



JUDICIARY OF
ENGLAND AND WALES

LORD JUSTICE THOMAS

**THE POSITION OF THE JUDICIARIES OF THE UNITED KINGDOM IN THE CONSTITUTIONAL
CHANGES**

ADDRESS TO THE SCOTTISH SHERIFFS' ASSOCIATION

PEEBLES

8 MARCH 2008

If I were to give a talk south of the Border on this subject, it would be thought good to begin by taking one of the many examples of the Stuart kings' clashes with the judiciary; I am not sure that would set the right note here. At least it would have been better than beginning with the dynasty that originated in my own native country, for it is said that the Tudor Dynasty regarded the Chancery as a branch of their civil service as well as a judicial court¹. But there is far too much to talk about for an introduction of this kind, even if it was diplomatic to find a relevant historical event.

For the past 10 years the United Kingdom has been in the middle of major constitutional change. This fact has surprised many in overseas jurisdictions who had not been used to the movement in the constitutional position within these Isles. It began with devolution and the Human Rights Act, continued first here and then in England and Wales with a change in the manner of making judicial appointments, then the changes consequent upon the reform of the office of Lord Chancellor in England and Wales (which are still continuing as I shall explain) and a major amendment of the scheme of devolution to Wales²; at present your Judiciary and Courts Bill and the Lisbon Treaty are before the respective Parliaments.

There has, though it may not yet be possible to see the extent of it, been an enormous shift in the position of the judiciary within the state. It is not easy to work out precisely what the consequences are, but I will attempt to do so as seen from my own perspective³.

In my few remarks to you, I will of necessity address the question from the point of view of England and Wales, but I would like to do so by looking at three constitutional levels in the relationship of the judiciary to the other branches of the state. If I was to address these remarks to you as someone who looked at it solely from the perspective of England, I might omit to place this in the context of devolution. It would also be easy to ignore the context of the changes in Europe.

¹ Holdsworth, History of English Law, 273

² The Government of Wales Act 2006

³ I was appointed as a Presiding Judge for the Wales and Chester Circuit as the devolution legislation referenda took place, was asked to be Senior Presiding Judge for England and Wales by Lord Irvine three weeks before the decision was announced to reform the office of Lord Chancellor and, consequent upon the decision to create the Ministry of Justice in January 2007, I have been closely engaged throughout the negotiations and appearances before Parliament in relation to the arrangements for the governance of the court service.

But it seems to me essential, when looking at the position of the judiciary within these Isles, that it is necessary to look on three levels, namely the relationships with

- (i) The devolved executives and legislatures in Scotland, Wales and Northern Ireland.
- (ii) The United Kingdom executive in Whitehall and the legislature at Westminster; there is a difference in the position of England to Scotland, Northern Ireland and to a lesser extent Wales.
- (iii) The Commission and the European Parliament in Brussels and Strasbourg.

It is convenient, it seems to me, to look at the issues under three headings under which our functions as judges can be divided for the convenience of illustration: (I) upholding the rule of law; (II) operating the judicial system and (III) providing advice.

I UPHOLDING THE RULE OF LAW

The primary duty of the judiciary to uphold the rule of law is well understood as is the pre-condition for the ability to perform it - the independence of each judge. I shall consider in more detail the independence of the judges and the judiciary when I address the topic of operating the judicial system, but there is no doubt that the scope of the task of upholding the rule of law by deciding cases has been made more complex by the devolution legislation and the passing of the Human Rights Act. Time does not permit to speak on this – it is well trammelled and well understood⁴; judges must be free to make decisions in accordance with our judicial oath.

Tension⁵ with the executive is an inevitable part of the relationship with the executive but at least three significant problems have emerged which I can do no more than mention. First the obligations of the judiciary under the Human Rights Act have not been fully understood; as the effect of EU legislation becomes more widespread, that change will also have to be understood. Secondly, ministers have failed to observe on occasions the convention that they do not criticise judges when they lose as litigants or legislation is not interpreted in the way they would wish. Over the past few months, matters have got very much better, but, as the Constitutional Reform Act makes clear, it is the duty of every minister to uphold the continued independence of the judiciary⁶; they do the exact opposite when they publicly criticise judges who give decisions of which they disapprove. Thirdly, the judiciary needs always to have in mind the need for self-restraint in the very changed constitutional position it holds, if its authority is to be maintained⁷.

II OPERATING THE JUDICIAL SYSTEM

During a part of the last century, there was a view most ably explained by Lord MacKay of Clashfern⁸ that the function of the judge was to decide cases and it was only necessary for the judge to have some control or influence over what he described as the administrative penumbra immediately surrounding the judicial process, such as listing. This epitomised the independence of each judge.

However, for a long time before and much more recently, the view has emerged that the independence of each judge necessary to uphold the rule of law also had to be founded upon the institutional independence of the judiciary - the ability of the judiciary as an institution and separate branch of government to be free of executive interference in a wider context⁹. In England and Wales, the position was advocated in the late 1980s by Lord Browne-Wilkinson in his FA Mann Lecture¹⁰, *the Independence of the Judiciary*, but it was only upon events triggered by

⁴ For example Lord Bingham's Sir David Williams Lecture 2006, published in the Cambridge Law Journal and at: http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php

⁵ See Lord Bingham's 2005 Macabean Lecture: www.britac.ac.uk/pubs/src/pdf/bingham.pdf

⁶ S.3 of the Constitutional Reform Act 2005

⁷ See for example, Lord Hoffman's 2001 Combar Lecture: The Separation of Powers at paragraph 11.

⁸ See Purchas: What is happening to Judicial Independence, New Law Journal 30 Sep 1994

⁹ See for example Arden: Judicial Independence and Parliaments in *Constitutionalism and the Role of Parliaments* (2007)

¹⁰ [1988] P.L. 44

the decision to reform the office of Lord Chancellor made in June 2003 that the opportunity arose to secure this broader institutional independence¹¹.

I do not think it necessary to trace in detail the history of how this happened over the past five years for there is an admirable summary of this given by Professor Anthony Bradley in a recent lecture¹² to the Institute of Advanced Legal Studies in London. There were three major stages – the agreement of the Concordat between the Lord Chancellor and the Judiciary in January 2004, the enactment of the Constitutional Reform Act in April 2005 and the agreement reached in January 2008 in relation to resources for the courts and court administration.

What I would like to do is to examine what is needed for the institutional independence of the judiciary as a branch of the state so that it is in a position better to uphold the independence of each member of the judiciary through the operation of the judicial system. There are seven specific topics that need to be addressed¹³:

- (i) Appointment and promotion of judges.
- (ii) Judicial training.
- (iii) Protection of the image of justice.
- (iv) Discipline and ethics.
- (v) Finance for the courts and court administration.
- (vi) Performance standards and performance management.
- (vii) Health and Welfare.

Before turning to these seven topics, the title of one of which might seem surprising to judges, I do think it necessary to address four preliminary questions (a) the governance of the judiciary, (b) the position of Tribunals (c) public involvement in aspects of it and (d) the issue of accountability, as each of these is an essential part of the background to the seven topics.

(a) Governance

It is clear that if the judiciary are to govern their branch of the state, they must have their own structure of governance to ensure the proper governance of the system. In England and Wales, the first step taken to provide a system of judicial governance was to transfer from the Lord Chancellor to the Lord Chief Justice the position of headship of the judiciary.

Through the long evolution of the system in England and Wales, the Lord Chancellor had become, in fact, head of each level of the judiciary, a very different position, as I understand it, from Scotland where there was no single head of the different courts. The Constitutional Reform Act transferred the headship to the Lord Chief Justice and made him President of all the courts; it involved no change in hierarchy, just a transfer. On its face, therefore, it might seem that England and Wales had created a monarchical form of government. However the transfer of the headship of the judiciary to the Lord Chief Justice and the vesting of almost all the powers formerly exercised by the Lord Chancellor in the Lord Chief Justice, was not intended to create and did not create such a form of governance.

The transfer was made in this way so as to enable the judiciary to alter their governance structures internally without recourse to Parliament. It was always intended that the functions and powers vested in the Lord Chief Justice would often be exercised by others and they would be subject to the checks and balances already in being within the judiciary, namely what was known as “the extended family” and the Judges’ Council¹⁴.

¹¹ Some small changes had been made in the 1990s: see Lord Bingham’s 1996 JSB Lecture: The Independence of the Judiciary

¹² 20 February 2008: Relations between the executive, judiciary and Parliament, An Evolving Saga?

¹³ This list is adapted from paragraph 42 of Opinion No 10 of the Consultative Council of European Judges, Strasbourg November 2007.

¹⁴ A detailed description is set out on the website of the Judiciary of England and Wales:

http://www.judiciary.gov.uk/about_judiciary/governance_judiciary/organisation_judiciary/index.htm

Prior to the 2003 reforms, the “extended family” was a group comprising the Heads of Division and the Lord Chief Justice together with certain others who had senior administrative responsibility such as the Senior Presiding Judge, the vice-President of the Queen’s Bench Division and the Deputy Heads of Family and Civil Justice. They formed a small group who would meet regularly to discuss and decide general issues relating to the judiciary; their principal function was to give advice to the Lord Chancellor under the old system for appointments. That body, upon the coming into force of the constitutional changes, was transformed into the Judicial Executive Board, a body with a smaller membership but with the responsibility for taking, as its name implies, decisions on the matters that now fell squarely within the jurisdiction of the Lord Chief Justice.

The Judges’ Council had existed since about the 1870s and was born of a dispute between the Lord Chancellor and the Lord Chief Justice; it was for its first two decades a very active and important body in carrying through the major reforms of the judiciary of England and Wales in the latter part of the 19th Century. However during the 20th Century it gradually fell into disuse. It was only the very significant clashes that occurred between the judiciary and the executive in the last decade of the 20th Century that saw its revival and its eventual re-constitution as a body representative of the judiciary as a whole¹⁵.

An attempt was made to define and distinguish the relationship between the Judges’ Council and the Judicial Executive Board. It was also decided, by a Committee chaired by Lord Neuberger, that the Judges’ Council might function better if the members of the Judicial Executive Board, other than the Lord Chief Justice and Senior Presiding Judge, were not part of it. It was appreciated that the Council could not meet more than about five or six times a year, and so an Executive Committee was established with a representative from each level of the judiciary, including the tribunals.

Over the period of nearly three years since the Constitutional Reform Act came into effect, the process of working out the relationship has progressed. The Judges’ Council has taken on the burden of looking at certain long-term strategic issues that affect the judiciary as a whole. Examples of these include the maintenance of a code of judicial conduct, the welfare and health of the judiciary and, in a topic to which I will come separately, what might be described as the performance management of the judiciary. Much of the time of the Judicial Executive Board has been taken up with issues in relation to appointments, the plans to create a unified civil court and resources. Two steps which have been taken to improve the working of the two bodies are the sharing of each other’s agenda and minutes and arranging meetings from time to time at which the whole of the Judges’ Council and the Judicial Executive Board are present. Much thought is still being given to the relationship and also to the very considerable problem that has arisen in requiring so much of the time of the senior judges to be devoted to matters of judicial administration and away from judicial sittings.

It was also necessary to provide for more civil service staff to support the judiciary. Until 2005, the staff was tiny. It is now a little bigger; the judiciary had to have more staff to deal with appointments, the function of swearing in (now performed by the Lord Chief Justice and other senior members of the judiciary), overseas relations and other functions. It is clear that insufficient senior posts were created and the overall numbers were too small; this has imposed a large burden on the judiciary.

There is one further issue which I can only mention – the relationship of governance of the judiciaries of the constituent jurisdictions of the United Kingdom to the Supreme Court when it is

¹⁵ I traced the history of the Council in a paper I gave to the Constitutional Law Group of the British Institute of International and Comparative Law on October 28, 2004, published at [2005] PL 608.

established; there is a relationship through the Judges and Judicial Councils, but clearly this is a matter on which much further thought is needed.

(b) The position of the Tribunals

When I have spoken of the judiciary, I have spoken of judges as distinct from those who sit in Tribunals. It had always been intended at the time of the making of the Concordat and the enactment of the Constitutional Reform Act that the Tribunals would be within a system headed by the Lord Chief Justice; the Act was structured on that basis and it was envisaged that a Senior President would be appointed and hold a position similar to the Senior Presiding Judge or Head of Division under the Lord Chief Justice as head of the Judiciary and the Tribunals. This part of the reform could not be included in the Bill because the necessary steps to transfer some of the tribunals away from the other Ministries which sponsored them had not been put in place.

However this plan was not carried through; on further reflection Lord Falconer, the then Lord Chancellor, decided that the Tribunals should be distinct from the judiciary. He put forward legislation that created a Senior President with statutory duties separate from the Lord Chief Justice and not as part of the judiciary headed by the Lord Chief Justice of England and Wales. The justification put forward was (i) that the jurisdiction of some of the tribunals extended across the UK and therefore could not form part of the judiciary of the different jurisdictions within the UK; they therefore needed a different structure; (ii) Tribunals were different from the courts.

The consequences of Lord Falconer's decision are not widely appreciated; many of the details are still being worked out. There are significant complexities in the assignment of work and in the deployment of judges to the Upper Tribunal; the creation of a separate administration through the Tribunals Service means the duplication of functions and hence cost. The Senior President is under a statutory duty to report to the Lord Chancellor on the matters which the Senior President wishes to bring to the attention of the Lord Chancellor and on matters which the Lord Chancellor asks the Senior President to cover in his report¹⁶. The three jurisdictions within these isles will have to work closely together on the complexities brought about by this decision.

When I therefore turn to consider the seven topics, I will do so primarily from the point of view of the judiciary, but as is self evident it is also largely applicable to the Tribunals.

(c) Public participation

Where the running of the judicial branch of the state is entrusted to Councils for the Judiciary in most of the states of Europe, there are representatives of the legal profession and of the public on the Councils¹⁷. The modern justification for this is that outside expertise is necessary and the inclusion of the public on these bodies helps dispel the perception that the judiciary govern themselves in their own interests and not in the interests of the state as a whole.

In my view there is much to be said for this in certain of the functions I have listed. May I take the obvious example of discipline. One of the reasons why the judiciary of England and Wales readily acceded to outside participation in the disciplinary process was to ensure that the decision of a disciplinary tribunal would command public confidence by being seen to have an outside participant. It could not then be said that the system was being run by the judges in their own interest. In the result in England and Wales there is outside participation also in the appointments process and there will be in the functions of administration of the court system as I shall explain. It remains to be seen whether any of the other functions require public participation.

(d) Accountability

The issue of the accountability of the judiciary is a difficult topic which could easily justify a talk in itself. It is axiomatic that within a judicial system each judge is accountable for the decisions he

¹⁶ S.43 of the Tribunals, Courts and Enforcement Act 2007

¹⁷ See the expert reports written for the preparation of Opinion No 10 of the Consultative Council of European Judges

makes; the decisions are made in public and so open to public scrutiny and can be reviewed on appeal. That is our principal accountability.

But what of the functions in relation to appointments, discipline or administration and the functions transferred to the Lord Chief Justice by the Constitutional Reform Act and the Concordat? It seemed to us that it was necessary to develop our position on accountability in these areas and how it related to the position of individual judges when deciding cases. We had started to do this, but a decision by our Parliamentary Committees to review the relationship of the Executive, Judiciary and Parliament made it necessary to prioritise this. To that end, in May 2007 the Judicial Executive Board and the Judges' Council approved a paper setting out the principles of accountability and a recommendation that the Lord Chief Justice should publish an annual review of the Administration of Justice in the Courts. The Constitution Committee of the House of Lords reported in July 2007 and in October 2007, as well as responding to their report the Judiciary of England and Wales published in October of last year a paper on the subject of accountability¹⁸. Our principal focus has been on accountability through reporting on what the judiciary does. As one of the most important steps in that direction is the Annual Review the Lord Chief Justice agreed to publish. The draft of that is now nearing finalisation and it is hoped to publish it at the end of the month¹⁹. The decision to provide an Annual Review followed the practice of the Court of Appeal and the Commercial Courts providing annual reports and the significant step taken when Lord Bingham was Lord Chief Justice of each Crown Court publishing annual reports²⁰; the Judges' Council also has provided an Annual Report on its work²¹. A body which makes decisions which affected the public ought to set out annually an account of what it did.

However considerable caution is needed. It is, I think, self evident that in the governance of the judiciary in the type of matter to which I have referred, there can be no account to the Executive without the risk of significant inroads to judicial independence. The judiciary is, however, entrusted with significant responsibilities apart from determining cases and funds from the legislature to discharge them; there is a powerful view that the judiciary should account for what it does in the sense of reporting on these functions.

Over the years, perhaps imperceptibly, the Parliament at Westminster began to develop the practice of asking judges to appear before it and give evidence or advice on certain topics; this practice is quite different to that in most common law jurisdictions where judges rarely appear before the legislature. I shall, as I have indicated, return to the subject of advice, but it is important to point out that the consequence of the practice at Westminster has been that Parliament has become used to receiving evidence from judges; and it is in this area, that self restraint will be required in relation to extending this practice.

The seven topics in relation to the operation of the judicial system

It is against the background of those four preliminary questions that I turn to deal with the seven specific topics which I consider need to be addressed in relation to the operation of the judicial system.

(i) Appointment and promotion of judges

Time does not permit me to speak at length on this on this topic. The old system of the Lord Chancellor appointing judges seems to have worked well for very many years; however, it was under attack by the 1990s. Lord Irvine made a number of reforms in the hope that this would

¹⁸ <http://www.judiciary.gov.uk/docs/accountability.pdf>; the paper was prepared by a small group chaired by Mr Justice Beatson FBA and approved by the Judges Council and Judicial Executive Board.

¹⁹ It was published on 31 March 2008: http://www.judiciary.gov.uk/docs/lcj_review_2008.pdf

²⁰ These are published on the HMCS Website: http://www.hmcourts-service.gov.uk/publications/annual_reports/crown/index.htm

²¹ The Reports for 2006 is at: http://www.judiciary.gov.uk/docs/judges_council/judges_council_annual_report_2006.pdf

enable the old system of appointment by the Lord Chancellor to continue. The pressures grew and it seems in retrospect to have been inevitable that England and Wales would have moved to a form of Judicial Appointments Commission, even if the office of Lord Chancellor had not been radically reformed in other respects.

The Judicial Appointments Commission came into operation in April 2006, with the Lord Chancellor retaining some functions for a further year. It has seven judicial members (including a magistrate and a tribunal member), two commissioners drawn from the legal profession and six other independent members, one of whom is the chairman; the effect of devolution is evident in that one of these has to have a special knowledge of Wales.²² Appointment is to be solely on merit²³.

The Executive in Westminster decided recently to review the appointments system in the context of its paper on the Governance of Britain published in July 2007²⁴. The judiciary's position is that the principles set out in the Constitutional Reform Act under which an independent commission was established were broadly right, but there have been problems in the day-to-day operation of the system which necessitate some changes. The fact that some changes are needed should not detract from the significant achievement of the Commission, the quality of the appointments it has made and the overall success of this constitutional innovation.

One issue that is important for the future is the development of a system for appraisal and the use of this to obtain proper evidence of how a judge does when he is sitting part time. It is often claimed that part time sitting prior to an appointment is the best method of assessing a person's suitability for judicial appointment. Plainly it would be the most reliable evidence as to the future, given the well known fallibility of interviews and the dangers of references, particularly if they come from "fan clubs" or discriminate against those who have not practised before the courts. Unfortunately, a very successful pilot developed on the Northern Circuit for Recorders could not be continued and developed as there were insufficient financial resources available; the reports derived from the very successful scheme for Deputy District Judge appraisal (which pre-dated it and which is on going) do not appear to be being used when making District Judge appointments.

There are special provisions for the appointment of members of the Court of Appeal, the Heads of Division and the Lord Chief Justice. Of more interest, because it is here that the effect of devolution is most evident are the detailed provisions for appointments to the Supreme Court; the First Ministers of the Devolved Executives are consulted and the judiciary and appointments commissions in each of the jurisdictions in these Isles are involved.

(ii) Judicial training

It has long been accepted that judicial training must be in the hands of the judiciary. The JSB was established about 28 years ago and was run by the judiciary. It has been very successful. The reforms have, apart from the transfer of nominal headship from the Lord Chancellor to the Lord Chief Justice, transferred the budget to the control of the judiciary.

The JSB has had to develop two new areas of training – leadership and management and conducting cases in Welsh. As the judiciary has assumed the responsibility for so much more, it has proved important to develop training for this. These have not been easy courses to develop, but their value is now recognised and a handbook produced²⁵. Devolution has provided an impetus to the use of Welsh which litigants in Wales are entitled to use on a basis of equality with

²² Constitutional Reform Act 2005, Schedule 12, paragraph 10(4).

²³ S.63(2) of the Constitutional Reform Act 2005

²⁴ <http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf>

²⁵ Managing Judicial Leadership

English²⁶; the Government of Wales Act 1998 also provides for English and Welsh to be treated on a basis of equality by the National Assembly for Wales²⁷.

There is also a developing European dimension. The European Commission has funded, to an increasing extent each year, judicial training through the European Judicial Training Network. Most of the funding is used for judicial exchanges, but some goes towards encouraging the teaching of European law. The European Judicial Training Network is accountable to the Commission for the funds it provides to pay for its staff for other activities. This is therefore probably the first example of the need for the judiciaries of Europe to recognise that it has a direct relationship to the Commission and an accountability to it.

(iii) Protection of the image of justice

I have used the term “protection of the image of justice” as it seems to me that this term coined in Europe²⁸ better expresses the functions of a press or communications office in its relations with the media than the term public relations, press or communications office.

There is nothing new in criticism from the press – in the 1890s, judges were criticised for not retiring “when clinging to the Bench when the season of their strength had long passed” – (directed at Sir James Fitzjames Stephen – “a subject of wonder and regret to the whole profession”)²⁹

However such criticism was sporadic and much more muted; in a debate in 1966, the Lord Chancellor, Lord Gardiner, was able to observe that it was unfortunate that the administration of justice was insufficiently criticised³⁰. Probably this low level of criticism was due to the use of the powers of contempt; a well known example was the criticism of Mr Justice Avory in 1923 for his handling of the trial of libel against Dr Marie Stopes, the pioneer of birth control. The editor of *The News Statesman* wrote “prejudice against those aims ought not be allowed to influence a court of justice in the manner in which they appear to have influenced Mr Justice Avory in his summing up. ... The serious point in this case, however, is that that an individual owing to such views of those as Dr Stopes cannot hope for a fair hearing in the Court presided over by Mr Justice Avory and there are so many Avorys”. The editor was found guilty of contempt as it imputed unfairness and a lack of impartiality to a judge in the discharge of his duties and he had to apologise and pay the costs³¹.

Our different age has called for a very different approach. For example, at the instance of Lord Bingham when he was Chief Justice and under the leadership of Sir Igor Judge, a real effort was made to improve relations with the press; meetings with editors, particularly of local and regional papers, were arranged to delineate the issues. Most of the problems at local and regional level were problems of poor communication – moving cases without telling anyone, an inability to check names or what was said in court, the use of restrictions on press reporting and poor drafting of orders. Changes were made to deal with these issues – a person at each court was nominated to act as the channel of communication, the press were to be asked for their views before restriction orders were made and a guide for the judiciary was produced. A change was also made to the way in which relations with the press were handled; the Lord Chancellor’s Department Press Office had performed this function with admirable skill, but the fact that their brief was ultimately in the hands of the Lord Chancellor was demonstrated by a decision not to comment on a particular TV

²⁶ The Welsh Language Act 1993

²⁷ S.47 of the Government of Wales Act 1998; s.156 of the 2006 Act makes similar provision.

²⁸ Paragraph 84 of Opinion No 10 of the Consultative Council of European Judges, Strasbourg November 2007

²⁹ See Shimon Shetreet: *Judges on Trial (A study of the appointment and accountability of the English Judiciary)*, 1976 at page 182

³⁰ See Shetreet at page 193

³¹ *R v Editor of the New Statesman ex p DPP* 44 LT 300

programme in 2004. That hastened the transfer of those who had performed this task so well to an office established in 2004, The Judicial Communications Office, which responsible to the Lord Chief Justice. Its principal task is to try and ensure accurate reporting. However, a number of difficult issues have remained, such as the position taken by some of the tabloids on issues such as sentencing. Various steps have been taken and further steps are being developed such as the use of judicial spokesmen – but this itself brings with it many potential problems.

(iv) Discipline and ethics

The Judges' Council developed in 2004 its own ethical Code of Judicial Conduct³²; this is regularly reviewed by a sub-committee of the Judges' Council. England and Wales is one of the few European Judiciaries with such a code³³.

Prior to the reform of the office of Lord Chancellor, discipline was in the hands of the Lord Chancellor; although High Court Judges were protected by the procedure for removal by Parliament, the powers over all other judges and magistrates were vested in the Lord Chancellor. Some Lord Chancellors insisted these powers were reserved exclusively to the Lord Chancellor; a judge responsible for a Circuit was not even allowed to chase up part time judges for not meeting their sitting commitments. However discipline was all handled discreetly – the office dealing with it was known as “The Judicial Correspondence Unit”; most complaints were very fairly and very humanely dealt with and, in most cases, issues were resolved very quickly. Change was, however, underway, as there was a justified criticism of the lack of transparency and of the fact that the ultimate decision was made by person who was also a member of the Executive. Shortly before 2003, a new system was agreed under which the Lord Chief Justice was given a much clearer role in the system.

The Constitutional Reform Act established the Office of Judicial Complaints, an office jointly responsible to the Lord Chancellor and the Lord Chief Justice, a disciplinary system and an ombudsman. Final disciplinary decisions require the concurrence of both the Lord Chancellor and the Lord Chief Justice.

The disciplinary system is now very formal and contains a public element through lay representatives sitting on disciplinary hearings, as I have mentioned. The structure is elaborate and a criticism of it is that it is very slow. There are concerns about this as those who become subject to a complaint which has to be investigated may find themselves waiting a long time for anything to happen; the Judicial Associations now provide help and guidance, but there is no system for funding the costs a judge may incur if the judge becomes subject to formal hearings. It is too early to tell whether this system will need adjustment; it has a heavy volume of work, but the vast bulk of complaints continue to relate to tribunals and magistrates, if for no other reason than that they handle the vast bulk of cases.

In parallel to this, the Judiciary of England and Wales has established grievance procedures to try and ensure that matters which might give rise to complaints which would enter the formal system can, if possible, be dealt with outside it; these procedures cover issues between judges and judges (which sometimes arise particularly between magistrates), between judges and staff and between judges and others within the criminal justice system (such as a falling out between a judge and his local chief probation officer). These procedures (which are common to most organisations) are essential, as there must be an avenue to deal with such issues without them entering the formal complaints system.

The disciplinary system applies to misconduct, not to a failure to meet standards of performance³⁴; I shall return to this when I speak of performance standards. The decision was

³² http://www.judiciary.gov.uk/docs/judges_council/published_guide0606.pdf

³³ This is a subject under review by the European Network of Councils for the Judiciary.

³⁴ Regulations 14 and 15 of the Judicial Discipline (Prescribed Procedures) Regulations 2006

deliberate. Experience elsewhere has shown that a disciplinary system is a very bad way of dealing with such issues.

(v) Finance for the courts and court administration

It has always been the responsibility of the judiciary to ensure that the cases that come before the courts are tried by the right judge and dealt with as quickly and cheaply as possible, consistent with the maintenance of high standards of judicial determination. Central to the discharge of this responsibility is the management of the whole of the body of the cases before the court as well as the management of individual cases³⁵.

Procedure has to be kept under review and the cases managed so there is no unreasonable or unnecessary delay. To a Chief Justice of several centuries ago, this was no problem. May I take an example from Lord Mansfield's reform of procedure³⁶ during his long tenure of the Chief Justiceship of the King's Bench in the eighteenth century. He had only a few colleagues whom he saw on a daily basis and so could bring about change simply and speedily. On his second day as Chief Justice, he announced that he was proceeding to judgment at the conclusion of argument, ending the practice where almost every case was reserved for judgment later and ensuring that only the most difficult cases were reserved. He ended the substantial delays caused by over reserving of judgments. Although the judiciary grew in size, it was comparatively small until well into the 20th Century and bringing about change and managing the system was comparatively easy for that reason. Moreover, until the reforms initiated after Lord Beeching's Report in 1969³⁷, the administration was decentralised and largely accountable to the judiciary itself. The establishment of the centralised Court Service accountable to the Lord Chancellor alone and the Magistrates Courts Committees and Justices Chief Executives (for the Magistrates Courts) under the control of the Lord Chancellor changed all of that.

The principal matter which was not properly dealt with at the time of the Concordat or the Constitutional Reform Act was the responsibility for the administration of the courts. It should have been clearer that the court administration was accountable to the Lord Chancellor as head of the judiciary and as a minister; if he was no longer to be head of the judiciary, then the position whereby the administration was accountable to him alone was no longer tenable. Although in the judiciary's response through the Judges' Council to the proposals made by the Government in 2003 for the reform of the office of Lord Chancellor³⁸, the judiciary sought a transfer to them of a significant participation in the administration of the courts, it was clear that this could not be achieved; the detail and importance of the issue was not understood by the judiciary or the public and there was considerable hostility in government to such a change.

It was, therefore only possible to reach agreement on a position under which the Senior Presiding Judge became a member of the Departmental Board (for some purposes) and of the Court Service Board and provision was made for detailed discussion in relation to the finances provided to the courts before final decisions were made on budgets³⁹.

This did not work in practice during 2005 and 2006, despite initial optimism⁴⁰. The Board of the Courts Service was, under the terms of its governing instrument and in the way in which it was allowed to operate, what can kindly be described as a child to which the Ministry would not give

³⁵ An example of the working of these arrangements is to be found in the 2004 protocol that sets out the Responsibilities of Resident, Designated Civil and Family Judges which sets out the duties of the judges who are responsible for this work in the Crown and County Courts:

http://www.judiciary.gov.uk/docs/responsibilities_rjs_dcjs_dfjs.pdf

³⁶ See CHS Fifoot: *Lord Mansfield*, 1936, pages 52-81

³⁷ Report of The Royal Commission on Assizes and Quarter Sessions 1966 -1969, chaired by Lord Beeching, Cmnd 4153.

³⁸ Paragraphs 57 – 58 of the Response: <http://www.dca.gov.uk/judicial/pdfs/jcresp.pdf>

³⁹ See paragraphs 24 and 25 of the Concordat

⁴⁰ See the 8th Institute of Advanced Legal Studies Annual Lecture I gave in 2005: *The Judicial and Executive Branches of Government: A New Partnership?* http://www.judiciary.gov.uk/publications_media/speeches/2005/sp051110.htm

any real measure of independence. All important decisions were ultimately made either by the Lord Chancellor or by officials within the Ministry. The Chief Executive, although a very able and experienced administrator, was not given sufficient freedom to run the court administration as an agency of the Ministry. The arrangements for discussion about the finances did not work properly as usually the judiciary were not consulted until too late and were then not given sufficient information.

When for political reasons in January 2007 it was decided by the Prime Minister to create a Ministry of Justice by adding prisons, probation and criminal law reform to the responsibilities of the Lord Chancellor, the position of leaving budgetary arrangements and the control of the court administration solely in the hands of the Executive was clearly untenable. The judiciary had to withdraw from participation on the board of the Ministry under one of the provisions of the Concordat because of the conflict of interest to which this would give rise.

Nonetheless the judiciary had learnt a great deal about the importance of the budgets and the administration during 2005 and 2006 and what was important to it. A long argument between the Ministry and the Judiciary began. It took a year to achieve a resolution in principle of these issues; much of the resulting dispute took place in public and before Parliament. The then Lord Chancellor would not accept that the decision to create the Ministry of Justice was of constitutional importance; it was said to be merely a machinery of government change; nor was there any appetite to look again at what had been sought in 2003. Over the summer of 2007 matters were looked at afresh. The resolution of the issues was announced on 23 January 2008 and the third stage of the changes begun in 2003 was achieved.

The detailed agreement is only now nearing finalisation; the main features of the new arrangements can be summarised as follows.⁴¹

First, there is to be a budgetary process which, although it leaves the ultimate decision in the hands of the Treasury (and the responsibility in respect of that in the hands of the Lord Chancellor), is intended to be a clear and transparent process. It seemed that a clear and transparent process was far better than a ring fence as a ring fence can only fence in that which has been obtained; it is more important to have a transparent process about obtaining what is needed, as the decision on that is much longer term.

Second, the Court Service, an agency, is to be transformed into a body accountable to both the Lord Chief Justice and the Lord Chancellor; its leadership is to be in the hands of a board and chaired by an independent non-executive director who is to be neither a judge nor civil servant. The Chief Executive is to manage the day to day operations under the general direction of the board.

Third, the powers of intervention by the Lord Chief Justice and the Lord Chancellor are limited.

Fourth, the staff are to owe a joint duty to the Lord Chief Justice and Lord Chancellor, this should see an end of the position whereby the administration is seen as acting for “them” – the Executive.

Fifth, operational policy and guidance in respect of the courts is to be dealt with by the agency; as all other policy is properly a matter for the Executive, it is to be dealt with by the Ministry.

Sixth, performance standards are to be set jointly and there is to be a shared “end to end” responsibility for some.

The agreement is, of course, a compromise. It rests upon yet a further agreement between the Judicial and Executive branches of the State and not on legislation. It does not go as far as the

⁴¹ It was finalised and published on 1 April 2008, see: http://www.hmcourts-service.gov.uk/cms/files/Framework_Document_Fina_Version_01-04-08.pdf

model in Ireland, the Netherlands and many other European States⁴² or the model which Scotland is to adopt, but given the size of the jurisdiction of England and Wales and the very considerable problems facing the court administration in a time of extreme fiscal constraint it is considered that this will be a realistic way forward.

Will it work?

Much will depend on those that will operate it. It will also be necessary to see that the Executive and the Judiciary both derive benefit from this agreement and that benefit is visible in the short term. There is no doubt as to what the Executive wish to achieve – better judicial working with the court administration to achieve more cost effective improvements in the administration of justice. It is, however, also vital that the judiciary see a benefit from it in the short term and not merely a benefit by way of a reduction in cuts that might otherwise occur. For example, although the court administration has for years promised better support for judges, insufficient has materialised. I would hope achievement of better support for the judiciary will be seen as one of the immediate changes that the new arrangement brings about.

The confidence the new arrangement will attract in the judiciary will also depend upon establishing proper means of consultation with the judiciary as a whole so that it is clear that the whole of the judiciary understand decisions that are made by the Court Service and also feel that decisions are being made which help them in the administration of justice.

(vi) Performance standards and performance management

There can be no doubt, for the reasons that I have given, that the judiciary is responsible for ensuring the proper handling of the body of cases before the courts. To do this effectively it needs a substantial degree of control over the administration and its finances and for the staff of the court administration to work for them. If the judiciary does not carry out its responsibilities, others are quite prepared to do it for the judiciary. There has been public criticism of the failure of the judiciary to have a system for dealing with this (for example in the Attorney General's Fraud Review⁴³, published in July 2006), but it is not the fault of the judiciary, but of insufficiency of funding.

There are two quite distinct problems.

First, the judiciary's responsibility for ensuring that cases are determined as speedily and efficiently as possible consistent with the interests of justice⁴⁴.

Second, in the very, very few cases where a judge within the team is not pulling his weight, the judiciary must address the issue.

The first is clear. With a better degree of control over the administration, this can be better achieved, but it does give rise to issues that need to be understood. The Government in Whitehall seems as keen as almost any other government in the world on what it calls "targets". This is a word that has developed in the perception of many unfortunate connotations and has on occasions produced results which are the opposite of what was intended. However, it seems to me there can be no sensible objection to having what are better called performance standards – the term used in the agreement reached with the Lord Chancellor in January 2008. In England and Wales, until two or three years ago the delays in the magistrates' courts were such that cases in some parts of the country took six months to a year to come to trial; once delays of that magnitude developed more and more people pleaded not guilty in the hope that the file would be lost or

⁴² See the expert reports written for the preparation of Opinion No 10 of the Consultative Council of European Judges and the reference set out therein.

⁴³ Paragraph 9.29.

<http://www.attorneygeneral.gov.uk/Fraud%20Review/Fraud%20Review%20Final%20Report%20July%202006.pdf>

⁴⁴ The European Network of the Councils for the Judiciary has done much work on this subject.

witnesses would not appear, thereby increasing the problem of delay. The whole system, including the position of prosecutors, defence lawyers and the probation staff as well as the attitude within the court, was pervaded by the pessimism that everything just took a very long time. Despite the pressure of many judges to see an improvement, nothing much happened. Everyone involved therefore looked at how the process could be improved and set a performance standard for the average case of six weeks from first hearing to conclusion of the trial. With a number of reforms to the administrative complexity and form filling which had crept into the procedure and a greater concentration on hearing cases rather than finding excuses to adjourn them, the system is slowly turning round and the standard being achieved.

However such a system needs very careful handling. For example, it cannot be used to rush cases or to control judges. It cannot be used to create injustice by denying adjournments where they are necessary. Standards cannot become an end in themselves.

Furthermore, it needs to be appreciated that, if government finance is provided in the expectation that standards are measured to ensure they are met, funds will be directed at ensuring that those standards are met. It is therefore essential that standards are set which produce results that are consistent with the good administration of justice. The Judges Council accepted in 2004 that performance standards were a reality of modern government finance and since then the judiciary have tried to influence the performance standards that are set, though with insufficient success. As the judiciary is accepting a responsibility for achieving standards under the agreement reached in January 2008 where it is consistent with the interests of justice, the judicial representatives on the Court Services Board will have to ensure that the standards set are sensible and will direct the money to the right place. This will be no easy task.

The second of the two issues, often called performance management, can be even more difficult in a very few cases. For all but the tiniest number, this is not a matter that ever would be thought of; the judiciary is extremely hard working. However, it has been publicly identified as a problem, albeit tiny problem, but one which can give rise to significant criticism of the judiciary, quite apart from the effect a judge who does not pull his weight has on the workload of his colleagues – the work has to be done by others. I would therefore seek to address it under the heading of performance management.

Under the agreement which the judiciary have entered into with the Lord Chancellor for the administration of the courts, the judiciary's responsibility for the judiciary is made clear. As I have already stated, experience in other spheres has shown that a failure to meet standards of performance is not an issue for discipline; it is better tackled through a system of sensible appraisal and dealing with any issue early on as a matter of help to the judge concerned.

As I have mentioned in connection with judicial appointments, a pilot appraisal system for Recorders was run, but it could not be developed because of insufficient funding. The Judges Council have established a working party to examine the issue of appraisal by judges of judges as it is clear that such a system could assist greatly in the appointments process and also deal in an effective way with the rare cases where there was an issue as to judicial performance.

This is an area where the judiciary must deal with the problem; if not others will do it for the judiciary. Progress must be gradual and cautious.

Apart from the obvious problems which arise in relation to performance management and performance standards, there is one other matter the judiciary must guard against – the pressure of a hierarchy and its effect on individual independence – something that features significantly in discussions with continental judges⁴⁵ and which could easily become a problem in these isles.

⁴⁵ Paragraph 12 of Opinion No 10 of the Consultative Council of European Judges refers to the need for "individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the judiciary."

(vii) Health and Welfare

The Constitutional Reform Act placed upon the Lord Chief Justice statutory duties in respect of the welfare of the judiciary. Before this came into force in 2005, steps had already been taken to provide a judicial helpline⁴⁶ and this has been recently improved; it was modelled on the experience in Canada where it was clear that the problems affecting the profession were to an extent reflected in the judiciary.

The Judges Council established a standing committee in 2005 to keep all these arrangements under review; its first report in December 2007, published on the Judiciary's website set out progress⁴⁷ and pointed out that the Lord Chief Justice had not been provided with the funds necessary for him to discharge his statutory duties.

One of the other notable changes has been the introduction of salaried part time working; it had long been sought by certain judges, but was introduced as it was hoped to encourage more women to take up salaried appointment, but has largely worked in practice as enabling judges who would otherwise retire to be able to sit for a proportion of their time on a regular basis; I was initially sceptical of this as it would plainly require more resources, but it appears to be working well in practice.

III GIVING ADVICE

In England and Wales it has been the case, for a substantial period of time, that policy changes which are likely to affect the courts through intended legislation are usually sent to the judges either at the time of the policies being formulated or when a draft bill is in existence; the judges are asked to comment upon the legislation from a technical standpoint and as to its effects on the administration of justice. There are of course notable exceptions – the plan announced in June 2003 to abolish the Lord Chancellor or the decision to create the Ministry of Justice in January 2007! Each has a story to itself; the last is public – the Lord Chief Justice read of the decision in *The Sunday Telegraph*.⁴⁸

This is a clearly understood and limited role which the judiciary carries out; one aspect of the existence of this work is publicly known – the work of the Rose Committee which does very valuable work in reviewing criminal justice legislation and legislative proposals.

However, more recently the judiciary has been faced with requests to consider how to draft legislation so that it might overcome objections such as those under the Human Rights Act. The Executive has thought that, if the judges could be persuaded to help in this way, there would be no problems when they reviewed the legislation as to compatibility with the Human Rights Act.

It is clear that the attempt to extend the convention where the judiciary helped on technical issues in legislation relating to the operation of the courts, into giving advice in advance on how to draft legislation to deal with issues of pre-existing substantive law was misplaced. In my view, it crosses the boundary between what is acceptable and what is not acceptable. If there is to be a change, then the proposals promoted by Lord Wolff for advisory declarations given by a court need careful consideration.

Similar issues have arisen when judges are called to give evidence in Parliament. A judge can express a view on technical matters or on what he or she understands the current problem to be, but any attempt to go further may cross the boundary of what is acceptable and unacceptable.

⁴⁶ <http://www.lawcare.org.uk/>

⁴⁷ http://www.judiciary.gov.uk/docs/judges_council/first_report_sc_2_jc_1207.pdf

⁴⁸ Para 61 of the Report of the House of Lords Constitution Committee, July 2007: Relations between the Executive, the judiciary and Parliament.

It is easy to deal with the request from the Executive which crosses the boundary; it can be dealt with without publicity unless, as happened when Mr Charles Clarke was Home Secretary, he chooses to make it public⁴⁹.

The position in Parliament is very different. A judge may be confronted with a question and has to take a public position. For that reason therefore the judiciary has developed a protocol for appearances before Parliament⁵⁰ and ensure that a judge going to Parliament has some training in advance.

These problems have not yet arisen in the Welsh Assembly due to its present very limited competence. However, in September 2007 the European Parliament decided to ask judges to give evidence in relation to role of the national judge in the implementation of European legislation and case law and training in that respect. Although such a topic could be dealt with easily, as it was by Rix LJ when he was asked to give evidence in September 2007, it will be important to establish guidelines within which judges can give evidence, if so required, before the European Parliament.⁵¹

But the issue of giving advice to the Executive also extends to the devolved administrations and to Europe. Again, as regards Wales, the scope is limited; there are mechanisms in place to deal with issues such as the working of the Welsh Language Act⁵².

However, the position in Europe is one that merits close attention. For some time the judiciaries of Italy, Spain and France have seconded judges to the Commission; very recently the Netherlands followed them in this respect. The purpose was plain – being able to influence proposed European legislation at an early stage. I have very grave doubts whether secondment of this kind would ever be compatible with the status of judges within these isles; in Europe the relationship with their Ministries of Justice is more flexible and judges in some jurisdictions move between being prosecutor, a judge and the Ministry within their constitutional systems with general acceptance. However it is important that the judiciary is able to bring to bear its expertise on technical issues and the development of European legislation, just as by convention it has done so in England and Wales. The European Network of the Councils for the Judiciary has established a working party on the issues of mutual confidence. On 4 February 2008, the Commission announced the creation of a forum to consider the development of European legal policy⁵³. The judiciary will need very carefully to work out its position and its position in relation to the Westminster Parliament and Whitehall. There is some experience in this in part because of the convention that a law lord chairs the committee that reviews steps taken to implement EU legislation.

Conclusion: Working together within these isles

The important constitutional developments which have formed the background to this talk raise the question as to how the judiciaries within these Isles (and I include the Republic of Ireland in this respect) can work closely together. The Court Services already have regular meetings. It seems to me clear that most of the issues that the judiciary of England and Wales faces (as many of the judiciaries in Europe also face) are very similar; there is a great deal that each judiciary can learn from the others. The judiciary of England and Wales have certainly learnt a great deal from the other judiciaries in Europe over the last three years in relation to the seven topics I covered when speaking about the operation of the judicial system.

⁴⁹ See paragraphs 93-96 of the House of Lords Constitution Committee report referred to above.

⁵⁰ http://www.judiciary.gov.uk/docs/select_committee_guidance.pdf

⁵¹ The evidence contributed to a report on the role of the National Judge in the European Judicial System published in draft on 6 March 2008, with Diana Wallis MEP as rapporteur.

⁵² The Lord Chancellor's Standing Committee on the Welsh Language:
<http://www.hmcourts-service.gov.uk/cms/10651.htm>

⁵³ The European Network of the Councils for the Judiciary has already established a working party for this purpose on Criminal Justice; it is chaired by Mr Justice Fulford.

But it seems to me that sharing as we do a common constitutional position in these Isles in relation to the judiciary, a common career path for the judiciary and a common background as to the development of the law, we can no longer do without specific cooperation to the end that we share ideas and pursue a common policy to try and maintain what is inevitably a minority status within the European union.

I am therefore delighted that the Lord President has raised this issue with the Lord Chief Justice. It seems to me that it is a function of the Judges' Councils in each of the jurisdictions to see how this can best be done. A few first tentative steps on specific topics seems the best way forward.

The United Kingdom is in the middle of a very complex period of change and unprecedented interest in what the judiciary is doing, not only from colleagues, the legislature and the press, but across Europe and the wider world. I have therefore been very grateful for the opportunity to try and outline the changes that have occurred over the decade and to identify some of the issues of significance.

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