

The judicial and executive branches of government: a new partnership?

by Lord Justice Thomas

The Eighth Annual Lecture to be presented to the Society for Advanced Legal Studies was given by Lord Justice Thomas, Senior Presiding Judge, England & Wales, on November 10, 2005.

It might seem an inapposite time to pose the question as to whether the relationship between the judicial and executive branches of government should be characterised as a new partnership. Much press and other comment would have suggested that the informed observer should have asked me to entitle this lecture: “The new confrontation?” However, what I seek to do is to examine how the relationship between the two branches of government is to operate once the changes consequent upon the reform of the office of Lord Chancellor have come into effect. This is of particular importance to the way in which justice is administered – a subject of acute political and media debate and significant public interest, though not yet perhaps the subject of sufficient academic study.

Prior to the decision announced in June 2003 to reform the office of Lord Chancellor, the closeness of the relationship between the executive and the judiciary was embodied in the position of Lord Chancellor. He was and remains until April 2006, the head of the judiciary as well as being a senior member of the executive. With the decision that he should cease to be a judge and therefore the head of the judiciary came the need to find a new way of providing a framework for the relationship.

One of the essential purposes of the Concordat between the judiciary and the government made in January 2004 was to guarantee the continued independence of the judiciary. Another was to continue the benefits that it was perceived had been the result of that relationship. The second of these, the subject here, was recognised by the Lord Chancellor in his statement to the House of Lords on January 26, 2004 when announcing his agreement on the Concordat with the judiciary. He described the Concordat as being necessary to sustain and entrench “the successful partnership between the judiciary and his department”; its purpose was to bring clarity and transparency to that relationship and to see that it was enshrined in the forthcoming Constitutional Reform Bill. In his response,

Lord Woolf referred to “a close working relationship” which was “a special quality of our justice system which, in the interests of the public, it is important to preserve”. When enacted some 15 months later, the Constitutional Reform Act embodied many of the provisions of the Concordat.

The question as to whether there was a need for that change may be long debated. I believe the change was inevitable. Time will recognise that the reform was one of the substantial constitutional achievements of modern times. That question, however, is quite different to that which I propose to consider here, as that question involves looking backwards. As we are now less than five months away from the start of the new relationship, I intend to look forward and examine the new relationship and consider how it should be characterised.

The new relationship is premised, of course, on the recognition by the executive and Parliament of the independence of the judiciary. This is guaranteed by the Constitutional Reform Act¹ and the Lord Chancellor and other ministers are placed under an obligation to uphold that independence.

Given that fundamental premise, there are, it seems to me, three essential conditions to the new relationship. Each of these three conditions is consequent upon the change in the position of the Lord Chancellor. The first is a pre-condition – a structure for governance of the judiciary capable of discharging the responsibilities vested or transferred to the judiciary. If this is met, then the relationship depends upon:

- Clarity in the respective functions of the judiciary and the executive
- Constructive engagement premised upon an understanding of and respect for those functions

The character of the new relationship between the judiciary and the executive will depend on the extent to

which each can be achieved. Much has been done over the past 18 months, as inevitably there is a need to be ready for the operation of the new system. It is therefore possible to reach some tentative conclusions.

THE STRUCTURE FOR THE GOVERNANCE OF THE JUDICIARY

It is convenient first to deal with the structure of governance the judiciary has adopted to enable it to discharge the new responsibilities.

The Constitutional Reform Act makes the Lord Chief Justice President of all the Courts of England and Wales and Head of the Judiciary of England and Wales; in almost every section and every paragraph, the power transferred from the Lord Chancellor or declared by the Act is vested in the Lord Chief Justice. However, it was never intended that the Lord Chief Justice should exercise all these powers and functions personally; this would, as some feared, have transformed him into a judge who never had time to sit². The purpose was simply to enable the powers to be delegated in a manner that would fit in with detailed arrangements which it was obvious would have to be created, allowing the Lord Chief Justice to perform his primary responsibility of sitting in important cases in both divisions of the Court of Appeal of England and Wales and giving leading judgments. He is and must, above all, be a judge sitting in the courts, as that is essential to his authority and constitutional legitimacy.

Nor was it intended that he exercise the functions and powers entrusted and declared without an internal collegiate structure. Just as the purpose of the Concordat was to make clear and transparent, at a high level, the relationship between the judiciary and the executive, the way in which the judiciary was to be organised and the functions and powers of the Lord Chief Justice were to be exercised required more clarity and transparency in that structure. This is now being achieved through the new internal arrangements.

At the heart of the new internal arrangements are the Judicial executive Board, the Judges' Council and the Judicial Office of England and Wales; each has its origins in the way in which the judiciary was governed; only one of them has a long history.

The Judicial Executive Board

The Judicial Executive Board has its origins in the informal committee of senior judges known as the Heads of Division meetings; meetings of the Lord Chief Justice and the then three Heads of Division³ were expanded gradually over the years to include a further six judges including the Deputy Chief Justice, the Vice-President of the Queen's Bench Division, the Deputy Heads of Family and Civil Justice, the judge in charge of modernisation and the Senior Presiding Judge⁴. These meetings took place as occasion demanded and played an important role in

dealing with internal issues (such as security at the RCJ, filming court proceedings and orders restricting the reporting of proceedings), issues relating to the executive (such as the appointments process and IT), appointments to the High Court and Court of Appeal and occasional one off issues. Meetings with the Lord Chancellor were on a regular basis⁵; one of the topics that was covered with him at these meetings was advice on appointments to the High Court⁶.

The Judicial Executive Board is a smaller body and more formally structured. Its membership (as presently constituted) is seven judges – the Lord Chief Justice, the Heads of Division⁷, the Vice-President of the Queen's Bench Division and the Senior Presiding Judge; it meets monthly with a set agenda and forward programme. It is constituted and intended to operate as a board rather than an informal committee.

Its core function is to enable the Lord Chief Justice to make policy and general executive decisions through it. More specifically its objectives include developing policy and practice on judicial deployment, appointment to non judicial roles and general appointments policy, putting forward the requirements for new appointments of High Court Judges and Lords Justice of Appeal and holding discussions on specific appointments with the Judicial Appointments Commission and the Lord Chancellor, managing the judiciary's overall relationship with the executive branch of Government and Parliament, approving the annual budget for the Judicial Office and approving the agreement with the Permanent Secretary of the Department of Constitutional Affairs on resources for that office.

Apart from the issues relating to the judiciary in general, issues arise that are specific to each of the jurisdictions. It is neither necessary nor practicable for the Judicial Executive Board to deal with these, as legislative change has created Heads of the three jurisdictions. The first to be created in point of time was the Head of Civil Justice – the result of the proposals for civil justice put forward as part of what have been known worldwide as the "Woolf Reforms"⁸. The Constitutional Reform Act completed the process by creating the posts of Head of Criminal Justice and Head of Family Justice⁹. Issues relating to jurisdiction are the responsibility of the Heads of Civil, Criminal and Family Justice through sub-committees of the Judicial Executive Board¹⁰.

What may be described as the fourth area of jurisdiction – the tribunals – of necessity requires a more complex provision which is in the process of evolution. This is partly because the Constitutional Reform Act dealt primarily, save as to appointments, with the position of the courts, partly because the reforms envisaged by the Leggatt Report are still in the process of being carried into effect, and partly because the jurisdiction of some tribunals extends to Scotland and Northern Ireland. The tribunals are

represented on the Judges' Council and the relationship to the Judicial Executive Board is being developed.

The Judges' Council

The Judges' Council has a much more ancient pedigree, but in its modern composition and structure dates from 2002¹¹. It is a body broadly representative of the judiciary as a whole. Over the very short period since 2002, the Council has played an important role in providing a forum for the judiciary to discuss and resolve issues of policy, including a significant role in relation to the making of the Concordat. Its working parties have played an important role in the relations with the executive in areas such as the provision of adequate resources for the courts, the promulgation of a code on judicial conduct and the formulation of policy on judicial welfare and career development. Clearly its precise role in the new settlement and its relationship to the Judicial Executive Board needs clarification – particularly a clearer definition of those areas where the Judicial Executive Board and the Council respectively have policy and decision making functions. A working party chaired by Neuberger LJ is examining these at present.

The Judicial Office of England and Wales

The assumption of these and other functions to which I will refer would not have been possible without the creation of the Judicial Office of England and Wales. This has its origins in the very small private offices of the Lord Chief Justice, the Master of the Rolls and President of the Family Division. Again I do not want to look back and consider why in the past so little by way of support was provided to the judiciary. What is important is that the Concordat recognised the need for the creation of a proper office to support the judicial branch of government in the functions it had to discharge. Its head is a senior civil servant at Director level. The Office is being structured under the Director to mirror the responsibilities being assumed, subject to the resources agreed with the Permanent Secretary of the Department of Constitutional Affairs. It includes a communications office, the responsibility of which extends to the media and communication with the judiciary in its widest sense.

The circuits

Although these three bodies are, as I have said, at the heart of the new internal arrangements, it has also been necessary to provide for what happens outside London on the circuits. Again what is being done to accommodate the change builds on what is already in place. When as a result of the report of the Beeching Commission in 1969¹², the then Lord Chancellor's Department established a unified court service for all courts other than the Magistrates and House of Lords, two High Court Judges were then appointed on each circuit to "be responsible for a general oversight of the administration, and in particular for the

location and well being of the judges in the circuit"¹³; their responsibilities were to include supervision of the running of the courts, taking action to prevent delay and deploying the judiciary as needed on the circuit. These judges, known as the Presiding Judges, have had since that time an overall responsibility in respect of the judiciary on the circuit and the business of the courts; the posts of Family Division Liaison Judges and Chancery Supervising Judges were created to take more specific responsibility for family and chancery jurisdictions, so when I refer to Presiding Judges hereafter, I include within that term the Family and Chancery Judges with these specific responsibilities.

The most important function which is to be dealt with on the circuits by the Presiding Judges is the Lord Chief Justice's responsibility for the conduct of the business of the courts; in this and their other functions the Presiding Judges are to be supported by newly created Circuit Judicial Secretariats on each circuit. It is more convenient to consider the conduct of the business of the courts in the context of the other conditions on which the relationship with the executive depends.

The other functions

There are several other important functions which have to be carried out on a day to day basis. There is, for example, the responsibility for training which is to continue to be vested in the Judicial Studies Board. In addition, there are other significant functions including those in relation to appointments through the Judicial Appointments Commission, appointments to other posts such as Presiding Judges and Resident Judges, complaints and discipline and overseas relations. These are to be handled through the Judicial Office or by individual judges supported by the Judicial Office.

Conclusion on the establishment of a structure for the judiciary

This is only a brief summary, but I hope I have sufficiently outlined the structure for the governance of the judiciary which enable the responsibilities vested in the Lord Chief Justice as Head of the Judiciary to be discharged. That necessary pre-condition to the relationship is, I believe, therefore being fulfilled.

I therefore turn to the other conditions necessary for the operation of the new relationship.

THE OPERATION OF THE NEW RELATIONSHIP

It is axiomatic that it is the primary function of each judge to try and determine the case before the court applying the law as determined by Parliament. In respect of that function, the examination of the relationship with the executive and Parliament depends upon an examination of the scope of the judiciary's approach to legislative interpretation and the development of the common law.

Clarity in that area is a topic which has been frequently examined; it is the subject of much jurisprudence which has most recently and most clearly been considered by Lord Bingham in the 2005 Maccabean Lecture: *The Judges: Active or Passive*. Difference of opinion and difficulty in defining the respective roles of the judiciary and executive and the tension between them could be said to be endemic. The Concordat and the Constitutional Reform Act have effected no change; I do not intend to visit that topic.

What I wish to do is to examine the new relationship necessitated by the reform by taking three topics where there is very much less by way of jurisprudence – (1) the conduct of the business of the courts; (2) appointments, complaints and discipline; and (3) the making of legislative and executive policy. In each, I shall examine the extent to which the two further conditions to which I have referred can be achieved and the character of the new relationship defined. But first I must say a little more about the two conditions.

(a) Clarity in the respective functions of the judiciary and the executive

Until the decision to reform the office of Lord Chancellor, it was not generally necessary to have any real clarity as to what was done by the Lord Chancellor as a judge and head of the judiciary in relation to the proper functioning of the court and judicial system and what was done by him as a member of the executive. However, once the decision was made that he would no longer be a judge and the Lord Chief Justice was to be Head of the Judiciary of England and Wales, it became necessary to have greater precision as what functions under our constitution are for the judiciary and what are for the executive. The Concordat and the Constitutional Reform Act have sought to set a framework for this so that the executive and the judiciary can work closely together to ensure the proper functioning of the court and judicial system. This framework covered relatively high level functions. Work has been and continues to be necessary to bring clarity and transparency to many other functions.

(b) Constructive engagement premised upon an understanding of and respect for those functions

There has for a considerable time been constructive engagement between the judiciary and the executive; the intensity of that engagement has varied over time. It was sometimes referred to as a partnership, as, for example, by Lord MacKay of Clashfern in the 1991 Mischoon Lecture. But that engagement has hitherto always been conducted in the context of the special position of the Lord Chancellor as a judge and a member of the executive; his officials were his representative in both capacities. Indeed in several respects it was not necessary for the judiciary to engage, as this could be done for them by or on behalf of the Lord Chancellor. With the reform of that office:

- First, there was the need in some fields to create a framework for engagement.
- Second, there has been, I have found, a need for greater intensity in the engagement, partly because the judiciary are more formally a separate part of government and partly because engagement is perceived to be essential.
- Third, it has become clear that engagement can only take place constructively if, on the one hand, it does not compromise the independence of the judiciary and, on the other, the judiciary do not become involved in political controversy.
- Fourth, it is essential that the relationship is premised upon an understanding and respect for the differing functions of the judiciary and the executive; self restraint is a useful watchword.

Mechanisms for resolving tensions

There is another issue – mechanisms for resolving tensions. It may at some levels (particularly at local level) be a fourth condition on which the relationship at that level depends. As head of the judiciary and a minister, it was always possible for the Lord Chancellor to resolve tensions, particularly if they arose between judges and the administration for which he was responsible. The relationship between the judiciary and the executive extends, as I will endeavour to show, to engagement at different levels, including very local levels; experience shows that tensions are bound to arise at those levels. There have to be therefore ways of resolving those tensions at those levels. I turn next to the three topics which I wish to examine.

THE CONDUCT OF THE BUSINESS OF THE COURTS

I will begin with the conduct of the business of the courts. I will deal with it at much greater length than the other two topics, as it is by far the most important topic and much more has been finalised. Indeed it is difficult to underestimate the importance to litigants of ensuring that all cases are brought before the court as quickly and cheaply as possible as is consistent with the just determination of the case. Much of what I want to address is in the public domain, but it is neither easy to find nor well known.

The development of the responsibility of the judiciary for the conduct of the business of the courts developed in two stages. First, although in some jurisdictions, such as the Commercial Court, it had been long recognised that the judges had a responsibility for the definition of the essential issues in a case before the trial, it was not until the 1990s that there was a more general recognition of the responsibility of the judiciary for case management and not until 2004 that it was generally introduced into criminal

cases¹⁴. Responsibility for case management may broadly be defined as managing each particular case before the court and bringing that particular case to trial in a speedy, cost effective and just manner. The second stage was the logical consequence of the first. The ability to bring each particular case to trial swiftly and economically depends on the efficient management by the judiciary of all the cases before the particular court and the assignment of each case to the right judge. It was only in 2004, about 25 years after the establishment of the Judicial Studies Board, that it was recognised that training in such overall management was essential and management courses were inaugurated.

In giving the first of these annual lectures in 1998, Lord McKay of Clashfern, expressed the view that it was essential that the judiciary should be in control of the courts and that the judiciary should have security of tenure:

“The solution to this is to have the head of the judiciary the only judge without security of tenure, a member of the executive and accountable to Parliament as such. The unique solution is, to my mind, most valuable and notwithstanding the weighty opinions to the contrary, I hope it will long be retained.”

There can be no dispute about Lord MacKay’s proposition that that the judiciary must be in control of the courts; control of the courts and in particular the conduct of the business of the courts is an integral part of the independence of the judicial system. The responsibility for this will be formally vested in the Lord Chief Justice, as President of the Courts and Head of the Judiciary of England and Wales, and delegated by him.

However, this responsibility cannot be discharged in isolation. Its proper discharge depends on the interrelationship between (a) the provision and prioritisation of resources by the executive (b) the functioning of the administrative infrastructure, (c) the careful deployment of the judges and the assignment of cases to them and (d) the relations with other organs of the executive which play a role in the administration of justice, particularly criminal justice.

(a) The provision and prioritisation of resources

In most systems it is the responsibility of the other branches of government to provide the resources for the courts and judicial system; in some it is directly provided by the legislature, in others through the executive¹⁵. In England and Wales the responsibility is that of the executive. It is set out partly in section 1 of the Courts Act 2003 which provides the Lord Chancellor is under a duty to:

“ensure that there is an efficient and effective system to support the carrying on of the business of the Courts of England and Wales and that appropriate services are provided for those courts.”

The Concordat¹⁶ also makes it clear that it is the Lord Chancellor who is responsible for the provision and allocation of all resources for the administration of justice, whether the resources be financial, material or human.

However, although the provision of resources is the responsibility of the executive, the judiciary have the closest interest in that provision, as an independent judiciary cannot function without them¹⁷. This is recognised in the Concordat in the provision for the judiciary to be “effectively involved” in the resource planning of the Department and the agency appointed to provide the administrative infrastructure for the courts – Her Majesty’s Court Service (HMCS). This is to ensure, as the Concordat states “the judiciary is enabled to have early engagement with [HMCS] and Department at strategic level, including issues on resource plans and bids”.

This was an important, but necessary change. When the Lord Chancellor ceased to be a judge and Head of the Judiciary, it was essential that the interests of the judiciary were made clear and the engagement of the judiciary intensified in relation to resources. The effect of the provisions of the Concordat has already been seen in a number of different and beneficial ways. First, as the Concordat provided, was the appointment of a judge as a member of the board of the Department and a judge as a member of the board of HMCS; there has then been the involvement of the judiciary, through working parties of the Judges’ Council, in the Departmental Bid for the SR2004 spending round and the consequent engagement on targets¹⁸.

But what has been of greater significance is the much closer involvement of the judiciary in longer term planning and the options of the way in which modernisation and change is to be funded. Many strategic plans have been devised and many promises made; what happened to some and the role of HM Treasury were referred to by Lord Justice Brooke in last year’s lecture¹⁹; there was the unreal approach of saying that the judges should not worry about the provision of finance. The change that is being brought about is much closer involvement in understanding and having regard to what is financially viable. It is self evident, however, that this is premised upon the clarity of the principle that it is ultimately for the executive to decide on the allocation of resources and a clear understanding of the basis on which the judiciary is engaged in this process.

(b) The provision of an administrative infrastructure

In several countries, although it is the other branches of government that provide the resources, the entire running of the court system is entrusted to the judiciary or to a body independent of the executive on which the judges are active members. Although the Judges’ Council argued for a similar structure in their response in 2003 to the proposals for reform, it was accepted in the Concordat that the Lord

Chancellor should remain under the duty²⁰ in the Courts Act, to which I have referred, to provide the administrative infrastructure.

The management of the system to support the carrying on of the business of the courts and the provision of services for the courts has been entrusted to HMCS as an executive agency created under a Framework Agreement dated April 1, 2005. The agreement places on the Chief Executive of HMCS a duty to ensure that all of its activities are in accordance with the Concordat and provides in some detail for the working relationship with the judiciary. The Lord Chief Justice must be consulted before any change is made to the Framework²¹.

It is self evident that, as the executive provide the infrastructure and the staff to enable the judiciary to carry on the business of the courts, there has to be a close and constructive engagement between the staff and the judiciary at every level. I have already mentioned the origin of the Presiding Judges; their work provided fairly long experience at the level of the circuits of a close working relationship. At a central level, the foundation of a successful working relationship can be traced back to the board on which Lord Justice Brooke served in relation to IT; the frustrations and achievements were also described by him in last year's lecture. This model of participation was followed, when as a result of a review of the court estate by Lord Carter of Coles, it was decided to create a National Property Board in 2002 to oversee the management of the court estate; Lord Justice Mance was appointed to that Board. This was followed, when a Consumer Strategy Board was created in 2003 by the appointment of Lord Justice Latham to that Board. The Concordat supplied the overarching link by providing that the Senior Presiding Judge should be a member of the Board of HMCS.

The experience of the judges who serve on these Boards and of the Presiding Judges is that these arrangements for engagement are essential. May I take by way of example the monthly meetings of the board of HMCS? Clearly there are issues such as the terms and conditions on which the staff are employed which are entirely for the executive and understood to be so; however most of the issues that have to be resolved inevitably affect the way in which the judiciary conduct the business of the courts. The performance of HMCS and other executive agencies against targets, the budget, the needs of the estate and future strategy all depend to a greater or lesser extent on the way the business of the courts is conducted by the judiciary. In my experience so far this involvement of the judiciary in the governance of HMCS has been beneficial both to the judiciary and the agency.

(c) The deployment of judges and the allocation of cases

Assuming that adequate resources are provided and there is a sound administrative infrastructure, the proper conduct of the business of the courts is dependent upon the assignment of judges to the courts and the allocation of cases to judges for management and trial. It is in this third aspect that the structure adopted by the judiciary is important, but the judiciary cannot do this without engagement with the executive.

Deployment

The assignment of judges to particular courts ("deployment") is of significance for two reasons. First and most important, the business before the courts is not constant in either volume or type of case. As judges have different skills and different areas of knowledge, it is necessary to keep under regular review the number and identity of judges at particular courts to ensure that cases can be brought to trial in proper time and in as effective a manner as possible. Second, a judge must not be at risk of being moved away to a distant location because a decision made is unpopular; as far as I am aware this has never happened in this jurisdiction, though it has elsewhere.

Prior to the Concordat, the deployment of judges in the High Court was always effected by the Heads of Division and the Vice-President of the Queen's Bench Division; though it was the Lord Chancellor who assigned judges to Divisions and had the power to transfer judges between divisions, there was an arrangement that permitted judges to sit in any Division. Below the level of the High Court, the deployment of the judges was largely arranged by the staff of the Court Service; they agreed with each Circuit or District Judge what his deployment was to be on appointment and made the adjustments year to year. It was never clear, in my experience, in what capacity they were acting, but it seemed to be for the Lord Chancellor in his judicial capacity, though in close consultation with the Presiding Judges²².

The Act has declared that the deployment of the judiciary is the responsibility of the Lord Chief Justice. It has therefore been necessary to ensure there is a proper structure in place for the discharge of this responsibility. With the decision taken in July 2005 to keep the size of the High Court at its current level²³ at a time of increased demand on the time of the High Court, it has become more important to ensure that the deployment of the High Court is co-ordinated as closely as possible. To this end the Vice-President of the Queen's Bench Division has been given a special role.

Below the level of the High Court, the Presiding Judges have the responsibility for all deployment of Circuit and District Judges²⁴. Although the Act has not in substance affected the position in the High Court, it changes the

position below the level of the High Court. However the provisions of the Concordat make it clear that:

“Real and effective partnership between the Government and the Judiciary is seen as being paramount, particularly in this area. Therefore all significant issues should be decided after consultation”

At the level of the Circuit and District Bench, much of the day to day work in organising the deployment was, as I have said, dealt with by part of the Circuit Office of HMCS. That work will be dealt with by the Circuit Judicial Secretariat whose primary responsibility is to the Presiding Judges. It will be their task to consult the judges of the courts on the circuit, the officials of HMCS and others on the needs of, and pressures facing the courts in the circuit. They will provide regular information to the Presiding Judges on workload, sitting patterns, performance pressures, judges’ preferences and to make appropriate recommendations as to changes in deployment.

Allocation of cases

The way in which cases are managed and assigned for trial is the second of the factors in ensuring that the business of the court is run in such a way that cases are heard as quickly and cheaply as possible consistent with the just determination of each case. Many jurisdictions employ a system of assigning cases as they are filed to individual judges to have charge of them until they are decided; often this is done randomly and in a way so that each judge has a roughly equal caseload. The case load is referred to commonly by the US term – docket.

This has not generally been the practice in this jurisdiction. In the Commercial Court in the late 1990s an experiment was made of assigning each case to a team of two judges. It did not work because it did not provide the flexibility that the system generally employed in this jurisdiction has had. In this jurisdiction the system for the allocation of cases is known as listing, a process of listing determines which judge manages that case, when the case is heard and which judge hears that case. Because the system is central to the proper conduct of the business of the courts, it has always been accepted that this is a judicial function. In *Attorney General’s Reference No.3 of 1999*²⁵ Lord Steyn had made clear, in the context of criminal cases, that:

“There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.”

In the Court of Appeal and the High Court the responsibility of the Lord Chief Justice for the allocation of cases is discharged by the Heads of Division. Below the level of the High Court, the responsibility is discharged through the Presiding Judges. However, because the size and work loads of the courts are different, the allocation of cases in the Crown and County Courts is delegated, with

some exceptions, to the Judges in charge of each court centre – the 75 or so Resident Judges in the Crown Courts, the 28 or so Designated Civil Judges for the civil business of the County Court and the 50 or so Designated Family Judges for family business.

Since the Concordat, much has been done to ensure that there is much greater clarity about this function, particularly in the criminal courts. First, the roles and responsibilities of the Resident Judges, Designated Civil and Designated Family Judges for these and their other functions were set out in a protocol issued in July 2004 to ensure their role was understood.

Second, at about the same time, the Lord Chief Justice issued, with the Lord Chancellor, the Minister of State at the Home Office and the Attorney General, the Criminal Case Management Framework; in his foreword the Lord Chief Justice made clear that the judiciary would determine the listing policy for each Crown court or Magistrates Court area and direct, in liaison with the listing officer, the listing so as to ensure that, as far as possible, all cases were brought to a hearing or trial with the minimum of delay, heard by an appropriate judge and the available judiciary were fully and effectively deployed, consistent with the needs of the witnesses. Constructive engagement was also covered.

In July 2005, the Lord Chief Justice issued directions on more detailed principles on which listing was to be effected in the Crown and Magistrates Courts and on more detailed mechanisms for engagement. Reference to some of the principles to be followed in setting a policy for listing at each court demonstrate the breadth of what must be taken into account:

- “Meeting the needs of victims and witnesses; each of whom may have differing needs – the young and the vulnerable require particular attention.
- Ensuring the timely trial of cases so that justice is not delayed.
- Providing for certainty, and/or as much advance notice as possible, as to the trial date
- Striking a balance in the use of resources, by taking account of:
 - The efficient deployment of the judiciary in the Crown Court, ...
 - The proper use of the courtrooms available at the court.
 - The provision in long cases for adequate reading time for the judiciary.
 - The facilities in the available courtrooms, ...
 - The desirability of timing Plea and Case Management Hearings so that the trial advocates can attend.

- The proper use of those who attend the Crown Court as jurors.
- The need to return those sentenced to custody as soon as possible after the sentence is passed, and to facilitate the efficient operation of the prison escort contract.
- Taking into account the impact of policies, targets and initiatives of:
 - Her Majesty's Government and its agencies.
 - Local Authorities, the Criminal Justice Board for the Area, the Chief Constable or Chief Crown Prosecutor for the Area and other local bodies".

Clarity in these principles is necessary because the setting of the policy at each court for the listing of criminal cases is of such importance to the prosecution defence and witnesses alike; in civil and family cases similar principles apply. But the breadth of the matters to be taken into account shows the need for engagement, particularly with the executive.

A clear framework for that engagement was set out by the Lord Chief Justice. One of the aspects of that framework is a mechanism for resolving disagreements at a local level; provision is made for reference of an unresolved issue in the Crown Court to the Presiding Judges and, if necessary, to the Senior Presiding Judge.

Although the overall policy at each court provides an essential framework, each case has to be allocated to a judge within that framework. Again since the Concordat, much has been done to clarify that responsibility. Taking criminal work as the example, amendments to the Consolidated Practice Direction in May 2005 and Guidance issued under it at the same time to Presiding and Resident Judges made clear which types of case were to be allocated by the Presiding Judges, which were to be allocated by the Resident Judges and how the remainder were to be allocated.

As the primary function of a judge is and must always remain the trial and determination of cases, it has always been essential to ensure that as much of the function of listing as is possible is carried out by court staff on behalf of the judiciary. The statement of principles issued by the Lord Chief Justice in July 2005 and the Guidance to Presiding and Resident Judges has also brought clarity to this; at circuit level, the Presiding Judges are assisted in their role by circuit listing coordinators and at all courts there is a listing officer (with deputies at larger courts) who carries out, under the direction of the Resident Judge (or Designated Civil or Designated Family Judge) the day to day operation of the policy established.

The Magistrates Courts

The position in the Magistrates Courts needs separate consideration. First, the Courts Act 2003 abolished the

Magistrates Courts Committees which had been responsible for the administration of the Magistrates Courts. Second, the effect of the Concordat and the Constitutional Reform Act will be to make the Lord Chief Justice the President of the Magistrates Courts and responsible, as in the other courts, for the business of the courts.

In addition to the provision of clarity in the principles to be applied in setting listing policy by the arrangements to which I have referred, it was necessary to provide a framework for constructive engagement with the administration and others. Committees known as the Justices Issues Groups were established in each criminal justice area comprising Magistrates, District Judges (Magistrates Courts), Justices Clerks and the senior official of HMCS in that area. It was made clear, in accordance with principle, that the responsibility for the determination of listing policy for Magistrates Courts in each area was that of the judicial members of this group following the principles to which I have referred; the day to day operation of the policy was the responsibility of the Justices' Clerks²⁶.

Within many courts, including the Magistrates Courts, cases of certain types have been listed so that they are heard on the same day or by a judge with specialist knowledge or experience. The most celebrated example of this was the creation of the Commercial List by the judiciary in 1895 and its evolution into the Commercial Court. In the Magistrates Courts it has been common to list traffic cases together and these have been known as "traffic courts". It became clear that from time to time it would be suggested either at the instance of the Magistrates or the executive or others that lists or courts for specific types of case should be established; one current example is the piloting in two areas of a drugs court. To ensure that there was a process for constructive engagement between the executive and the judiciary at a local level, a specific protocol has been agreed between the Lord Chief Justice and the Lord Chancellor. Features which are key to its operation are clarity in the process, local decision making and a procedure for reference to higher levels, if there is local disagreement.

(d) Relationships with other organisations

The way in which the business of the courts is conducted cannot be done efficiently without engagement with users and bodies other than HMCS and the Department of Constitutional Affairs. In criminal justice in particular, there has to be constructive engagement with other bodies which are part of the executive branch of government. May I take three examples to illustrate the need for engagement and to show what is being achieved.

Following a recommendation made by Auld LJ in the Report of his Review of the Criminal Courts of England and Wales, the National Criminal Justice Board and Local Criminal Justice Boards were established with a

responsibility for coordination of criminal justice policy; the Report's recommendation, on balance, was against judicial membership of these boards²⁷; consultation was considered a better route. However, it has proved essential that a very senior judge, the President of the Queen's Bench Division as Head of Criminal Justice, is a member of the National Board. Following the recommendation of the Report, it was initially thought that consultation with the judiciary would also be the better route for the Local Criminal Justice Boards. This did not prove satisfactory and a different structure for engagement has been developed. In the case of the majority of boards, a judge now receives all board papers and attends meetings of the board when matters on which he needs to speak arise. The judge is not a member of the board, but attends as the representative of the judiciary to the board. This distinction was necessary because local boards are responsible for the delivery of the plans of the executive branch of government. Although it was not compatible with the separation of powers and independence of the judiciary for judges to be members, it was essential that there should be very close engagement, through attendance, when necessary, at the board's meetings.

A similar arrangement was made for Crime and Disorder Reduction Partnerships in March 2005. These again are bodies comprised of representatives of agencies of the executive and have a responsibility to reduce crime and disorder in each local government area²⁸. It was considered²⁹:

“that attendance at meetings from time to time where no issues which affect the independent position of the Magistracy have been discussed has been valuable as a means of being regularly informed as to the plans of local agencies in areas which impact on criminal justice and initiatives that are being taken. Magistrates have often found it useful to explain the role of the Magistracy and to comment on the efficacy of the programmes that are in use or contemplated.”

Magistrates were encouraged to attend not as members, but as representatives of the Magistracy to these bodies with guidelines laid down to ensure that their attendance did not compromise their independence³⁰:

“It has been agreed that CDRPs must conduct meetings at which Magistrates are present on the strict understanding that Magistrates are present to hear of the concerns of the community in relation to the prevalence of particular kinds of crime and the programmes that are being undertaken in the community to make the community safer and reduce crime. No issues which affect the judicial position of Magistrates should be discussed. Without seeking to limit the generality of that position,

(1) There should be no discussion of any particular case that is before the court, or may come before the court, or has been before the court.

(2) There should be no discussion about the identification of Prolific and other Priority Offenders (though there can be discussion about the programmes available).

(3) There should be no discussion of sentencing policy.”

My third example is judicial membership of the Probation Boards established in each criminal justice area. Judicial membership was specified in the statute which created the boards in 2001³¹. The boards are required to discharge the duty of the Home Secretary to provide probation services; to have plans that conform to the National Plan set by the National Probation Service and approved by Ministers; and to meet targets set by Ministers. In March 2005, in consultation with the National Probation Directorate, it was decided to bring clarity to the role of the judge members of Probation Boards. The resulting protocol made clear that there was no incompatibility with judicial independence in membership of the boards, because it was accepted that probation officers owed a duty to the court to comply with the requests of the court when sentencing. The protocol detailed the duties of the judge and provided for the pivotal role of the judge member in advising locally on priorities in the event that resources were constrained. Again there was provision for the resolution of any tensions that might arise.

At present the Home Secretary is engaged in a consultation process in relation to changing the status of boards so that they can compete to provide probation services with others; if this change is made, then plainly judicial membership of the new body would not be possible, but it is recognised that it will be essential for there to be arrangements at a local level for close liaison “which should build on the high level contact existing through the board...”³²

Conclusion on this topic

Before turning more briefly to consider the second and third topics, I hope that it is evident from a consideration of this topic that there is increasing clarity and transparency in the functions, frameworks for constructive engagement (where such did not exist) and increased intensity in engagement. Indeed there are strong grounds for optimism that the reform to the office of Lord Chancellor is bringing about improvements to the way in which the business of the courts is conducted; that the relationship between the executive and the judiciary, although inevitably there will be tensions, will be a very constructive one; and that the very close relationship that it was envisaged would continue is in fact continuing in a strengthened and more transparent form.

APPOINTMENTS, COMPLAINTS AND DISCIPLINE

When the Lord Chancellor was head of the judiciary and the person responsible for the appointment of judges and

for the resolution of complaints against them, much was done in a way that was informal; despite the changes that have been brought about in the past five or so years, the position of the Lord Chancellor enabled decisions to be made without the need for undue formality.

Appointments

The Act has brought about a fundamental change. It establishes a Judicial Appointments Commission and sets out with great clarity the functions and responsibilities. However, even though there is a separation of functions and a separate Commission, there is a real need for close engagement. Work is being done to ensure that this will happen, but within the clear separation of functions³³.

One of the responsibilities of the Lord Chancellor under the Concordat is to determine the overall number of judges required for each Division, jurisdiction and Region and the number required for each level. This is to be done after consultation with the Lord Chief Justice. Two examples may illustrate the engagement on this. The first arises out of the work done by a joint Departmental and Judicial Working Party into the better use of judicial resources³⁴; it was found that much more information of a statistical and forecasting type was needed if there was to be more accurate forecasting of the number of judges needed for the future. The group that is devising an improved methodology is one in which the judiciary is fully engaged.

The second example is the protocol that has been agreed for the procedure to be followed where a new post of a District Judge (Magistrates Courts) is to be created. There have in the past been occasions where tensions have developed because there has been a difference of view as to whether a post was needed or where the Magistracy felt there was no need. A protocol agreed in March 2005 sets out with clarity what is to be done at the level of the Justices Issues Group, the need, if possible, for a joint view between the Presiding Judges and the Regional Director and for the ultimate decision by the Lord Chancellor.

Although the judiciary and the executive are engaged in this way in determining what the judicial requirement is for the future and on the basis of which the Lord Chancellor makes a request to the Judicial Appointments Commission for the appointment of judges, the actual selection of those judges will be made by the Judicial Appointments Commission.

Complaints and Discipline

The Constitutional Reform Act sets out a framework for a new system in which there are clear roles and responsibilities for the Lord Chancellor and the Lord Chief Justice; it provides for more detailed provisions to be made by regulation. The detail of these provisions is still in the process of being drafted and I cannot comment on it, but

they are designed to meet the conditions to which I have referred.

LEGISLATIVE PROPOSALS AND POLICY

May I finally turn to the relationship with the executive over legislative proposals and policy.

Legislative proposals: the Rose Committee

Under our constitution, it is axiomatic that it is for Parliament to determine legislative policy and to enact that policy in legislation in the manner of its choosing. It is not the role of the judiciary to advise the government on what its draft legislation means; nor is it the role of the judiciary to become involved in the political debates as to the need for or terms of proposed legislation.

However, there has always been consultation with the judiciary over the terms of legislation which affect the administration of the courts and the administration of justice; during some periods consultation has been frequent, during others, sporadic³⁵.

The prime example of this is the work of the Rose Committee, so named after Rose LJ, the Vice-President of the Court of Appeal Criminal Division. This committee was established by Lord Bingham when Lord Chief Justice. It is a body comprising members of the senior judiciary who scrutinise proposals for law reform in the area of criminal justice; the essence of the work of the committee is to use the experience of the judiciary to ensure that the proposals are as well formulated as possible and can work in practice³⁶. However this highly constructive engagement can only be carried out on the basis that there is the clearest understanding of the roles and responsibilities and that there is transparency. All the formal responses by the judiciary to consultation papers are made on terms that they can be published.

Executive policy

On Monday November 7, 2005, the Department of Constitutional Affairs published a white paper on supporting Magistrates to do Justice.³⁷ The policies set out are, of course, a matter for the executive. However to ensure that there was a significant consensus on the broad thrust of the policies the Department established a steering group which included the judiciary and magistracy to consider what was to be proposed; they were discussed and debated in the group and there was a broad measure of consensus. This is, in my view, a useful example of engagement between the two branches of government.

Wales


The administration of justice is not a matter devolved to the National Assembly for Wales, but there are issues on which constructive engagement is necessary. The clearest is in the sphere of family law as the National Assembly Government is responsible for CAF/CASS. Although it

might be said that the present structure of devolution is not as clear as it should be, as there is clarity on the functions of the judiciary, engagement is underway.

CONCLUSION

There will always be argument about the proper scope of the function of courts in interpreting legislation and developing the common law and tension resulting from judgments given by the courts. However, it is, I hope, evident that the reforms brought about by the Constitutional Reform Act and the Concordat have necessitated:

- first a strengthened structure for the governance of the judiciary;
- second, greater clarity in the respective functions of the judiciary and executive in their day to day relationship; and
- third, more intense engagement.

As the relationship between the executive and the judiciary is one that is unique and quite different to the relationship that the executive has with any other body, those involved must have a close understanding of the respective responsibilities and always remember the need for self restraint. The clarity that has been brought to the respective responsibilities is enabling the more intense relationship to be achieved within the context of a better understanding of the constitutional position. The character of the relationship that is emerging in this way is, in my view, one that is as constructive, if not more constructive, than the one that existed before. I therefore am optimistic that the relationship will be a very close one. Indeed some might characterise it as a new partnership. I therefore expect that the relationship, though it will stand on a constitutional basis and on structures quite different to those which existed before the Concordat, will be one which will ensure the better administration of justice. 

Lord Justice Thomas

ENDNOTES

1 Section 3.

2 Evidence to House of Lords Select Committee on the Constitutional Reform Bill, 2004, HL Paper 125 –II at col 218, 233.

3 The Master of the Rolls, the Vice-Chancellor and the President of the Family Division.

4 The additional judges were often referred to as the “extended family” – a clear indication of the informality of the arrangements.

5 The process is described in Lord MacKay of Clashfern’s Mischon Lecture, March 1991, *The Lord Chancellor in the 1990s* at paragraph 28.

6 For an external description of that part of a meeting dealing with judicial appointments – see the Report of the Commissioner for Judicial Appointments, 2004.

7 The Master of the Rolls, the President of the Queen’s Bench Division, the President of the Family Division and the Chancellor of the High Court (the revised title of the Vice-Chancellor).

8 Now provided for by s. 62 of the Courts Act 2003.

9 Section 9 of the Constitutional Reform Act 2005.

10 They have a wider membership.

11 See “The Judges’ Council” [2005] *Public Law* 608.

12 Report of the Royal Commission on Assizes and Quarter Sessions, Cmnd.4153 (1969).

13 Paragraph 176, 256-65.

14 Criminal Case Management Framework, July 2004.

15 There is useful summary in Lord MacKay’s Maccabean Lecture; see also Lord Bingham’s Judicial Studies Board Annual Lecture: “*Judicial Independence*”, 1996.

16 Paragraph 19.

17 See Sir Nicholas Browne-Wilkinson’s *The Independence of the Judiciary in the 1980s*, [1988] PL. 44.

18 See [2005] *Public Law* at 626-8.

19 *Courts modernisation and the crisis facing our civil courts*, 7th ILAS Annual Lecture, 24 November 2004.

20 It is unnecessary to express a view as to whether the duty assumed by the Lord Chancellor is a legally enforceable duty; it is to be hoped that the issue will never arise.

21 This is very different to the first framework document for the Court Service (the predecessor agency to HMCS) as referred to by Lord Bingham in his 1996 Judicial Studies Board Lecture, *Judicial Independence*.

22 This topic is briefly dealt with in *Judges on Trial*, Simon Shetreet, 1976, North-Holland Publishing Company p 40-45.

23 The decision was made jointly by the Lord Chancellor and the Lord Chief Justice and is set out in *Focussing Judicial Resources Appropriately*, DCA Consultation Paper CP25/05.

24 The position of District Judges (Magistrates Courts) continues at present to be different as the Chief Magistrate has had a separate responsibility for them.

25 1999 [2000] UKHL 63.

26 Justices Clerks who were employed by the Magistrates’ Courts Committees have become employees of HMCS; they have certain judicial functions and have therefore a special status.

27 Paragraph 69 of Chapter 7, 2001.

- 28 They were established under the Crime and Disorder Act 1998.
- 29 Letter from the Lord Chief Justice and the Lord Chancellor to Magistrates, 9 March 2005
- 30 Letter from the Lord Chief Justice and the Lord Chancellor to Magistrates, 9 March 2005
- 31 The Criminal Justice and Court Services Act 2000 established Probation Boards with effect from April 1, 2001. Section 4(5) and Schedule 1 require the membership to include a Crown Court Judge appointed by the Lord Chancellor.
- 32 Home Office Consultation Paper, 20 October 2005, *Restructuring Probation to Reduce Re-offending*, paragraph 18.
- 33 As this is still the subject of discussion, it is not possible to refer to the detail
- 34 Its conclusions are summarised in the DCA consultation paper *Focusing Judicial Resources Appropriately*, referred to earlier.
- 35 In a debate on 23 May 2003 (*Hansard* vol 648, col 882), after referring to examples of cooperation, Lord Woolf LCJ, concluded: “Unfortunately, there are times when the judiciary is left with the impression that its efforts are neither appreciated nor welcomed.”
- 36 An example of its role is seen in the speech of the Attorney General in the debate on the Fraud Bill in the House of Lords 19 July 2005, *Hansard* Vol 673, Col. 1445.
- 37 Cm 6681.