Lincoln's Inn Denning Society

Upholding the rule of law: how we preserve judicial independence in the United Kingdom.

1. It is an honour and a great pleasure to be invited to Lincoln's Inn to address your society tonight.

2. Conceptions of the rule of law can differ. In my work on the engagement of the judiciary of the United Kingdom with the People's Republic of China I have encountered the concept of "the rule of law with Chinese characteristics". This qualification is designed to cater for the central role of the Communist Party as a guardian of the Chinese constitution. China has given priority in recent years to develop the rule of law and to achieve impartial adjudication of disputes. The Chinese government aims by that policy to encourage economic development more widely within its borders, to clamp down on corruption, and also to address internal criticism of its political structure. But it does not seek to have a judiciary which is independent of central party control. In other words, there is a clear rejection of the idea of the separation of powers.

3. Such an approach differs markedly from the tradition of the rule of law in the United Kingdom, in leading common law jurisdictions, including the United States, and in almost all European countries. Our Government, as part of its foreign policy, supports the promotion of the

ideal of the rule of law. Judicial independence is a critical component of that rule, as we see it in the West. In our tradition, impartial adjudication by the judiciary requires the separation of powers. In our modern history the executive organs of the State have been subjected to the rule of law by, among others, an independent judiciary.

4. It is accepted in our society that the rule of law requires there to be judicial independence. But we must ask, "independence from whom?" In view of its power over the judiciary, which it funds and whose judgments it enforces, the most obvious candidate against whom independence is asserted is the executive branch of government. But judges also need to act independently of parliamentarians, the media, pressure groups and powerful individuals or corporate organisations. Judges take a judicial oath to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will."[1] To do right, that is to decide cases impartially and in accordance with the law, judges must be independent of all litigants and also of all who might directly or indirectly seek to influence the outcome of a legal action, including their fellow judges who are not sitting on the particular case.

5. Historically, the judiciary was not independent of the executive. Last year, we celebrated the anniversary of Magna Carta. It is a document about which myths have developed. I do not see much support in the history of the thirteenth century for the view that judicial independence

[1] Promissory Oaths Act 1868, section 4.

is the direct product of that famous document. It is true that in clause 45 the King said:

"we will not make justices, constables, sheriffs or bailiffs, save from those who know the law of the kingdom and wish to observe it well."

6. This is arguably a precedent for later statutory provisions on the legal qualifications of candidates for senior judicial office. But it would not have occurred to King John that he would not control his judiciary. What was of far greater concern to him was clause 61, the commission of twenty five barons who were to make sure that he complied with his undertakings. But clause 61 did not survive King John's repudiation of the Charter.

7. The judges were, in Francis Bacon's words, "lions under the throne", upholding royal authority, and "being circumspect, that they do not check or oppose any points of sovereignty."[2] He said that they "must show their stoutness in elevating and bearing up the throne" and he also spoke of judges as "the principal instruments of obedience towards the king in others".

8. Yet, when Francis Bacon spoke and wrote, the separation of the judiciary from the King had started. Thus in the *Case of Prohibitions* in 1607[3] Sir Edward Coke stood up to King James I, informing him that he was not "learned in the laws of his realm of England" and did not have the

[2] Francis Bacon, "Of Judicature" (1625).
[3] *Prohibitions del Roy* (1607) 12 Co Rep 63.

"artificial reason and judgment of law" to determine "cases of life, or inheritance, or goods or fortunes of his subjects". When the King suggested that it was treason to suggest that he was under the law, Coke quoted Bracton, "quod Rex non debet esse sub homine, sed sub Deo et lege". A king is not subject to men but is subject to God and the law. While Coke was humiliated by the King for his presumption, the tide was with him and, in the words of Stephen Sedley, "the lions began to emerge from under the throne".[4] Thus in the *Case of Proclamations* in 1611,[5] Coke famously pronounced that:

"The king hath no prerogative but what the law of the land allows him."

9. There is not time tonight to address again the famous battles by which the common law prevailed over the royal prerogative, but several of the pillars which support judicial independence have their foundations in those battles of the seventeenth century. I will look at those pillars in their modern context.

10. It is always possible to expand a list of relevant factors. I have identified ten pillars. I could have analysed matters differently and thus have listed more. Instead I have, on occasion, grouped several ideas within one pillar. I remembered Georges Clemenceau's quizzical protest at President Woodrow Wilson's proposed fourteen points as a programme for world peace in 1918: *"Quatorze?"* He said, *"Le bon Dieu n' a que dix."* I will follow that example.

[4] Stephen Sedley, "Lions under the Throne. Essays on the History of English Public Law" (CUP 2015) p 127.
[5] (1611) 12 Co Rep 74.

11. What then are the ten pillars that I have identified?

12. My first pillar is a clear constitutional commitment to the independence of the judiciary and the rule of law. What is required is a constitutional framework which recognises these elements. Until recently, the United Kingdom enjoyed the reality of judicial independence by constitutional convention rather than by statutory statement. That enjoyment, without formality, was a product of our fortunate political and social development over several centuries, which cannot readily be exported. Countries which have a different history may benefit from a clear constitutional statement, and now we also have one. The Constitutional Reform Act 2005 in section 1 recognises and preserves the constitutional principle of the rule of law and in section 3(1) provides:

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

    That is an important duty which Parliament has given only to the Lord Chancellor but to all Ministers of the Crown.

13. The CRA also prohibits the Lord Chancellor and other Ministers of the Crown from seeking to influence particular judicial decisions through any special access to the judiciary, and requires the Lord Chancellor to have regard to the need to defend judicial independence, the need of the judiciary to have the support necessary to enable them to exercise their

functions, and the need for the public interest to be represented in decisions affecting matters relating to the judiciary or otherwise to the administration of justice.[6] In Scotland, which is my jurisdiction of origin, a similar guarantee of judicial independence has been enacted by the Scottish Parliament in section 1 of the Judiciary and Courts (Scotland) Act 2008, which imposes duties on the First Minister, the Lord Advocate, the Scottish Ministers and all persons with responsibility for matters relating to the judiciary and the administration of justice.

14. A constitution is, of course, not an absolute guarantor of the rule of law. Governments around the world do not always stay within the bounds of their constitutional powers. Constitutions often contain statements of a high level of generality. For example, the constitution of the Union of Soviet Socialist Republics contained noble propositions, but few would have regarded the USSR as a liberal utopia. Political culture is an important component of judicial independence, as I will discuss shortly. As I have said, in the United Kingdom we have long enjoyed a political culture which has generally respected judicial independence and the rule of law. That has been a considerable political achievement which is the product of work over several centuries.

15. My second pillar is the exclusion, or at the very least the minimisation, of political considerations as an influence on the appointment and promotion of judges. The Latimer House Guidelines, which the

[6] Constitutional Reform Act 2005, section 3(5) & (6).

Commonwealth adopted in 2003,[7] require "an appropriate independent process for judicial appointments" that will

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

16. For many years before the Constitutional Reform Act, the appointment of judges on the recommendation of the Lord Chancellor worked rather well because, although a Government Minister, he selected candidates on the basis of merit, through informal soundings and consultation with the judiciary. Political considerations generally played no role in such appointments. The system could be and was criticised for lacking transparency and doing too little to promote the diversity of the judiciary. Now we have an independent Judicial Appointments Commission on which the judiciary are represented. The Chair of the Commission and a majority of its members are not judges. There is an open competition preceded by advertisement in which people are invited to apply for appointment. The Commission recommends candidates to the Lord Chancellor who has a limited power of veto.

17. My third pillar is adequate finance. This involves at least three things. First, judges must be given adequate salaries to ensure their integrity and impartiality. Judges should receive fair remuneration, and changes

[7] The Latimer House Guidelines were the work of the Commonwealth Lawyers Association, the Commonwealth Legal Education Associations, the Commonwealth Magistrates and Judges Association, and the Commonwealth Parliamentary Association in 1998 and were adopted at a Heads of Government meeting in Abuja in 2003.

to their salaries and pensions must not be used as a means of influencing judicial decision-making. The Latimer House Guidelines provide

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

18. In this country, the Senior Salaries Review Body is the non-political body charged with making recommendations to the Government on the remuneration of among others the judiciary. Sadly for judges, the Government, which is answerable politically for public expenditure and economic management, does not always implement their recommendations, particularly in times of economic difficulty or crisis. Nonetheless, we have enjoyed a long tradition of judicial integrity so that it is inconceivable that an informed litigant would attempt to bribe a judge. Secondly, the Government must provide the finance to allow the judicial system to operate effectively. This includes maintaining or constructing court buildings, providing sufficient staff and, increasingly in recent years, investing in information technology to improve the efficiency of the court system. This second element of the pillar is adverted to in the CRA's requirement that the Lord Chancellor must "have regard to" the judiciary's need to have the support necessary to perform their functions.[8] That reflects the Latimer House Guideline that "sufficient and suitable funding should be provided to enable the judiciary to perform its functions to the highest standards". The third element, which happily has generally not been a major concern in this

[8] Constitutional Reform Act 2005, section 3(5).

country outside Northern Ireland but which will require to be reviewed regularly in the light of terrorist violence such as the recent tragic events in Paris, is resources to protect judges and court users from violent attacks. This includes maintaining sufficient security within court buildings to deter and prevent violence.

19. My fourth pillar is that judges should have personal immunity from suit for acts and omissions in the exercise of their judicial functions. Judges deal with disputes and, often, the disputatious. It is not uncommon for disappointed litigants in person to make unfounded claims about the behaviour of judges. They are able to invoke complaints procedures, as I shall mention, but they cannot sue the judges. The importance of immunity has long been recognised. Lord Stair, who in the troubled later seventeenth century was one of the institutional writers on Scots law and Lord President of the Court of Session, said that without it, "no man but a beggar or a fool would be a judge".[9] Judges have immunity from civil liability for acts that they carry out in performing their functions. For example, they cannot be sued for defamation for what they say about parties and witnesses during a court hearing.

20. My fifth pillar is security of tenure. In the United Kingdom judges of the High Court and the courts above can be removed only by a resolution of both Houses of Parliament. This was the product of the political battles of the seventeenth century. It was not until the Act of Settlement of 1701 that judges of the higher courts gained this security against

[9] Stair, Institutions of the Law of Scotland IV.1.5.

dismissal at the will of the Crown. In his essay, "the Royal Prerogative",[10] Stephen Sedley records Macaulay's account of the response of Sir Thomas Jones, the Chief Justice of the Common Pleas, to the pressure by King James II to change his opinion or give up his place, when in 1686 the king sought to pack the court to get the result that he desired in the case of *Godden v Hales*:

"For my place, said Jones, I care little, I am old and worn out in the service of the Crown. But I am mortified to find that Your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give … Your Majesty may find twelve judges of your mind, but hardly twelve lawyers."[11]

21. Sir Thomas was not alone in being subjected to such pressure. In the later 17th century, when judges held office "during the King's pleasure" they were regularly sacked. There were then, and until 1830, only 12 judges in the common law courts; four in each. Yet Charles II sacked 11 judges in the last eleven years of his reign and his brother, James II sacked 12 judges in the three years of his reign before he was overthrown.[12] The Act of Settlement, by giving Parliament control over the removal of senior judges, prevented the repetition of such pressure from the executive branch of government. Senior judges currently hold office "during good behaviour, subject to a power of removal by Her Majesty on an address presented to her by both Houses of

[10] "Lions under the Throne" Essay 5, p 131.
[11] Quoted by Sir Stephen Sedley, ibid, p131.
[12] Brooke LJ, "Judicial Independence – Its History in England and Wales", available at http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbbrook.htm

Parliament."[13] The Lord Chancellor has the right to remove judges below the level of the High Court only after the prescribed disciplinary procedures have been completed.[14] Disciplinary sanctions against a judicial office holder, which do not involve removal from office, require the agreement of the Lord Chief Justice and the Lord Chancellor. This discourages any suspicion or perception that the Chief Justice is protecting his or her fellow judges.

22. My sixth pillar is the separation of powers. In this I am not talking about the formal separation of the judicial function from the other branches of government. That is the edifice that the pillars support. Rather I speak of the way in which different branches of government conduct themselves in relation to judicial matters. In this country this is governed by convention rather than formal rules. Thus the Government does not attempt to use its contacts with the judiciary to influence the outcome of legal cases other than through the advocacy of their counsel in the courts. Ministers exercise restraint in commenting on judicial decisions whether or not they are in the Government's favour. It is quite proper for a Minister who has received an adverse decision which he thinks is wrong to express disappointment and announce that he or she will appeal the decision or bring on legislation to reverse it. It would be contrary to parliamentary custom or convention for the Minister to launch an attack on the courts or the judiciary as a whole. A number of years ago, a Home Secretary, irritated by adverse judicial decisions in relation to immigration and asylum policies, wrote an article in a

[13] Senior Courts Act 1981, section 11(3); for Supreme Court Justices see the Constitutional Reform Act 2005, section 33.
[14] Constitutional Reform Act 2005, sections 108, 115, 117 and 122.

newspaper which had the heading, "It's time for judges to learn their place". The Lord Chief Justice wrote a private letter to the Home Secretary protesting at what he had done. Within Parliament it is a parliamentary custom, supported by rulings of the Speaker, that an attack on a judge's character or motives, or charges of a personal nature or a call for his or her dismissal, should be made only on a substantive motion on which a vote will be taken, and also that arguments that a judge had got a decision wrong should be made in moderate language. Those rulings and the *sub judice* rule, prohibiting parliamentary debate of matters currently before the courts, are intended to regulate the relationship between politicians and judges.

23. It is important for judges to maintain good relations with Ministers and civil servants to ensure the efficient operation of each branch of government. The increased role of judges in the administration of the courts has brought judges at all levels of the hierarchy into closer contact with the executive branch. But each branch must remember the proper limits of those contacts. In relation to judicial independence, the words of the Latimer Guidelines are very much in point:

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

24. Thus when Charles Clarke, as Home Secretary, whose measures to prevent terrorism had been held to be incompatible with the ECHR,[15]

[15] The Belmarsh Case: *A and Others v Secretary of State for the Home Department* [2005] 2 AC 68.

wished to discuss with the Law Lords the issues of principle which might be raised by further measures which he proposed, the Senior Law Lord, Lord Bingham, declined his invitation to meet. Lord Bingham took the view that the courts might have to rule on the legality of the measures in future, and that, if judges of the senior court advised the Government, they might be perceived as having pre-judged the issue they were later called upon to determine. The Home Secretary was understandably frustrated at being denied the assistance of the senior judiciary, but Lord Bingham could not properly do otherwise.

25. There is another aspect to the separation of powers. The judiciary and the Courts and Tribunals Service are served by civil servants whose loyalty, so long as they perform that role, is owed to the judicial branch of government. This applies not just to judges' clerks and court officers who are present with the judge in court but also to the people who administer the wider courts service. There may be a perception that a career civil servant, who spends only part of his or her career in the courts service and who will move on to other work, will be anxious to please the wider civil service rather than the judiciary or the courts service to which he or she is temporarily attached. But in reality there is ample evidence of civil servants giving their undivided loyalty to the judicial branch so long as they work for it. A shining example is the recently retired chief executive of the Supreme Court, Jenny Rowe, who very skilfully and single-mindedly arranged the establishment of the Supreme Court and the transfer of the UK's senior court across Parliament Square from the House of Lords to the court building in which I now work.

26. Seventhly, judicial independence is supported by accountability. The public have access to the courts and can see justice being done. There are some exceptions to the public's right of access to the court, such as when the victim of a sexual offence is giving evidence, but those exceptions must be kept to a minimum. Judges are accountable for their decisions by the requirement to state their reasons for those decisions. Until a case is finally determined by the Supreme Court, it may be subjected to review by an appellate court. The Government, Parliament and the public have access to published judicial decisions, which can be the subject of informed debate. In recent years the courts have worked to enhance public access to their work in order to promote understanding of that work. In my court, hearings are posted on our website and are streamed live on the internet and you can access recordings of the court handing down judgments on YouTube. Modern forms of accountability have included the formulation and publication of ethical guidelines which allow the public to understand what they may expect of a judge.[16] Formal complaints procedures have been put in place to allow the investigation of complaints and the imposition of sanctions on the judicial office holder if the complaint is justified.

27. The complaints procedure is a useful pivot for me to move from what others do in relation to the preservation of the independence of the

[16] See for example the UK Supreme Court Guide to Judicial Conduct (available at https://www.supremecourt.uk/docs/guide-to-judicial_conduct.pdf), the Guide to Judicial Conduct for the Judiciary of England and Wales (available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf), and the Distillation of ENCJ Guidelines, Recommendations and Principles 2012-2013 Report (available at http://www.encj.eu/images/stories/pdf/workinggroups/encj_report_distillation_approved.pdf).

judiciary to my last three pillars which concern what judges must do to that end.

28. There is, eighthly, what I call "role recognition". It is incumbent on judges to see with clarity the limits of the judicial role. Last year at Stellenbosch University in South Africa I gave a lecture called "Judicial law-making in a changing constitution". I discussed judgments in which judges have recognised the constraints on their ability to change the law and I suggested that this was not a matter of deference or restraint but one of role recognition. The lecture has been published,[17] and there is not time tonight to cover the same ground. So far as it is relevant to tonight's topic, in short, there are decisions of policy, which involve social, economic or political preferences that are properly the domain of the elected branches of government. Not only do the courts lack the resources to formulate policy and assess the practical consequences of decisions in such matters, but also the courts cannot be politically accountable for them in a democracy. Parliament is sovereign and Article 9 of the Bill of Rights prevents the courts from questioning what takes place in Parliament. It provides that:

"the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

[17] UK Supreme Court Annual Review 2015 Vol 5 pp 61-75; [2015] Stellenbosch Law Review Vol 26 no 3, 471-485.

29. That is a clear boundary and the limits of the judicial role are clear and recognised. To my mind it is appropriate to speak of judicial restraint not as a general description of a judge's approach to his or her role but only when the boundary between the merits of a policy and its lawfulness is not clear.

30. Judges are not and should not be players in a political process. Were they to be so, their impartiality would be lost. In recent years, senior judges have given public lectures to explain the justice system in a way which was forbidden sixty years ago.[18] But we have to be careful about the content of those lectures. We must avoid commenting on political policy outside very limited areas. We must also avoid lobbying parliamentarians in our own interest. This has limited what the judges could do in recent years when they opposed, unsuccessfully, the significantly adverse alteration of their pensions. Some also question whether judges should accept the chairmanship of controversial public inquiries.

31. My ninth pillar is performance and moral authority. Alexander Hamilton, one of the creators of the United States Constitution, said that the judiciary had "neither force nor will but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacy of its judgments."[19] That aid, which is essential to the rule of law, is

[18] "The Kilmuir Rules", derived from a letter which the Lord Chancellor, Lord Kilmuir, wrote to the Director general of the BBC in 1955, which were abrogated by a subsequent Lord Chancellor, Lord Mackay, in 1987,
[19] Madison, Hamilton and Jay, "The Federalist Papers" Penguin Classics, (2008) p 437.

provided when judges do their jobs well.[20] Judges must be true to their judicial oath and act impartially and honestly. They must dispose of the business of the courts speedily and efficiently. They must also avoid political involvement and comply with recognised ethical standards both in their work and in their private lives.

32. At the start of her Reith Lectures in 2002 Onora O'Neill quoted Confucius, who advised his disciple that three things were needed for government: weapons, food and trust. "If a ruler can't hold on to all three, he should give up the weapons first, and the food next. Trust should be guarded to the end: without trust we cannot stand."[21] Judges have control over neither weapons nor food. Like the ancient ruler, and also modern government, they depend on trust. In recent years documents setting out ethical guidance for judges have become widespread at national and European levels. In England and Wales there is the guide to judicial conduct published in 2008 and updated in 2013 and the UK Supreme Court has a guide published in 2009. In the EU, the European Network of Councils of the Judiciary published a report called "Judicial Ethics: Principles, Values and Qualities" in 2010. In the United Kingdom judges have enjoyed considerable moral authority; but that moral authority has to be earned every day.

33. Finally, my tenth pillar is maintaining political and public understanding and support. There is a danger to judicial independence if elements in

[20] In the United Kingdom we generally take for granted that judges have the necessary legal qualifications and experience to do their jobs. This is an important foundation of the 9th pillar. But this is lacking in many jurisdictions in which judges are not independent.

[21] Onora O'Neill, "A Question of Trust", the BBC Reith Lectures 2002, Cambridge University Press.

the media portray a caricature of the judiciary and if judges, politicians and officials with responsibility for the administration of justice do not act to correct misunderstandings. Some of the media coverage of the High Court's decision on the article 50 challenge last week highlights this danger. The publication of reasoned decisions, including sentencing statements in high profile criminal cases, helps inform the public on the work of the judiciary. The methods of increasing public access, which I discussed in the seventh pillar are important, as is the preparation of press summaries to inform the reporting of court decisions. Judicial communications officers, who can explain the work and decisions of the judiciary to the media, are now a necessary part of the modern justice system. This is not a question of spin, or "presentationalism" as it used to be called when I was a civil servant; it is a form of explanatory accountability in a democracy. The rule of law, and judicial independence as its essential component, is a political achievement. All judges have a duty to take care to preserve political and public support for the rule of law; senior judges in particular have a duty to explain. For the rule of law is based ultimately on society's confidence in and consent to our judicial institutions.

34. Several of my ten pillars were constructed long ago and are revered parts of British constitutional and political history. Others, such as the tenth pillar, are more modern phenomena. In the final part of my talk tonight, I look at the arrangements which have emerged since the passing of the Constitutional Reform Act 2005. As is well known, that Act ended the role of the Lord Chancellor as a bridge between the three branches of government, as presiding officer in the House of Lords, a

member of the Cabinet and the senior judge in England and Wales. The selection of candidates for judicial appointments became the role of the Judicial Appointments Commission, leaving the Lord Chancellor only with a veto. The Lord Chief Justice has taken on much of the responsibility, which used to be the role of the Lord Chancellor, of speaking for the judiciary. Judges no longer have a spokesman in Cabinet, but as I have said, the Lord Chancellor retains a statutory duty to uphold judicial independence.

35. It is not possible in the tail end of this talk to do justice to the new arrangements which have been and are being developed. If you are interested in more detail, I recommend that you read among others the two lectures which the Lord Chief Justice gave in December 2014 and June 2015 and which can be obtained on the judicial website.[22] Also, for those who wish to look more closely, there is the scholarly book, "The Politics of Judicial Independence in the UK's Changing Constitution" by Gee, Hazell, Malleson and O'Brien, which Cambridge University Press has published and which is a fascinating analysis of the position of the judiciary as it has developed since 2005.

36. In the time remaining I will confine myself to matters relevant to the last five pillars: separation of powers, accountability, role recognition, performance and maintaining public and political understanding.

[22] "The Judiciary, the Executive and Parliament: Relationships and the Rule of Law", lecture to the Institute for Government 1 December 2014, available at https://www.judiciary.gov.uk/wp-content/uploads/2014/12/institute-for-government.pdf ; "Judicial Leadership", lecture to the Conference on the Paradox of Judicial Independence, UCL Constitution Unit 22 June 2015 [2015] JR 63, available at https://www.judiciary.gov.uk/wp-content/uploads/2015/06/ucl-judicial-independence-speech-june-2015.pdf

37. First, there is the enhanced role of the judiciary in the management of the court system. Before the enactment of the 2005 Act the Lord Chief Justice and the Lord Chancellor entered into a concordat in 2004 by which they agreed that they would manage the Court Service in partnership. In my former jurisdiction, Scotland, several years later, we adopted a model closer to that in the Republic of Ireland in which the court service is run by a Board, the majority of whose members hold a judicial office. That is much easier to achieve in a small jurisdiction and the partnership model is an understandable compromise, at least as a staging post in a transition, in a jurisdiction as large as England and Wales. The partnership model envisaged in the concordat was formalised in a Framework Document in 2008 which was then revised in 2011 to accommodate the incorporation of tribunals into the court service to create HM Courts and Tribunals Service. The Tribunals, Courts and Enforcement Act 2007 was a major advance for the independence of the tribunals as they became part of the judiciary rather than being dependent on their sponsoring government departments. But the Lord Chief Justice in leading the judicial side of the partnership, administering both the courts and tribunals systems, has taken on a very significant administrative burden. He is assisted in that task by his senior colleagues in the Judicial Executive Board and by the Judges Council, which has representatives from all branches of the judiciary.

38. This enhanced administrative role has made judges responsible for the performance of the courts system in a way which they were never in the past. In recent years we have seen judges produce important reports that recommend fundamental reforms, such as Jackson LJ's review of

civil litigation costs (2009), Ryder J's report on modernising family justice (2012), Briggs LJ's review of the Chancery Division (2013) and Leveson LJ's review of efficiency in criminal proceedings (2015). Briggs LJ is currently engaged in a review of the structure of the civil courts, which includes an examination of how to give litigants in person access to justice by devising computer programs which will help them identify and describe the nature and content of their claims. The judiciary must also take advantage of the initiatives of others such as Professor Susskind's work for the Civil Justice Council on "Online dispute resolution" (2015) and Sir Stanley Burnton's work for the charity, Justice, on "Delivering justice in an age of austerity" (2015). Given the new administrative duties of judges, my ninth pillar (performance) now involves performance of those tasks as well as traditional judging.

39. There is a lot going on. One year ago the Chancellor of the Exchequer confirmed the allocation of £700 million to the Ministry of Justice to modernise the justice system, its buildings and facilities and involving the enhanced use of IT in order to provide justice more efficiently.[23]

40. Secondly, there are the ways in which contact is maintained with other branches of government in order to uphold the seventh and tenth pillars, which are explanatory accountability and maintaining support. Under section 7(2)(a) of the Constitutional Reform Act 2005 the Lord Chief Justice has a duty to represent the views of the judiciary to Parliament and Ministers. Since 2014, he has used his power to make

[23] The Chancellor's Spending Review and Autumn Statement (November 2015) para 1.282.

written representations to Parliament under section 5 of the CRA, a power which may originally have been thought to be a nuclear option to be used when relationships with the executive became fraught, to give an annual report to Parliament.

41. In recent years the parliamentary select committees have become an important locus of dialogue between the judiciary and Parliament. The Lord Chief Justice appears annually before the House of Commons Justice Committee and the House of Lords Constitution Committee to discuss the non-judicial work of the judiciary in the administration of justice. Since the 1990s judicial appearances before select committees have become more common than in the past. The President and the Deputy President of the Supreme Court appear annually before the House of Lords Constitution Committee to give evidence on matters relating to the administration of justice. It is generally considered that appearances by other judges should be exceptional. But Lord Lisvane and Beatson LJ have calculated that between 2010 and 2014 there have been 47 appearances by judges before select committees.[24] In order to ensure a proper separation of powers, so that judges do not interfere in political matters and politicians do not question judges about matters on which they should not comment, the Judicial Executive Board has published guidance for judges appearing before the committees[25] and

[24] See the lectures of Sir Jack Beatson "The New Model Judiciary and the other two branches of the State" available at https://www.judiciary.gov.uk/wp-content/uploads/2015/06/speech-by-lj-beatson-new-model-judiciary1.pdf and Lord Lisvane, "The Courts and Parliament" (a lecture in Middle Temple 13 October 2014).

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

parliamentary officials liaise with the Lord Chief Justice's private office about committees' requests for evidence from judges.

42. Each of the branches of government has a shared interest in the rule of law. Cooperation and mutual understanding are essential. In the post-CRA world in which new forms of dialogue have developed, each must be aware of the proper boundaries of its role. In the case of judges, this is a recognition that policy-making is the province of democratic politics. The lawfulness of policy is the province of the courts. But Parliament is sovereign and can overrule the courts. It is legitimate for judges to express views on policy in relation to the operation of the courts and the administration of justice either in response to consultation by the executive branch or before select committees. Judges may also be able to offer technical and procedural advice on the practical consequences of the Government's policy initiatives in some other areas. But the boundary between such advice and policy-making is not an easy one to discern and judges require to exercise care if they are to protect the eighth pillar- that is role recognition.

43. I was struck, when reading the book by Gee, Hazell and others, which I have mentioned, by their warning that the disengagement of politicians from the justice system could be the greatest threat to judicial independence in future. In chapter 10[26] the authors state:

"A key finding of this work is that, counterintuitively, the greater constitutional separation between judges and politicians since 2005

[26] pp 90-91 &262-3.

requires more day-to-day contact between them in order to negotiate and maintain the terms of that separation."

44. In the past there were many MPs who were practising lawyers or who had had significant experience of legal practice. There were also many judges who had had political experience. Not so now. Also politicians may lose interest in the justice system because of the removal of their involvement in the appointment of judges and their diminished role in the operation of the court system. This would be most unfortunate, as all three branches of government and the public at large have a vital interest in the rule of law. If I may conclude with a prediction, it is that judges, lawyers and all who care about the rule of law will have to work to support the tenth pillar, to maintain political and public understanding of and support for the rule of law and the independence of the judiciary which is its necessary component.

Thank you.