



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RT HON. THE LORD THOMAS OF CWMGIEDD

**THE JUDICIARY WITHIN THE STATE – THE RELATIONSHIP
BETWEEN THE BRANCHES OF THE STATE**

MICHAEL RYLE MEMORIAL LECTURE
RIVER ROOM, PALACE OF WESTMINSTER

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Introduction¹

1. It is a privilege to have been asked by the Study of Parliament Group to give this year's Michael Ryle Memorial lecture, and to follow the practice of delivering it in the Palace of Westminster.
2. Michael Ryle² was one of the two founders of the Study of Parliament Group which had its aim of bringing a particular focus to the study of the contemporary working of Parliament. When asked earlier in the year to give this lecture, I thought it appropriate to look at the contemporary position of the judiciary of England and Wales within the State and its working relations with the other branches of the State. I hope that Michael Ryle would have thought the contemporary working of another part of our constitution to be a good subject for similar study.

¹ I wish to thank Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, for his help in preparing this lecture.

² Michael Ryle came from an extremely distinguished family, which included eminent philosophers (Gilbert Ryle, writer of *The Concept of Mind*), doctors (John Ryle, inventor of the nasogastric tube), and theologians (The Rev Herbert Ryle, Dean of Westminster), as well as astronomers (Martin Ryle, Nobel Prize winner and Astronomer Royal).

3. As the subject was too large to cover in one lecture, I agreed with the trustees of the Lionel Cohen lecture which is given at the Hebrew University of Jerusalem and the Dean of its Law School and with your President that I would divide the subject. Last month at the Hebrew University in Jerusalem³, I explained why it was apposite to address this large subject; I concentrated on the development by the judiciary of its own coherence and its governance structure which was appropriate to its contemporary position as a clearly separate branch of the State with its own functions and responsibilities. I explained how coherence and governance were essential for the protection of the judiciary's individual and institutional independence when performing its role in upholding the rule of law; and how its developing governance structure enables the judiciary better to discharge for the benefit of the public its other functions and responsibilities such as the timely and efficient delivery of justice and its activism in reform.
4. In today's lecture, I want to consider the way in which the working relationship between the judiciary and the other branches of the State⁴ should operate, as for large part it does, in our contemporary democracy. As I explained in the earlier lecture, one of the reasons for doing so is that we have about 10 years' experience of the effect of the Constitutional Reform Act 2005 (the 2005 Act). Over that 10 year period the judiciary has not only had to develop its own governance structure but also develop a different relationship with the other branches of the State.
5. I will assume that the concept of the independence of the judiciary needs no further explanation from me; it is a well traversed subject. However the working relationship between the judicial branch of the State and the other branches is not as developed a subject. It suffers from the same lack of study, with some exceptions,⁵ as the subject I addressed in the earlier lecture: Judicial Governance.

³ J. Thomas, *The Judiciary within the State – Governance and Cohesion of the Judiciary*, (17 May 2017) <<https://www.judiciary.gov.uk/wp-content/uploads/2017/05/lcj-lionel-cohen-lecture-20170515.pdf>>

⁴ As I noted in that earlier lecture, following Edmund Burke, I have treated the media as akin to one of those branches. E. Burke attrib. in T. Carlyle, *Sartor Resartus, On Heroes, Hero-Worship, and the Heroic in History*, Lecture V (Dent, 1948) at 392, 'Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all.'

⁵ Such as *The Policies of Judicial Independence in the UK's Constitution* (Hazell et al) Cambridge University Press 2015; Shetreet and Turenne: *Judges on Trial* 2nd edition 2013 (Princeton and Oxford).

6. I intend to look at the subject under six headings:
- (1) The necessary understanding of the position of the judiciary;
 - (2) The interdependence of branches of the State;
 - (3) The judiciary and Parliament;
 - (4) The judiciary and the Executive;
 - (5) The judiciary and the media; and
 - (6) The constitutional role of the Lord Chancellor.

I come to the position of the Lord Chancellor last. The other relationships make clear why the special position of the Lord Chancellor and the need for the holder of that office to discharge properly the responsibilities of that office are an essential part of the overall operation of our constitution.

(1) The necessary understanding of the position of the judiciary

7. It may be thought surprising to many here that it is necessary to begin with a word about the need for a better understanding of the position of an independent judiciary within the State and the centrality of justice and of upholding the rule of law to the good governance, prosperity and social order of the UK.
8. The independence of judges, as decision-makers entrusted to make impartial decisions, has been accepted since the constitutional revolution at the end of the seventeenth century. It was somewhat later that the judiciary was recognised as a separate branch of the State in the United Kingdom.⁶ It has only been since 2006 that the judiciary of England and Wales has had its own governance structure to protect its individual and institutional independence and to carry out the responsibilities and functions entrusted to it. Some of those functions, such as the making of decisions in disputes, are its exclusive function and some others it shares with other branches of the State.

⁶ Lord Neuberger PSC acknowledged that by the end of the 20th century history had brought our constitution to the point where there were three recognised and '*principal organs of state*': legislature, executive, and judiciary. The latter's role, exercising the prerogative power of justice, being to '*uphold and further the (constitutional principle of) the rule of law*' through identifying and applying the law in individual cases that come before the courts. *R (Miller & Anor) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5; [2017] 2 WLR 583 at [41]–[42].

9. Its constitutional relationship to the other branches of the State today is clear. In very simple terms, just as Parliament exercises its form of sovereignty, one which is supreme in our constitution,⁷ through legislation, so the judiciary exercises its core function through judicial decisions in the courts⁸. The Executive exercises the Crown's administrative powers⁹: implementing Parliament's will as expressed in legislation and securing the execution of judicial decisions. It, additionally and amongst other things, formulates policy to be considered by Parliament as part of the law-making process.
10. Although that is relatively straightforward, there is a somewhat surprising lack of understanding of the position of the independent judiciary as a separate branch of the State. There are several possible explanations for this. I will take four which I consider the most significant. First, as the current working of our constitution is the product of evolution, such evolution does not make as clear the nature and consequences of the change effected by evolution as the clear words of a constitutional amendment to a written text.¹⁰ There was no "big bang".
11. Second, as I have mentioned the idea that the courts were a separate branch of the State has in terms of our constitutional evolution a relatively short history.¹¹ Judges, like Ministers of the Crown, historically served at the pleasure of the sovereign.¹² As Professor Sir John Baker noted judges were understood to be:
- "servants of the king . . . paid by the king, and in theory removable at the pleasure of the king . . . no more secure in office than government ministers."¹³

⁷ As acknowledged in *Miller* at [43].

⁸ The status of the courts was explained by Lord Bridge in 1991 when he stressed that in our country the rule of law depends upon 'twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.' *X v Morgan-Crampian Ltd* [1991] AC 1 at 48.

⁹ *Miller* at [45].

¹⁰ See, for instance, V. Bogdanor, *The New British Constitution*, (Hart, 2009). Unlike in countries such as the United States, we do not have a written text which sets out our constitution's fundamental features; and, as US Chief Justice Marshall famously noted, one advantage of a written constitution is that such fundamentals '*may not be mistaken, or forgotten*'. He, of course, was accentuating the positive. See *Marbury v Madison* 5 US 137 (1803 at 176; also see S. Levinson, *Reflections on what constitutes 'a Constitution': The importance of 'Constitutions of Settlement' and the potential irrelevance of Herculean Lawyering*, in D. Dyzenhaus & M. Thorborn, *Philosophical Foundations of Constitutional Law*, (OUP, 2016) at 83.

¹¹ A brief glance through John Locke's theory of government would lead to the conclusion that there was no such thing as the judiciary. Parliament and government were there. The judiciary was absent. It was considered to be a part of the government; an aspect of the executive. J. Locke, *Second Treatise on Government*, (CUP, 1994) chapter 12, section 147

¹² As originally provided by the Act of Settlement 1701; now see, for instance, Senior Courts Act 1981, s.11(3).

¹³ J. Baker, *An Introduction to English Legal History*, (Butterworths) (Fourth Edition) (2002) at 166.

More than that they were, during the Middle Ages at least, required to follow any instructions issued by the King. Judges often acted as advisers to the Crown, and more significantly as Ministers. Lord Mansfield sat in the Cabinet, as did Lord Ellenborough, for instance.¹⁴ The Lord Chancellor was the epitome of this: a senior Minister and head of the Court of Chancery. Separation of powers, and the clearer understanding that the judiciary was not simply another aspect of the Executive, came with the 18th Century. Judges no longer served at the sovereign's pleasure, but during good behaviour, removable only by address to Parliament or writ of *scire facias*.¹⁵ Judicial offices did not determine on a demise of the Crown, thus no longer could a new monarch appoint their own judges as they could appoint their own Ministers.¹⁶ Judges no longer acted as advisers to the Crown or sat in the Cabinet and, from the 1870s, all judges were finally barred from sitting as Members of the House of Commons.¹⁷

12. Third, the relationship between the Executive and the judiciary was, until the 2005 Act, complicated by the lack of clarity of the position of the Lord Chancellor and the blurring of the respective responsibilities of the Lord Chancellor's Department and the responsibilities of the judiciary. Let me give you an example from the early 1970s - one of Lord Beeching's reports - not his reports which looked at the railway industry, but the report he undertook between 1966 and 1969 as Chairman of a Royal Commission on assizes and quarter sessions.¹⁸ The report was wide-ranging and ultimately resulted in fundamental reform of the courts' structure in the Courts Act 1971. One significant recommendation, which was implemented, was the wholesale transfer of responsibility for the courts' administration from the judiciary to the Executive - the Lord Chancellor and the Lord Chancellor's Office.¹⁹ Like his railway reports, Lord Beeching's report into the courts was not met with universal approval. One particular complaint raised against it was made by William Wells QC MP, Recorder of King's Lynn, and a former member of the

¹⁴ See N. Poser, *Lord Mansfield: Justice in the Age of Reason*, (McGill) (2013); the latter served in Lord Grenville's 'Ministry of all the Talents'.

¹⁵ For a discussion see, R. Jackson, *The Machinery of Justice in England*, (CUP, 4th edn, 1964) at 258; Act of Settlement 1701, 1 W. & M. Sess. 2. c. 2. s.2, "That after the said limitation shall take effect as aforesaid, judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

¹⁶ Commissions and Salaries of Judges Act 1760, 1 Geo. III c. 23, s. III.

¹⁷ Common law judges had been excluded since 1805; see Shetreet, *Judges on Trial* 1st edition, (1976) at page 15. Supreme Court of Judicature Act 1873, s.9, Supreme Court of Judicature Act 1875, s.5; House of Commons Disqualification Act 1975, s.1(1)(a).

¹⁸ The Report of the Royal Commission on Assizes and Quarter Sessions, (Cmd 4153, 1969).

¹⁹ Beeching Report paras. 489ff.

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Committee,

which had examined the operation of the High Court and Court of Appeal in the late 1940s and early 1950s. His complaint was straightforward: the report and recommendations failed to understand a constitutional fundamental, that

‘the administration of justice is not only a matter of machinery but is a part of the functions of the State which goes to the root of a well-ordered society ...’²⁰

The reforms it ushered in, because they were made without a proper understanding of the constitutional status of the courts and judiciary as a separate branch of the State, concentrated the running of the courts in the hands of the Executive whereas it had for centuries, and properly, been carried out independently of the Executive. As Professor Shetreet would go on to conclude, the consequence of this was to “pose a challenge to judicial independence”.²¹ Lord Browne-Wilkinson set out a similar conclusion in his well-known lecture, *The Independence of the Judiciary in the 1980s*.

13. Fourth, there is an insufficient understanding of the centrality of justice to the functioning of our society. I have spoken of this on other occasions²², but one illustration of the lack of understanding is the characterisation of the courts as being service providers akin to a utility like water supply, of litigants exercising their constitutional right of access to the courts to vindicate their rights, to being consumers who, like any other consumer, must pay for the service they receive.²³ Indeed, just as Lord Beeching failed to appreciate the proper role and nature of the courts within our State, contemporary discussions that focus on the idea that they are service providers that operate on a pay-as-you-go basis is one that, as Lord Scott of Foscote noted some time ago now,

²⁰ T. Wells, *The Royal Commission on Assizes and Quarter Sessions 1966–69*, *The Political Quarterly* Vol. 41, Issue 2 (1970) 216 at 216.

²¹ S. Shetreet, *Jewish and Israeli Law – An Introduction*, (De Gruyter, 2016) at 239.

²² *The Centrality of Justice: its contribution to Society and its delivery* (Lord Williams of Mostyn Memorial Lecture, November 2015 <https://www.judiciary.gov.uk/wp-content/uploads/2015/11/lord-williams-of-mostyn-lecture-nov-2015.pdf> ; *Judicial Independence in a changing constitutional landscape* (Commonwealth Magistrates and Judges Association Conference, Wellington, New Zealand (September 2015); <https://www.judiciary.gov.uk/wp-content/uploads/2015/09/speech-lcj-judicial-independence-in-a-changing-constitutional-landscape2.pdf> ; both are published in *Being a Judge in the Modern World* (OUP, 2017)

²³ See, for instance, J. Jolowicz, *Civil Litigation: What is it for?* in D. Dwyer, *The Civil Procedure Rules Ten Years* (OUP, 2010) at 60; R. Dingwall & E. Cloatre, ‘*Vanishing Trials?: An English perspective*’, *Journal of Dispute Resolution* 7 (2006) 51 at 67; Ministry of Justice, ‘*Court fees – proposals for reform*’ (December 2013) (CM 8751) at 4.

'profoundly and dangerously mistakes the nature of the (judicial) system and its constitutional function.'²⁴

14. Thus, although the 2005 Act has finally made explicit the position of the judiciary as an independent branch of the State with its own governance and responsibilities, that has not been sufficient. What has been needed, and still is needed, is an understanding by all that the judicial branch is just that: a branch of State, and, crucially, the branch that with Parliament secures the rule of law. As such it cannot be confused with, or referred to as, a provider of consumer services. Equally, there cannot but be a proper recognition that it should be funded properly by the State, just as Parliament is properly funded, so that the State can discharge its constitutional function effectively, efficiently and equally.

(2) The interdependence of the branches of the State

15. An understanding of the judiciary not only as an independent judiciary making impartial decisions but as a separate branch of the State, independent of Parliament and the Executive, with its own governance and its own responsibilities must therefore be the necessary starting point for the consideration of the proper working relationship between the judiciary, the Executive and Parliament and the media.

16. However, the recognition of the fact that each branch of the State is separate and independent of the other does not, nor can it properly, mean that each branch stands in isolation from the other, each carrying out its functions without reference to, understanding of, or working with the others. The opposite is the case. While careful to ensure they maintain their distinct roles, and do not intrude upon the functions and responsibilities of the others, the Executive, judiciary and Parliament cannot but work together.

17. Thus, although one of the objectives of the 2005 Act was to make clear the position of the judiciary as a separate and independent branch of the State, 10 years on it has become very clear that a proper method of working between the judiciary, the Executive

²⁴ Cited in Zander, *The State of Justice*, (Sweet & Maxwell) (2000) at 39, and see D. Neuberger, *Has mediation had its day?*, (Keating Lecture, 10 November 2010) at [10].

and Parliament has had to be established. As I have said elsewhere,²⁵ somewhat paradoxically the 2005 Act and the agreements associated with it have not only provided the necessity for working together, but, if observed, provided a framework for that to happen in a structured way.

18. There have been many terms used to characterise that working together. In the United States, one of the best-known descriptions was that given by Jackson J in the US Supreme Court in *Youngtown Co v Sawyer* 343 US 579 (1952) at 635,

“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”

Some have described working together as “a collaborative exercise”,²⁶ but “interdependence” is the preferred term I have used, as it embraces “inter-institutional comity”²⁷ and “mutual respect”²⁸ for without such comity or respect, there cannot be proper interdependence. In choosing the term “interdependence” which has been used so aptly in a US Supreme Court judgment, it is essential to bear in mind that the constitution of each nation state is different; it is therefore necessary to use any term that is borrowed in a context that is apt for the United Kingdom.

19. Using that term, interdependence, in the context of the United Kingdom, I think it possible to identify three essential characteristics of a relationship premised on interdependency²⁹:

²⁵ J. Thomas, *The Judiciary, The Executive and Parliament: Relationships and the Rule of Law*, (Institute for Government, 1 December 2014) <<https://www.judiciary.gov.uk/wp-content/uploads/2014/12/institute-for-government.pdf>>.

²⁶ A. Kavanagh, *The Constitutional Separation of Powers*, in D. Dyzenhaus & M. Thorborn, *ibid* at 235;

²⁷ A. Kavanagh *ibid* at 235-236 citing: J. King, *Institutional Approaches to Judicial Restraint*, 28 (2008) OJLS 409; and, *Buckley v Attorney General* [1950] Irish Reports 67 at 80, it is

‘. . . , ‘the respect which one great organ of the State owes to another.’

²⁸ Lord Hope in *R (Jackson & Ors) v Her Majesty's Attorney General* [2005] UKHL 56; [2006] 1 AC 262 at [125], ‘In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality . . . is maintained to a large degree by the mutual respect which each institution has for the other.’

That balance and mutual respect, in terms of the judiciary and executive, was explained by Nolan LJ in *M v The Home Office* [1992] QB 270 at 314 as,

‘The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.’

²⁹ Professor Kavanagh sets out an interesting discussion of this at 236.

- (i) There must be a clear understanding by each branch of the constitutional functions and responsibilities of the other branches. I have already set out the difficulties that have arisen in relation to a proper understanding of the constitutional position, functions and responsibilities of the judiciary, as an independent and separate branch of the State.
- (ii) Each branch must mutually support the others when they are carrying out the functions and responsibilities which the constitution has assigned to the other branches.
- (iii) No branch should interfere in the proper working of the functions and responsibilities which the constitution has assigned to another branch; each must show a proper and mutual respect for the role of the other branches.³⁰

(3) The relationship with Parliament

- 20. I will begin with the relationship between the judiciary and Parliament.
- 21. Historically, there was a fluid movement between Parliament and the judiciary. Judges could sit as MPs. The Law Lords could sit in the Upper House. MPs were often appointed to the bench; at one time service as an MP was considered to be an almost essential prerequisite for appointment. It being thought that experience gained as an MP was an essential grounding in our constitution, which was essential for the judicial role.³¹ And, of course, Ministers could become judges. As is well-known, until the end of the 1940s the serving Attorney-General had first refusal on appointment to the office of Lord Chief Justice. It is now only exceptionally that a former MP or Minister will seek or secure appointment to the bench. Sir Ross Cranston, the recently retired High Court judge, former MP and Solicitor-General, being the only recent exception.

Understanding

- 22. One consequence of this greater separation between Parliament and judiciary has been the risk that the two will have a decreasing understanding of their constitutional roles,

³⁰ See for example, *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868 at [148].

³¹ Lord Halsbury, *Autobiography*, (1929) at 69, cited in Heuston, *Lives of the Lord Chancellors (1885 – 1940)*, (Clarendon Press) (1964) at 39.

ways of working and ways of working with each other. Parliament and judiciary have engaged to increase the understanding of their respective roles, to give real understanding of what goes on inside a court room (and behind the scenes) to ensure that Parliamentarians fully understand the need for respect of the role of the judiciary and to improve the judiciary's understanding the contemporary workings of Parliament.

23. Regrettably, but understandably, few people attend court to see what goes on, something which may become easier as we digitise our processes. There is a hope more widespread streaming, based on the excellent scheme of the Supreme Court for its hearing and judgments, may enable more to follow the work of the courts, subject to safeguards for witnesses and victims, as the judiciary has made clear. However, visiting courts has real value though for policy-makers to understand the practicalities of the administration of justice. As Marie Rimmer MP put it during my appearance before the Justice Select Committee last November, a visit to St Helens courthouse was 'very enlightening' and 'quite humbling'.³² Greater familiarity breeds greater understanding, which cannot but help Parliament carry out its constitutional role. To increase such awareness we devised, under the initiative of Sir Ross Cranston, and are implementing a programme for MPs to visit the Royal Courts of Justice and local courts and tribunals.³³
24. Education may need to go wider than this. There have been one or two instances of MPs writing to judges on behalf of constituents who are involved in proceedings. There has been a suggestion, no doubt inadvertent, that the letters should or could be taken account of by the judge dealing with the proceedings. I say inadvertent because I am sure that no Member of Parliament would deliberately seek to influence a judicial decision; I should add that any such letters are disclosed by the judge concerned to all the parties and are not taken account of in any judicial decision-making process. A proper understanding of the constitution would preclude that possibility. But education is necessary to ensure that proper constitutional boundaries are well-understood.

³² House of Commons Justice Select Committee, Lord Chief Justice's Annual Report 2016, One-Off evidence session, (22 November 2016) at Q32

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/lord-chief-justice-annual-report-2016/oral/43679.pdf>>

³³ There is currently a scheme operated in conjunction with the Industry and Parliament Trust.

25. Fostering an understanding of Parliament is equally important for the judiciary. A number of examples can be given. First, there needs to be a better understanding by the judiciary of the practical operation of the political process and the reality of law making. Second, the need for a better judicial appreciation of Parliamentary perceptions of the role of judges. Third, there is a need for a greater insight into the reality of the nature and extent of devolution, and the inter-relationship between Parliament and the devolved legislatures. Where, as in the case of Wales, we are seeing the development of distinct legal regimes which can form the basis of proceedings in our courts, this is particularly important. Fourth, the manner in which the policy of the Executive is transformed into law through the Parliamentary process, the work of select committees, bill committees and ‘ping pong’ needs to be better understood; not least to ensure that extra-judicial comment does not stray into political territory. Fifth, an understanding of the constitutional relationship between the courts and Parliament, as mediated by the Bill of Rights 1689, and the effect it may have in certain circumstances on the court’s role and powers.³⁴ I will return to the 1689 Act.

Mutual support

26. I turn to the characteristic of mutual support. As one of the aims of the 2005 Act was to provide for a clearer separation of the branches of the State, no criticism could be made of the logic of removing the Law Lords from the House of Lords and prohibiting peers who hold judicial office from speaking in the Chamber of the House of Lords. The only substitution was the right granted to the chief justice of each of the United Kingdom’s legal jurisdictions, and more recently the President of the Supreme Court, to make written representations to Parliament under s.5 of the 2005 Act.³⁵ Although originally described as a “nuclear option”, the section has been used as a more workable every day tool as a means of communication on non-political issues from the Lord Chief Justice on behalf of the judiciary to Parliament. Its most regular use has been to enable the Lord Chief Justice to submit an annual report to Parliament; a more novel use was, on the occasion of the recent introduction of the Prison and Courts Bill in May 2017, to submit

³⁴ See for instance, the discussion in *The Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (2011) <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf>>.

³⁵ Section 5 of the 2005 Act as amended Criminal Justice and Courts Act 2015, s.81(2).

representations supporting the parts of the Bill relating to the delivery of justice as they were essential to the court reform and modernisation programme³⁶.

27. The fact that after the coming into effect of the 2005 Act there had to be a means of achieving a working relationship between Parliament and the judiciary is illustrated not only by the wider use of the right to make representations, but in the growth in the relationship between the judiciary and the Justice Committee of the House of Commons and the Constitution Committee of the House of Lords. Equally, and increasingly other Select Committees are also inviting members of the judiciary to assist them in their enquiries.³⁷ Such appearances provide a means by which Parliament and judiciary can, subject to certain obvious reservations, exchange views on matters of interest³⁸, but equally, contribute in a constitutionally appropriate manner to the legislative process.³⁹
28. For the existence of these Committees may I return to Michael Ryle. He was, as Sir Michael Wheeler-Booth, Clerk of the Parliaments, put it, “one of the great (Parliamentary) modernisers”, because of his championing of the development of Parliamentary Select Committees and the scrutiny role they play. Democracy and the rule of law, amongst other things, depends upon scrutiny: the ability of Parliamentarians, and ultimately through them the public, to scrutinise the work of Parliament, of the departments of the Executive, and the judiciary. As Tam Dalyell described it, without Michael’s “persuasive words in the ears of many MPs, and in particular the impression he made on (Richard) Crossman (MP)”, at the time Leader of the Commons, departmental Select Committees would have been “snuffed out in the infancy” and no doubt the

³⁶ <https://www.publications.parliament.uk/pa/cm201617/cmpublic/PrisonsCourts/memo/PCB19.pdf>

³⁷ House of Commons Justice Select Committee, *Courts and Tribunal Fees* (2nd Report of 2016-2017) <<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/167/167.pdf>>.

³⁸ An early example, both Lord Phillips CJ and Sir Anthony Clarke MR gave valuable evidence to the Committee, which scrutinised what became the Legal Services Act 2007. Joint Committee on the Draft Legal Services Bill - First Report (2005-2006) <<https://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/23202.htm>>: Lord Neuberger MR and Mr Justice Tugendhat gave evidence to the same Committee on super-injunctions.

And more recently in January last year, Lord Dyson MR, Sir James Munby PFD, and Sir Ernest Ryder, the Senior President of Tribunals, gave important evidence, again to the Justice Select Committee, on court fees

³⁹ Clarke MR and Sir Rupert Jackson gave evidence to the Department of Culture, Media and Sport Select Committee on defamation House of Commons Culture, Media and Sport Committee, *Press Standards, Privacy and libel*, (2008-2009)(HC362-II)³⁹ Joint Committee on Privacy and Injunctions - First Report, Privacy and Injunctions (12 March 2012) <<https://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/27302.htm>> . <<https://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomeds/362/362ii.pdf>>.

Sir James Munby PFD gave evidence which was described as “significant and worthwhile” to the Children and Families Bill Committee in respect of what is now the Children and Families Act 2014; see para 25 of the speech to the Institute for Government referred to in footnote 25.

robust select committee structure we have today would not have developed as it has.⁴⁰ As we see in the present development and detailed work of such committees today, the health of our democracy owes him a great debt. Similarly the judiciary owe him a debt of gratitude, as the Justice Committee and the Constitution Committee have proved essential to the working relationship and interdependence between the judiciary and Parliament.

29. The building of this interdependent working relationship through the committees has enabled Parliament and the judiciary to go further. Let me give three instances of this. First has been the institution of regular meetings between the Clerks of the House and the senior judges responsible for the relationship with Parliament. Second, has been the institution of informal meetings between the senior judiciary and members of both Houses to discuss broader issues of the workings of the judiciary and Parliament. Third, has been the support given both by the Justice Committee and the Constitution Committee to the judiciary when it has been abused in the performance of its functions.

Mutual Respect and Non-Interference

30. However, to ensure both sides understand their respective positions and do not stray into impermissible areas of questioning – an instance of the third characteristic - proper and mutual respect– the Judicial Executive Board issued guidance to the judiciary in 2012 in relation to the giving of evidence to Parliament.⁴¹
31. There are many other instances where Parliament and the judiciary respectively recognise that they must respect the constitutional functions and responsibilities that the other has and not interfere with those functions and responsibilities. A good illustration is the Human Rights Act provision for a declaration of incompatibility. Parliament gave to the judiciary the power (which they would not otherwise have had), to determine whether a provision is compatible with the Convention rights, but retained the right for

⁴⁰ T. Dalyell, *Michael Ryle: House of Commons Clerk who played a key role in establishing departmental Select Committees*, Obituary, 12 December 2013 <<http://www.independent.co.uk/news/obituaries/michael-ryle-house-of-commons-clerk-who-played-a-key-role-in-establishing-departmental-select-9001557.html>>.

⁴¹ JEB, *Guidance to judges on appearances before select committees*, (October 2012) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/select_committee_guidance.pdf>.

Parliament itself, not the judges, to decide whether, and, if so, how to change the law⁴². A different illustration of the way in which this operates is the report made by the Lord Chief Justice annually to Parliament which I have mentioned already in connection with s.5 of the 2005 Act. The Report enables the judiciary through the Lord Chief Justice to give an account to Parliament by way of explanation of the discharge of its responsibilities for the effective and speedy delivery justice. As I made clear in the Lionel Cohen lecture⁴³, it is a form of explanatory accountability which enables the judiciary and Parliament to look at wider aspects of the proper delivery of justice for which resources are provided by Parliament through the Executive, whilst avoiding any examination of judicial decisions which are the exclusive responsibility of the judicial branch of the State.

32. However, there is no room for complacency in relation to this third characteristic of interdependence. For example, the judiciary is sometimes criticised as being unduly activist when it is said to assume law-making functions that our constitution has assigned to Parliament. Issues also arise in connection with one of the foundation stones of our constitution: The Bill of Rights 1688 and, specifically article 9⁴⁴ which provides that the “freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament.” The prohibition delineates a boundary between the three branches by enshrining the principle that Parliamentary speech is sacrosanct, but the extent of prohibition may not be as clear as many have thought. As it is for the courts to explain and interpret article 9’s ambit, as they do for any statutory provision⁴⁵, it may provide in the future an important example of whether as a State we can achieve a correct delineation of the ambit of the court’s respect for the decision made in Parliament, even where the reasoning for the decision is neither patent nor obvious. A similar issue may well arise in relation to primary legislation passed by one of the devolved legislatures; although there is no Article 9 protection, there needs to be more informed debate about the respect that must be accorded for similar legislative decisions where the Supreme Court could take the view that it had a broader function of review.

⁴² See further: Lord Irvine, *Human Rights, Constitutional Law and the Development of the English Legal System*, (Oxford) (2003) at 98.

⁴³ See paragraph 52.

⁴⁴ 1688 Chapter 2, 1 Will and Mar Sess 2.

⁴⁵ See, for instance, *Pepper v Hart* [1993] AC 593; *R (Chaytor & Ors) (Rev 2)* [2010] UKSC 52, [2011] 1 AC 684.

Conclusion

33. The steps that have been taken to build an interdependent working relationship between the judiciary and Parliament so far have, in my view, met the characteristics required of such a relationship. They represent in many respects the unique features of our evolving constitution, such as appearances by judges before committees of the legislature or the mechanism of a declaration of incompatibility, which would not work in other states. As what has so far been developed works within the confines of our constitution, we must be very careful, when looking at the ways in which other states operate, that we do not import inadvertently methods or concepts (such as the idea of a constitutional court) that could be misunderstood or might adversely affect the delicate balance we are achieving.

(4) The relationship with the Executive

34. I turn next to the relationship with the Executive. This has been a more difficult area in which to establish a working interdependent relationship, given on the one hand the obvious areas of tension, such as judicial review of executive functions, declarations as to the extent of executive power and challenges to subordinate legislation made by ministers, and on the other hand the need for the judiciary to avoid entering into areas of political controversy. Nonetheless, real progress is being made in achieving a workable balance in the interdependent relationship.

Understanding

35. Many of the same difficulties as have arisen in relation to Parliament have arisen in relation to the Executive. Senior civil servants have been of critical importance in ensuring proper understanding. The work carried out by the Government Legal Department headed by the Treasury Solicitor and by the Law Officers and their Department has contributed to the fostering of the understanding. Just as the constructive dialogue between the Clerks of the House and the senior judiciary has increased understanding between judiciary and Parliament, the constructive dialogue that exists with senior civil servants, the Treasury Solicitor and the Law Officers has had a similar effect. We should not underestimate the importance to this understanding of the

day-to-day work carried out by civil servants and lawyers across the various Departments in promoting a proper understanding amongst Ministers and other parts of the Executive of the role of the judiciary.

Mutual support

36. There are many examples of mutual assistance to the Executive. Advice is given to the Executive on technical matters or the practical consequences of proposed legislation. I gave some examples in my lecture to the Institute for Government⁴⁶ in December 2014. A current example of this is the advice being given in relation to the technical issues that will arise in relation to legislation consequent on Brexit. This is a subject of very considerable technical complexity on which the help given by the judiciary on the various technical options is likely to be of the greatest assistance, provided that the basis on which the judiciary is acting is clear and the political issues that are for the Executive and Parliament, such as the choice of technical options, are scrupulously avoided.
37. That clarity is provided in a booklet entitled *Guidance to the judiciary on engagement with the Executive*⁴⁷. The Guidance was developed so that it operated on the same basic principles as are applicable to Parliament. Engagement must not impair judicial independence and as such must not, for instance, seek to
- “. . . comment on: the merits of legal cases or decisions; the merits of public figures or appointments; the merits of policy or the merits, meaning or likely effect of prospective legislation; or, policy proposals subject to consultation when a formal response by senior leadership judges is intended.”⁴⁸
38. The effective application of this guidance is mediated by the Lord Chief Justice’s private office, as any requests for individual judges to engage with either the Executive or Parliament are routed through it. In that way, proper consideration can be given to the probity of engagement in the particular case, and both the individual judge and the requesting body, whether Parliament or the Executive, can be given proper guidance on the nature and limits of engagement. The approach has since its introduction in 2016

⁴⁶ See J. Thomas, *The Judiciary, The Executive and Parliament: Relationships and the Rule of Law*, (Institute for Government 1 December 2014) at [17] ff.

⁴⁷ JEB, *Guidance to the judiciary on engagement with the Executive*, (15 July 2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/guidance-to-the-judiciary-on-engagement-with-the-executive.pdf>>.

⁴⁸ *Ibid* at 2.

proved very successful; an example of not only the judiciary and the Executive providing mutual assistance for the good governance of the State, but setting clear parameters so there is no misunderstanding; I would hope for example, that it will now be clear that the judiciary cannot properly act as advisers to the Executive, a point that has on occasion caused frustration to ministers.⁴⁹

Mutual Respect and Non-Interference

39. I turn to the third aspect – respect and non-interference - and begin with the judiciary. It is some years since Lord Mackay, as Lord Chancellor, revoked in 1987 the Kilmuir Rules that had been promulgated by a predecessor. He concluded that it was for judges to determine when they could and should speak in public.⁵⁰ This relaxation of the convention against public comment did not, nor could it, have allowed judges untrammelled freedom of speech. Lord Neuberger in 2012, when Master of the Rolls, attempted to formulate a set of principles guiding judicial comment on public matters.⁵¹ The central principle was that judges should consider the effect of any public comment on judicial independence. His focus was on both institutional and individual independence.
40. The focus goes wider than that. Judicial independence is one aspect of separation of the branches of the State. Public comment must equally consider the effect on the Executive and Parliament. It must respect their constitutional roles, as much as it must respect that of the judiciary as an institution. It is for that reason that judges must not comment on matters of political controversy or political policy which are for Parliament and the Executive alone. It is also why judges cannot and do not explain their judgments; the judicial branch speaks through its judgments. That is how it explains and interprets the law. A public explanation by judges of one of their own judgments would call the law into question: what is authoritative the judgment or the extra-curial statement? It would undermine certainty in the law. It would undermine public confidence in the law. And it

⁴⁹ See, for instance, the discussion of Charles Clarke MP's criticism of the judiciary not being able to offer advice to the government whilst he was Home Secretary in S. Shetreet & S. Turenne, *Judges on Trial*, (CUP, 2013) at 374-375.

⁵⁰ The rules are reprinted in A. Barnett, *Judges and the media – the Kilmuir Rules*, (1986) Public Law 383 at 384 – 385; Lord Mackay, *The Administration of Justice*, (Stevens & Co) (1993) at 25 – 26.

⁵¹ D. Neuberger, *Where Angels Fear to Tread*, (2 March 2012) at [46]-[53] <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-holdsworth-lecture-2012.pdf>>.

would undermine the Executive and Parliament's confidence in the courts to explain and interpret the laws. Judicial silence on such subjects is not just a proper aspect of non-interference. It is an aspect of the respect the judiciary owes to the Executive and Parliament.

41. The constitutional limits on judicial comment is one to which the judges have to pay the closest attention, particularly today when judicial speeches and lectures are more of a commonplace than they were historically.⁵² Judges must do so, because there have been occasions when some have, in recent times, overstepped the mark and entered the realm of political comment: they have intruded, improperly, into those areas which the constitution has assigned to the Executive and Parliament. We all need to be more careful and ensure we do not stray into areas constitutionally reserved for others.
42. But what of the Executive? At one time there was a risk that mutual respect and restraint by Ministers concerning the judiciary was in danger of being lost. In the years before and after the enactment of the 2005 Act there were a number of incidents where Ministers, in the words of the Constitution Select Committee set out in their 2007 report⁵³, attacked judges for the decisions they made and with which the Minister disagreed. As they noted in 2003, the then Home Secretary took the view that judges should "learn their place":⁵⁴ the source of his ire was a decision that went against the Home Office. In 2006, a different Home Secretary, was noted as "casting aspersions on the competence" of a Crown Court judge; the basis of this was a decision of which the Home Secretary disapproved.⁵⁵ Again, as they noted, the Lord Chancellor of the time failed to step in for three days; when he did defend the judiciary on *Question Time*, he also appeared to suggest the Home Secretary had done nothing wrong. When a junior Justice Minister joined in the criticism, the Lord Chancellor rebuked the Minister who had to apologise.⁵⁶

⁵² As also previously noted by Lord Neuberger MR *ibid*.

⁵³ Constitution Select Committee Report (26 July 2007) *Relations between the executive, judiciary and Parliament* (HL Paper 151, at [44] ff.

⁵⁴ As cited *ibid* at [44].

⁵⁵ *Ibid.* at [45].

⁵⁶ *Ibid* at [46] ff; for a discussion of a number of examples, see J. Dyson, *Criticising Judges: Fair Game Or Off-Limits?*, (27 November 2014) <<https://www.judiciary.gov.uk/wp-content/uploads/2014/11/bailli-critising-judges.pdf>>.

As the Constitution Committee said he did in the end “speak out fully and forcibly in public in defence of the judge”⁵⁷.

43. Following scrutiny⁵⁸, the Constitution Committee, which rightly concluded that it was for the Lord Chancellor to defend the independence of the judiciary, recommended in July 2007 that changes should be made to the Ministerial Code to minimise the possibility of such lapses of constitutional propriety occurring in future.⁵⁹ That did not prove necessary, and generally since 2006 – with some notable exceptions – the Constitution Committee’s warning has been heeded and its reminder that, “Ensuring that ministers do not impugn individual judges, and restraining and reprimanding those who do, is one of the most important duties of the Lord Chancellor”,⁶⁰ has been properly acted upon.

(5) The relationship with the media

44. Next I turn to what can be described as the fourth branch of State, the media. It is axiomatic that a liberal democracy rests upon free and vigorous media to inform the public of what goes on in Parliament, of what the Executive does or is considering doing, and of what the judiciary decides in court. It is the necessary means through which public debate is informed, and very often articulated.

Understanding

45. There is, with some significant exceptions, a good understanding of the respective functions and responsibilities of the judiciary and the media. The ideal was very well expressed by my predecessor, Lord Judge, in 2011⁶¹ in the following terms:

“The most emphatic feature of the relationship between the judiciary and the media is that the independence of the judiciary and the independence of the media are both fundamental to the continued exercise, and indeed the survival of the liberties which

⁵⁷ Relations between the executive, the judiciary and Parliament: Follow-up Report, October 2008, HL Paper 177 at [6]

⁵⁸ The Committee took evidence from a number of judges and others including the legal Editors of two newspapers. It noted at [47], “Astonishingly, Mr Rozenberg had been told by a DCA press officer that it was for the Lord Chief Justice rather than the Lord Chancellor to speak out on these matters.”

⁵⁹ Ibid at [50].

⁶⁰ Ibid at [49].

⁶¹ Lord Judge: *The Judiciary and the Media*, Lionel Cohen Lecture, Hebrew University of Jerusalem, 28 March 2011

we sometimes take for granted.... In any community which is governed by the rule of law, the independence of the media and the independence of the judiciary are both of crucial importance to the liberties of the community at large.”

Mutual support

46. Mutual respect and support for the media to carry out its fundamental constitutional role is one of the underpinnings of open justice and its link to freedom of speech. Where the judiciary are concerned the freedom of the media, and freedom of speech, are inextricably linked with the constitutional principle of open justice. The media must be in a position to hear and understand what goes on in court: knowledge of proceedings is necessary if there is to be any speech about it. And they must then be free to report it. Debate must be rigorous, as it helps inform consideration by the Executive and Parliament over whether, and if so how and to what extent, the law needs to be revised or developed by Parliament. It is equally important because media and, through it, public scrutiny of the courts helps to ensure that justice is carried out properly, that arbitrary and unjust practices do not develop: that justice is done through being seen to be done.
47. And the courts facilitate this through, for instance, providing for service on the media of applications to impose reporting restrictions in family matters⁶² and similar notification processes in criminal proceedings⁶³. Similarly the media are accorded privileged access to materials used in court⁶⁴. The Judicial Communications Office provides them with very considerable assistance in relation to the operation of the courts and judges are much more conscious of the need to explain important decisions in short summaries. The media, independent and rightly so, for the most part operate as an integral element of the proper functioning of democratic government.

Mutual Respect

⁶² Family Procedure Rules, PD 12I.

⁶³ See, *Reporting Restrictions in the Criminal Courts* (May 2016 rev) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>>.

⁶⁴ Criminal Procedure Rules 215, rr. 5 and 6; *Marines A & Ors v Guardian News and Media & Other Media* [2013] EWCA Crim 236; [2014] 1 WLR 3326.

48. In 2012 Parliament, with the assent of the judiciary, abolished that form of summary contempt known as “scandalising the court”.⁶⁵ Such means of curtailing media freedom were out of date in a robust democracy.⁶⁶ The relationship is one that should be characterised by the same mutual respect and non-interference inherent in the relationship between the branches of the State and should underpin the approach taken by courts and the media to each other; enabling each to do its job.
49. This is not to say that the press should pull its punches or should shy away from criticism, discussion or debate; judges must expect to be criticised in the media from time to time for their decisions, though as I have explained they cannot answer such criticism. However, the press is equally under a duty not to act in a way that undermines democracy through undermining the judiciary, Executive or Parliament. In this respect, it is therefore important to distinguish between criticism and abuse. Although the overwhelming majority of media journalists and commentators understand the difference, nonetheless the media have on occasions (rare though they be) subjected the judiciary to abuse, such as happened in November 2016 by labelling of judges as “enemies of the people” - language used most commonly by totalitarian dictators⁶⁷. Such abuse is not simply an attack on the judges who made the decision; judges have undertaken to decide cases without fear or favour and must not be subjected to improper pressure of this kind. Moreover, such abuse is corrosive of public confidence in the judiciary and the rule of law and hence the other branches of the State. That is why it is so important to distinguish between criticism and abuse and for the media to properly respect the working of our constitution.
50. I therefore finally turn in the context of the interdependent working relationships I have described and in the context of that abuse to the position of the Lord Chancellor in the operation of the constitution.

⁶⁵ Crime and Courts Act 2012, s.33. There is a good account of the type of case where the press were subject to such proceedings in Shetreet: *Judges on Trial*, 1st edition, (1976) 185-192.

⁶⁶ The option being considered, for instance, in Singapore’s Administration of Justice (Protection) Bill 2016, which proposes to criminalise criticism of the courts is one that we could not possibly contemplate. As Amnesty International described it in August 2016, the approach taken was a ‘threat to freedom of expression’, <<https://www.amnesty.org/en/latest/news/2016/08/singapore-contempt-of-court-law/>>

⁶⁷ Such as Robespierre, Lenin and others in Soviet Russia and Nazi Germany

The position of the Lord Chancellor

51. While a handful still regret the reforms made to the office of Lord Chancellor by the 2005 Act, an attempt to recreate the past role of the Lord Chancellor would be undesirable and would not succeed; that past role was in any event not all that it is now perceived to have been, as now viewed through rose tinted spectacles rather than contemporary experience. Change was inevitable.⁶⁸

52. In 2003, when the White Paper on the office of Lord Chancellor was published, it was made clear that the intention was to abolish the office, putting the “relationship between the Executive, Legislature and the judiciary on a modern footing” and to increase the separation of powers⁶⁹. It was accepted however by Lord Falconer in his foreword that as Secretary of State for Constitutional affairs he would continue to have a duty to safeguard the independence of the judiciary both within government and outside and to ensure proper consideration of judicial concerns. The judiciary made quite clear that it was in the public interest that the proper administration of justice and the independence of the judiciary be fully protected by the Executive and that what was seen as a “partnership” between the branches of the State should continue⁷⁰. Time does not permit me in this lecture to go into the events which then happened in which I was an active participant – the Concordat, the debates in Parliament, the reports on Constitutional Reform Bill and the passage of the Bill.

53. It is sufficient that what emerged was the 2005 Act which set out on a statutory basis the office of Lord Chancellor and its unique nature. It is quite distinct from that of a Minister of Justice as it exists in other states. It is also one that is manifestly different from that of any other Minister. The Lord Chancellor is not simply a Secretary of State with a separate title resonant of our long history, such as the Chancellor the Exchequer or the Chancellor of the Duchy of Lancaster. The 2005 Act sought to reform a great Office of State so that it could fulfil an important, but changed, role in our unwritten constitution. As I explained in the Lionel Cohen lecture⁷¹, the judiciary is the weakest of the three branches of the

⁶⁸ See the Memorandum of the Judges’ Council of April 2004 printed as part of the evidence of Lord Woolf CJ to the HL select committee on the Constitutional Reform Bill, July 2004 at page 146; evidence of Lord Bingham on the Bill to the HC Constitutional Affairs Committee, 25 January 2005 Q127

⁶⁹ Constitutional Reform: reforming the office of the Lord Chancellor, CP 13/03 September 2003

⁷⁰ See paragraphs 11-13 of the Memorandum referred to in footnote 68 and the evidence of Lord Woolf.

⁷¹ Paragraph 23

State; there are certain things it cannot do; that is why under our unwritten constitution, it is of vital importance that the provisions of the Act relating to the office of Lord Chancellor are properly understood and effect is given to them.

The statutory qualification for the office of Lord Chancellor

54. The 2005 Act imposed a statutory qualification for appointment as Lord Chancellor⁷² - a unique constitutional requirement for a Minister. The criteria set out – qualified by experience as a Minister, a member of either House of Parliament, a legal practitioner, a university law teacher, and any other experience the Prime Minister considers relevant – are broad and ill-defined. Importantly they do not specify what amounts to being sufficiently qualified through such experience.
55. In 2007, the Constitution Committee expressed the view⁷³:
- “We believe that the role of the Lord Chancellor is of central importance to the maintenance of judicial independence and the rule of law. Prime Ministers must therefore ensure that they continue to appoint to the post candidates of sufficient status and seniority.”
56. The Constitution Committee again debated the criteria extensively in its 2014 Report on *The Office of Lord Chancellor*⁷⁴. It concluded that, although the statutory provisions were generally thought to be ineffective, it was not essential that the holder of the office be a lawyer, but:
- “Given the importance of the Lord Chancellor’s duty to uphold the rule of law, the Lord Chancellor should have a high rank in Cabinet and sufficient authority and seniority amongst his or her ministerial colleagues to carry out this duty effectively and impartially”.
57. I do not think that it is right, given the need for working relations between the branches of the State which I have sought to outline, that a provision inserted into the 2005 Act should be treated as ineffective⁷⁵. There is considerable force in the evidence of Lord Falconer (the Lord Chancellor at the time of the passage of the 2005 Act) to the

⁷² Constitutional Reform Act 2005, s.2.

⁷³ [71] of the 2007 Report

⁷⁴ House of Lord’s Constitution Select Committee, 6th Report of 2014 *The Office of Lord Chancellor*, at [104] to [126] <<https://www.publications.parliament.uk/pa/ld201415/ldselect/ldconst/75/7502.htm>>.

⁷⁵ See the response of 10 Downing Street to a Freedom of Information request made in September 2012: Letter N. Howard to R. Wright, 27 September 2012 <<https://www.whatdotheyknow.com/request/130595/response/316224/attach/3/R%20Wright%20reply%20270912.pdf>>

Constitution Committee in 2014, that the criteria were inserted in order that a signal should be given to the Prime Minister that you need somebody of special quality⁷⁶ and, it must be added, able to carry out the special responsibilities of the office. It is to those responsibilities I turn.

The statutory responsibilities of the office of Lord Chancellor

58. The 2005 Act imposed on the holder of the Office of Lord Chancellor three particular responsibilities as encapsulated in the oath of office:

“... do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God.”

These responsibilities are quite distinct from the office of Secretary of State which the Lord Chancellor may also hold.

59. The first responsibility the 2005 Act specifically requires of the Lord Chancellor is to uphold the constitutional principle of respecting the rule of law.⁷⁷

60. Second the 2005 Act requires the Lord Chancellor to secure judicial independence and defend the independence of the judiciary, without which there can be no genuine commitment to the rule of law. That it does so is further stressed as upholding judicial independence is singled out in the 2005 Act as a specific statutory duty.⁷⁸ So matters cannot be forgotten the duty is set out twice.

61. The third responsibility imposed on the Lord Chancellor is the requirement to support the judiciary in carrying out its functions. This includes, and again there is a specific statutory duty in this respect, to secure sufficient resources for the efficient and effective running of the courts.⁷⁹

The practical application of the duties

⁷⁶ *ibid*, [122].

⁷⁷ Constitutional Reform Act 2005, s.1.

⁷⁸ Constitutional Reform Act 2005, s.3.

⁷⁹ Courts Act 2003, s.1.

62. Each of these duties exemplifies the vital importance of the constitutional role of the Lord Chancellor in the interdependent relationship between the judiciary and the other branches of the State.
63. Taking the third responsibility as my first example, the running of the courts is explicitly a formal partnership between the Executive and judiciary effected through the agency of Her Majesty's Courts and Tribunals Service.⁸⁰ There is a very considerable amount of excellent work being carried out under this partnership. Funds have been secured by successive Lord Chancellors to enable the court's administration to be digitised. Work is being carried out to create an Online Court. All of this is in order to improve the delivery and proper administration of justice. Problems can and do arise however. The provision of resources to HMCTS to modernise the courts is crucial to their ability to carry out their function. The Lord Chancellor must therefore have the standing and ability to obtain sufficient resources from HM Treasury. As with the provision of funds to enable Parliament and the Executive to carry out their roles effectively, there is a duty to secure equivalent provision for the judiciary and the courts to carry out their role, efficiently and effectively.
64. This first example is easy to understand. My second example should now also be easy to understand. I have referred to the instance of abuse of the judiciary in November of last year when the judiciary were carrying out their constitutional function in determining a dispute as to the allocation of powers between Parliament and the Executive which was accepted to be justiciable. There could be no doubt that each of the branches of the State should in such circumstances mutually support the other. Many in Parliament did this. Similarly, given the special responsibility of the Lord Chancellor for protecting the independence of the judiciary and upholding the rule of law, the Lord Chancellor was under an obligation to speak out firmly, for, as I have already explained, the judges were not able to do so.
65. It is in such contexts that the duties of the Lord Chancellor set out in the oath of office must be seen. The duties may present the holder of the Office with uncomfortable

⁸⁰ The HMCTS Framework Document sets out the terms of the partnership.
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf>.

decisions and difficult action in carrying out the duties set out in the oath. Indeed, they may require the holder of the Office to act against the wishes of other members of the Cabinet or the Prime Minister, for that is inherent in the Office and the oath that is taken. Difficult though it may be, these are responsibilities which Parliament has required of the Lord Chancellor a solemn oath to perform. The duties are an essential part of the proper interdependence inherent in the operation of our constitution and an essential safeguard to the independence of the judiciary which is fundamental to the maintenance of the rule of law, our democracy and the prosperity and good order of our State.

Conclusion

66. If I had not been asked by the Constitution Committee about my views about what had happened in November 2016 in the course of my evidence in March 2017⁸¹, I had already decided, as I told the Committee, that this was an issue that could not be ignored and the context needed to be fully explained. I am therefore grateful for the opportunity given by the Lionel Cohen lecture and this lecture to explain in greater detail the changed position of the judiciary in the State and the important principles of the interdependence between the branches of state. I hope I have illustrated by examples how significant they are in the functioning of our democracy and how very well the relationships generally work for the benefit of all in our nation State.
67. It is unnecessary for me to say, given the issues facing our State, that we must do all we can to ensure that our institutions of State work well together. I have spoken plainly this evening, as we cannot afford any lack of understanding of the functions and responsibilities of each of the branches of the State and of the Lord Chancellor or of their essential interdependence. I am sure there will now be that understanding. I am therefore convinced each of the branches of the State will be able to discharge their constitutional functions and responsibilities independently, but, with proper interdependence, supporting each other with proper respect. No one should underestimate the importance of the enormous benefit this way of working brings to our nation State in these very, very difficult times.

⁸¹ <https://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/CC220317LCJ.pdf>

68. Thank you.