

Meaningful Dialogue: Judicial Engagement with Parliamentary Committees at Westminster

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Introduction

This article has three main objectives. First, we present an alternative form of constitutional 'dialogue' to that which is prevalent in the legal academic literature, and use dialogue in its ordinary meaning of face to face conversation. Through a detailed study of dialogue between judges and parliamentary committees we offer an account of how this works in practice. Second, we argue that dialogue between the judiciary and legislature in this sense has benefits which greatly outweigh the costs, and that it does not constitute a threat to judicial independence. Third, we illustrate those benefits by analysing the practice of the UK Parliament at Westminster, where the judiciary regularly give evidence to parliamentary committees, and with increasing frequency. In this respect the UK differs markedly from other Westminster countries, showing how judicial independence can be interpreted very differently even in countries with a shared legal and political tradition.

We start by defining our terms, in particular dialogue, judicial independence, and judicial accountability. We then set the practice at Westminster in comparative perspective with a brief survey of judicial evidence to the legislature in six other common law countries. The remainder of the article focuses on Westminster, with quantitative and qualitative data about the nature of judicial evidence, explaining which judges talk to which committees, and about what. To anticipate our conclusions, we find the benefits are that Parliament hears at first hand from a wide range of judges who are expert witnesses about the working of different parts of the justice system. It also provides a forum in which the judiciary can meaningfully – if very gently – be called to account. For the judiciary, it provides an opportunity to talk directly to Parliament, to overcome any misunderstandings or mistrust, and to inform and influence legislative policy making at a formative stage. This is a genuine dialogue with benefits for both sides.

Our research was conducted as part of a wider research project on the politics of judicial independence in the UK's changing constitution, funded by the AHRC. During that project we interviewed 150 judges, parliamentarians, ministers and officials, and held a dozen seminars (including three in Parliament). This article draws on that interview material, and on analysis of the evidence given by judges to Westminster parliamentary committees.¹ The dataset upon which the analysis in this article is based is available on the Constitution Unit website.²

¹ AHRC Grant No AH/H039554/1. We are particularly grateful to our colleagues on that project, Graham Gee and Kate Malleson, for their help and advice; and to research assistance from Matt Honeyman, Edward Lucas, Katie O'Donoghue, Patrick Tomison and Nitish Verma.

² See ucl.ac.uk/constitution.

Dialogue, judicial independence, and judicial accountability

Where we refer to ‘dialogue’ we do not intend the restricted meaning that the term has acquired in the academic literature about legislative responses to court decisions.³ We use the term in its ordinary dictionary meaning of ‘a conversation between two or more persons’. A dialogue is a discussion between two parties in which they listen to each other, exchange information and ideas, and hope to influence each other’s thinking. Such conversations take place between British judges and the Westminster Parliament (on average) on a monthly basis. We will argue that they constitute meaningful dialogue in that both sides get to speak; both sides listen to each other; and both sides inform and influence each other’s thinking.

Countries which reject such dialogue (discussed in the next section) do so, implicitly or explicitly, on the basis that it breaches separation of powers, or threatens judicial independence. The British constitution has a very weak conception of the separation of powers but a strong conception of judicial independence. This is not the place for a detailed discussion of the relative meanings of judicial independence and the separation of powers in constitutional theory. We take the view that – at least in practice – judicial independence performs the same function in the British constitution as conceptions of the separation of powers do in many other constitutions, in defining and dividing the relative roles of judges, the executive and Parliament. With this in mind, we need next to define judicial independence. For us, the core of judicial independence is decisional independence: the freedom of the individual judge to decide disputes impartially, according to the law, and free from improper pressure. This core understanding of judicial independence is based on ‘the social logic of courts’ as a mechanism of impartial dispute resolution. Judicial independence is not for the benefit of judges, but for litigants, who have a right to a fair trial before an independent and impartial tribunal.⁴ But while there is little disagreement about the core meaning of judicial independence, there is less agreement about the conditions necessary to ensure its realisation in practice. These conditions typically include measures to boost individual judicial independence and the collective independence of the judiciary as an institution: security of tenure, immunity against suit, merit based appointments, fair and secure remuneration, adequate funding for the justice system, and rules to protect the jurisdiction of the courts.⁵ The individual and collective dimensions are related: ‘without institutional independence the critical environment on which the independence of [individual] decision making depends would gradually wither’.⁶

Judicial independence is contextual, being underpinned by different structures and processes in different countries. In practice the judiciary cannot be completely autonomous from the other branches of government. Judges generally depend on the political branches of government for their appointment, remuneration and removal, for the funding of the courts and for the enforcement of judicial decisions. How much independence judges should have is ultimately a question of degree,

³ P Hogg and A Bushell, ‘The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)’ (1997) 35 *Osgoode Hall Law Journal* 76.

⁴ This analysis of judicial independence and accountability draws on chapter 2 of our book: G Gee, R Hazell, K Maleson and P O’Brien, *The Politics of Judicial Independence in Britain’s Changing Constitution* (Cambridge: CUP 2015).

⁵ Numerous international declarations articulate the conditions necessary to ensure judicial independence, e.g. the UN Basic Principles on the Independence of the Judiciary (1983).

⁶ Lord Judge, ‘Constitutional Change: Unfinished Business’, Lecture to UCL Constitution Unit, 4 December 2013 at para 7.

with each system striving for a balance within which judges are sufficiently independent to decide disputes impartially, but with sufficient institutional accountability to ensure they do not exercise wholly unchecked power.

We do not offer a detailed theoretical analysis of judicial accountability in this article, but rather draw on a useful shorthand distinction drawn in the academic literature between ‘sacrificial accountability’ and ‘explanatory accountability’.⁷ The discomfort some judges feel about accountability comes (we believe) from an assumption that accountability connotes *sacrificial* accountability, where failure to meet required standards may result in a sanction or even dismissal.⁸ In the UK, sacrificial accountability has a strong hold on the public imagination because of the convention of ministerial responsibility. A minister must account to Parliament for their actions and those of their department, and must resign in the event of a serious failure or wrongdoing. The principle of judicial independence insulates judges from the kind of sacrificial accountability that attaches to political office.

If judges assume that the only relevant type of accountability is sacrificial, it is not surprising that they then conclude (as did one judge whom we interviewed) that they are ‘not accountable at all, apart from to the head of the judiciary’.⁹ But accountability is much broader than this. Even within the political sphere, the greater part of accountability is not connected to sanctions and penalties but with a more basic duty to give account, to explain and to justify, demonstrated every day in Parliament. This *explanatory* accountability is entirely compatible with the judicial role and with the preservation of judicial independence. In Parliament, it is secured to a significant extent by conversations – by dialogue – between judges and parliamentary committees.

It is true that neither the judges nor the committees think of their relationship as involving accountability. Nonetheless all the markers of (explanatory) accountability are present. The judiciary explain how different parts of the justice system operate, and respond to common criticisms (over delays, sentencing, lack of diversity, etc). Lord Thomas LCJ had no doubt about his role in his annual appearance before the Commons Justice Committee, when he said: ‘I feel that we owe a duty to tell you how we are administering the system and how people are being appointed’.¹⁰ In his annual report in 2014 he wrote of the judiciary having two duties: the first being to decide cases, and the second ‘to work with others to improve and enhance the way the justice system works’.¹¹ It is in talking to Parliament about this second duty that the judges engage in explanatory accountability.

⁷ For a more theoretically-minded approach see Gee *et al*, n 4, at 16-21 in particular. There is a significant literature on accountability and its application to the judiciary. See e.g. M Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: CUP 2006); M Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13 *European Law Journal* 447; A Le Sueur, ‘Developing Mechanisms for Judicial Accountability in the UK’ (2004) 24 *Legal Studies* 73; A Le Sueur, ‘Parliamentary Accountability and the Judicial System’ in N Bamforth and P Leyland (eds) *Accountability in the Contemporary Constitution* (Oxford, OUP 2014); A Sengupta, ‘Judicial Accountability: a Taxonomy’ [2014] PL 245.

⁸ V Bogdanor, ‘Parliament and the Judiciary: The Problem of Accountability’, (Third Sunningdale Lecture on Accountability, 9 February 2006).

⁹ Private interview with a High Court judge conducted as part of the Judicial Independence Project.

¹⁰ Commons Justice Committee, 2 April 2014, at Q18.

¹¹ Lord Chief Justice *Annual Report 2014* at p 8.

Judicial dialogue with the legislature in other common law countries

The UK Parliament is an outlier within the common law world for the extent to which the judiciary and Parliament engage with one another.¹² Elsewhere in the common law world – with the notable exception of the United States – the practice is rare. Perhaps because the practice is unusual, literature on the phenomenon of judges appearing before committees is also rare. We found very little English language literature directly studying these encounters, and the literature we did find discussed either the British or the American experience. In attempting to locate our study of Westminster in a wider comparative context we looked at practice in six common law countries: Australia, Canada, Ireland, New Zealand, South Africa, and the United States. In the absence of any significant comparative literature we supplemented our account with inquiries of academics and practitioners in those countries.¹³ We found that the practice is common in the United States and (to a lesser extent) New Zealand, but rare or unheard of in the rest of the jurisdictions sampled.

Concerns about engagement between judges and parliamentary committees generally centre on a perceived breach of either judicial independence and (or) the separation of powers (which, as we noted above, we are treating as roughly analogous for our purposes in this article). It is curious that of the six countries we looked at it is in the US that engagement seems to be most common. The US has a famously robust and formal doctrine of the separation of powers, but the practice of federal judges appearing before congressional committees is accepted as legitimate, and judges seem to regard it as important that the judicial voice should be heard on relevant matters. The US Judicial Code specifically provides that judges may engage with executive and legislative bodies in this way.¹⁴

Rishikof and Perry describe a very significant increase in judicial appearances before US congressional committees, beginning in the 1930s.¹⁵ Writing in 2003 Winkle noted that appearances were still increasing year on year. He attributes this to the formalisation of interactions between judges and Congress; and particularly to the creation of a Judicial Conference and an Administrative Office of the US Courts, which liaises with Congress.¹⁶ Four categories of appearance are particularly significant: appropriations (23%), court administration (23%), judicial nominations (21%) and policy directly affecting the courts (17%). Supreme Court judges mostly give evidence on appropriations (76% of appearances). With the exception of judicial nominations, these are similar to the kinds of issues on which judges in Britain give evidence.¹⁷ The US Senate Judiciary Committee holds famously robust public confirmation hearings with candidates for the federal bench but this type of hearing does not occur in the UK, where many British politicians and judges regard the American practice with horror.¹⁸ Rishikof and Perry note that the evidence given by judges before Congress ‘frequently

¹² It also hears far more evidence from judges than do the UK devolved legislatures. See Gee *et al*, n 4, 107-8.

¹³ Because of the limitations of this methodology this brief discussion cannot be treated as a fully comprehensive comparative account.

¹⁴ See Canon 4(A)(2) of the US Judicial Conference Code of Conduct for United States Judges, revision of March 2014.

¹⁵ H Rishikof and B Perry, ‘“Separateness but Interdependence, Autonomy but Reciprocity”: A First Look at Federal Judges’ Appearances before Legislative Committees’ (1995) 46 Mercer LR 667

¹⁶ J Winkle, ‘Interbranch Politics: The Administrative Office of U.S. Courts as Liaison’, (2003) 24 The Justice System Journal 43, 60.

¹⁷ See the Appendix to Rishikof and Perry, fn 12.

¹⁸ Judicial appointments in Britain are made through a number of independent appointment bodies with little political involvement.

attempts to lend jurists' prestige to legislative debates on complex policies.¹⁹ In this, US practice also mirrors that in the UK.

Judicial appearances are also reasonably common in New Zealand, and it is there that practice is closest to Westminster. As in the US, the New Zealand judiciary's 'Guidelines for Judicial Conduct' specifically permit such appearances. Paragraph 64 of the Guidelines permits judges to make submissions and give evidence to parliamentary committees, although it also requires that the head of the judge's jurisdiction must be consulted before making a submission. On matters of public controversy the Guidelines advise that judicial responses should come from the Chief Justice (or the relevant head of jurisdiction), and they also note the importance of avoiding expressing opinion on matters that may become the subject of litigation. Judges appear before committees of the New Zealand Parliament 'occasionally'.²⁰ They sometimes (albeit rarely) discuss or make written submissions on draft legislation. Our anecdotal evidence suggests that the volume of appearances in New Zealand has increased in the last 15 years, although not to the same extent as at Westminster.

In the remaining countries surveyed engagement by judges with parliamentary committees is regarded less favourably. At the furthest remove from British practice is Ireland, where engagement by judges with the legislature is regarded as a breach of the separation of powers *per se*. We are not aware of any appearances by an Irish judge before a committee of the Irish Oireachtas (Parliament), despite the fact that in Ireland the courts service is led by the judiciary: the Chief Justice is also the head of the board of the Irish Courts Service. The head of such a large public body might be expected to appear before parliamentarians, but because of separation of powers concerns the Chief Executive appears instead.²¹ A similar approach is taken in South Africa. Following the establishment in 2010 of the Office of the Chief Justice as a government department, the Secretary General of the new Office appears before parliament as reporting officer. Unlike in Ireland, however, South African judges do appear (albeit rarely) before committees to discuss matters of professional importance to the judiciary.²²

Australia also takes a strict approach to the separation of powers, and judicial appearances are almost unheard of. Our correspondents felt that 'intuitively it appears inappropriate'. We have found only two occasions in which judges gave evidence: when Justice Ruth McColl spoke to a Senate Committee as President of the Judicial Conference of Australia on 'Australia's judicial system and the role of judges',²³ and when the Chief Justice of the Family Court gave evidence to a Senate Committee on the sterilisation of people with disabilities.²⁴ In Canada there is slightly more traffic, but this primarily concerns recent appointment hearings for the Supreme Court, with three such

¹⁹ Rishikof and Perry, fn 12, 687.

²⁰ D McGee, *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington 2005), Chapter 23.

²¹ Information from Judicial Independence Project interviews. One notable case in which a serving judge would have given evidence to an Irish parliamentary committee concerns the case of Judge Brian Curtin, who resigned from the bench in 2006, days before he was due to give evidence to a joint committee that was investigating a motion to impeach him for possession of child pornography.

²² An exception was the appearance of Chief Justice Chaskalson in 2001 to discuss a proposal to amend the constitution to extend the tenure of Supreme Court judges.

²³ Senate Legal and Constitutional Affairs Reference Committee, 11 June 2009.

²⁴ Senate Standing Committee on Community Affairs, evidence by Diana Bryant, 27 March 2013.

hearings since 2006.²⁵ Apart from appointment hearings, judicial appearances are rare. There are some examples of sessions with serving judges at the lower levels of the courts,²⁶ but evidence is given more usually by retired judges.²⁷ Some of our correspondents suggested that calling judges before committees might be unconstitutional: the fact that legal academics had this impression gives some indication of the rarity of such appearances in Canada.

What is remarkable from this brief comparative survey is not just the great variation in practice between common law countries, but the variation in their underlying thinking about separation of powers, judicial independence and accountability. It is particularly ironic that the United States, regarded as the archetype of strict separation of powers, is more relaxed about judges appearing before the legislature than all the Westminster countries surveyed. Our correspondents in Australia and Canada seemed genuinely shocked that judges might be asked to give evidence to parliamentary committees, and puzzled that they could find anything which they could properly talk about without compromising their independence.

The frequency of appearances by UK judges is perhaps not particularly surprising given the pragmatic British attitude to constitutional matters, an attitude which, amongst other things, allowed the law lords and certain senior judges to sit in Parliament until 2009. Dialogue with parliamentary committees represents a continuation of the close contact judges always had with Parliament. The remainder of this article explains what kinds of things judges do talk about at Westminster, and the safeguards they have developed to protect their independence, before analysing the benefits that accrue to Parliament and to the judiciary from engaging in dialogue with each other.

Our Methodology

Our analysis began by compiling a list of all recorded instances of judges giving evidence before a parliamentary committee, of the House of Lords or the House of Commons, and joint committees of both Houses. We covered a 35-year period, between May 1979 and December 2014. We chose 1979 as the starting point because that is when departmental Select Committees were introduced at Westminster. Within this timeframe, there were 275 instances of judges providing oral testimony to a parliamentary committee inquiry, and a further 143 instances of judges providing written evidence. These figures included judges who have appeared on multiple occasions, and judges appearing in panels. In each case, whether of the same judge appearing several times, or several judges appearing at the same time, we counted each judge and each appearance as a separate instance.

Our analysis of judicial evidence is in two parts. First we present high-level analysis of the full list of oral and written evidence given by judges, starting with the reasons for their remarkable growth.

²⁵ This emerging Canadian practice has as yet been applied inconsistently, with some judges being nominated without the process.

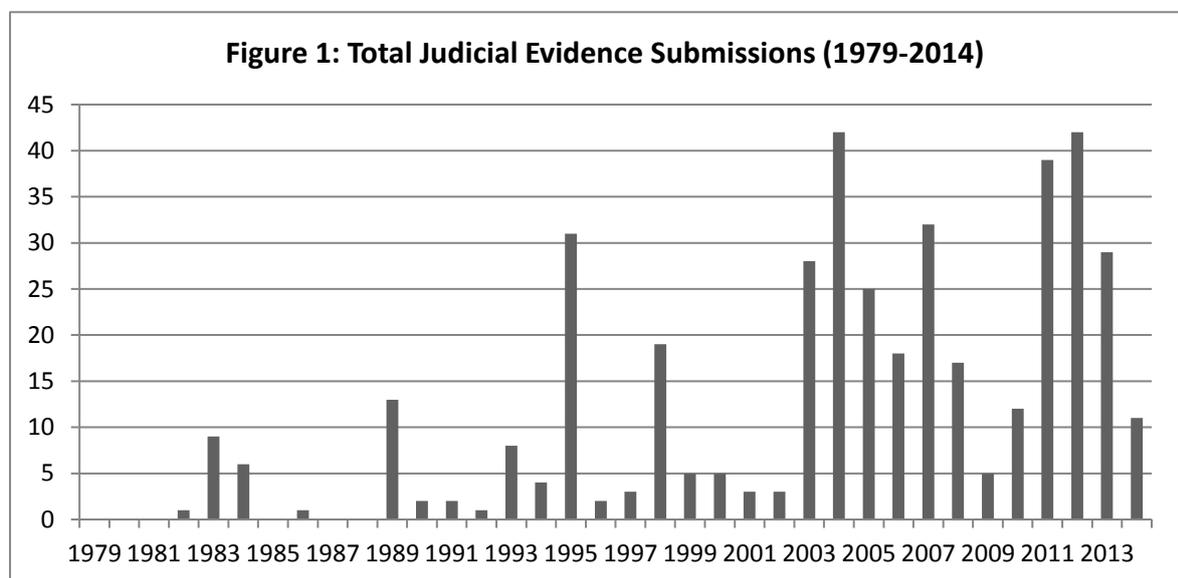
²⁶ For example, Judges Peter Harris and Tony Mandamin before the Senate Committee on Legal and Constitutional Affairs discussing criminal justice issues on 23 October 2001.

²⁷ For example, retired Justice John Charles Major appeared before the Standing Senate Committee on Legal and Constitutional Affairs on 22 May 2013 to discuss an amendment to the criminal code.

Secondly, we present a more detailed analysis of a sample of 50 oral evidence sessions in more detail. That detailed analysis appears later.

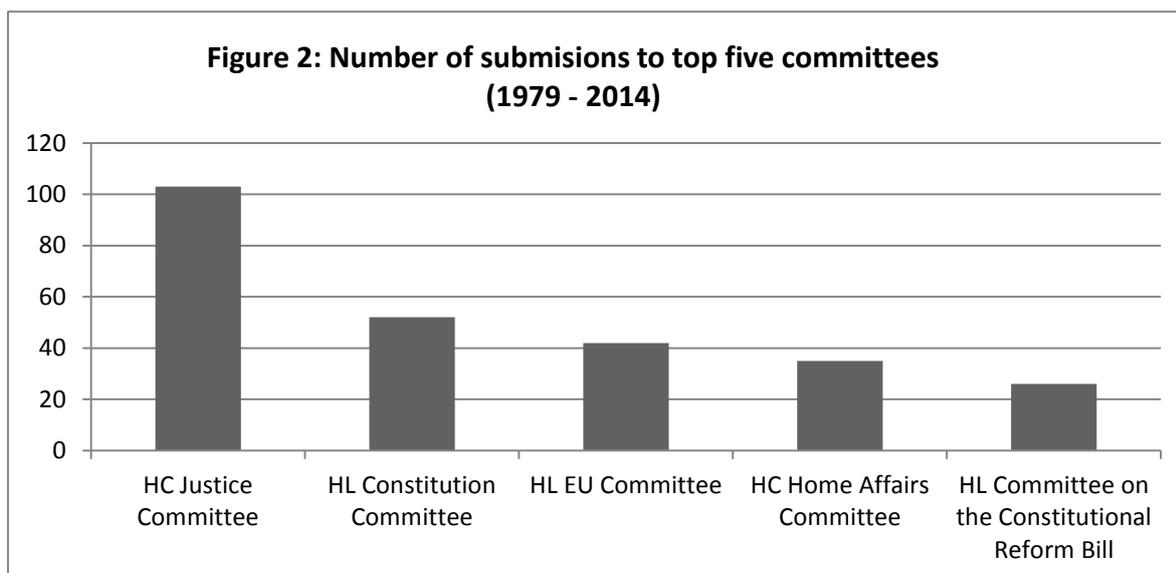
The growth in judicial evidence, and the reasons for it

Figure 1 shows the steady increase in the number of judicial evidence sessions since 1979, when the House of Commons first introduced a network of departmental Select Committees. The last twelve years (2003 to 2014) account for over half the total submissions.



The frequency of judicial evidence has increased dramatically with each decade. There are two main reasons behind this increase. First is the gradual growth in parliamentary committees, starting from a low base when they first began, in terms of their activity rates, their assertiveness, and their reach. Reflecting their wider reach, the early 2000s saw the creation of several new committees with a direct interest in the judiciary and the justice system. These are the Lords Constitution Committee (created in 2001), the Joint Committee on Human Rights (also created in 2001), the Commons Justice Committee (created in 2003)²⁸, and the Political and Constitutional Reform Committee in 2010. The Commons Justice Committee and the Lords Constitution Committee are the two most frequent recipients of judicial evidence, so it is no surprise that their creation was followed by a big increase in judicial evidence sessions. In the last ten years the Commons Justice Committee has received just over 100 submissions (oral and written) from judges, and the Lords Constitution Committee just over 50: see Figure 2.

²⁸ The Commons Justice Committee started life as the Committee on the Lord Chancellor's Department, and later operated as the Constitutional Affairs Committee, reflecting changes to the name and organisation of the government department whose work it scrutinised.



The second main reason behind Parliament’s growing demand for judicial evidence is a series of recent improvements in the legislative process. The publication of bills in draft for pre-legislative scrutiny was introduced by the first Blair government, and since then over 100 draft bills have undergone this process.²⁹ Evidence is invited from interested parties and outside experts, and in the last ten years judges have given evidence on ten draft bills. A second innovation came in 2006, with the introduction of Public Bill Committees, which can also take external evidence; here too the judges have been asked to play their part. A third innovation was the introduction of post-enactment scrutiny, sometimes by special committees such as that on the Mental Capacity Act 2005. With this opening up of the legislative process, the judiciary – like others – have been drawn in to assist Parliament in its law making. Between 2000 and 2009 16.5 per cent of judicial appearances involved judges giving their views on bills and draft bills.

How are the evidence sessions organised?

Committees have no power to compel or direct judges. Though a parliamentary committee could in theory summon (i.e. compel) a judge to appear, it is extremely unlikely, and recognised as constitutionally inappropriate.³⁰ A retired judge has been summoned, but in his capacity as Intelligence Services Commissioner.³¹ Attendance by serving judges as committee witnesses at Westminster is thus consensual. Because of the absence of compulsion we describe the explanatory

²⁹ On average six draft bills were published each year by the Labour government from 1997 to 2010. Under the coalition government since 2010 the average has gone up to eight draft bills a year. R Kelly, *Pre-Legislative Scrutiny under the Coalition Government*, House of Commons Library SN/PC/5859, 4 June 2014.

³⁰ R Kelly, ‘Select Committees: Powers and Functions’ in A Horne, G Drewry and D Oliver (eds), *Parliament and the Law*, (Hart Publishing, Oxford 2013) at 186-7.

³¹ The Commissioner was former Court of Appeal judge Sir Mark Waller. ‘MPs summon Security Services watchdog over Snowden leaks’ *The Guardian* 27 February 2014. He appeared before the Home Affairs Committee on 18 March 2014. In Canada there was a controversial (and unsuccessful) attempt in 2011 to summon a judge to appear before the Standing Committee on Access to Information, Privacy and Ethics. The attempt was abandoned after an intervention by the Canadian Bar Association, amongst others.

accountability at issue here as ‘voluntary accountability’. Judges who appear before parliamentary committees are choosing to make themselves accountable.

Until recently, evidence sessions were arranged informally between committee clerks and judges. Judges usually informed the Judicial Office, which provided advice and support. In 2008 this was crystallised into formal guidance, based on practice developed by the Commons Justice Committee.³² The guidance identifies four broad topics on which judges should not comment: (i) the merits of individual cases; (ii) the personalities or merits of serving judges, politicians or other public figures; (iii) the merits, meaning or likely effects of prospective legislation or government policy; and (iv) issues which are subject to government consultation on which the judiciary intend to make a formal institutional response. The third category appears to erect an absolute bar on discussing a Bill or government policy. But the guidelines permit comment on the practical and technical aspects of a Bill or policy where it relates to the operation of the courts or the administration of justice; or if a Bill affects the independence of the judiciary.³³ These dividing lines are difficult to draw even in the abstract, and as we shall see, comments by judges may sometimes stray over the line.

Occasionally judges might submit written evidence on their own initiative or volunteer to give evidence. In 2004 the Lord Chief Justice, Lord Woolf, volunteered to give oral evidence as part of the Public Administration Committee’s work on public inquiries.³⁴ Judges may sometimes decline to appear outright, and the clerks report five refusals in the 2010 Parliament. It is hard to keep an exact score. The Judicial Office might seek to persuade a committee clerk that judicial evidence would be inappropriate, or that a different judge might be more suitable, or that written evidence would be better than oral.

That judges have refused to appear on occasion underscores the fact that this is voluntary accountability. There have also been a few cases where the appearance happened only after protracted negotiations. One example was the reluctant appearance in 2013 before the Culture, Media and Sport Committee of Sir Brian Leveson, chairman of the Inquiry into the culture, practice and ethics of the press.³⁵ Another was when the Public Accounts Committee asked the President of the Family Division, Sir Nicholas Wall, to give evidence in its inquiry into the Child and Family Court Advisory Support Service (‘CAFCASS’). The committee had a fierce reputation, but Wall eventually agreed because he accepted that judges in the family court had a unique perspective as the main ‘customers’ of CAFCASS.³⁶ Judicial sensitivity increases with the political sensitivity of the topics to be discussed, and for this reason more senior judges are likely to give evidence where the matter is politically sensitive. Protracted negotiations are, however, the exception. Most hearings are organised with little difficulty.

³² Judicial Executive Board, ‘Guidance for Judges Appearing before or Providing Written Evidence to Parliamentary Committees’ (2008); revised in October 2012.

³³ *Ibid* Section III para 13.

³⁴ See House of Commons Public Administration, ‘Government by Inquiry - Minutes of Evidence’ (2005) HC 51-II.

³⁵ Culture, Media and Sport Committee, 10 October 2013, at Q771. See also ‘Press Regulation: Brian Leveson’s obstinate tour de force’ *Guardian* 10 October 2013.

³⁶ Public Accounts Committee, evidence session with Sir Nicholas Wall and Sir Mark Hedley, 11 November 2010. Background information is from our private interviews for the Judicial Independence Project.

The process for arranging judicial appearances was tightened up in 2012. According to revised guidance agreed between the Lord Chief Justice and the Clerk of the House of Commons, a request to give evidence should be made directly from a parliamentary committee to the private office of the LCJ.³⁷ This more centralized process is in part a product of judicial anxiety that there are now too many judicial appearances. Successive LCJs have voiced this anxiety,³⁸ as have other senior judges.³⁹ Judicial concerns are threefold: first, that judges will become drawn into politically contentious debates; second, that judges may express opinions that do not accord with the collective views of the judiciary; 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 the frequency of judicial appearances has increased dramatically since 2003, as shown in Figure 1. It is also true that the judiciary are not always of one mind, with differing views about the European Court of Human Rights,⁴⁰ and judicial appointments.⁴¹ It is too early to say whether the tighter guidance will lead over time to a decline in judicial appearances, or tighter control over what the judges feel able to say.

What do committees discuss with judges?

Judges give evidence on a wide range of legal subjects and often as part of wider committee inquiries, for example, on family law and the family justice system; on criminal law; and on constitutional issues. Figure 3 gives a breakdown of the subjects discussed by parliamentary committees with judges over the 35 years from 1979 to 2014. The prominence of constitutional matters and judicial appointments in their evidence in recent years reflects the prominence of these issues during the preparation and passage of the Constitutional Reform Act 2005, and in its aftermath. Topics are chosen by parliamentarians and reflect political concerns. Family law was prominent because of concerns about court delays.

³⁷ Judicial Executive Board, 'Guidance to Judges on Appearances before Select Committees' (2012).

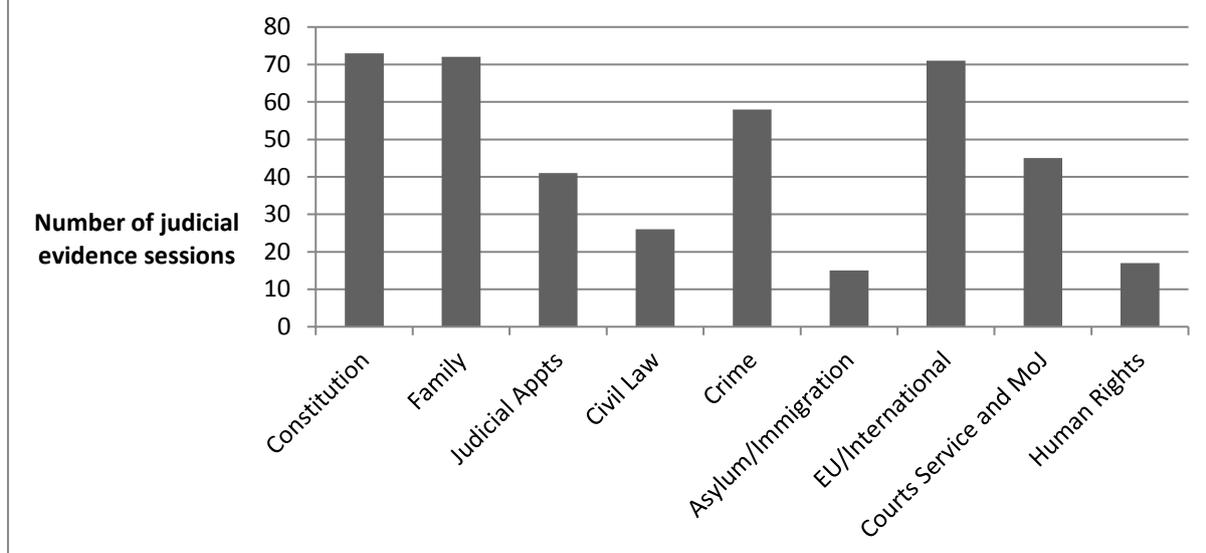
³⁸ Lord Judge expressed this view in the course of the above appearance before the JCHR. See also Lord Phillips, 'Judicial Independence' (Commonwealth Law Conference 2007, Nairobi, 12 September 2007).

³⁹ Letter from Lord Justice Toulson to Lord McNally (Minister of State at the Ministry of Justice) dated 9 December 2011 and published by the Lords Constitution Committee as part of its inquiry into Judicial Appointments.

⁴⁰ See for example the contrast between Lord Phillips and Lord Judge in their evidence to the Joint Committee on Human Rights, November 2011. Lord Judge expressed strongly critical views once he had retired: see his lecture 'Constitutional Change: Unfinished Business' UCL Constitution Unit, 4 December 2013.

⁴¹ House of Lords Constitution Committee, *Judicial Appointments* (2012) HL 272.

Figure 3: What do Committees discuss with judges? (1979-2014)

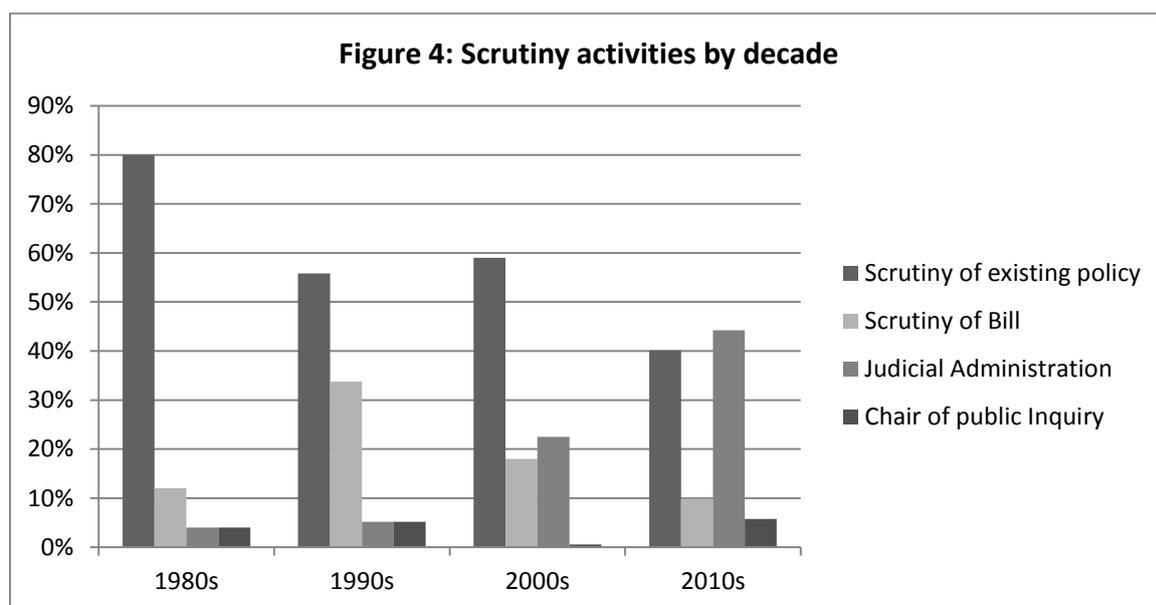


To give a better sense of the wide range of different topics on which judges are invited to give evidence, we mention here some of the subjects grouped under these different headings. In recent years ‘the Constitution’ has included sessions on relations between the executive, judiciary and Parliament, the draft Constitutional Renewal Bill, the accountability of civil servants, and parliamentary privilege. ‘Family’ has included operation of the Family Courts, pre-legislative scrutiny of the draft Children and Families Bill, adoption legislation, and the child protection system. ‘Civil law’ has included regulation of the press, the unified Patent Court, privacy and injunctions, and the draft Defamation Bill. Crime has seen judges giving evidence on women offenders, draft sentencing guidelines, youth justice, child sexual exploitation, and crime reduction policies. The EU and international affairs have included the US/UK extradition treaty, justice issues in Europe, the Treaty of Lisbon, an EU Competition Court, and European supervision orders. The Courts Service and MoJ has included interpreting and translation services in courts, and the budget and structure of the Ministry of Justice. ‘Human Rights’ has included prisoner voting, followed by the draft Voting Eligibility (Prisoners) Bill, and regular sessions on human rights judgements.

The topic chosen helps to determine the kind of evidence given by judges. Family law judges discuss family law; ECJ judges discuss topics like the Treaty of Lisbon; magistrates and Circuit judges discuss crime. Junior judges are more likely to be invited to talk about family law and criminal law; senior judges to be asked about constitutional issues and the administration of justice. Analysis of our total sample shows that one third of junior judges gave evidence on family law, and one quarter about criminal law. Amongst senior judges, constitutional issues (nearly 40%) and the administration of justice (nearly 20%) are much more prominent.

Kinds of scrutiny and kinds of accountability

Different kinds of parliamentary committee engage in different kinds of scrutiny activity, and these in turn call on judges to perform different roles, some of which involve offering accountability for their activities. For the purposes of our analysis we identified four different types of scrutiny: scrutiny of bills or draft bills; scrutiny of existing policy or practice; scrutiny of judicial administration and leadership; and scrutiny of inquiries chaired by judges. Again, the relative importance of these different scrutiny activities has varied over time, as shown in Figure 4.



Inquiries have always been the smallest category. Scrutiny of bills has fluctuated, representing a third of judicial evidence sessions in the 1990s, falling to almost 20 per cent in the 2000s, and 10 per cent in the 2010s. Since 1979 judges have given evidence on 20 bills, with half of those being draft bills. The categories are not watertight, but we can schematise them as follows in the table below.

Different kinds of scrutiny call for different judicial roles

Type of evidence	Examples	Judicial role	Function
Scrutiny of bills or draft bills	Draft Children and Families Bill 2012	Legal and policy expert	Educative
Scrutiny of policy and practice	Youth justice. Family courts	Legal and policy expert	Mainly educative, some accountability
Scrutiny of judicial administration and leadership	Annual session with Lord Chief Justice, and President of Supreme Court	Judicial leadership	Accountability for leadership of justice system and for public expenditure
Scrutiny of judges appearing as chair of public inquiry	Scott Baker on Extradition 2011. Leveson on the Press 2013	Policy expert	Accountability for policy proposals

Judges play different roles depending on the context. When judges give evidence on bills or draft bills, they are appearing mainly as legal experts. Sometimes they double as policy experts: in family law and criminal law, aspects of legal and social policy are closely intertwined. Judges' evidence can include analysis of what is wrong with the current law, so shading into our second category, scrutiny of existing policy and practice. When they are asked to discuss the content of a draft bill they are in an especially sensitive position, as this kind of exchange goes to the heart of the relationship between Parliament, as the legislature, and the judiciary charged with implementing and interpreting the law. In critiquing the text of a bill, judges will be concerned to avoid trespassing onto the terrain of the legislature and to avoid prejudicing their own adjudicative role. They will offer expert opinion on whether specific draft provisions are likely to work as intended, and why; but they are meant to avoid getting drawn into more substantive debate on the content of the draft bill, and to avoid commenting on how particular provisions might be interpreted by the courts. Occasionally they cross this line, usually following pressure from the committee.

The most common kind of judicial evidence involves helping committees with inquiries into existing policy and practice. Here again judges appear as legal and policy experts, explaining their role in relation to topics such as children in care, domestic violence, remands in custody, youth justice, asylum and immigration, licensing law. These are all multi-agency issues where the courts have only part of the story. Insofar as they can help other agencies through changes in procedure or improvements in performance (for example, reducing delays) there is also an element of accountability. The judges give an account of how the system works and the difficulties they face, but also say how they might work to improve things.

Accountability is most clearly in play in our third category, of judicial leadership. In recent years the practice has developed of the Commons Justice Committee holding an annual session with the Lord Chief Justice. The Lords Constitution Committee does likewise, but also has an annual session with the President and Deputy President of the Supreme Court.⁴² The session with the LCJ is most clearly an exercise in accountability, since he is giving an account of his leadership of the whole judiciary (which now numbers 5,500 judges in England and Wales, including the tribunals judiciary). This was evident during the new Lord Chief Justice Lord Thomas's first appearance before the Commons Justice Committee in 2014.⁴³

Accountability is also in play when judges appear as chairmen of an inquiry. These sessions are relatively rare, not more than 5% of the total, but have a different character. They are more of a policy discussion about the findings and recommendations in the inquiry report, so the judge appears more as a policy expert, explaining and justifying the conclusions of the inquiry. Sir Brian Leveson found it difficult to accept this, maintaining that his report into press regulation spoke for itself, like a judgment.⁴⁴ The Lord Chief Justice has taken a similar view, arguing that an inquiry chaired by a judge is a judicial process and that it is thus constitutionally inappropriate for judges to be questioned by committees in relation to their inquiry work.⁴⁵ Inquiry chairmen may also be treated with less deference than judges talking about their judicial work, especially if the Committee

⁴² The first session by the Lords Constitution Committee with the LCJ was in 2006; and by the Commons Justice Committee in 2008. They became annual sessions in 2013.

⁴³ Commons Justice Committee 2 April 2014 at Q18.

⁴⁴ Culture, Media and Sport Committee, 10 October 2013.

⁴⁵ Lord Thomas, 'The Future of Public Inquiries' [2015] Public Law 225, 234.

disagrees with their report. Sir Scott Baker had a rough time with the Home Affairs Committee when talking about the report of his Extradition Review Panel, because the MPs found it hard to accept his findings.⁴⁶

Analysing the dynamics and the tone of judicial evidence sessions

So far we have reported on the growing number of judges giving evidence, the wide range of subjects they talk about, the different roles they play depending on different types of committee activity, and the different kinds of accountability which then ensue. We also wanted to convey something of the dynamics of judicial evidence: the kinds of questions which are asked, the frequency of hostile questions, and of refusals to answer. We also recorded the frequency of answers which are critical of government policy and potentially in breach of the Judicial Executive Board guidelines. In this section we include some extracts to give the flavour of judicial evidence, to help illustrate the broader analysis.

Rather than pick quotations from all the sessions, we decided to do a systematic analysis of a sample of 50 oral evidence sessions, using multi-stage stratified sampling. For our first stage, we used “type of judge” as our variable for stratification, and established six distinct strata: junior judges (magistrates and District Judges), middle ranking (Circuit and High Court Judges), and senior judges (Court of Appeal judges, Heads of Division, law lords and Supreme Court Justices); with a further three strata covering international (including NI/Scotland and EU judges), Tribunals, and retired judges.

We further stratified based on the decade in which the committee inquiry was held, establishing four distinct sub strata: 1980s, 1990s, 2000s, and 2010s. Using a random number generator, we then selected 50 evidence sessions, such that our sample was representative of the proportion of judges and decades in the original population. It includes a variety of House of Lords, House of Commons, and joint committees, addressing a wide range of topics including the administration of justice, constitutional reform, legislation, sentencing guidelines, tribunals, and international/EU affairs.

We began our analysis of the sample sessions by asking how many questions sought factual information and accounts of their experience from judicial witnesses; how many sought their opinions on the current state of the justice system; and how many were questions about the effects or merits of government policy or bills. Across the sample as a whole questions were divided evenly between these three categories. The evidence sessions with judges were lengthy and detailed, with an average of 40 questions asked in each session. But the nature of the questioning varied, depending on the seniority of the judge.

Judges drawing on their first hand experience

Junior judges were asked more questions about their own first hand experience (over half of all questions to them), and then asked for their opinion on wider justice matters (one third of

⁴⁶ Home Affairs Committee, 20 December 2011.

questions) by drawing upon this experience. Typical is this exchange in the Home Affairs Committee about domestic violence:

Q61 Mr Streeter: In your experience how much domestic violence is alcohol-related?

District Judge Mornington: Alcohol and drugs are used as excuses and exacerbate domestic violence as do mental health and socio-economic problems. The reality is that domestic violence is about power and control and perpetrators will be violent whether they have been drinking, abuse drugs or whatever. Most of the families I see do not have one problem but a variety of them.⁴⁷

This answer could equally well have been given by a senior police officer, or social worker: the judges' role when answering questions of this kind is akin to other front line service providers. More commonly however, judges are asked to provide an account of their own judicial decision making, as well as of the administrative procedures in place for handling certain types of cases. For example, for the Commons Home Affairs Committee inquiry into the US-UK Extradition Treaty, the judges sought to explain the limited nature of their role, which allowed little scope for discretion.⁴⁸

Rarely, however, are judges limited to providing simply factual or experiential accounts. After some fact-seeking questions, judges are generally asked to provide their own expert opinions. We divided these opinion-seeking questions into two categories: on the current state of the justice system; and the effects or merits of government policy. In our sample, one third of all questions came into the first category, and a quarter into the second. But again, the proportions varied with the seniority of the judge. Less than 10 per cent of questions to junior judges were about government policy, whereas with senior judges it was over 30 per cent.

Questions about the current state of the justice system ranged from the availability of resources to staff training, the efficiency of support services, problems with backlogs, etc. Naturally, these questions led to the judges suggesting ways in which the current system could be improved. Resources are often the key constraint.

Pleas for additional resources

Judges seldom criticise the government head on for providing insufficient resources. Rather, they tell Parliament of the difficulties they face when coping with limited resources. Here is an example of a judge explaining the constraints. He was being pressed on how delays might be reduced, so this is also an example of judicial accountability. It comes from the Commons Constitutional Affairs Committee inquiry into Asylum and Immigration Tribunals.

Q21 Keith Vaz: How can the system be improved without unduly disadvantaging the claimants? Can you improve the system any further?

Mr Justice Collins: I do not think we can. We deal with them as fast as we possibly can and we reckon that the vast majority we can turn round within, at most, three weeks, usually

⁴⁷ Commons Home Affairs Committee inquiry into Domestic Violence, 22 January 2008.

⁴⁸ Judge Riddle, 28 February 2012.

less than that ... This certainly puts a strain on the system and it does mean that we are at risk of not being able to hear our other work within the time that we would like to.⁴⁹

Judges criticising government policy

Questions about government policy are more often put to senior judges than junior ones. Such questions form a high proportion when committees are scrutinising bills, or conducting inquiries into constitutional issues. In such inquiries judges are often asked to comment on the potential effects of pending bills or treaties or of new policies on the judiciary and justice system. In this context, judges play a role closer to that of an expert witness or policy expert, advising parliamentarians on the practical operation or technical aspects of policy within their area of judicial expertise. Judges may sometimes advise against a proposed policy, as when Judge Crichton indicated he was against legislation introducing the concept of shared parenting;⁵⁰ and sometimes in favour, as when Sir Nicholas Wall supported the perpetrator programmes introduced in the Children and Adoption Act 2006.⁵¹

Sometimes judges are very sharply critical. When Judge Mornington was asked whether she felt the Domestic Violence, Crime and Victims Act 2004 Act was a retrograde step by the Commons Home Affairs Committee, she did not hesitate forcibly to criticise the legislation, saying:

District Judge Mornington: We have received totally unsolicited reports from all over the country about serious concerns that the police are not treating breaches of injunctions in the serious way they deserve ... Before July 2007 a breach would be dealt with within hours by the civil judge; now it takes many weeks ... There is enormous concern which the President asked me to pass on to the Committee.

Another example of a judge criticising (prospective) legislation is Lady Justice Smith commenting on gaps in the Health and Social Care Bill, which implemented some of the recommendations from her Shipman Inquiry.⁵² In both these cases, the judges were appearing in dual roles: Judge Mornington as a member of the Family Justice Council, and Lady Justice Smith as the chair of a public inquiry. Judges in these contexts are more willing to provide direct commentary on the merits of legislation, drawing upon expertise gained outside of their judicial roles.

Hostile Questions, and Refusals to Answer

One concern felt by judges is that parliamentary committees will give them a rough ride. In practice the reverse is the case: committees are invariably courteous, and if anything too deferential. Only 1-2 per cent of questions in our sample sessions were hostile or critical of the judiciary, with senior judges more likely to face such questions than others. Critical answers by judges are more common

⁴⁹ This committee was the precursor to the Justice Committee. Commons Constitutional Affairs Committee, 22 March 2006.

⁵⁰ Commons Education Committee inquiry into Child Protection System in England, 22 May 2012 at Q760

⁵¹ Commons Justice Committee 22 January 2008.

⁵² See e.g. her answer to Q64 about the composition of Fitness to Practise Panels, on 22 January 2008.

than critical questions fired at them. On average three judicial answers per session (6 per cent) were critical of government funding or government policy, evenly spread across all subject areas, and with junior judges as likely to make critical comments as senior ones.

Another concern is that judges may be forced to answer questions which go too far and trespass on their independence. Again this fear has not been borne out in practice. Judges can decline to answer, and did so in response to between 1 and 2 per cent of questions. The similarity with the proportion of hostile questions is a coincidence. Judges refuse to answer when they fear that they are being invited to stray into the political arena. Such questions often invited the judge to give political opinions rather than strictly judicial expertise. A good example occurred in the Commons Home Affairs Committee inquiry into the US-UK Extradition Treaty, when Judge Riddle declined to say whether he wanted more discretion, or whether the Treaty should be repealed.⁵³

Senior judges as constitutional experts

Senior judges are more likely to appear in committee inquiries around the broader topics of constitutional reform, judicial appointments, separation of powers, and judicial independence. In these contexts, the judge is not being questioned as a front line service provider, but is representing the interests of the judiciary as a whole. Senior judges are viewed by parliamentary committees as constitutional experts, and committee members are more likely to seek their views on potential policy and legislation. In return, senior judges have the confidence and seniority to be more critical of government policy and government ministers. Here are two examples from the House of Lords Constitution Committee Inquiry into the Judicial Appointments Process:

The Chairman: Do you think the role of the Lord Chancellor now is the right one or is there scope for a different emphasis on his or her role in this organisation of the new appointments?

Lord Phillips of Worth Matravers: I do not think the role of the Lord Chancellor under the statute as it is now is satisfactory. He has a limited veto power. He can say, "Think again", but he puts his input in ... at a very late stage ...

Lord Judge: The Lord Chancellor is not what the Lord Chancellor was ... We could end up with ... a youngish man or woman who would regard the Lord Chancellor's office as simply a stepping stone to yet grander and more important political authority. I do not want a Lord Chancellor who wants to keep the Prime Minister happy.⁵⁴

Within their roles as constitutional experts, senior members of the judiciary are also more willing to disagree with the testimony and opinions offered by fellow judges.⁵⁵

⁵³ Commons Home Affairs Committee, 28 February 2012 at Q354 and Q369.

⁵⁴ Lords Constitution Committee, 19 October 2011.

⁵⁵ For example, Lord Phillips and Lord Judge expressed different views about the Strasbourg Court before the Joint Committee on Human Rights on 15 November 2011; and Lord Kerr disagreed with Etherton LJ about judges as law makers in evidence to the Lords Constitution Committee, 13 July 2011 Q50.

Conclusion: the Benefits of Dialogue for Parliament, and for the Judges

Judicial dialogue with parliament, through their evidence to parliamentary committees, benefits both sides. The benefits to Parliament are perhaps more obvious than those to judges. Parliament has a particular interest in how the laws which it has passed are working in practice; or in how proposed laws might work. In recent years Parliament has become more systematic in seeking expert evidence about both elements: through Public Bill Committees, which can hear outside evidence about the likely impact of bills; and through more systematic post enactment scrutiny.⁵⁶ Judges are ideal expert witnesses to talk about how criminal law, family law and other civil law is enforced by the courts, and the practical and other difficulties which arise. They are independent and impartial, articulate and well informed experts in their different fields, who can give committees the benefit of their front line experience. The deferential way in which they are treated by committees is partly respectful of their position, but partly reflects the quality of their evidence. Their evidence is frequently cited in the committees' reports: in the reports from our sample, twice as often as the evidence of non-judicial witnesses.⁵⁷

When inquiries focus on the judicial system or judicial process it is no surprise that judicial evidence is frequently cited. Sometimes judges have additional expertise: so in the report of the Home Affairs Committee on police complaints, Judge Francis Petre was cited twice as much as other witnesses, because he was chairman of the Police Complaints Authority. Judges also command respect because of their office as well as their expertise; although not always. To give an example going the other way, two judges comprised 10 per cent of the witnesses helping the Lords EU Select Committee inquiry into EC competition procedures, but their evidence featured in only 1 per cent of the citations.

Parliament is also able to use these encounters to call the judiciary to account. It does not do so quite as obviously or directly as with the executive branch or other public bodies who appear before parliamentary committees. But the judiciary, as well as constituting an independent branch of government, are also responsible for leading and providing a major public service. As public service providers they have a responsibility to provide a high quality service, with economy, efficiency and effectiveness, the mantra of new public management. This is reflected in the annual Business Plans produced by the Courts and Tribunals Service and the Judicial Office and cascaded down the system. The Lord Chief Justice recognises the need to give Parliament an account of how well the justice system operates, and in some evidence sessions judges (mainly senior ones) are doing just that.⁵⁸ We do not want to overstate this. In most sessions judges appear as expert witnesses. But we are in no doubt that in giving an account of how the justice system operates, they are also sometimes being called to account, even if neither side would characterise the dialogue in this way.

⁵⁶ 20 judicial evidence sessions in the last 35 years have been about bills or draft bills. Post legislative scrutiny is a more recent development in Parliament, inspired by the Lords Constitution Committee report in 2004. Recent examples to which the judges have given evidence include the post-legislative scrutiny committees on adoption legislation, the Mental Capacity Act 2005 and the Inquiries Act 2005.

⁵⁷ 8.5 per cent of the witnesses were judicial, while 15.1 per cent of the citations are of judicial witnesses.

⁵⁸ In his Foreword to the Judicial Office Business Plan for 2014-15 the LCJ talks of 'delivering a justice system which serves the public'.

We see two key benefits for judges in this kind of dialogue with Parliament. The first is relatively intangible but nonetheless important. By making themselves voluntarily accountable to Parliament for their stewardship of the justice system, judges sustain and enhance a relationship of trust between themselves, as the 'weakest branch' of government, and Parliament. This is valuable to judges as a means of reducing institutional friction. Where necessary, committees offer judges a platform for directly addressing parliamentary criticisms of judges or their work. The second key benefit of engagement with parliamentary committees is more practical. It allows judges the opportunity to influence legislative policy making at a formative stage. When engaging with pre-legislative scrutiny, or appearing before public bill committees, judges can argue against provisions which will not work, or are unnecessary, or will cause difficulties for the courts in other ways. When engaging with committee inquiries they can point to ways in which the law is not working as it should, in the hope that it might in future be amended. They can also make the case for more resources, for courts and tribunals, or for the agencies (such as CAF/CASS, or interpreters) which work in support of the courts. They may already have made such arguments in private to the government. Giving evidence to Parliament offers judges an additional and more public forum for making these kinds of arguments.

For the judiciary there is little risk in submitting evidence to Parliament. The process, as we have emphasised, is voluntary. Judges choose the extent to which they will contribute and the ways in which they will offer accountability. We have found no evidence that their engagement has compromised their judicial independence, in the sense defined at the beginning of this article, of decisional independence: the judiciary have not put at risk the freedom of individual judges to decide cases according to the law, and free from improper pressure. By engaging in dialogue with Parliament the judiciary in the UK implicitly accept this tight definition, that the core of judicial independence is decisional independence. They reject the view that we detected (with varying degrees of strength) in Australia, Canada, South Africa and Ireland, that simply by talking to Parliament they are compromising their independence.

By publishing their own guidelines on judicial evidence to parliamentary committees the judiciary have set the terms of trade. They are almost never asked to interpret provisions which they might subsequently have to adjudicate; and no judge has subsequently been recused because of evidence given to a parliamentary committee.⁵⁹ The main cost to the judges is the opportunity cost of time devoted to preparation and the hearing that would otherwise be devoted to judicial work. Judges can decline to appear, and occasionally do so; or they can agree to appear on certain terms, indicating in advance questioning which they are not prepared to answer. There have been occasional tensions in these negotiations, illustrated in some of our examples. But if at the hearing judges are asked questions which they do not wish to answer, they can simply decline to do so. So although formally the questioning is in the hands of the committee, in practice the judges remain in control, through negotiation before the session and their conduct at the session.

The final safeguard for the judges is that parliamentary evidence sessions are held in public, filmed for the Parliament TV channel, and appear on the public record. When judges talk to the executive about the pressures on the justice system, or proposed legislation, there may be suspicion that they

⁵⁹ Unlike the law lords: Lord Hoffmann and Lord Scott both had to recuse themselves from the litigation on the Hunting Act because of their previous interventions in Parliament.

have compromised their independence simply because such talks are held in secret and no one outside knows what was said. When judges talk to Parliament there can be no such concern. If they succumbed to improper pressure it would be there for everyone to see.

Westminster is sometimes perceived as an ancient and conservative Parliament. In many of its habits and traditions it is. But by inviting the judiciary to enter into dialogue about the law and the justice system it has shown itself to be something of a pioneer within the wider Westminster world. It is good for democracy that Westminster has been able to learn from judges, and occasionally to challenge them, and it is to the credit of the judiciary that they have been so willing to engage in dialogue with the legislature. It is a dialogue that has worked to the benefit of both sides.