvious that they simply did not believe me. This emphasises the importance of the simple principle that an independent judiciary does not take bribes. I believe that the best paid judges in the Commonwealth are those of Singapore. When laying the foundations for that country’s independence, Lee Kuan Yew had the foresight to set judicial salaries at a level comparable with the private sector which may account, in part, for the high standing of the judiciary of that jurisdiction.

The Latimer House Guidelines provide:

‘As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.’

Judges should never feel that if they do not please the government their salaries may be at risk.

For that reason in many countries judicial salaries are a direct charge on the Consolidated Fund and are voted by the legislature. Some Constitutions, for instance that of Uganda, provide that salaries and other benefits shall not be varied to the disadvantage of the judiciary. In the United Kingdom the Government follows the recommendations of an independent Top Senior Salaries Review Body when fixing judicial salaries, and we have no reason to complain of the result.

Not only should judges be properly paid, they must have security of tenure. The Latimer House Guidelines provide:

‘Judicial appointments should normally be permanent; whilst in some jurisdictions contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.’

What is essential is that the judge should not have to depend upon the decision of the executive either to obtain or to keep his office, for such dependence might incline him to favour the interests of the executive when performing his duties. In the United Kingdom it requires a resolution of both Houses of Parliament to remove a High Court judge and judges at the lower levels can only be removed after disciplinary proceedings, to which I shall turn shortly.

### **Discipline**

Whatever the Constitution may say, judicial independence depends upon the government respecting the principle of judicial independence. They will be more inclined to do so if the judiciary have the confidence and respect of the populace. We are all sadly aware of some members of the Commonwealth where judges have been dismissed or forced from office by the abuse of executive power. The reaction of the populace to the suspension of the Chief Justice of Pakistan is an example of the importance that the support of the people can have for the rule of law. The authority of the Supreme Court of India, which is second to none, is, I believe, firmly founded on the respect that the people of India have for that court.

Where judges have been forced from office, this has often been on the pretext of judicial misconduct. This emphasises the importance of a sound system for disciplining the judiciary that is free of influence of the executive. I am constantly being faced with the demand ‘how are judges to be accountable?’ Judicial independence does not require absence of accountability, but there is nonetheless sometimes a tension between independence and accountability. So far as a judge’s judicial decisions are concerned the judge is accountable by way of appeal.

So far as other aspects of his conduct are concerned, it is important that there should be a system that permits complaints to be made and investigated. This is another form of accountability. The Latimer House Guidelines provide that:

‘A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges.’

A sub-committee of our Judges Council, which represents all levels of our judiciary, has prepared just such a code of conduct.

Breach of that code of conduct could properly be made the subject of a judicial complaint — that is a complaint against a judge. The Latimer House Guidelines have this to say about discipline:

- i. In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.
- ii. Grounds for removal of a judge should be limited to:
  - a) Inability to perform judicial duties;
  - b) Serious misconduct.
- iii. In all other matters, the process should be conducted by the Chief Judge of the courts.
- iv. Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the Chief Judge.

Both under the old regime and under the constitutional changes we have departed quite significantly from this guidance. Under the old regime the Lord Chancellor himself dealt with complaints against judges, aided by a substantial sector of his department.

He could dismiss circuit judges and below for misconduct or impose a lesser sanction such as a reprimand. Before taking such action he would discuss the case with the Lord Chief Justice, and in practice, would seek his agreement. Under the Constitutional Reform Act, statutory Regulations have been made to deal with judicial discipline. These are of considerable complexity. They run to 23 pages.

The Lord Chancellor retains the right to remove from office judges below the rank of the High Court.

The Lord Chief Justice has the right to give a judicial office holder formal advice, a formal warning or a reprimand or to suspend him from office in certain circumstances. The vital principle is, however, that none of these actions can be taken unless the Lord Chancellor and the Lord Chief Justice agree on it. It is unconventional to have a Minister involved in this way in judicial discipline, but I think that it is no bad thing. The Guidelines recommend that discipline is left to the Chief Justice, but I cannot help thinking that this might leave the public, or the media, with a suspicion that the Chief Justice was looking after his own.

Under our new system all complaints are made, or referred, to an Office for Judicial Complaints, which vets the complaint to see if it is one that falls within the system. More than half do not, being complaints about judicial decisions rather than judicial conduct.

Complaints that are not screened out will be considered by a nominated judge, who will either make a recommendation straight away to me and the Lord Chancellor, or refer the case to an investigating judge. Ultimately a recommendation will be made to the Lord Chancellor and me and we have to decide what action, if any, to take.

The judge who is the subject of the complaint has a right to make submissions at every stage and, if he is not content with the Lord Chancellor and my decision, he can refer the case to a Review Body.

Complaints against magistrates, of whom there are about 30,000, follow a somewhat different course as they are considered by Advisory Committees of magistrates, which recommend the appropriate disposal to me and the Lord Chancellor. The system places quite a heavy burden on us, for we have to give personal

consideration to any case in which disciplinary action is recommended. Overseeing the entire process is a Conduct Ombudsman and, very often, when a complaint is dismissed, the complainant appeals to the Conduct Ombudsman, alleging that his complaint has not been properly investigated. The Ombudsman reports to me and the Lord Chancellor, so here is a further considerable volume of reading.

So far as I am concerned the Achilles heel of this system is the appeal to the Review Body. This is made up of two judges and two lay members and a review can sometimes take several days. There is no downside to seeking a review and judges against whom complaints have been upheld seek a review almost as a matter of course.

There is a case for altering the regulations so that either wholly unarguable cases are filtered out or a cost sanction is imposed where a Judge insists on taking such a case to review.

### **Resources**

To carry out their functions judges need courts to sit in and staff to man them. They always have, but today they also need expensive information technology. The Latimer House Guidelines provide:

‘Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.’

A note to this Guideline comments:

‘The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. However it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints.’

Although the guideline envisages that financial resources will be provided directly to the judiciary by the legislature, this is not always, or indeed usually, what happens. In some jurisdictions judges are responsible for running the court system and are provided with resources for this by the legislature. This is true of the Federal system in the United States and in Japan, which I recently visited, the judges run the courts. While such a system undoubtedly underpins the independence of the judiciary, it is important that judges are not drawn into day to day administration, as that should be for the administrative staff. Our role should be strategic decision making, as after all our principal role is to judge cases.

The more common model is one under which court accommodation and court staff are provided by government. This is the model we presently have in the United Kingdom.

This model will, however, not work so as to preserve the independence of the judiciary and deliver a sound system of justice unless the executive and the judiciary are partners in the decision making process; the judiciary must have at least a joint and equal voice in directing those that provide the administration so as to ensure that the judiciary, and all others involved in the administration of justice, not least the

court users, have the facilities that are needed for the efficient and effective administration of justice.

The Constitutional Reform Act requires an incoming Lord Chancellor to take an oath to 'discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible'. Before the Constitutional Reform Act the Lord Chancellor had entrusted the running of the court system to Her Majesty's Court Service, an executive agency. At that time the duties owed by the Court Service were owed to the Lord Chancellor, both because he was the head of the judiciary and because he was the Minister responsible for the agency. When the Lord Chief Justice became head of the judiciary in place of the Lord Chancellor, this altered the duties owed by the Court Service.

It continued to owe a duty to report to the Lord Chancellor as the responsible Minister, but it also owed a duty to the Lord Chief Justice as head of the judiciary responsible for the administration of justice to provide the infrastructure necessary to discharge those responsibilities.

Close communication and co-operation with the Lord Chief Justice and the senior judges when decisions were taken was essential in order to ensure that what was needed for the administration of justice was provided.

This did not happen. The Lord Chancellor and the staff in his Department continued to act as if he retained primary responsibility for the administration of justice and had sole responsibility for deciding what resources should be allocated to this and how they should be deployed. Decisions were taken without our participation and we were then belatedly told what was proposed.

Allied to this was another unsatisfactory feature in relation to resources. The money needed for the court service came out of the budget of the Department for Constitutional Affairs that the Lord Chancellor headed. That budget also had to pay for legal aid.

Expenditure on criminal legal aid proved much larger than had been anticipated. The consequence was that the Court Service was told that they had to cut back on their expenditure to help to fill the black hole that had opened up in the finances.

The vulnerability of our resources to the demands of other responsibilities of the Department was a matter that was causing us serious concern.

This concern greatly increased when, on 21 January of this year, I read an article in the Sunday Telegraph suggesting that the Home Secretary, John Reid, intended to divest his Department of responsibility for prisons and the justice system and transfer this to a new Ministry of Justice. I got on to Lord Falconer, the Lord Chancellor, to find what this was all about to learn that he was no wiser than I was. However after two months of intense speculation, but without formal or meaningful consultation, the Prime Minister announced on 29 March 2007 what was described as a major Machinery of Government change. A new Ministry of Justice was to be formed to be headed by the Lord Chancellor. This would combine his previous responsibilities for the courts and legal aid with responsibility for the prisons and offender management.

My immediate concern was as to the impact that these changes might make on court funding. The courts would now be in competition with the prisons. The prisons were full to overflowing and dealing with the prison problem was likely to be the Lord Chancellor's primary concern.

If the prisons proved to be under-funded there could be a further squeeze on court resources. There might even be a perception that judges were going soft on sentencing in order not to exacerbate a need for expenditure on prisons at the expense of the courts. I made a public statement saying that the Prime Minister's statement raised important issues of principle and that structural safeguards needed to be put in place to protect the due administration of justice.

Early the following month we sent to the Constitutional Affairs Select Committee of the House of Commons a position paper in which we asserted that the creation of the Ministry of Justice was "not a simple Machinery of Government change but one which impacted on the separation of powers". Neither the (then) Lord Chancellor nor the Prime Minister accepted that the changes had any constitutional significance. The Constitutional Affairs Committee, having taken evidence from, among others, myself and the Lord Chancellor, concluded in a Report published at the end of July:

'Significant changes to the Lord Chancellor's responsibilities as Secretary of State took place as a result of the creation of the Ministry of Justice. They are of constitutional importance as they may affect, in practice or public perception, the exercise of the Lord Chancellor's statutory function of guardian of judicial independence, both in organisational and budgetary terms... such changes go far beyond a mere technical Machinery of Government change and as such should have been subject to proper consultation and informed debate, both inside and outside Parliament.'

We persevered in negotiations with Lord Falconer for the safeguards that we needed, but he made it clear that there were certain parameters that were not negotiable, including the status of the Court Service as an executive agency and a refusal to contemplate ring-fencing of the Court Service's budget. We were unable to reach agreement within these parameters. In the end we asked him to agree to a fundamental review of the best method of running the court system in the light of the creation of the new Ministry of Justice. He was not prepared to agree to this.

On 26 July the House of Lords Select Committee on the Constitution published a Report on 'Relations between the executive, the judiciary and Parliament. This commented:

'The creation of the Ministry of Justice clearly has important implications for the judiciary. The new dispensation created by the Constitutional Reform Act and the Concordat requires the Government to treat the judiciary as partners, not merely as subjects of change. By omitting to consult the judiciary at a sufficiently early stage, by drawing the parameters of the negotiations too tightly and by proceeding with the new Ministry before important aspects had been resolved, the Government failed to do this. Furthermore, the subsequent request made by the judiciary for a fundamental review of the position in the light of the creation of the Ministry of Justice was in our view a reasonable one to which the Government should have acceded in a spirit of partnership'.

We now have a new Lord Chancellor — for the first time a member of the House of Commons — in Jack Straw. He has acknowledged our concerns and has asked for time to consider them.

This is a reasonable request, but we have emphasised the urgency of getting a resolution of the situation. This ongoing saga illustrates an aspect of judicial

independence that has been giving rise to concern in a number of jurisdictions. Judges should not, as I have said, become involved in the detail of administration, but if administration of the court system is shared with the executive this must be done in a way that leaves the court service and the judges working as a team. The former must recognise that they have a duty to provide what the latter need in order to achieve the efficient and effective administration of justice. By way of example, this is a topic that has received detailed consideration in Canada, in Denmark, in the Netherlands and in the Republic of Ireland and as I have recently learned in a number of Commonwealth jurisdictions, including this one with the Kenya Judiciary Strategic Plan.

### **Relations with the executive**

This brings me on to the more general topic of relations between judges and the executive. When I started in the law nearly fifty years ago, judicial review was in its infancy. Judges were reluctant to review the exercise of discretionary powers vested by the legislature in the executive. All of this changed with the application of the *Wednesbury* test and, more recently, the requirement that has arisen as a result of the Human Rights Act 1998 for the judge himself to apply a test of proportionality to executive action that interferes with human rights.

Ministers do not enjoy having their decisions ruled unlawful by judges. Sometimes they react by making a personal attack on the judge. Happily this does not happen very often and when it does it has tended to be the Home Secretary who has taken public umbrage, for his area of responsibility has been such that he has been often in the firing line.

Thus in 2003 David Blunkett on a number of occasions attacked judges who had made decisions in favour of asylum seekers of which he disapproved. He wrote a newspaper article under the headline 'It's time for judges to learn their place'. On an earlier occasion Michael Howard had reacted to a judgment against him with the public comment 'the last time this particular judge found against me. . . the Court of Appeal decided unanimously that he was wrong.'

It is difficult for judges to know how to respond to attacks of this kind, for a public slanging match with Ministers is not going to enhance confidence in the administration of justice. The action taken by Lord Woolf in relation to the earlier matter was to write privately to David Blunkett, protesting at his behaviour. I will not tell you what he said, but David Blunkett recorded in his diary, now published, that 'I have received a monstrous letter from Harry Woolf'.

When the Lord Chancellor was Head of the Judiciary it was his duty to stand up for the judges in the face of any inappropriate behaviour by his Cabinet colleagues. That duty has been preserved in the Constitutional Reform Act. Section 1 provides:

- 'This Act does not adversely affect —
- (a) the existing constitutional principle of the rule of law, or
  - (b) the Lord Chancellor's existing constitutional role in relation to that principle;

Section 3 provides, among other things:

'(1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary...

(5) The Lord Chancellor and Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.

(6) The Lord Chancellor must have regard to:

(a) the need to defend that independence.'

That duty was put to the test last summer when an experienced judge was attacked not merely by the media but by the Home Secretary and by a Junior Minister in the Lord Chancellor's own Department, for imposing a sentence in a child abuse case that it was suggested was 'unduly lenient'. The sentence was not, in fact, unduly lenient. The judge had correctly applied complex legislative provisions and sentencing guidelines. But that is not the point. The Attorney-General has a power to refer sentences that are alleged to be unduly lenient to the Court of Appeal and it is wholly inappropriate for any Minister to pre-empt either his decision or that of the Court of Appeal. Coincidentally or not, one newspaper began a campaign, identifying judges whose sentences were alleged (not always correctly) to have been increased by the Court of Appeal on the ground that they were unduly lenient and calling for their resignation.

Three days passed from the first criticism before the Lord Chancellor, appearing on Question Time, commented that it was completely wrong for the judges to have become the whipping boys for something that was not their fault and went on to say that the judge was not at fault. His own Minister was forced to apologise publicly for her comments. The House of Lords Select Committee criticised the Lord Chancellor for an inadequate response to this incident.

It also criticised me for not moving faster behind the scenes to get action taken. Unfortunately I was at the time in Warsaw, where I was chairing an international judicial conference, but I was in touch with what was going on in England. Some say that I should have made a public statement in support of the judiciary. Whether such action is desirable is a matter to which I shall return.

The Latimer House Guidelines provide:

'While dialogue between the judiciary and government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence'.

I have always believed that it is important, if possible, for judges to maintain good relations with Ministers. I have to date managed to achieve this, both with Home Secretaries and with Lord Chancellors. I meet frequently with the Lord Chancellor and regularly with the Home Secretary to discuss matters of common interest — typically the effect that administrative or legislative options will have on the administration of justice. It is important at such meetings that the line is clearly drawn between what are and what are not appropriate areas of discussion and Ministers are, in my experience, quick to accept if told that a topic is 'off limits'.

Ministers responsible for meeting the challenge of terrorism can be particularly concerned when measures that they have introduced are held by the courts to be incompatible with the European Convention on Human Rights. Charles Clarke, when he was Home Secretary, was keen to discuss with the Law Lords, in advance of taking such measures, issues of principle that they might raise and he was aggrieved when the Senior Law Lord, Lord Bingham, declined an invitation to meet. He subsequently commented "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" and suggested that "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”.

The problem with this is that it is the judge’s job to resolve disputes as to the legality of action or legislation when those disputes arise. If he advises the Government on that question beforehand he will place himself in a position where he cannot do so, or appear to do so, impartially. The House of Lords Select Committee commented:

‘It is essential that the Law Lords, as the court of last resort, should not even be perceived to have prejudged an issue as a result of communications with the executive.’

### **Relations between the judiciary, the media and the public**

It is important that justice should not only be done but be seen to be done, and freedom to report court proceedings is one of the most important aspects of freedom of expression. And yet, when two or more judges are together, it is not long before they are complaining about the media. A theme that is popular with some of the media in the United Kingdom is that judges are soft on sentencing. After a sentence is reported, perhaps for causing death by dangerous driving, there will follow a report of the comment of a relative of the victim that four years imprisonment is no punishment for taking a life.

For every hundred sentences that go unreported, there will be singled out for criticism the sentence that, on its face, appears lenient, without report of the explanation, painstakingly given by the judge in his sentencing remarks for his choice of sentence. There is also a tendency to accuse judges of using, or abusing, the Human Rights Act in order to justify their wish to treat criminals more leniently.

The Editor of the Daily Mail gave evidence to the House of Lords Select Committee. He commented that the public saw “an increasingly lenient judiciary handing down lesser and lesser sentences”. He had commissioned a poll of 1000 members of the public and only 18% had faith that the sentences that they wanted passed against criminals would be reflected by the courts whereas 75% felt that sentences were too lenient. This perception is totally at odds with reality, for sentences imposed by judges have been becoming steadily heavier. The Editor accepted no responsibility for the public’s misconception, notwithstanding editorial comment such as this in an edition of his own newspaper:

‘Britain’s unaccountable and unelected judges are openly, and with increasing arrogance and perversity, usurping the role of Parliament, setting the wishes of the people at nought and pursuing a liberal, politically correct agenda of their own, in their zeal to interpret European legislation.’

This was quoted by the House of Lords Select Committee, which reached the conclusion that

‘the media, especially the tabloid press, all too often indulge in distorted and irresponsible coverage of the judiciary, treating the judges as “fair game”.’

What is the solution? For once the Latimer House Guidelines have nothing to offer. They state

‘Legitimate public criticism of judicial performance is a means of ensuring accountability’ and ‘the criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.’

But what of illegitimate criticism? One of the legal correspondents for whom I have a high regard expressed the view to the Select Committee that public relations are important and judges ought to be doing more to retain — and even regain — the public's confidence. In particular he expressed disappointment that I had allowed over a year to go by without a press conference and suggested that I was wrong to treat the media as uniformly hostile. I would add that I have since had a press conference and I by no means consider that the media are uniformly hostile. But it is true that I have a diffidence about talking too often to the media. Ideally a judge should be judged by his judgments, not by pronouncements made out of court.

The Select Committee concluded that judges were over diffident about talking to the media.

They expressed the view that it was appropriate for them to communicate with the media on appropriate issues and that there was no reason why they should not communicate with the media about their activities outside the courtroom.

We have the benefit of an outstandingly able Communications Office that provides much useful information to the media, and is able to correct, sometimes in advance, erroneous press coverage or to explain some of the restrictions to which judges are subject. If there is one misconception that is more prevalent than any other it is that it is open to judges to decide cases, or impose sentences, according to their personal inclinations.

We are, however, giving careful consideration as to whether we should identify judges who, with the benefit of media training, can be available to give the viewpoint of the judiciary in circumstances where it seems desirable to communicate this.

I should very much welcome learning of the experiences and views of others in this delicate and controversial area.

### **Training**

The Latimer House Guidelines recommend that a culture of judicial education should be developed under the control of an adequately funded judicial body with the curriculum controlled by judicial officers who have the assistance of lay specialists. I do not believe that anyone would cavil at this recommendation. It is, of course, a recommendation that calls for substantial expense. I am happy to say that we have always received an allowance for judicial training that reflects the importance of this area, even if it does not cover all that we would like to do.

Our Judicial Studies Board is run by judges for judges, and is one of the foundations of our judicial independence. I am also keen that, insofar as we can manage it, we should help other jurisdictions with judicial education, either by responding to invitations to send judges abroad, or by welcoming judges who want to come to learn about the administration of justice in our jurisdiction.

### **Accountability**

I have already referred more than once to accountability and to the increasing demand that judges should be accountable.

The duty to give reasons and the appellate system is the way that judges should be accountable for their decisions and a system for judicial complaints is the way in which judges should be accountable for their general conduct. The duty to give reasons for all decisions is a clear example of “explanatory” accountability, which not only facilitates appeals but assists transparency and scrutiny by the other branches

of State and the public. But that is not the end of the story. Insofar as we insist, as I believe we should, in having an input into all aspects of the administration of justice and, in particular, to the running of the court system, then it is not unreasonable to expect us to account for the way in which we have discharged our responsibilities. The question is how and to whom?

The House of Lords Select Committee expressed the view that Select Committees “can play an important role in holding the judiciary to account by questioning in public”. I do not find that phrase attractive. It suggests subservience and a command and control relationship between judiciary and Parliament, which is not appropriate. The judiciary is a separate and independent arm of State. The Select Committee elaborated their thoughts as follows:

‘We believe that Select Committees can play a central part in enabling the role and proper concerns of the judiciary to be better understood by the public at large, and in helping the judiciary to remain accountable to the people via their representatives in Parliament.

Not only should senior judges be questioned on the administration of the justice system, they might also be encouraged to discuss their views on key legal issues in the cause of transparency and better understanding of such issues amongst both parliamentarians and the public. However, under no circumstances must committees ask judges to comment on the pros and cons of individual judgments.’

I have no difficulty with the last sentence. Furthermore I can see merit in the suggestion that Select Committees can represent an appropriate and helpful forum for me or for other senior judges to explain or state our views on aspects of the administration of justice that are of general interest or concern and upon which it is appropriate for us to comment. The appearance of judges before Select Committees should, however, be a relatively rare, and thus a significant event.

I do not believe that it would be desirable for judges to appear to be at the beck and call of Parliament.

I have made it plain that I intend to produce an Annual Report on the administration of justice. I see this as part of the judiciary’s explanatory accountability. My current thinking is that this Report should be made to the Queen in Parliament and I should be prepared to answer questions on its content. In this way the report and my answers to questions on its contents will be instruments to provide the right measure of explanatory accountability.

### **Conclusion**

There are just a few words that I would like to say in conclusion on the topic of judicial independence. A judge should value his independence above gold. Not for his or her own benefit, but because it is of the essence of the rule of law and a judge should care passionately for the rule of law. It is the satisfaction of reaching decisions without fear or favour, affection or ill-will that makes being a judge a vocation that has no equal.