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Relations between Judges and Parliament

In the years following the passing of the Constitutional Reform Act 2005, the relationship between Parliament and the judiciary has undergone a structural change. The removal of the UK's highest court of appeal from the House of Lords formally separated the judges from the legislature and this has inevitably changed the institutional architecture within which judges and parliamentarians interact. But the provisions of the Act do not tell the whole story of those changes, which did not begin and end in 2005. The removal of the Law lords was a critical moment, but practices shaping relations between Parliament and judges were changing before then, and have evolved since. In this chapter, we explore how both sides understand this changing relationship. Our focus is on the ways that Parliament acts both as a guardian of judicial independence and also offers new and constructive avenues of judicial accountability. The findings set out in this chapter counterbalance the tendency of lawyers and judges to focus on the high-profile but relatively rare occasions when politicians fail to respect judges and their decisions. There will always be tensions between Parliament and the courts. Recent years have provided a number of high-profile examples: sustained wrangling over the proper scope of judicial review in human rights and national security cases, the role of the European Court of Human Rights, and the boundaries of parliamentary privilege. Decisions by courts in relation to human rights and judicial review are often points of friction between judges and politicians, but this is not our focus here. We are interested

instead in the ways in which judges and politicians interact beyond judicial decision-making. Occasional tensions over high-profile cases must be distinguished from the quiet diplomacy and everyday practices that ensure an effective dialogue is maintained.

Judges as Parliamentarians

Before the Supreme Court opened its doors in 2009, the relationship between the judiciary and Parliament in the UK was most notable for the role of certain judges – not just the Law Lords, but also other senior judges – as parliamentarians. Observers from other countries were often understandably baffled by the fact the UK’s highest court operated formally as a committee of the upper house of the legislature. But what looked like an arrangement that might undermine the independence of the UK’s top court had in fact insulated it from political pressure since its creation in 1876.¹ As highly respected members of the Lords, with their budget and facilities provided by Parliament, the Law Lords carried out their judicial work with little interference from politicians. The arcane workings of the upper house served to promote the independence of the Law Lords, a point to which we return in Chapter 8. Debate tends to focus on the Law Lords and on the role of the Appellate Committee, but in fact the Law Lords were not the only ‘judicial peers’ in the House of Lords. The Lord Chief Justice of England and Wales (‘LCJ’) was by convention given a peerage on appointment. Other senior judges, such as the Master of the Rolls and the Lord President in Scotland, tended also to receive peerages, and some judges held peerages for reasons

¹ See generally D. Steele, ‘The Judicial House of Lords: Abolition and Restoration 1873-6’ in L. Blom-Cooper, B. Dickson and G. Drewry (eds.), *The Judicial House of Lords 1876–2009* (Oxford: Oxford University Press, 2009).

unrelated to their judicial roles.² The significance of retired judges in the Lords should also not be overlooked. These judicial peers were full members of the upper house, enjoying the right to speak and vote in the legislative process and contribute to its scrutiny work. Some had prominent roles on Lords committees, such as the legal sub-committee of the EU Committee and the Joint Committee on Delegated Powers and Regulatory Reform. Here we generally refer to the Law Lords (meaning the members of the Appellate Committee), but use the term ‘judicial peers’ to refer to the wider group of judges with peerages.

Writing in the 1970s, Louis Blom-Cooper and Gavin Drewry argued that ‘the fundamental advantage of having active judges in the House of Lords is that they provide a two-way channel of communication between the courts and the legislature’.³ Judges tended to speak as legal experts on constitutional matters and ‘lawyers’ law’ (technical matters of construction).⁴ Some argued strongly for the retention of the Appellate Committee precisely because of the contribution judicial peers could make to the work of the upper house as experts.⁵ But with almost 100 other lawyers and judges, the Lords was not short of legal expertise.⁶ Judges also spoke on judicial ‘trade union’ interests, but the ability of the Law Lords to communicate judicial concerns was limited by the fact that they could not

² In January 2014 eight judges were listed as being excluded from participation in the Lords by virtue of section 137 of the 2005 Act: five Supreme Court judges, two judges of the Court of Session, and the Lord Chief Justice of England and Wales. House of Lords, *The Grey Book: Who Does What in the House of Lords* (2014), p. 34. The two Scottish judges (Baroness Clark of Calton and Lord Boyd of Duncansby) both held peerages as a result of prior political careers.

³ L. Blom-Cooper and G. Drewry, *Final Appeal* (Oxford: Oxford University Press, 1972), p. 209.

⁴ Such as the law on unfair contractual terms: for example, *Hansard*, HL, vol. 384, cols. 435–530, 20 June 1977.

⁵ For example R. Cooke, ‘The Law Lords: An Endangered Heritage’ (2003) 119 *Law Quarterly Review* 49.

⁶ This is the figure for 2009, taken from M. Russell and M. Benton, *Analysis of Existing Data on the Breadth of Expertise and Experience in the House of Lords* (London: The Constitution Unit, 2010), Table 10 and p. 6.

speak for the judiciary as whole. They were unlikely to have much experience of the courts at the lower levels. True, the LCJ and Master of Rolls were better placed to speak on behalf of the English and Welsh judges, but the occupants of these posts tended to contribute to parliamentary debates rarely, and only when there were matters of serious concern to the judiciary. A notable example of this kind of activity occurred in the early 1990s when the then Lord Chancellor, Lord Mackay, initiated reforms to judicial pensions and the regulation of the legal profession that enraged the judiciary, leading to a notable spike in contributions by judicial peers (see Figure 5.1).⁷

Participation by judicial peers in parliamentary debates had in fact largely fallen away before the Constitutional Reform Act 2005, with many judges in the Lords following a self-imposed vow of silence and debates in the chamber increasingly clashing with the business of the Appellate Committee.⁸ In 1967, judicial peers contributed to debates twenty-six times and in 1980 the figure was thirty-three.⁹ In 2000, by contrast, there were only eight contributions and from 2000 to 2004 the contributions averaged four per year.¹⁰ The sharp decline that occurred around 2000 is largely explained by the hostility of Lord Bingham, then Senior Law Lord, to the practice.¹¹ The Wakeham Commission on reform of

⁷ Lord Lane, as Lord Chief Justice, was at one point prompted to such flights of hyperbole that he drew an analogy between the impending reforms to the legal profession and the rise of fascism: *Hansard*, HL, vol. 505, col. 1331, 7 April 1989.

⁸ Lord Hope, 'Voices from the Past – the Law Lords' Contribution to the Legislative Process' (2007) 123 *Law Quarterly Review* 547, 566.

⁹ The first figure is from Blom-Cooper and Drewry, while the second is our own. See Blom-Cooper and Drewry, *Final Appeal*, on p. 202. Both figures refer to serving members of the Appellate Committee plus serving LCJs and Masters of the Rolls.

¹⁰ HL Committee on the Constitutional Reform Bill, *Constitutional Reform Bill [HL]* (HL 125-I 2004), Appendix 8.

¹¹ Lord Bingham, 'The Evolving Constitution' (The JUSTICE Annual Lecture, 4 October 2001), published in his *Lives of the Law: Selected Essays and Speeches: 2000–2010* (Oxford: Oxford University Press, 2011), p. 56. See also A. Le Sueur and R. Cornes, *The Future of the UK's Highest Courts* (London: The Constitution Unit, 2001).

the legislative House of Lords did not accept in its 2000 report that there was any immediate need for reform of the role played by the Appellate Committee.¹² It did, however, suggest that the Law Lords publish a statement clarifying how and when they would participate in debates in the Lords. Lord Bingham duly did so, explaining in a practice statement that the Law Lords ‘do not think it appropriate to engage in matters where there is a strong element of party political controversy’, and that they ‘bear in mind’ that they might render themselves ineligible to sit judicially if they express opinion on matters which might later be relevant to an appeal.¹³ This tentative phrasing was deliberate. The Law Lords were divided and could not agree on a stronger collective position. Some, notably Lord Hope, felt that participation in debates was of mutual benefit to the judiciary and to Parliament. Participation kept the top judges in touch with politics, while also providing Parliament with the benefit of their legal expertise. The Wakeham Report had reached the same conclusion.¹⁴ However, shortly after his statement, Lord Bingham indicated that he regarded participation in debate as incompatible with the judicial role.¹⁵ Most of his colleagues followed his example, accelerating an existing tendency for judicial peers to disengage themselves from parliamentary business that had been building for at least a decade, if not longer.

Yet as late as 2004 Lords Hoffmann and Scott participated in the controversial debates on proposed legislation to outlaw hunting with dogs. Lord Scott argued that ‘[t]o impose the ban would be a misuse of law’, ‘profoundly undemocratic’ and ‘a vast section of

¹² Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534 2000), para. 9.5.

¹³ *Hansard*, HL, vol. 614, col. 419, 22 June 2000.

¹⁴ Royal Commission on the Reform of the House of Lords, *A House for the Future*, paras. 9.6–9.7.

¹⁵ Lord Bingham, ‘A New Supreme Court for the United Kingdom’ (The Constitution Unit Spring Lecture, 1 May 2002).

the community would think it unfair'.¹⁶ Having expressed such vehement opinions and voted against portions of the Bill, both judges were precluded from hearing cases that arose out of the Hunting Act.¹⁷ This highlighted the potential pitfalls of the Law Lords' association with Parliament. Interventions of this kind did not do them or the wider judiciary great credit, creating an impression of bias that, in later years, advocates cited in order to have individual Law Lords recused from appeals. At worst, comments of this kind risked the impression that certain Law Lords were reactionary and self-interested.¹⁸

The 2005 Reforms

By 2005, notwithstanding the high-profile contributions of Lords Hoffmann and Scott, judicial peers had largely withdrawn from participation in Lords debates and the apparent breach of the separation of powers arising from their presence in Parliament was more technical than real. Given the practical benefits of being in Parliament, it is not surprising that removal to a new Supreme Court was controversial and was strongly resisted by some of the senior judges. As Lord Hope expressed it when the Law Lords finally departed, 'the House of Lords has become a byword for judicial work of the highest quality. . . Why give up something that seemed so valuable?'¹⁹ But for the Labour government the reform had become an important element in its constitutional modernisation programme. It was not sufficient for the courts to be independent of politicians: they had to be seen to be independent. Two years after the proposal was first made, and after detailed scrutiny, including by a special ad hoc committee of the upper house, the Constitutional Reform Act

¹⁶ *Hansard*, HL, vol. 623, col. 626, 12 March 2001.

¹⁷ *R (Jackson) v. Attorney General* [2006] 1 AC 262; *R (Countryside Alliance) v. Attorney General* [2008] 1 AC 719.

¹⁸ Lord Hoffman was also recused in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127.

¹⁹ See, for example, *Hansard*, HL, vol. 712, col. 1514, 21 July 2009 (Lord Hope).

was passed in 2005.²⁰ Because of the time taken to find and then to adapt a new building (Middlesex Guildhall), it took a further four years for the Law Lords to move to their new home across Parliament Square, breaking the formal link with Parliament.

As well as removing the top court from Parliament, the Constitutional Reform Act barred all judges with peerages from sitting and voting in the Lords while holding judicial office.²¹ Lord Hope was not the only senior judge who lamented the loss of ‘something that seemed so valuable’. Lord Judge regretted that as Lord Chief Justice he lacked the power enjoyed by his predecessors to speak in Parliament.²² Our findings, however, suggest that judges have in fact lost little (if any) influence as a result of the changes. While judicial peers can no longer participate in debates, the judicial voice has not been extinguished from Parliament. In 2009, after the departure of the judicial peers, lawyers and judges were the largest single professional group in the Lords, comprising ninety-four peers, of whom twenty-six were retired judges.²³ The next largest professional groups were from banking and finance (ninety-two) and academia (eighty-one). The House of Commons elected in 2010 contained a similar number of lawyers, with ninety MPs who had been barristers or solicitors; fewer than fifty years ago, but still a large professional group.²⁴ On retirement, judicial peers resume the right to participate in the Lords. In 2013, the most active former

²⁰ See, generally, A. Le Sueur, ‘From Appellate Committee to Supreme Court: A Narrative’ in L. Blom-Cooper, B. Dickson and G. Drewry (eds.), *The Judicial House of Lords, 1876–2009* (Oxford: Oxford University Press, 2009).

²¹ Constitutional Reform Act 2005, s. 137.

²² Lord Judge, ‘Constitutional Change: Unfinished Business’ (The Constitution Unit, 4 December 2013).

²³ Russell and Benton, *Analysis of Existing Data on the Breadth of Expertise and Experience in the House of Lords*, Table 10 and p. 6. On historical patterns of lawyer representation in Parliament, see M. Rush and N. Baldwin, ‘Lawyers in Parliament’ in D. Oliver and G. Drewry (eds.), *The Law and Parliament* (Edinburgh: Butterworths, 1998), p. 155.

²⁴ D. Howarth, ‘Lawyers in the House of Commons’ in D. Feldman (ed.), *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2013), p. 41n2.

judges were Lords Brown, Hope, Judge, Lloyd, Phillips and Scott, with Lords Hope and Judge becoming active as soon as they retired.²⁵ In the Lords, retired judges are the guardians of the interests of judges and the courts and can sometimes act as proxies for serving judges. Shortly after his retirement as President of the Supreme Court in 2012, Lord Phillips introduced an amendment designed to protect the independence of the Chief Executive of the Supreme Court.²⁶ He acted at the request of his successor, Lord Neuberger. One of our interviewees felt that, following the departure of the Law Lords, the Supreme Court ceased to have a relationship with Parliament, but this kind of interaction suggests that informal links do in fact persist.

It is not yet clear whether Supreme Court Justices appointed since 2009 who have been given only courtesy titles of 'Lord' will be automatically granted peerages on retirement. The granting of a peerage to Lord Thomas on being appointed as the new LCJ in 2013 suggests that this tradition at least will continue. If so, the judiciary, through its retired members, will not be short of voices in the Lords to represent their interests and could form a very effective lobby group. Moreover, newly retired judges who go to the Lords may throw themselves into their new parliamentary role with less circumspection than their predecessors, who were schooled in caution by their membership of the Appellate Committee. If, on the other hand, Supreme Court justices are not routinely given peerages on retirement, a greater burden will fall on prominent lawyers – like Lords Lester and Pannick – to promote legal and judicial concerns in the upper chamber.

²⁵ Lord Hope and Lord Scott had been the most active contributors as serving Law Lords. In 2001–4, only four out of the twelve Law Lords contributed to debates: see HL Committee on the Constitutional Reform Bill, *Constitutional Reform Bill [HL]* (HL 125-I 2004), Appendix 8.

²⁶ *Hansard*, HL, vol. 741, col. 1488, 18 December 2012. The amendment was contained in section 29 of the Crime and Courts Act 2013 (amending sections 48 and 49 of the 2005 Act).

Judges as Account-Givers

Prior to 2009, the judicial peers participated in debates as parliamentarians, not as account-givers. The question of whether or how Parliament should hold them to account for their judicial roles did not usually arise. Yet Parliament has a role to play in promoting judicial accountability, both in a sacrificial sense – of holding judges to account for failings in the judicial system – and in an explanatory sense of judges giving an account of the system over which they exercise stewardship.²⁷ The ultimate form of sacrificial accountability held by Parliament is the power to dismiss a judge at High Court level or above by presenting an address by both Houses to the monarch.²⁸ This power has been used only once: in 1830, in relation to a judge of the Irish High Court who had misappropriated court funds. Parliament is very unlikely to use this dismissal power. There is instead a tradition of judges being encouraged by the Lord Chancellor and the LCJ to resign long before that stage is reached; of being ‘eased out’ as Robert Stevens delicately put it.²⁹ It is possible for Parliament to criticise an individual judge without calling for his or her dismissal, but this can only be done through a substantive motion, not in the course of ordinary parliamentary debate.³⁰ In practice, this significantly reduces the scope for parliamentarians to criticise individual judges.

²⁷ V. Bogdanor, ‘Parliament and the Judiciary: The Problem of Accountability’ (Third Sunningdale Lecture on Accountability, 9 February 2006).

²⁸ The procedure was created by the Act of Settlement and re-enacted in the Senior Courts Act 1981, s. 11(3).

²⁹ R. Stevens, *The English Judges: Their Role in the Changing Constitution* (Oxford: Hart Publishing, 2005), p. 80.

³⁰ M. Jack and others (eds.), *Erskine May: Parliamentary Practice*, 24th edn (London: LexisNexis Butterworths, 2011), pp. 443–4.

In contrast, explanatory accountability takes place during the ordinary course of parliamentary work through a variety of channels including parliamentary questions, the laying of reports by the judiciary and HM Courts and Tribunals Service, and through judicial appearances before Select Committees. Of the two senses of accountability, explanatory accountability is by far the more important. In practice, relatively few parliamentary questions concern the judiciary. Between January 2013 and July 2013, the Ministry of Justice was asked 1,617 questions in the Commons, of which 116 (7 per cent) concerned the court system. Questions about prisons, by contrast, made up 20 per cent of the total. Questions about the court system tend to focus on lower and mid-ranking courts (e.g. coroners, magistrates courts and the Crown Court) and typically concerned current or local issues such as court closures or changes to sentencing policy, or restorative justice. Only six questions concerned the High Court level or above. Questions about individual judgments or the conduct of individual judges would be ruled inadmissible by the clerks.³¹ These questions can offer only limited and indirect accountability for the judiciary, in large part because parliamentary questions are addressed to ministers and must raise an issue to which ministerial responsibility attaches (and as we have seen in Chapter 4, senior judges have increasing responsibility for the management, administration and efficiency of the judiciary as a whole).

Senior judges such as the LCJ issue reports, which are usually submitted to Parliament. Successive LCJs have demurred from a commitment to publish annual reports, instead issuing periodic reports. Under s. 5 of the Constitutional Reform Act, the LCJ can lay written representations before Parliament. The use of this provision provides an illustration

³¹ Jack and others (eds.), *Erskine May: Parliamentary Practice*, p. 365.

of some of the teething troubles that have arisen in relations between Parliament and the judiciary. In 2008 the Lords Constitution Committee encouraged the then LCJ, Lord Phillips, to submit annual reports to Parliament as a 'key mechanism of accountability'.³² When Lord Phillips sought that same year to use s. 5 to lay his report before Parliament, the parliamentary clerks resisted. Lord Phillips had previously described the s. 5 power as a 'nuclear option',³³ and the clerks felt that its use to submit something as routine as a periodic report went against Parliament's intention in passing the section. After initially agreeing with the clerks to deposit the report as a paper with the parliamentary libraries, instead of via s. 5, Phillips subsequently changed his mind and used s. 5 anyway. His successor, Lord Judge, also sought to use s. 5 to submit reports to Parliament – unsuccessfully in 2010 and 2012, following further resistance from clerks in the Commons, but successfully in 2013. In a private letter to the Lord Speaker, Lord Judge had argued that s. 5 was an appropriate vehicle to submit the report since LCJs were no longer able to use their position as peers to voice concerns in Parliament. Of course such wrangling would be resolved if the LCJ were under a statutory duty to submit an annual report, akin to that imposed on the Senior President of Tribunals.³⁴

³² HL Constitution Committee, *Relations between the Executive, the Judiciary and Parliament: Follow-Up Report* (HL 177 2008), paras. 21–3.

³³ HL Constitution Committee, *Relations between the Executive, the Judiciary and Parliament* (HL 151 2007), paras. 114–15.

³⁴ Tribunals, Courts and Enforcement Act 2007, s. 43.

Judges as Witnesses

Parliamentary questions and judicial reports are useful means of producing factual information about the courts and the judiciary, but they are increasingly overshadowed by the role of Select Committee hearings, which have 'acquired a central role in accountability practices relating to the judicial system'.³⁵ These committees have become the primary forum for communication between judges and Parliament. This reflects not just changes to the judicial role, but also to the culture of Parliament itself. The centre of influence in Parliament has moved away from the debating chamber towards committees. The committees are 'hungrier and more self-confident', as one senior clerk put it, partly as a result of changes such as the election of committee chairs and increased resources, including the availability of specialist advisers.³⁶ A consequence of the growth in judicial appearances before Select Committees is that judges are now called to account in a more collective sense. When they spoke in Parliament, the judicial peers did not offer accountability for the courts system. The greatest number of them – i.e. the Law Lords – could not speak for the judiciary as a whole, nor did they claim to. More focused Select Committee inquiries allow greater scope for institutional accountability, with the agenda set principally by Parliamentarians rather than the judiciary.

³⁵ A. Le Sueur, 'Parliamentary Accountability and the Judicial System' in N. Bamforth and P. Leyland (eds.), *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013), p. 207.

³⁶ See R. Kelly, 'Select Committees: Powers and Functions' in A. Horne, G. Drewry and D. Oliver (eds.), *Parliament and the Law* (Oxford: Hart Publishing, 2013).

Judicial Appearances before Select Committees

The level of judicial appearances before Select Committees is high. For the period of ten years from January 2003 to December 2013, we compiled 148 records of oral evidence by seventy-two salaried UK judges before Select Committees at Westminster.³⁷ If international judges, retired judges, deputy High Court judges and magistrates are included, the number of judges who gave evidence rises to 185 individuals.³⁸ When the Lords Constitution Committee argued in 2007 that removal of the Lord Chancellor as head of the judiciary meant that Select Committees should play a 'central part' in facilitating understanding of the judicial role and in holding the judiciary to account, it was describing a constitutional trend that was already well developed.³⁹ As judicial contributions to debates in the Lords declined from the late 1990s, there was a significant and sustained (if erratic) increase in the number of judges who gave evidence before committees, with 2003 being a particular turning point.⁴⁰ In large part, this timing is due to the creation of a new Select Committee on the Lord Chancellor's Department in early 2003 and, just a few months later, the intense debate precipitated by the sacking of Lord Irvine and subsequently the introduction of the Constitutional Reform Bill. Prior to 2003, there was no designated committee to shadow the work of the Lord Chancellor's Department.⁴¹ The new committee regularly invited judges to

³⁷ The figure of 148 counts each judicial witness at each evidence session separately, including judges who have given evidence on multiple occasions and as part of a group.

³⁸ Except where otherwise stated, figures for the numbers of judges appearing before Select Committees given here refer to evidence given by serving salaried UK judges.

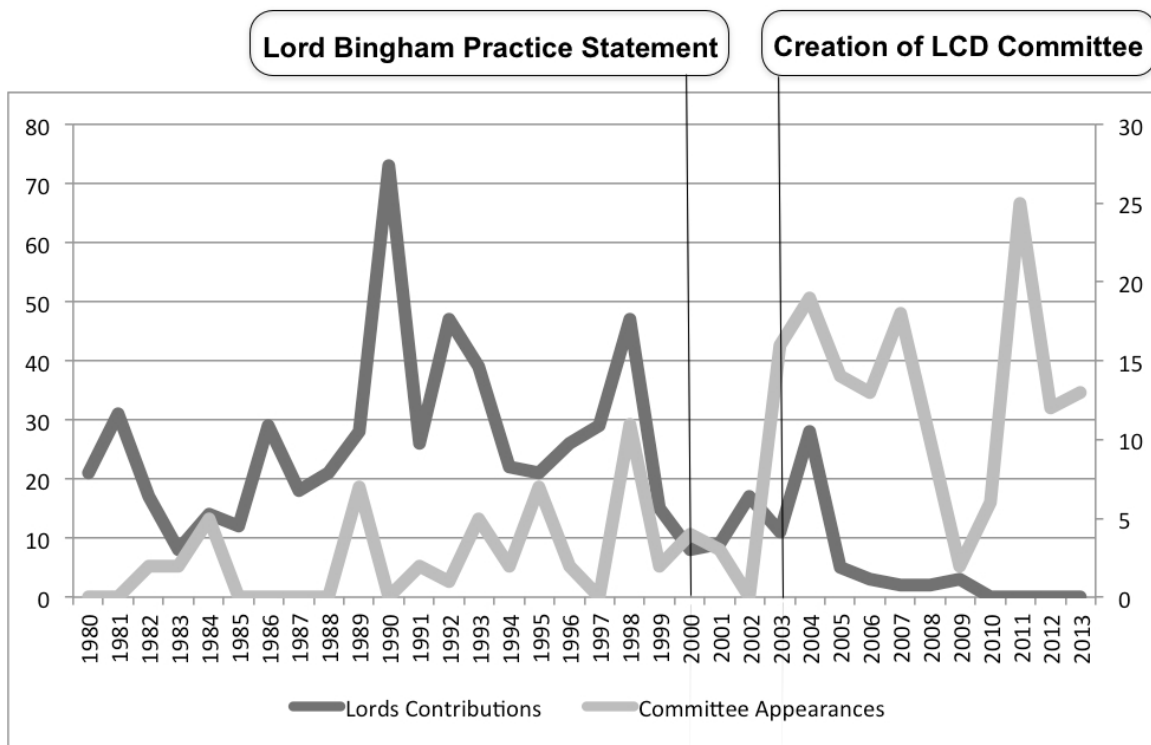
³⁹ HL Constitution Committee, *Relations between the Executive, the Judiciary and Parliament*, para. 126.

⁴⁰ The erratic nature of the increase reflects the fact that committee interest in judicial matters is episodic, often arising out of a particular inquiry (for example into judicial appointments or constitutional reform).

⁴¹ See, generally, G. Drewry and D. Oliver, 'Parliamentary Accountability for the Administration of Justice' in D. Oliver and G. Drewry (eds.), *The Law and Parliament* (London: Butterworths, 1998), pp. 40–42.

assist it in its work, and other committees also grew more confident in calling judicial witnesses. In 2004, the *ad hoc* Lords Committee on the Constitutional Reform Bill took extensive evidence from twenty-one judges anxious to express concerns about the proposed constitutional changes, as well as receiving collective submissions from the Judges' Council and the Law Lords.⁴²

<FIGURE> Figure 5.1: Debate contributions by Law Lords against Committee Appearances by Judges 1980–2013⁴³



⁴² See HL Committee on the Constitutional Reform Bill, *Constitutional Reform Bill*, Appendix 4.

⁴³ The left vertical axis refers to 'Lords Contributions' and the right axis to 'Committee Appearances'. Figures for 'Lords Contributions' refer to contributions by serving members of the Appellate Committee, serving LCJs and serving Masters of the Rolls. Figures for 'Committee Appearances' (as elsewhere) refer to appearances by serving salaried UK judges.

How are Judicial Appearances Arranged?

Judicial appearances before Select Committees are essentially a form of voluntary accountability. Committees have no power to compel or direct judges. Although a Select Committee could in theory order a judge to appear before it, it is extremely unlikely (amounting almost to a practical impossibility), and our interviewees agreed that to do so would be constitutionally inappropriate.⁴⁴ Attendance by judges as committee witnesses at Westminster is thus consensual in practice. Judges in Scotland and Northern Ireland have even greater protection as the Scottish Parliament and the Northern Ireland Assembly are precluded by statute from compelling judges to give evidence before them.⁴⁵ This protection is real, and the Lord President recently cited it when declining to appear before a Scottish committee.⁴⁶

Until recently, evidence sessions were arranged informally between committee clerk and judges. Judges usually informed the Judicial Office, which provided advice and support.⁴⁷ Occasionally judges might submit written evidence on their own initiative or even volunteer to give evidence; an example an interviewee offered of the latter was in 2004 when the then LCJ, Lord Woolf, volunteered to give evidence as part of the Public Administration Committee's work on public inquiries.⁴⁸ Individual judges can take quite

⁴⁴ See Kelly, 'Select Committees: Powers and Functions' in Horne, Drewry and Oliver (eds.), *Parliament and the Law*, pp. 186–7.

⁴⁵ Scotland Act 1998, s. 23(7) and Northern Ireland Act 1998, s. 44(5).

⁴⁶ The Lord President declined to appear before the Petitions Committee to discuss a campaigner's call for a register of judicial interests, although subsequently he met with the Committee's convenor in private. Letter from Lord Gill to the Convenor of the Public Petitions Committee (28 May 2013).

⁴⁷ See Judicial Executive Board, *Guidance for Judges Appearing before or Providing Written Evidence to Parliamentary Committees* (2008).

⁴⁸ See HC Public Administration Committee, *Government by Inquiry – Minutes of Evidence* (HC 51-II 2005).

different attitudes to the process of giving evidence. One of our interviewees described the contrast between two judges attending the same session: judge A ‘fell over themselves to come and give evidence’, while judge B was ‘far less happy’ and the committee clerk had to ‘talk to judge B on the phone to go through in painstaking detail’ what the committee was going to ask. Judges seldom decline to appear outright, although the Judicial Office might seek to persuade a committee clerk that judicial evidence would be inappropriate, or that a different judge might be better placed to give evidence. Committees can be dogged at times in the face of an initial reluctance to appear: for example when the Public Accounts Committee’s Chair, Margaret Hodge, wrote repeatedly to the President of the Family Division, Sir Nicholas Wall, asking him to give evidence in its inquiry into the Child and Family Court Advisory Support Service (‘CAFCASS’). The committee has a fierce reputation and Wall was unwilling to be questioned about CAFCASS’s value for money. In correspondence with Wall, Hodge acknowledged his concerns, but also stressed that the committee felt that judges in the family court had a unique perspective as ‘customers’ of CAFCASS. Wall gave evidence in late 2010, in what one parliamentary clerk described as a productive session.

The joint appearance in November 2011 of the President of the Supreme Court, Lord Phillips, and the LCJ, Lord Judge, before the Joint Committee of Human Rights (JCHR) illustrates the intense behind-the-scenes negotiations that can occur. The session involved discussion of ‘the legal issues with which . . . politicians have to wrestle’ in the context of human rights.⁴⁹ Six weeks before the evidence session, the judges’ officials contacted the JCHR’s clerk to request more detailed information about the questions the President and

⁴⁹ Joint Committee on Human Rights, *Human Rights Judgments: Minutes of Evidence* (Uncorrected Transcript of Oral Evidence) (HC 873-II 2011) Hywel Francis MP, Q. 1.

the Lord Chief Justice were likely to be asked and expressed concerns about the areas into which questioning might lead. The clerks were unable to provide any cast-iron guarantees about the sorts of questions that the MPs and peers on the JCHR might ask, and in reply the judges indicated that they would think carefully before confirming their attendance. Their appearance was in doubt up until a matter of days before the session. Ultimately, the JCHR's chair, Dr Hywel Francis MP, spoke to the LCJ, who agreed to attend. At the session, the judges engaged with most of the topics about which they had previously expressed concern, even making tacit criticism of the Strasbourg Court. One parliamentary official was 'astonished' that the LCJ answered a question pertaining to a pending case before the Strasbourg Court. Only once, in response to a question about prisoner voting, did they refuse to answer; Lord Phillips declined to answer it 'because, although [it] may have been phrased as a matter of nice, pure constitutional law, this is one of the most hot political issues of the moment'.⁵⁰

The process for arranging judicial appearances changed in 2012. According to revised guidance agreed between the LCJ and the Clerk of the House of Commons, a request to give evidence should now be made directly from the Select Committee in question to the private office of the LCJ.⁵¹ The LCJ's office discusses with the committee's clerk whether a judicial appearance is appropriate, or whether written evidence might be more suitable. This is a tightening of control by the LCJ and is the product of increased dialogue between the senior judiciary and Parliament. A more centralised process, controlling who gives evidence and when, nonetheless runs against the direction of travel since the abolition of the Kilmuir

⁵⁰ Joint Committee on Human Rights, *Human Rights Judgments: Minutes of Evidence*, Lord Phillips responding to Q. 96.

⁵¹ Judicial Executive Board, *Guidance to Judges on Appearances before Select Committees* (2012).

Rules in 1987 permitted greater public comment by judges. It remains for individual judges to decide when it is appropriate to venture public comments,⁵² but appearances before Select Committees now fall into a more carefully controlled category. The more centralised process has resulted from judicial anxiety that there are now too many judicial appearances. Successive LCJs have voiced this worry,⁵³ as have other senior judges.⁵⁴ In private, one senior judge told us that judicial appearances presented ‘a very serious danger’. Judicial concerns are threefold: first, the risk that judges will become drawn unwittingly into politically contentious debates; second, that judges may express personal views that do not accord with the collective views of the judiciary; and third that preparing for an appearance is time-consuming, with each appearance likely to cost a day or two of court time. It is certainly true that members of the judiciary are not always of one mind, as the Constitution Committee found during their inquiry into judicial appointments.⁵⁵ Equally valid are the human resource implications. But as we explain below, the tone of questioning tends to be highly respectful, with MPs and peers conscious of the constraints on what judges are able to discuss publicly. Judicial concern seems overstated and, above all, understates the value of appearances before committees as an important and mutually beneficial mechanism of explanatory accountability.

⁵² See, for example, Lord Neuberger, ‘Where Angels Fear to Tread’ (The Holdsworth Club, 2 March 2012).

⁵³ Lord Judge expressed this view in the course of the above appearance before the JCHR. See also Lord Phillips, ‘Judicial Independence’ (Commonwealth Law Conference, Nairobi, 12 September 2007).

⁵⁴ Letter from Lord Justice Toulson to Lord McNally (Minister of State at the Ministry of Justice), dated 9 December 2011 and published by the HL Constitution Committee as part of its inquiry into Judicial Appointments.

⁵⁵ HL Constitution Committee, *Judicial Appointments* (HL 272 2012).

What Do Judges Talk About?

To build up a picture of judicial evidence sessions, we looked at a selection of the transcripts, focusing primarily on fifty-two transcripts of the ten most frequent judicial witnesses between 2003 and 2012.⁵⁶ Evidence sessions with judges tend to cover a range of topics rather than a single issue (See Figure 5.2). The prominence of constitutional matters and judicial appointments reflects their importance in the passage and implementation of the Constitutional Reform Act, and in its aftermath. By and large, the topics also reflect the priorities of parliamentarians, not the judges, since it is the Select Committees who choose the topics of their inquiries. Family law was prominent because of concerns about court delays. Judges are, unsurprisingly, more comfortable talking about the administration of the courts than about more substantive legal issues, and seek where possible to avoid politically sensitive issues altogether.

Judges appear most commonly before the Commons Justice Committee: sixty-five appearances between 2003 and 2013. Next are the Lords Constitution Committee (twenty-two) and the Commons Home Affairs Committee (eleven). The LCJ appears annually before the Constitution Committee and regularly, though less frequently, before the Justice Committee. The Lord Chancellor also appears annually before the Constitution Committee, which enables some 'triangulation' to take place, whereby each witness can comment on the evidence of the other.⁵⁷ In addition to these two, judges appear before a wide range of

⁵⁶ The judges were Igor Judge, Nicholas Phillips, John Thomas, Nicholas Wall, Michael Walker, Henry Hodge, David Neuberger, Nicholas Crichton, Thomas Bingham and Timothy Workman. We examined transcripts of some other judicial witnesses (outside this core group) where issues in specific sessions were raised by our interviewees, or where we were aware of features of a particular session that were of interest.

⁵⁷ Le Sueur, 'Parliamentary Accountability and the Judicial System' in Bamforth and Leyland (eds.), *Accountability in the Contemporary Constitution*, p. 208.

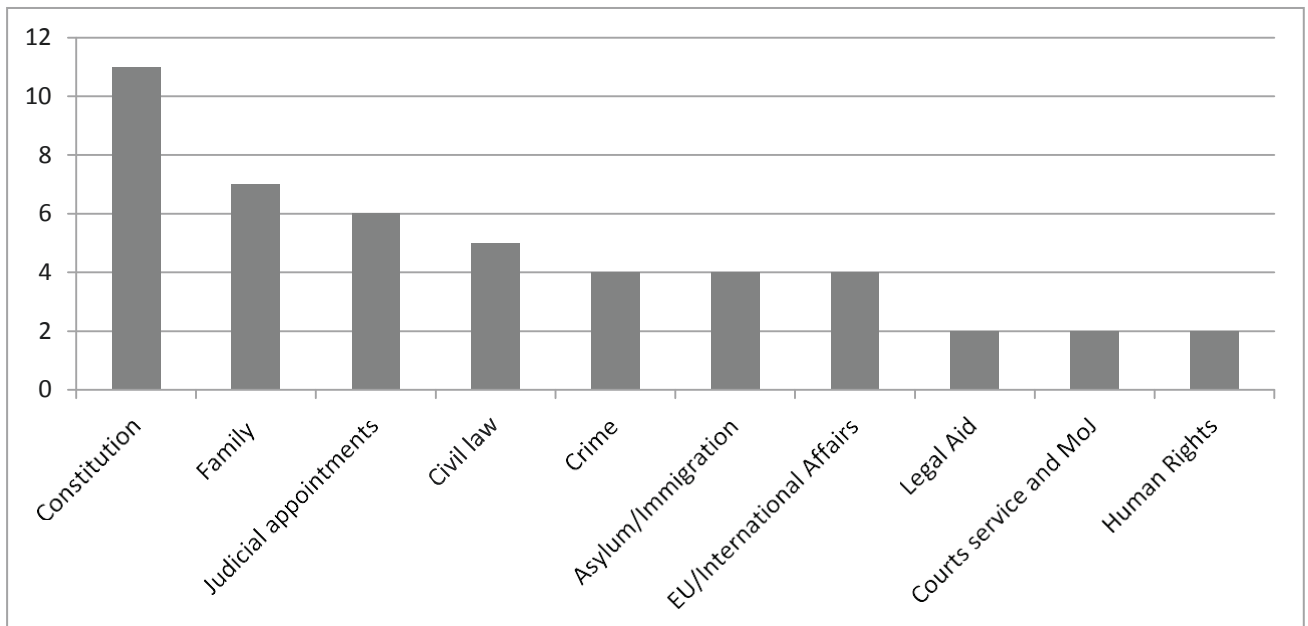
committees, including the Lords EU Committee and the Culture, Media and Sport Committee (particularly on press regulation) as well as Bill committees.⁵⁸ At times, judges have been reluctant to appear before Select Committees with which they were less familiar or those with combative reputations. The reluctance of the President of the Family Division to appear before the Public Accounts Committee is an example. But judges must recognise that Select Committees are not only increasingly important sites of parliamentary business, but also that the approach of individual committees can change. For example, with Hodge as its chair, the Public Accounts Committee now invites a much wider range of witnesses. Although judicial leaders such as the LCJ and heads of division are the most frequent witnesses before Select Committees, there have been appearances from judges from across the judicial hierarchy.

<FIGURE>

Figure 5.2: Top Ten topics discussed by judicial witnesses 2003–2012⁵⁹

⁵⁸ The Joint Committee on the Draft Defamation Bill, for example, heard from two judges in 2011.

⁵⁹ Top ten topics discussed by judicial witnesses between 2003 and 2012, based on the title of the inquiry or evidence session.



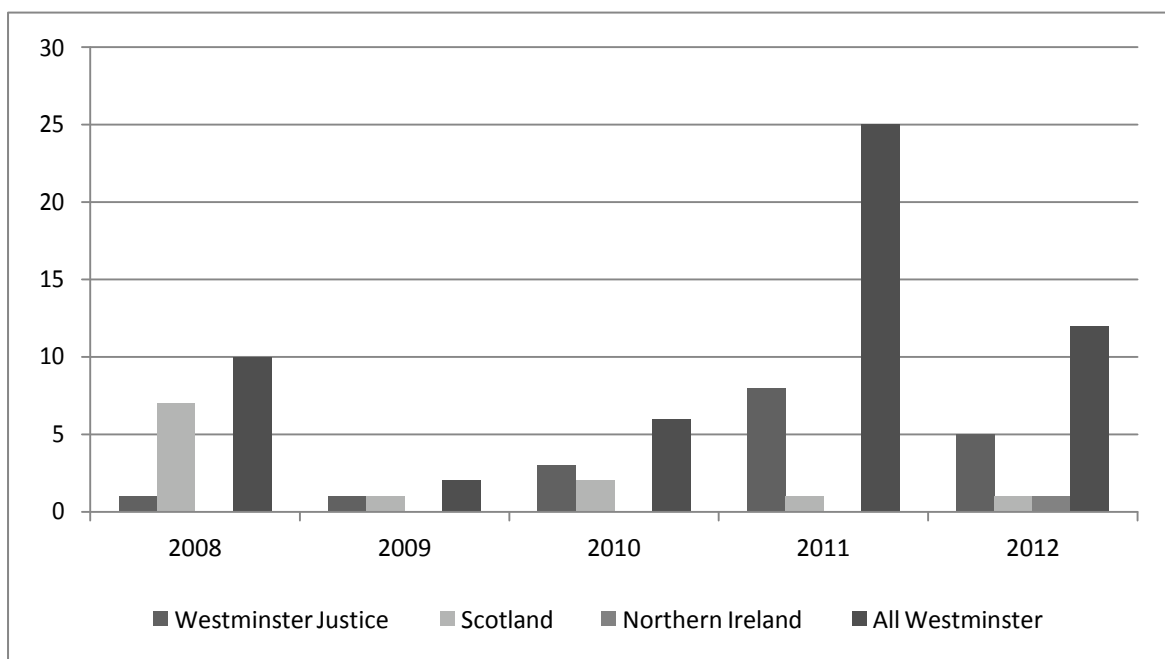
By contrast, judicial appearances before the Scottish Parliament and Northern Ireland Assembly are rare, confined to senior judiciary and almost exclusively conducted by the respective Justice Committees. At Westminster, a broad range of committees call a much wider selection of judges to give evidence. Figure 5.3 compares the number of appearances before the Justice Committees at Westminster, Edinburgh and Belfast with the figure for all Westminster committees.⁶⁰ Unsurprisingly, given the big differences in size of both the legislature and the judicial system, there were many more appearances each year before Westminster committees. What is more, the Northern Ireland Assembly's Justice Committee was only created in 2010, when justice powers were devolved to Stormont. It wasn't until 2008 that the Scottish Parliament's Justice Committee had more appearances than its Westminster counterpart, as a result of its scrutiny of the Bill that became the Judiciary and Courts (Scotland) Act 2008. The spike in the 'all Westminster' figure for 2011 is similarly

⁶⁰ The Welsh Assembly does not have any powers over justice-related matters and so is omitted from the comparison.

accounted for in part by the Lords Constitution Committee’s inquiry into judicial appointments, which coincided with the preparation of the Bill that became the Crime and Courts Act 2013.

<FIGURE>

Figure 5.3: Judicial Appearances before Justice Committees in Westminster, Edinburgh and Belfast⁶¹



While the primary function of appearances is for judges to explain the workings of the judicial system, the sessions also provide an opportunity for the committees to articulate Parliament’s concerns to the judiciary, including urging judicial witnesses to address problems that have been identified. In this way, there is a degree of dialogue in the Select Committee process. For example, the Lords Constitution Committee suggested in 2007 that the LCJ needed to change his strategy for media and public communication. Since

⁶¹ Total number of judicial appearances before Justice Committees in each legislature in each year, together with figures for all Westminster committees. Where the same judge gives evidence twice or more, each appearance is counted separately.

then, the LCJ has developed a practice of giving an annual press conference, with the Judicial Communications Office also becoming more proactive.⁶² During an inquiry into immigration asylum appeals before the Constitutional Affairs Committee, the predecessor of the Justice Committee, Mr Justice Hodge responded to a question about delays in processing documentation by undertaking to investigate the matter and ‘report to you as we go along how we are getting on, but we are looking at it in a major way now’.⁶³ Committee reports can also hold judges to account even without calling them before the committee. After criticism in a report by the House of Commons Home Affairs Committee about the treatment of significantly vulnerable witnesses in cases of serious sexual crime, the LCJ announced a change in policy.⁶⁴

In short, evidence sessions with judges are useful for Parliament because they can engage in a dialogue with the judiciary and influence judicial thinking. This dialogue can enrich Parliament’s work of scrutiny. Several clerks told us that judicial witnesses typically have a ‘unique perspective’ and supply ‘some of the best evidence’. But other clerks also noted that judicial appearances did not always attract much interest among committee members; one early appearance by the LCJ before the Justice Committee involved a struggle to find enough committee members to achieve quorum. This reflects the unavoidable truth that some aspects of the administration of justice will tend to be of only peripheral concern to many politicians, at least for as long as the judicial system is perceived to work satisfactorily. Evidence sessions are also of value to judges in offering a platform from which

⁶² Le Sueur, ‘Parliamentary Accountability and the Judicial System’ in Bamforth and Leyland (eds.), *Accountability in the Contemporary Constitution*, p. 210.

⁶³ HC Constitutional Affairs Committee, *Asylum and Immigration Tribunal: The Appeals Process* (HC 1006-I 2006).

⁶⁴ Letter from Lord Judge to Keith Vaz, MP (6 July 2013).

to educate Parliament and influence policy-making and can at the same time demonstrate their accountability to the democratic process.⁶⁵ Committee sessions also add to judicial influence in more subtle ways: the Ministry of Justice may be more willing to heed judges in the consultation phase of policy-making knowing that subsequently judges may be given a platform by Select Committees to publicise their concerns.

What are Judges Asked?

In committee rooms, the committee's members, its clerks and the judges collaborate to create a 'constitutional safe space' in which judges can express concerns to Parliament and Parliament in return can seek a measure of accountability from the judiciary. Evidence sessions on specific areas of law, such as family law or small claims proceedings, tend to be almost entirely factual in tone. The judge acts as an expert witness, for example by outlining how custody hearings work in practice, identifying problems and offering solutions.⁶⁶ Opinions are offered, but are generally quite uncontroversial. Judges are most willing to talk about contentious issues when discussing constitutional change, judicial appointments and the running of the courts. They are willing to answer questions, provided that committees refrain from asking questions that could compromise their independence. The committees are schooled by the clerks to avoid doing so. In general, judges are given wide latitude by comparison with other committee witnesses. There is broad recognition that there are

⁶⁵ Andrew Le Sueur argues that committee appearances have three functions: accountability, education and judicial criticism of government policy: Le Sueur, 'Parliamentary Accountability and the Judicial System' in Bamforth and Leyland (eds.), *Accountability in the Contemporary Constitution*, pp. 210–11.

⁶⁶ For example, Sir Nicholas Wall, Mrs Justice Pauffley and Mr Justice Ryder appearing before the HC Justice Committee, *Operation of the Family Courts* (HC 518-I 2011) Ev. 34–42.

some issues on which judges cannot offer an opinion and committee chairs often take pains to explain to their members that judicial witnesses are subject to special constraints.

But not every evidence session is restrained and personality is important on both sides of the table. Individual committee members sometimes press judicial witnesses hard. One example cited by two judges in interview was the Home Affairs Committee's treatment in 2011 of retired judge Sir Scott Baker, who had chaired a committee on the US–UK Extradition Treaty.⁶⁷ One senior judge characterised some of the questioning as 'entirely inappropriate for a judge'. The committee's questioning was certainly sharp, as it often was under its chair, Keith Vaz, MP. But it is not immediately clear that retired judges need the same careful treatment as currently serving judges, nor is robust questioning (by itself) necessarily disrespectful or inappropriate. In any event, judges are generally very able witnesses; and Sir Scott Baker certainly gave a robust defence of his report. Those with good political skills can handle questioning very effectively, as in this case, where Lord Judge, who had clearly been well briefed, deflected a question on local court closures:

<EXT.>

There are courts that are in places where they are no longer needed . . . To take one from your area, I think Flint Crown Court is hard to justify. . . On the other hand, I do know very well there is a court not so far away from you at Pwllheli which is going to be closed, and I know that getting from Nefyn to Caernarfon is a very different journey on public transport than it is in getting to Pwllheli.⁶⁸

⁶⁷ HC Home Affairs Committee, *The US–UK Extradition Treaty* (HC 644 2012) Ev. 25–32; Judges' Council, *Guide to Judicial Conduct* (2008), para. 9.2.

⁶⁸ Lord Judge, appearing before the House of Commons Justice Committee on the topic of 'The Work of the Lord Chief Justice' on 26 October 2010.

<EXT. ends>

The context in which judges appear may also be important. Judges who appear as chairs of an inquiry, like Sir Scott Baker or Sir Brian Leveson in relation to press regulation, tend to be treated more robustly than judges appearing in more clearly judicial roles.⁶⁹

Guidance issued by the Judicial Executive Board in 2012 identifies four broad topics on which judges should not comment: (1) the merits of individual cases; (2) the personalities or merits of serving judges, politicians or other public figures; (3) the merits, meaning or likely effects of prospective legislation or government policy; and (4) issues which are subject to government consultation on which the judiciary intend to make a formal institutional response.⁷⁰ The last category is listed merely as ‘desirable practice’, discouraging individual judges from responding to consultations until after the judiciary has submitted a formal, collective response, whether via the LCJ, the Heads of Division, the Judicial Executive Board or the Judges’ Council. However, this reflects and reinforces the increasingly hierarchical, closely managed nature of the judiciary, as discussed in Chapter 6. The third category covers political comment and attempts to prevent a judge’s impartiality being impugned in the event of sitting in a case where those provisions are at issue. There is no absolute bar on discussing a Bill or government policy. Judges are permitted to comment on the merit of a Bill if it affects the independence of the judiciary; they can also comment on practical and technical aspects of a Bill or policy, where it relates to the operation of the courts or the administration of justice. This reflects the judiciary’s interest in the administration of the courts. But the distinction is difficult to draw even in the abstract and comments by judges

⁶⁹ Sir Brian Leveson appeared before the Culture, Media and Sport Committee on the topic of *Press Regulation* on 10 October 2013. A senior civil servant we interviewed felt that in this session ‘several lines were crossed’.

⁷⁰ Judicial Executive Board, *Guidance to Judges on Appearances before Select Committees*.

often strain against this restriction. Lord Phillips, for example, expressed the following view in a discussion on penal policy, an issue of high political salience:

<EXT.>

If you are going to put somebody in prison for 30 years by way of punishment you are investing £1 million or more in that operation. I think Parliament ought to reflect whether that is the most desirable way of using resources having regard to, obviously, the viewpoint of the electorate.⁷¹

<EXT. ends>

Yet, as we noted above, he refused to answer a question before the JCHR about the voting rights of prisoners because it was politically controversial.⁷² Given that penal policy and voting rights for prisoners are both political issues, an important consideration will be whether or not a topic is currently attracting high levels of political and media attention. The likelihood of litigation will also be prominent in the mind of a judicial witness. Unlike the issue of prisoner voting, the question of how best to allocate resources within the realm of criminal justice is non-justiciable.

The other guidelines are also disregarded on occasion. Persistent questioning can push judges into saying more than they ought. Asked to interpret the words ‘in good faith and without malice’ in a statute, Lord Neuberger initially demurred out of fear that he might later be asked to interpret the words in court, but after persistent questioning offered a

⁷¹ At Q. 28 of his evidence before the House of Lords Constitution Committee inquiry into *Relations between the Executive, the Judiciary and Parliament* (HL Paper 177, 2008).

⁷² He may also have been mindful that prisoners’ voting was likely to come before the Supreme Court. Lord Phillips with Lord Judge before JCHR, October 2012.

tentative definition.⁷³ At another session, several judges were willing to criticise the decision-making of an unnamed family judge in listing a case for hearing at a date six months after the initial hearing.⁷⁴ Only relatively rarely do committees ask questions about a specific judicial decision in a clear breach of convention.⁷⁵

Select Committees as Guardians of Judicial Independence

For non-UK readers, it may seem extraordinary that judges should appear before Parliamentary Committees because this practice is not usual in many other jurisdictions. However, Select Committees perform a valuable dual role. Not only are they holding the judiciary to account, and in the process learning about the inner workings of the justice system – they have also developed into key guardians of judicial independence and the rule of law. Indeed, they are emerging as more systematic guardians than judicial peers could be in the past. Interventions by judicial peers in parliamentary debates can be eccentric and idiosyncratic, depending on the interests and time commitments of the individual. Select Committees, by contrast, are far more systematic. Three new committees scrutinise all Bills in detail for adherence to legal and constitutional values: the JCHR, the Lords Constitution

⁷³ Lord Neuberger appearing before the Joint Committee on Privacy and Injunctions, 21 November 2011, at Q. 524.

⁷⁴ Sir Nicholas Wall, Mrs Justice Pauffley and Mr Justice Ryder appearing before the HC Justice Committee, *Operation of the Family Courts* Ev. 34–42.

⁷⁵ In an evidence session before the Justice Committee in 2007, for example, Judge Julian Hall appeared to have difficulty steering the Chairman away from questions about a recent sentence he had delivered which had attracted media controversy and was the subject of an appeal. HC Justice Committee, *Towards Effective Sentencing: Oral and Written Evidence* (HC 184-II 2008) Ev. 20–7.

Committee and the Lords Committee on Delegated Powers.⁷⁶ They were all established at around the same time as contributions in the Lords by judicial peers were declining.⁷⁷ It is no coincidence that these are primarily Lords committees, since peers typically take the business of detailed legislative scrutiny more seriously than MPs. Much – and even most – of the work of these committees does not directly relate to judicial independence. But their work helps shape a political culture that respects the authority of law and the legal system – and, in doing so, helps to nurture the political appreciation of judicial independence in ways that we outlined in Chapter 2.

The establishment of the Lords Constitution Committee resulted from a recommendation in the Wakeham Report that the upper chamber should serve as a constitutional guardian. With prominent retired judges and senior lawyers amongst its members, the Constitution Committee has largely fulfilled this expectation. As Le Sueur and Simson Caird explain, it has evolved into an indispensable venue for an institutional dialogue with the judiciary.⁷⁸ This dialogue fulfils four main goals. First, it facilitates the ventilation of judicial concerns. Second, it holds ministers to account for their judiciary-related responsibilities, particularly the Lord Chancellor. Third, it calls the senior judiciary to account for operational and leadership matters. Fourth, it monitors the workings of the new institutional architecture across the judicial system. We refer to the Constitution Committee's reports throughout this book, especially its 2007 inquiry on relations between the judiciary, executive and Parliament and its 2011 inquiry on judicial appointments.

⁷⁶ R. Hazell, 'Who Is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?' [2004] *Public Law* 495.

⁷⁷ The Lords Constitution Committee and the Joint Committee on Human Rights were both established in 2001; the Delegated Powers Committee in 1997.

⁷⁸ A. Le Sueur and J. Simson-Caird, 'The House of Lords Select Committee on the Constitution' in Horne, Drewry and Oliver (eds.), *Parliament and the Law*, pp. 281, 304–306.

Making use of detailed evidence from a wide range of stakeholders, and with clear findings and recommendations, these inquiries have more potential to educate their fellow parliamentarians and the wider public than the occasional intervention from one of the Law Lords.⁷⁹

Less well known is the Committee's legislative scrutiny role. Its legal advisers examine every Bill for constitutional issues. In its first eleven years, it produced eighty-six legislative scrutiny reports. In 2013, three academics used these reports to articulate the set of scrutiny standards that informs the Constitution Committee's work.⁸⁰ A number relate directly to issues covered in this book: the independence of the judiciary should not be undermined;⁸¹ judges' security of tenure should be preserved;⁸² the politicisation of the judicial appointments process should be avoided;⁸³ and where a government minister is to be made responsible for judiciary-related matters, then that minister should be the Lord Chancellor.⁸⁴ Several of the standards relate less directly to the constitutional position of judges and more to their constitutional role: the exercise of powers to combat terrorism should be subject to adequate judicial control;⁸⁵ the roles of Parliament and the judiciary should not be conflated;⁸⁶ coercive powers that restrict a constitutional right should be

⁷⁹ G. Drewry, 'Parliamentary Accountability for the Administration of Justice' in Horne, Drewry and Oliver (eds.), *Parliament and the Law*, p. 361.

⁸⁰ J. Simson-Caird, R. Hazell and D. Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (London: The Constitution Unit, 2014).

⁸¹ HL Constitution Committee, *Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary* (HL 167 2008), para. 38.

⁸² HL Constitution Committee, *Justice (Northern Ireland) Bill* (HL 40 2004), Appendix 1.

⁸³ HL Constitution Committee, *Judicial Appointments*.

⁸⁴ HL Constitution Committee, *Northern Ireland Bill* (HL 50 2009), para. 14.

⁸⁵ HL Constitution Committee, *Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, para. 5.

⁸⁶ HL Constitution Committee, *Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, para. 39. 'Far from being a system of checks and balances, this is a

exercised by the judiciary rather than the executive;⁸⁷ ouster clauses should be avoided;⁸⁸ the nature of the judicial oversight of a ministerial power should be clear on the face of the Bill;⁸⁹ and laws should avoid creating the possibility of conflict between Parliament and the courts.⁹⁰ These standards were extracted from a number of Bills, illustrating the wide range of legislative contexts in which judicial issues can arise – terrorism, coroners and welfare reform included.

One report notable for its impact was that on the Public Bodies Bill in 2011, in which the Constitution Committee strongly criticised the proposed use of Henry VIII powers, which enable ministers to amend primary legislation through the use of secondary legislation. Schedule 7 of the Public Bodies Bill proposed conferring on ministers powers to abolish a number of bodies, including the Judicial Appointments Commission and other bodies related to the judiciary. Alongside the private negotiations with senior judges, a speech in the House of Lords by the retired LCJ Lord Woolf,⁹¹ and strong words from the serving LCJ during an evidence session before the Constitution Committee,⁹² the Committee's trenchant criticism helped persuade the government to remove the JAC and other judiciary-related bodies from the Schedule. The Committee's work has been described as 'parliamentary constitutional

recipe for confusion that places on Parliament tasks that it cannot effectively fulfil and arguably risks undermining the rights of fair trial for the individuals concerned.'

⁸⁷ HL Constitution Committee, *Welfare Reform Bill* (HL 79 2009), para. 10.

⁸⁸ HL Constitution Committee, *Justice and Security (Northern Ireland) Bill* (HL 54 2007), para. 2.

⁸⁹ HL Constitution Committee, *Coroners and Justice Bill* (HL 96 2009), para. 9.

⁹⁰ HL Constitution Committee, *Parliamentary Standards Bill: Implications for Parliament and the Courts* (HL 134 2009), para. 22.

⁹¹ *Hansard*, HL, vol. 722, cols 75–7, 9 November 2010.

⁹² HL Constitution Committee, *Meetings with the Lord Chief Justice and the Lord Chancellor* (HL 89 2011).

review’,⁹³ and with its help the House of Lords has developed into the constitutional guardian that the Wakeham Report envisaged.

Much of the Lords Constitution Committee’s success is due to its composition: it includes experienced parliamentarians, distinguished lawyers and sometimes a former Lord Chancellor or Attorney General, and their work is supported by two specialist legal advisers.⁹⁴ At the same time, this can sometimes lend their evidence sessions a ‘slightly surreal’ air, insofar as the committee members and its witnesses are often ‘all old mates’, with the genteel tone of its evidence sessions risking the impression that it is a ‘non-scrutinising body’, in the words of one official at the Ministry of Justice. In reality, the detailed work of legislative scrutiny, drafting reports and deciding on recommendations is conducted out of sight. It is one thing for the Constitution Committee to make recommendations and propose changes to Bills; it is quite another for the government to accept them. There is no specific data on its success rate, although one experienced Ministry of Justice official told us that the prospect of the Committee’s scrutiny role ‘scared the hell out of [him]’. It is notable, however, that one third of government defeats in the House of Lords arise from issues relating to justice and the courts.⁹⁵

⁹³ J. Simson-Caird, ‘Parliamentary Constitutional Review: Ten Years of the House of Lords Select Committee on the Constitution’ [2012] *Public Law* 4.

⁹⁴ See Le Sueur and Simson-Caird, ‘The House of Lords Select Committee on the Constitution’ in Horne, Drewry and Oliver (eds.), *Parliament and the Law*, pp. 281, 284–5.

⁹⁵ In the thirteen years from November 1999 until May 2012 the government lost 488 votes in the Lords. Of these a significant proportion (170; 35 per cent) related to justice and the courts. In the case of 62 of these, the government either completely or substantially accepted the effect of the defeat. These data were provided by the Constitution Unit Parliament Project, which maintains a database of government defeats in the House of Lords since 1999. They relate to the period 17 November 1999 to 1 May 2012. Additional coding for ‘justice and the courts’ has been done by the authors and

Other committees, such as the JCHR, foster a political culture respectful of the courts and the judges who work in them. The JCHR does so in part by engaging with ministers to ensure compatibility with the UK's human rights obligations. For example, in 2010 it engaged with the government over its response to the Supreme Court decision in *R (F) v. Home Secretary*,⁹⁶ which held that the absence of any review of whole-life reporting requirements for sex offenders in s. 82 of the Sexual Offences Act 2003 was incompatible with Article 8 of the ECHR. The Court issued a declaration of incompatibility under s. 4 of the Human Rights Act. The Prime Minister and Home Secretary criticised the decision in trenchant terms, prompting the Lord Chancellor to write and remind them of the ministerial duty to uphold judicial independence. The government initially proposed that the order remedying the incompatibility should only do so as minimally as possible. Despite its earlier criticisms, however, the government subsequently accepted the JCHR's recommendation that the order should address the incompatibility more fully by creating access for registered sex offenders to independent courts for the purposes of review.⁹⁷ Behind the scenes, the JCHR has also encouraged ministers to use temperate language when criticising judicial decisions, writing to explain that while ministers can criticise decisions they ought to do so in measured terms. In this way the JCHR has helped to sustain a political culture that respects the authority of judicial decisions. It is not just committees with a legal focus that contribute to the independence of the judiciary. In 2010, the Culture, Media and Sport Select Committee examined the privacy judgments of Mr Justice Eady and rejected the complaints of newspaper editors that he was single-handedly developing a law of privacy.

includes non-binding motions (for example, motions to express regret at a government decision) and votes to insist on an earlier defeat.

⁹⁶ *R (F) v. Secretary of State for the Home Department* [2010] UKSC 17.

⁹⁷ M. Hunt, 'The Joint Committee on Human Rights' in Horne, Drewry and Oliver (eds.), *Parliament and the Law*, p. 238.

The committee concluded that the media's focus on the decisions of a single judge was misplaced, and mounted a strong defence of Mr Justice Eady.⁹⁸

An account of the influence of Select Committees would not be complete without mention of the special Select Committee established by the Lords to examine the Constitutional Reform Bill in 2004. Four hundred and sixty-two amendments were made to the Bill as a result of the Committee's work, including several to underpin judicial independence. These included amendments emphasising the special role of the Lord Chancellor in protecting the rule of law⁹⁹ and others tightening aspects of the judicial appointments process.¹⁰⁰ The independence of the new Supreme Court was also strengthened, by providing that selection committees would submit just one name to the minister, not between two and five;¹⁰¹ and by giving the court more autonomy over the creation of its own rules.¹⁰² The Lords were also responsible for retaining the office of Lord Chancellor. This was not in the Select Committee's report, but resulted from amendments tabled by the Shadow Lord Chancellor, Lord Kingsland. In the Commons, the Constitutional Affairs Committee took evidence on six occasions and closely questioned the Lord Chancellor, Lord Falconer. The result of efforts in both the Lords and Commons was a 'painstakingly slow process' of parliamentary scrutiny that 'contrasted with the casual abruptness of the initial announcement' of the reforms by Downing Street in 2003, all of which 'stood as a salutary reminder to ministers and their advisers that, unless and until

⁹⁸ HC Culture, Media and Sport Committee, *Press Standards, Privacy and Libel* (HC 362-I 2010), para. 76.

⁹⁹ Now section 1 of the Constitutional Reform Act 2005.

¹⁰⁰ For example what are now ss. 74 and 95 of the CRA.

¹⁰¹ Now ss. 27(5) and 27(10) of the CRA.

¹⁰² Now s. 45 of the CRA. Section 36(2) of the Bill had given power to the minister to allow or disallow Rules submitted to him.

approved by both Houses . . . intended reforms calling for changes in the law were not at the disposal of government alone'.¹⁰³

It is important not to overstate the significance of judicial accountability to Select Committees. This scrutiny is a relatively new phenomenon, accompanied by understandable hesitancy and occasional tensions between the committees and the judges. So far committees have shown considerable deference towards judicial witnesses, who give an account of different parts of the justice system but are rarely held to account for any failings. Our research also understates the role of committee scrutiny in that this scrutiny goes far beyond the work of the judiciary to include all the other actors in the judicial system: most obviously the Lord Chancellor, but also specialist bodies such as the Judicial Appointments Commission, which has been scrutinised repeatedly by committees of both Houses.¹⁰⁴ But here too their role should not be overstated. Our interviews suggest that the JAC would welcome more interest in its work, but Select Committees do not have the time or the resources constantly to patrol all corners of the justice system. At best they shine the occasional searchlight on one part of the system before moving on. The JAC is unusual in having been reviewed so intensively in its early years. In the same period, the Courts

¹⁰³ Lord Windlesham, 'The Constitutional Reform Act: The Politics of Constitutional Reform – Part 2' [2006] *Public Law* 35, 50.

¹⁰⁴ Much of this scrutiny took the form of evidence only sessions. The JAC commissioners appeared before the Commons Constitutional Affairs Committee on 18 July 2006, 20 March 2007 and 20 June 2007, and before its successor the Justice Committee on 7 September 2010 and 31 January 2011 (the latter session being the pre-appointment scrutiny hearing for the new chair Chris Stephens). They appeared on 4 June 2008 before the Joint Committee on the draft Constitutional Renewal Bill: for its report see chapter 4 of HL 166, HC 551, August 2008. And they appeared several times before the Lords Constitution Committee for their 2011–12 inquiry into Judicial Appointments: for the report, see HL Constitution Committee, *Judicial Appointments*.

Service, which has experienced a series of major changes, as we explained in Chapter 4, has been the subject of much less scrutiny.¹⁰⁵

Parliamentary Proceedings

The work of Select Committees is at the heart of the day-to-day relationship between Parliament and the judiciary, but it rarely attracts extensive media coverage and is largely under the public radar. In contrast, speeches and comments in the debating chamber, particularly in the House of Commons, command wider interest, and constitute the more public face of the relationship between Parliament and the judges. It is in the chamber that MPs sometimes breach the rules regulating what parliamentarians can and cannot say about judges. These high-profile clashes are relatively uncommon, but they tend to be remembered. If judges or lawyers were asked about the interaction between Parliament and the judges, their immediate response might be to recollect occasions when parliamentarians had criticised court decisions, or used parliamentary privilege to breach injunctions or the *sub judice* rule. But these are rare events and behind the scenes parliamentary officials work hard to prevent them. When they do occur, they challenge the relationship of ‘comity’ – of mutual respect and understanding for each other’s respective

¹⁰⁵ The Lords Constitution Committee looked at the process for setting the budget of the courts: HL Constitution Committee, *Relations between the Executive, the Judiciary and Parliament*, paras 75–87; HL Constitution Committee, *Relations between the Executive, the Judiciary and Parliament: Follow-Up Report*, para. 12. There has been no inquiry into the structure or management of the Courts Service. The Commons Justice Committee held no evidence sessions with the Courts Service.

constitutional roles – that ought to exist between Parliament and judges.¹⁰⁶ However, as the Joint Committee on Parliamentary Privilege has noted, comity is not a static ideal: ‘The principle of comity, which nobody would challenge, does not prevent constant evolution and occasional tension’,¹⁰⁷ and in this section we reflect on some recent evolutions and tensions. First we describe the rules and breaches, and then explain how parliamentary officials and Select Committees have sought to police the boundary between Parliament and the courts, and minimise friction between the two.

The Sub Judice Rule, and Injunctions

One of the clearest expressions of Parliament’s respect for the courts and their independence is the *sub judice* rule. The rule is expressed in a pair of resolutions passed by the Commons and the Lords in 2001, though it can be traced back to the nineteenth century.¹⁰⁸ It prohibits discussion of matters that are before the courts, in order to avoid prejudicing judicial proceedings. The rule is not absolute. It affects neither the right of either House to legislate nor the right to discuss ministerial decisions.

The day-to-day work of applying the rule in the Commons is done by the Table Office, which screens questions tabled by MPs for admissibility.¹⁰⁹ The Office functions as a quiet guardian of judicial independence and will help MPs to rephrase their question or

¹⁰⁶ D. Oliver, *Constitutional Reform in the United Kingdom* (Oxford: Oxford University Press, 2003), pp. 19–20.

¹⁰⁷ Joint Committee on Parliamentary Privilege, *Parliamentary Privilege* (HL 30/HC 100 2013), para. 116.

¹⁰⁸ The *sub judice* rule was first formulated as a settled set of precedents in *Erskine May*, 10th edition, in 1893. It was first constructed as a formal rule of the House of Commons in 1962, and revised in 1972 and again in 2001, on each occasion following a report from the Procedure Committee. See also the HC Procedure Committee, *The Sub Judice Rule of the House of Commons* (HC 125 2005).

¹⁰⁹ We refer only to ‘MPs’, but everything discussed applies equally to the House of Lords.

motion in a more general way. If MPs are dissatisfied, they can seek a waiver: the Speaker has discretion to waive the rule, as do Select Committee chairs.¹¹⁰ In the case of anonymous injunctions and super-injunctions (in which the very existence of the injunction is made confidential), the task of the Table Office is more difficult: because of the secrecy, it can be harder to identify whether litigation is still active.

The rules depend on the willingness of MPs to obey them. Obeying the rules at times carries a cost for MPs, who might find it difficult to explain to constituents why they are unable to raise a matter of local concern in Parliament, and might feel that the *sub judice* rule can result in an issue being discussed everywhere but Parliament.¹¹¹ In the vast majority of cases, MPs do adhere to the rule, though there have been a number of breaches. In 2011, John Hemming, MP, named footballer Ryan Giggs as the holder of a super-injunction. Hemming was cut off by the Speaker, and strongly criticised by his parliamentary colleagues.¹¹² In 2012, several MPs spoke in defence of Danny Nightingale, an SAS soldier tried by court martial whose case had become the subject of a well-organised media campaign.¹¹³ Breaches of an injunction do not necessarily fall within the *sub judice* rule. If an injunction is permanent, and court proceedings are no longer active, the rule will also not apply. In 1996, Brian Sedgemore, MP, tabled a motion naming the daughter of Cecil

¹¹⁰ For a recent example of the former, see the debate on Ford's pensioners, *Hansard*, HC, vol. 572, col. 419, 12 December 2013, 'Ford and Visteon UK Ltd'. For the latter, see Justice Committee (30 November 2010), when Sir Alan Beith waived the rule in the context of discussion of the work of the Legal Services Commission.

¹¹¹ Appearance of John Denham, MP, before HC Procedure Committee, *The Sub Judice Rule of the House of Commons* Ev. 1–8.

¹¹² *Hansard*, HC, vol. 528, col. 638, 23 May 2011.

¹¹³ *Hansard*, HC, vol. 553, cols 553–8, 20 November 2012. The debate was timed so that technically it did not breach the *sub judice* rule, because it was after conviction but before an appeal had been lodged.

Parkinson, MP, in breach of an injunction.¹¹⁴ If the matter had been raised outside Parliament, Sedgemore would have been in contempt of court; but because proceedings were no longer pending, the motion did not breach the *sub judice* rule.

Parliament has taken these breaches seriously, instigating several reviews to decide whether the rules needed tightening. After the Sedgemore affair, the Commons Procedure Committee held an inquiry, but concluded that such incidents arose so rarely that a new rule was unnecessary.¹¹⁵ After more recent breaches, there were inquiries by Parliament and the judiciary. These went wider than breaches only in Parliament, because the main culprits were the media, who were hostile to privacy injunctions. The Master of the Rolls chaired an inquiry into super-injunctions, which recommended that they be granted only in very limited circumstances, and for very short periods of time.¹¹⁶ Parliament established a Joint Committee of both Houses on Privacy and Injunctions. The Clerk of the House suggested that a new resolution on injunctions should be adopted, mirroring the *sub judice* rule. But after hearing evidence from legal experts, the judges and the media, the Joint Committee concluded that tightening the rules was not necessary.¹¹⁷ In the event, the Joint Committee was proved right: the courts' use of super-injunctions declined, and so did the temptation to bust them amongst MPs. Injunction-busting had been a passing phase.¹¹⁸ In 2012, the Joint Committee on Parliamentary Privilege looked at other aspects of the boundary between Parliament and the judges, including whether references to

¹¹⁴ The injunction arose out of *Re Z (a minor) (Freedom of Publication)* [1997] Fam 1.

¹¹⁵ Lord Bingham MR expressed concern about the breach of the injunction in *Re Z*, and suggested in evidence to the Committee that if such incidents became more frequent a new resolution should be adopted (21 February 1996).

¹¹⁶ Committee on Super-Injunctions, *Super-Injunctions, Anonymised Injunctions and Open Justice* (2011).

¹¹⁷ Joint Committee on Privacy and Injunctions, *Privacy and Injunctions* (HL 273/HC 1443 2012).

¹¹⁸ Joint Committee on Parliamentary Privilege, para. 5.

parliamentary proceedings in court cases amounted to the ‘questioning’ of proceedings in Parliament, thereby contravening Article 9 of the Bill of Rights 1689. In his evidence, the LCJ acknowledged that some judges had gone too far by praying in aid reports of Select Committees, but suggested that these aberrations did not justify legislation. The committee agreed, and concluded that codification was not required.

These various inquiries show how much effort Parliament and the judiciary devote to policing the boundaries, understanding each other’s respective roles, and dealing with the difficulties that arise. It is not just through formal inquiries and committee reports that such difficulties get addressed. The Joint Committee on Parliamentary Privilege’s report hinted at other channels of communication: ‘We trust that less formal means than those above, building on the current good relations between the judiciary and the parliamentary authorities, will address recent problems’.¹¹⁹ Informal contacts with the judiciary greatly increased following the appointment of Sir Robert Rogers as Clerk of the House of Commons in 2011. His view that ‘good fences make good neighbours’ is indicative of the priority he placed on working closely with the senior judiciary, while also remaining alert to protecting Parliament’s privileges.¹²⁰ To develop better mutual understanding, Rogers began holding regular informal meetings with the LCJ and the President of the Supreme Court. He was invited to an away-day of the Judicial Executive Board, and in 2012 addressed an after-court seminar for seventy senior judges. The topics discussed at these informal meetings all concerned the boundaries between the courts and Parliament: the *sub judice* rule, the use of parliamentary materials in court cases, judicial appearances before Select Committees, how the judges collectively speak to Parliament, and parliamentary privilege. Dialogue

¹¹⁹ Joint Committee on Parliamentary Privilege, para. 136.

¹²⁰ Speaking at a seminar for this project on the Judges and Parliament, December 2011.

between the senior judiciary and Parliament is conducted not just in the committee room, but also through regular informal contacts. These help to ensure a better understanding of the respective roles and responsibilities of the senior judges and Parliament, and to deal with difficulties that arise.

Conclusion

The reforms of 2005 brought about a step change in the institutional setting within which the politics of judicial independence are played out between the judiciary and Parliament. Although there was concern amongst the judiciary about the removal of the Law Lords from Parliament, and the effects this might have on judicial independence, this has proved largely unfounded. Under the new system, judges have gained more than they have lost. Indeed, it is arguable that they have lost very little. Although serving judges no longer have any legislative role, they retain proxies – retired judges in particular – in the House of Lords, who articulate judicial concerns. It is unclear, however, whether senior judges – such as outgoing Justices of the Supreme Court – will continue to receive peerages. What is already clear is that it only takes one or two very active and engaged retired judges (such as Lords Phillips and Hope) to promote the interests of the judiciary in the Lords quite effectively, especially when they coordinate with prominent lawyer-peers (such as Baroness Kennedy and Lord Macdonald or, in their day, Lord Alexander and Lord Kingsland).

Engagement with a wide range of Select Committees allows judges to speak to a wider audience – to the politically powerful Commons as well as to the Lords. Judicial interventions in policy debates are now more professional and systematic, and less

dependent upon the idiosyncratic interests of the small group of judges who hold peerages. Coordinated and collective responses by the judiciary as a whole were almost impossible to deliver through the Law Lords, but are more easily facilitated by the committee process. Collective responses are also a product of the judiciary's evolution into a larger and more centralised corporate body headed by a more active leadership, as described in Chapter 6. With the increasing corporatisation of the judiciary, it is possible to speak of the emergence of an institutional dialogue between the senior judiciary and Parliament in a way that was not possible with the Law Lords. But corporatisation also enables a wide range of judicial voices to be heard. Whereas Parliament previously heard from the most senior appellate judges who could have had only limited knowledge of the lower courts and tribunals, judicial engagement with Select Committees encourages contributions from judges at all levels. The result is that Select Committees have the capacity to operate as more constant and effective guardians of judicial interests than the Law Lords.

Careful coordination takes place on both sides to foster mutual understanding and respect for each other's positions, although, as we have seen, not always successfully, with occasional flare-ups over fairly trivial matters, such as the appropriate use of the LCJ's powers under section 5 of the Constitutional Reform Act. As in all of the areas covered in this book, the interests and personalities of central players play an important role in shaping relationships. The appointment of Sir Robert Rogers as Clerk of the House of Commons in 2011 is widely acknowledged to have strengthened understanding on both sides through active engagement with the senior judiciary. Sir Robert sought to ensure that Parliament and the judiciary do not work at cross-purposes, while at the same time remaining conscious of his primary responsibility to ensure that courts do not trespass on the

prerogatives of Parliament. The senior judges, for the most part, have been equally keen to develop a dialogue, although some are quick to note that relations with Parliament are 'still very green and new'. The new guidance issued in 2012 on judicial appearances before Select Committees is one product of the new relationship: parliamentary clerks must now ensure that Select Committees channel their requests through the private office of the LCJ, thus facilitating better coordination on both sides. It remains to be seen whether this constructive engagement between senior judges and senior officials will address the difficulties that parliamentary clerks at the coalface have sometimes encountered, such as the occasional wrangling over whether a particular judge should appear before a committee and what he or she can be asked.

Perhaps because of the Law Lords' traditional involvement in the House of Lords, the senior judiciary has been receptive to overtures and willing to engage with Parliament. By and large the engagement has been constructive and, for the judges, positive in terms of outcomes. More than once Parliament has provided a forum in which the judiciary can express serious concerns about government policy, and in effect negotiate with ministers in and via Parliament. That happened in 2004, when the House of Lords established a special Select Committee on the Constitutional Reform Bill, and again three years later when the Lords Constitution Committee launched a speedy inquiry into executive-judicial-parliamentary relations following creation of the new Ministry of Justice. At a time when relations between senior judges and ministers were strained, Parliament opened up a new channel of communication. And on the issues involved Parliament was a staunch supporter of the judiciary, strongly upholding judicial independence.

There have also been clear benefits for Parliament. Modern politics has become more separate from lawyers and legal practice, with fewer MPs having a background in the law.¹²¹ Whereas in the twentieth century there were dozens of judges with parliamentary backgrounds, there are now almost none. As David Howarth (a lawyer-politician himself) has suggested, a perception has developed amongst lawyers and judges that politics is a ‘kind of pollution’ that must be kept apart from the law. Amongst politicians, there is a converse trend towards what many judges and lawyers view as a more ‘lawless politics’, especially in the field of human rights and relations with European institutions, with politicians more inclined to criticise the courts and to treat legislation as more akin to a press release.¹²² Yet beneath the occasional din caused by high-profile political criticism of judicial decisions, the quieter and lower-profile work of Parliamentary Committees is often enriched by the expertise and insights of judicial witnesses.

With greater engagement has come a more responsive and accountable judiciary. Judges at all levels are willing to explain themselves and, on occasion, to respond to criticism. This does not mean that relations between Parliament and the judiciary are never troubled. The boundaries and rules which govern the day-to-day communications between the two are still evolving. The running sores of Europe and human rights cases can stretch conventions of mutual respect to breaking point. But so far these episodes are the exception and angry outbursts at Prime Minister’s Questions are not replicated in Parliament’s everyday business. In general, Parliament takes great pains to ensure that rule of law values are upheld. The work of the committees is unpublicised and unglamorous, but

¹²¹ R. Cranston, ‘Lawyers, MPs and Judges’ in D. Feldman (ed.), *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2013); Howarth, ‘Lawyers in the House of Commons’ in Feldman (ed.), *Law in Politics, Politics in Law*, p. 41.

¹²² Howarth, ‘Lawyers in the House of Commons’ in Feldman (ed.), *Law in Politics, Politics in Law*, pp. 61–3.

judicial independence and the rule of law are upheld through small particulars, not grand pronouncements.

The occasional points of tension serve to emphasise our central claim that judicial independence is a political achievement. The aim is not to avoid tensions, since tensions are an inevitable part of the interplay of law and politics. It is to ensure that there are effective channels of communication through which the politics of judicial independence can be played out and better understandings can be forged. The transformation of judges from parliamentarians to expert witnesses before Select Committees has facilitated this process. And the willingness of Parliament and its senior officials to reach out and engage with the judges has also helped to smooth the way.