LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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LORD CHIEF JUSTICE OF ENGLAND AND WALES

THE JUDICIARY, THE EXECUTIVE AND PARLIAMENT: RELATIONSHIPS AND THE RULE OF LAW

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INTRODUCTION

1. It is a very great pleasure and also a privilege to have been invited to give this speech.[1] I do so not as an interested observer, but as one of the beneficiaries of the highly valuable work that the Institute for Government undertakes with the aim of promoting better and more effective government in its widest sense.

2. Why am I a beneficiary? Shortly before I took up my current post, my colleague, Sir Ross Cranston, persuaded Peter Riddell to come and discuss whether the IFG could facilitate a forum in which we could discuss the relationship between the three branches of the state. Born of this were three seminars chaired by Peter Riddell. Their theme was the fostering of a better understanding and relationship between the judiciary, the Executive and Parliament as this is vital to the rule of law, and access to justice and our economic prosperity, all of which are fundamental to an effective and inclusive democratic system.

THE CHANGE IN RELATIONSHIPS

3. But first I must explain why it is necessary to foster a better understanding and better relationship between the judiciary and the other branches of the state. An important

[1] I am greatly indebted to Lucy Boyle, Legal Adviser to the Lord Chief Justice, for her assistance in preparing this address.

aspect of the answer was the change in the position of the Lord Chancellor in 2003 and the consequent reforms under the Constitutional Reform Act 2005 which came into effect on 3 April 2006. These included:

a. the abolition of the Lord Chancellor's role as speaker of the House of Lords and Head of the Judiciary (and the requirement that the office be held by a lawyer);
b. the creation of the Supreme Court in place of the Judicial Committee of the House of Lords;
c. the establishment of a Judicial Appointments Commission to appoint judges in place of the Lord Chancellor;
d. the prohibition on a serving judge from speaking in the House of Lords; and
e. the assumption of a number of the Lord Chancellor's functions by the Lord Chief Justice.

4. However, the changes in 2003 to 2005 which formally removed the Lord Chancellor from what many perceived as an office that provided a formal bridge between the judiciary and the other two branches of the state reflected changes that had been taking place over the preceding half century. It was during that period that the informal relationships between the three branches of the state had weakened. First, in contrast to the position earlier in the last century, there is today only one judge who has served as an MP or Government Minister: Sir Ross Cranston. It is no coincidence that he appreciated and drove forward the need to foster the relationships. Second in contrast to the position earlier in the last century, there are few MPs who have practised as lawyers for a significant period of time before they became MPs; very few continue to practice after they become MPs. In a rapidly changing environment, it is not easy to keep up to date. Third, the Lord Chancellor's Department which was staffed almost exclusively by lawyers or those with practical experience of the courts in its senior positions has evolved so that few in the senior positions in the Ministry of Justice have much experience of the courts; even fewer are lawyers. Fourth, civil servants do not necessarily stay long in the same position, whereas many lawyers and judges spend their whole professional life doing very similar kinds of work; this provides for a very different outlook and levels of detailed knowledge.

5. In short, the relationships between the judiciary and the other branches of the state had prior to 2005 and have thereafter continued progressively to diverge. But you may say that this is surely beneficial. Is this not the true separation of powers which many from Montesquieu onwards have believed to be fundamental to democratic government? I do not regard it as beneficial. To explain why, it is necessary very briefly to return to the Constitutional Reform Act.

THE EXISTING RELATIONSHIPS BETWEEN THE THREE BRANCHES OF THE STATE

6. The Act formally sets out our state's commitment to the rule of law and to the independence of the judiciary. There is no time, even if it were necessary, to discuss the rule of law or what is embodied within that principle, such as the right of access to the courts and the principle that there must be equal justice before the law.[2] It is accepted as axiomatic. But what of the independence of the judiciary? Again time does not permit me to say more about judicial independence than to make two points. First, the judiciary as a whole must be institutionally independent and provided with sufficient support so that each judge can discharge his or her primary duty of reaching decisions free of outside influence or pressure. The 2005 Act specifies in particular that Ministers must not seek to influence particular judicial decisions through any special access to the judiciary. Secondly the judiciary has a further duty to uphold the rule of law through the way in which justice is delivered. In addition to the judiciary's core function of managing and hearing cases, it is the second duty of the judges themselves to secure not merely the efficient and effective administration of justice, but the independence and impartiality of justice in its widest sense from Executive interference, let alone control. Both of these duties are fundamental to the principle of the rule of law and of equality before the law.

7. However, the independence of the judiciary, far from precluding relationships with the other two branches of the state, requires engagement with both. There are two areas that can readily be identified. First, what some describe as a dialogue through judgments where the UK courts, in a way akin to the manner of continental Constitutional Courts, set out their view of the existing rights at law and accord to Parliament the decision on

[2] *Bremer Vulcan v South India Shipping Corporation Limited* [1981] AC 909 at 917.

what to do (as for example in relation to assisted dying and in *Nicklinson*[3]*);* and second, direct judicial engagement in strengthening access to justice, helping to make better law and in modernising and reforming the law.

8. Each of these areas requires a separate approach. This evening I seek to consider the second of these areas; in part because that is the area in which I have been a beneficiary of the IFG, and in part because it has a direct benefit to all citizens. I intend to reflect on why active engagement in this area is necessary to strengthen the rule of law, to highlight some examples of where it has been achieved, and to discuss how it can be developed for the future. I would hope to encourage the IFG to return to the first (and possibly more recondite) area in due course, as that area is particularly important in the context of the constitutional changes which we are about to set out in new legislation.

9. The constitutional role and independence of the judiciary nonetheless means that in the area I intend to examine, adequate mechanisms and well-understood boundaries must exist to allow it to play such an active part. This is an ongoing process. It depends on utilising the existing mechanisms but also on developing new ones.

10. Caution is always required when willing greater interaction between the three branches of the state. Maintaining appropriate constitutional limits is not only of equal importance to the rule of law but a prerequisite to it. Policy is a matter for politicians, while the lawfulness of policy is a matter for judges.

11. Greater engagement and influence does not therefore amount to the erosion of the separation of the powers. As recent examples have shown, the judiciary, the Executive and Parliament can work well together while still respecting their functional boundaries. Moreover, such flexibility means that each branch of the state can better understand the role of and benefit in engaging with the other. This is more likely to lead to results that will secure public confidence in all three.

EXISTING MECHANISMS FOR ENGAGEMENT

12. Fortunately, the work done in 2003 to 2005 particularly by Lord Woolf who was then Lord Chief Justice, Lord Falconer, the then Secretary of State and Lord Chancellor, Sir Hayden Phillips, the then Permanent Secretary and the Select Committee on the

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[3] *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) v Director of Public Prosecutions* [2014] UKSC 38 (25 June 2014).

Constitutional Reform Bill chaired by Lord Richard, put in place mechanisms upon which it has been possible to build. Three examples must suffice.

13. First, the agreement between Lord Woolf and Lord Falconer known as the Concordat, and the terms of the 2005 Act, require the Lord Chief Justice and the Lord Chancellor to reach agreement on some very difficult issues regarding the administration of justice. The constitutional position of Her Majesty's Courts and Tribunals Service, as determined by agreement between the Lord Chancellor and the Lord Chief Justice when the Ministry of Justice was formed, is unique. It requires equal input from the Lord Chancellor and the Lord Chief Justice in terms of a joint venture or partnership.[4] In this way, the significant programme of reform to HMCTS which was announced earlier this year will be taken forward through a partnership between myself and Lord Chancellor. Nevertheless, this institutional and cooperative relationship operates within the parameters of adequate constitutional safeguards. The Lord Chief Justice may, for example, terminate the partnership if it is no longer compatible with his or her constitutional position or the independence of the judiciary.

14. Second, the Lord Chief Justice also has a statutory duty to represent the views of the judiciary to Parliament and Ministers.[5] This permits ad hoc representations and more formal institutional responses to Government consultations from the judiciary as and when required. In practice, the Lord Chief Justice appears before the Justice Committee and the Constitution Committee annually. This allows the judiciary to speak candidly about its non-judicial work and the administration of justice. In addition to enhancing transparency, this provides the judiciary with an opportunity to provide to Parliament information on its role in the administration of justice, as distinct from its role in making judicial decisions. In addition the Lord Chief Justice has power to lay written representations before Parliament under section 5 of the Constitutional Reform Act 2005. Should such a means of reporting on matters of importance relating to the judiciary, or otherwise to the administration of justice only ever be used as a "nuclear option"? I think not. It is another part of the framework for engagement; it is used, for example, in order to lay the Lord Chief Justice's report before Parliament.

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[4] The HM Courts & Tribunals Service Framework Document can be viewed at: http://www.justice.gov.uk/downloads/publications/corporate-reports/hmcts/2014/hmcts-framework-document-2014.pdf.

[5] Section 7(2)(a) of the Constitutional Reform Act 2005.

15. Third, there is the Judicial Office established by a mini Concordat. The fact that it is staffed by able and exceptionally hard working civil servants who come from departments of state means that, despite the tenacious independence which they show in working for the judicial branch of the state, they nonetheless have constructive relationships with other officials, and a knowledge of the workings of government.

16. Thus somewhat paradoxically, rather than entrench deep divisions between the different arms of the state, the 2005 Act and the agreements associated with it have provided a framework which enables the judiciary to work more closely with the Executive and Parliament in a structured way.

THE USE MADE OF THE MECHANISMS

17. Questions on whether to bring forward legislation, what to put into legislation and the mischief it should be aimed at addressing are matters which fall squarely within the ambit of the democratically elected branches of the state. Consequently, judges do not offer advice to the Executive and Parliament on the merits of proposed legislation or the meaning or likely effect of provisions in draft legislation. This includes advice on, for instance, the constitutionality of legislation or whether proposed legislation is likely to be compatible with Convention rights. Such advice should be provided by the Attorney General and Government lawyers.

18. However, judicial input into the technical and procedural aspects of reform is plainly distinguishable. In this regard, the judiciary should be regarded as part of the expert landscape for legislation.

19. Why? The answer is simple: apart from being constitutionally appropriate, judicial input in these areas is informed. Judges work “at the coal face” of such measures and have a wealth of experience regarding the operation of substantive and procedural law. By comparison, it would not be thought of as novel for the Government to consult Her Majesty's Treasury on policy proposals involving the spending of public money. Quite the contrary, it would be regarded as inconceivable for it not to do so.

20. How far can technical and procedural advice go? It can properly encompass the practical consequences of proposals and outline how they would interact with existing procedure. The aim is not to pass judgement on the merit of proposals. It is to ensure

that if the proposal goes ahead it will work as well as it possibly can; or to identify the pitfalls, so that if possible they can be rectified. This allows the Government to have a better understanding of the impact of its decisions and assures Parliament that legislation is fit for purpose. There are likely to be consequences of the reform for the administration of justice that could never be anticipated by the Executive or Parliament. I will take two examples one in relation to the Executive and one in relation to Parliament.

Criminal justice

21. The first is in the contrast between what happened in relation to two important pieces of criminal justice legislation: the Criminal Justice Act 2003 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO 2012"). Both contain a number of matters that remain controversial, such as the creation of Imprisonment for Public Protection orders and their abolition for the future, but not for existing prisoners. I can, however illustrate the point by reference to something entirely uncontroversial: the way in which a judge is required to deal with crediting against a sentence of imprisonment the time spent in prison on remand awaiting trial.

22. Until the 2003 Act, the time to be credited was worked out by the prison authorities and credited. The 2003 Act changed this and required the sentencing judge to calculate and specify how many days of credit were to be given.[6] This resulted in a significant level of error, usually as a result of inaccurate or incomplete information being given to the judge. These errors had to be corrected on appeal to the Court of Appeal Criminal Division with the consequent diversion of limited resources away from substantive issues. The courts had to rectify this problem by devising a formula which in the majority of cases enabled corrections to be made without the need for a costly appeal. It appears that no one in the Executive took the advice of the judges on this or any of the other provisions of the Act which resulted in a significant number of cases on other parts of the Act which were needed to clarify its operation.

23. In contrast, when changes to the sentencing regime were contemplated prior to the enactment of LASPO 2012, there was full consultation with the judiciary on this issue by the Ministry of Justice. It was recognised that the impact of potential sentencing

[6] Section 240.

reforms should be informed by the experience of those who actually sentence in the courts and understand which systems work and those that do not. As a result of this process, the Government was able to make a better assessment of the likely implications of its policy and ensure that the legislation implementing sentencing reform was workable. In the particular instance I have chosen, LASPO 2012 reintroduced automatic credit for time spent on remand in custody.[7] Apart from instances where it was contemplated there would be the need for the court to lay down guidelines, in this area, LASPO 2012 has produced little that the courts have had to correct to make it work properly.

Family justice

24. It has become a trend in recent years for members of the judiciary to be asked to appear before Select Committees and Public Bill Committees. Such appearances should be regarded as exceptional. Judges should never enter the political arena. They cannot comment on policy, cases or outside of reports that they have completed following public inquiries or reviews.

25. Nevertheless, such appearances can be valuable provided that they are selective and restricted to the technical and procedural aspects of a policy or proposal. One example was the evidence given by President of the Family Division, Sir James Munby, to the Children and Families Bill Committee last year in respect of the now Children and Families Act 2014. The Act is wide-ranging and complex and includes various provisions which have changed the law in relation to family justice. The President provided the Committee with feedback on the feasibility of the proposed 26 week time limit for dealing with care and supervision orders by way of amendment to section 32 of the Children Act 1989. This was based on empirical information gained from his extensive experience of sitting in the family courts and as the Head of Family Justice. While giving evidence to the Justice Committee earlier this year, I was told by the Chair of the Bill Committee, Mr Christopher Chope MP, that this contribution was *"significant and worthwhile".*

26. The routes that I have outlined so far have been used to ensure that the judiciary engages appropriately with the other branches of the state. However, it is also vital that the Executive and Parliament are proactive in consulting the judiciary on matters which

[7] Section 108 LASPO 2012 inserted section 240ZA into the 2003 Act.

go to the heart of the proper administration of justice while also respecting the constitutional limits of its ability to contribute.

TOPICS FOR DEVELOPING AND FUTURE ENGAGEMENT

27. I believe that the key to better relations is creating better understanding between the three branches of the state. As I have said already, there is a way to achieve this without offending constitutional principles. Let me therefore look at five examples of topics which should be considered.

Improving the quality and accessibility of law

28. There can be no doubt but that UK legislation, particularly subordinate legislation, is usually highly complex, very lengthy and difficult for the public to access easily; it is a problem which the UK shares with many other states. One of the great judges of the last century described our law as being somewhat akin to "medieval magic" to which access was only possible through a person practised in the art. There may be many reasons for this complexity. One is the disinclination of allowing judges, or others working on the front line, too much discretion. Another is trying to provide for every eventuality. There can be an over-trusting belief that enacting a law will always change behaviour. And finally, there is the conservatism of lawyers of seeking to carry on with the old law despite a change.

29. This is clearly an area where the three branches of the state need to work more closely together to understand what legislation can actually achieve, how it can be more simply drafted and how it can be made more accessible. There is, for example, an urgent need to use IT not simply to replicate the practices we presently carry out on paper, but to produce a modern corpus of law set out in a systematised and up to date manner (and not by separate acts of Parliament) which is readily accessible and will work in practice.

Understanding the importance of lawful decision making

30. Everyone says that they accept that when the Executive has to make a decision, it has to make it in accordance with the law. Judicial review has been developed to ensure that there is such compliance, but there are some who consider that it is too readily used. We also discussed this in the context on the vital role of lawyers in Government in one of the seminars here at the IFG.

31. I must, however, respect the present difference between the Houses of Parliament about the scope of judicial review in a Bill currently before them. It would be wrong of me to seek in any way to influence the outcome by saying anything further about judicial review, save that, it is an aspect of our constitution that has given rise to much misunderstanding.

Identifying problems and making the legal system more cost effective

32. None of us have been left in any doubt that the next spending round will see an ever increasing need to make the functions that the state performs more cost effective or to reduce the scope of those functions.

33. Although it is for Parliament to decide what functions the state is to perform and how much it is prepared to spend, the judiciary has as keen an interest as the Executive in ensuring cost effectiveness in many of the functions of the state, in addition to the delivery of justice where it has the direct responsibility and duty. Let me take an example related to the cost effectiveness of litigation. One of the issues most frequently raised by commercial interests who chose to litigate their civil disputes in the UK is our system of disclosure of documentation. Although the judiciary have through judicial decisions and their leadership of the reform of procedural rules tried to lessen the burden, the advent of modern methods of communication, particularly e-mail, has massively increased the amount of documentation relevant to a dispute. Similar problems have arisen in criminal cases, particularly in relation to fraud and market manipulation. The similar duties of disclosure imposed on the Executive in relation to its duty of candour have also significantly increased the burden. These are related problems to which there are many differing solutions which need further work and discussion.

The EU

34. Another area of intense interest is legislation that is made in Brussels. I do not intend to enter into the controversy as to the extent of the legislation made in Brussels, but I wish illustrate what needs doing by drawing on another example in relation to the EU Regulation in relation to victims of crime. A few years ago, the judiciary established with the relevant UK ministries and with those in universities expert in criminal justice

in Europe a round table forum to discuss legislative proposals by the EU commission under what was known as the Stockholm Programme. One of these proposals related to victims of crime. By early engagement with the Commission by those bodies represented at the roundtable forum, by attendances, speeches and active participation in conferences across Europe and meetings with the Commission, the Regulation that emerged was compatible with our common law in the welcome improvements it sought to make.

35. We have not so far discussed this at the IFG, and in the immediate future the timing would not be right. But it is an important task for the future.

Devolution

36. Another area which we have not so far discussed is devolution. Let me take Wales as an example, as by and large, justice is not a devolved function. Since the Welsh Assembly acquired in 2011 powers to enact primary legislation, it has begun to enact law which is different from that in England in matters that affect the work of the courts, such as family law and landlord and tenant law. For this reason there is an urgent need to establish mechanisms through which the courts can give effect to the drafting and implementation of these laws in a manner similar to that I have described in relation to Westminster legislation. For example, the Ministry of Justice has long been accustomed to considering and proposing changes to the Civil Procedure Rules arising out of changes to primary legislation. It is important that mechanisms likewise exist in Wales, so that changes to primary legislation in Wales are followed through, where necessary, in the Rules.

37. This topic in relation to Wales and the more general topic of the need for precision and clarity, particularly in relation to justice, in the drafting of the new Bills which will be brought forward in the next Parliament, are again areas for engagement.

THE WAYS AND MEANS OF DEVELOPING ENGAGEMENT

38. How do we do take this work forward? Some measures to improve understanding and cooperation are already underway. For example:

    a. We have encouraged members of the Justice Committee to come to the courts and sit in on court proceedings both in the appeal courts and locally,

to help develop a current understanding of the work of the courts and the judiciary.

b. We have encouraged members of the Office of the Parliamentary Counsel to visit the Royal Courts of Justice and see first-hand the way in which lawyers and the court approach issues of statutory interpretation.

c. There is already formal Guidance to Judges on Appearances before Select Committees.[8] Guidance on judicial engagement with the Executive on discussing legislative proposals and draft bills is underway and will be produced next year.

39. But what is really needed is a deeper and broader understanding across the Executive and Parliament of what is being done and how much more could be done. I therefore welcome the wide attendance here tonight. Again an illustration may be useful. It may not be obvious that legislation introduced by departments other than the Ministry of Justice and the Home Office would benefit from judicial engagement. All will depend on the nature of the legislation being considered. For instance, the Consumer Rights Bill will shortly complete its passage through the House of Lords. Although sponsored by the Department for Business, Innovation and Skills, Schedule 8 of the Bill introduces significant changes to the jurisdiction of the Competition Appeal Tribunal. It will become a specialist court hearing private competition claims from all parts of the United Kingdom. It is therefore essential for the effective and efficient administration of justice that judges with sufficient expertise are able to sit in the Tribunal and deal with its caseload. Yet the current system contained bars to this. I am pleased that engagement with the judiciary has led to an undertaking by the Government that the Bill will be used to remove these bars. It is an excellent example of a way forward for wider engagement.

CONCLUSION

40. It is, I hope, self-evident from what I have outlined that the judiciary, the Executive and Parliament must, within the clear framework of our constitution in which the independence of the judiciary is fundamental, work together to make the law clear, technically correct and accessible. Further, they must work together to ensure that the systems designed to facilitate access to justice and uphold the rule of law actually

[8] The guidance can be viewed at: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/select_committee_guidance.pdf.

achieve those aims. When it comes to upholding justice and the rule of law, there are no "silent partners" of the constitution.

41. It is not sufficient to leave these matters to evolution, chance or individual relationships. We have a framework for development, but it is not widely understood. On the eve of an election and in circumstances where it is essential that the state discharges its functions in a cost effective and fair manner, we have an opportunity. I am sure with the enormous help and encouragement of the IFG we can take advantage of it.

42. Many thanks to you all for listening and to the IFG and to Peter Riddell in particular for all they have done.