LORD CHIEF JUSTICE
OF ENGLAND AND WALES

The Rt Hon The Lord Phillips of Worth Matravers

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I was called to the English Bar in 1962. This was against the advice of almost all whom I had consulted. Practice at the Bar had been in the doldrums since the end of the end of the Second World War, and I was told that I would have my work cut out to scrape a living. On the face of it this seemed sound advice. The High Court Bench numbered a total of 45 and there were 8 members of the Court of Appeal. Civil litigation in the High Court had been relatively sparse, although undefended divorces could provide a basic livelihood. Work at the criminal bar had been growing steadily, but the prison population was only about 30,000. Out of London justice was administered on a local basis. The vast majority of criminal cases were decided by benches of lay magistrates, who lived in the vicinity of their courts. The magistrates courts and staff were provided and funded on a local basis, that is by the boroughs. The more serious criminal cases were also tried locally – at Quarter Sessions or on Assize. These courts also were provided on a local basis, both by the boroughs and the counties, but the cost was subsidised by the Home Office and the Home Secretary exercised capital investment control.

The High Court judge, when out on circuit on Assize, would also try civil cases in these courts. The less important civil cases were tried by County Court judges. Sometimes these sat in custom built County Courts, but more often they sat in the Magistrates Court or some other public building owned by the local authority. The Ministry of Public Buildings and Works made a contribution to the running costs. The County Courts were, however, administered centrally by the Lord Chancellor and each court had its Registrar, responsible for its administration.

Between 1966 and 1969 a Royal Commission, chaired by Lord Beeching, considered the arrangements for administration of justice in England and Wales. This is what they found (Beeching Report, paragraph 109).

> "...in many places, particularly in some of the large towns, the court buildings are a disgrace to the bodies which own and maintain them. Accused persons, witnesses, jurors, police officers, and even solicitors

> and counsel conferring with clients, all jostle together in embarrassing proximity in halls and corridors which, far from providing any elements of comfort, may well be stacked with paraphernalia associated with other uses of the building, such as dismantled staging, parts of a boxing ring, or the music stands for a brass band contest.
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> We have seen courts with no waiting rooms, no consulting rooms, no refreshment facilities and with toilet facilities which were disgustingly insanitary.
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> Beneath the courts, some of the accommodation for remanded prisoners is so cramped and primitive that prison officers avoid using the worst of it if they can. Behind the scenes the judge's retiring room may not be much bigger than a cupboard and may, indeed, serve the charwoman in that capacity when its distinguished occupant is gone".

The administration of these courts was done by the staff of the local authorities.

The head of the judiciary was the Lord Chancellor. As such he presided over the Appellate Committee of the House of Lords. Because he had few administrative duties he was able to sit quite a lot. His department consisted of a Permanent Secretary and a small handful of lawyers. Their most important task was assisting the Lord Chancellor in the task of making recommendations for judicial appointments – recommendations that were followed as a matter of course. This was by far the most significant function of the Lord Chancellor, so far as the administration of justice was concerned.

He was, however, concerned with much more than the administration of justice. He was the antithesis of the separation of powers. Not merely did he sit as a judge, he presided over the legislative business of the House of Lords, often promoting bills concerned with the administration of justice and, as a member of the executive, he was the most important member of the cabinet after the Prime Minister.

The role of the Lord Chancellor's Department changed out of all recognition as a result of the Beeching Report. Beeching recommended (paragraph 309) that the Lord Chancellor should in future accept responsibility for the running of all the courts above the level of the Magistrates Courts and, with a view to achieving this, setting up a unified court service and appointing and paying its members. This recommendation was implemented by the Courts Act 1971, which set up a unified administrative court service. This saw the start of the exponential growth of the Lord Chancellor's department.

There was another factor that was making his role more significant – the introduction of legal aid in both criminal and civil proceedings. This produced, as was no doubt intended, a huge surge in the demand for legal services. This happened just as I was starting at the bar and throughout my legal career I have had the good fortune to find myself providing a service in an area where demand tended to exceed supply. By 2007 the staff over whom the Lord Chancellor's presided had grown to 37,000.

Although the Beeching Committee included a senior judge, there was no hint in its report that the unification of court administration under a single Minister had any implications for the independence of the judiciary.

This was recognised for the first time in a famous lecture given by the Vice-Chancellor, Sir Nicholas Browne-Wilkinson in the Old Hall, Lincoln's Inn, on 17 November 1987, entitled 'the Independence of the Judiciary in the 1980s'. I well remember the sensation that this made. Sir Nicholas' theme was that the control of the finance and administration of the legal system was capable of preventing the performance of those very functions which the independence of the judiciary was intended to preserve, that is to say the right of the individual to a speedy and fair trial of his claim by an independent judge.

"If Parliament and the Minister between them control the provision and allocation of funds, how can the administration of justice be independent of the legislature and the executive?" he asked. "He who pays the piper calls the tune".

Sir Nicholas observed that while Britain had been a rich country with a stable society there had been no conflict between the judicial and ministerial functions of the Lord Chancellor. He had been able to convey the needs of the judges to the government and see that provision was made for those needs. But things had changed. The cost of dealing with the upsurge in crime and the growth of civil litigation had had the result that it was no longer possible for the judges to obtain all the resources that they needed. The increase in the cost of legal aid had led to pressure to reduce the cost to the state of providing the courts and judges.

Sir Nicholas referred to the effect of the implementation of the Beeching Report and to the difficulty of determining where administration ends and a judicial function begins. He observed that the number and quality of the staff in court offices had a direct impact on the conduct of cases as did the policy as to the maintenance of staff in positions where they had, by experience, acquired specialist skills. These observations are of particular significance in relation to listing officers.
He commented:

> "The court administrators are answerable to their superiors in the civil service, not the judges. If, as is bound to be the case, differences of view emerge between the judges and the administrators, there is no machinery for resolving such disputes short of the Lord Chancellor himself."

What concerned Sir Nicholas most was a change in attitude on the part of the Treasury. The Treasury was no longer content simply to allocate public funds between Departments. It was now overseeing how these funds were spent to ensure that they gave 'value for money'. This was not acceptable so far as the Lord Chancellor's Department was concerned. Justice was not capable of being measured out by 'an accountant's computer'. The assessment of the need of the facility for which funding was required was not for the minister

but for the judge. The Department was being required to formulate policy and make determinations as to 'value for money' without, for the most part, even consulting the judges.

Sir Nicholas accepted that the total legal budget had to be determined politically and controlled by Parliament. He considered, however, that judges had to be involved both in preparing estimates and in the allocation of the overall budget once received.

To this end he considered that a collegiate body of judges should be created to perform these functions on behalf of the judiciary. Decisions would be taken by the Lord Chancellor in consultation with this body. Sir Nicholas stopped short of suggesting that the judges should become directly responsible for the administration of the courts. He did not advocate that judges should be responsible for employing the staff and paying for the construction and maintenance of court buildings out of a budget provided by Parliament. He called for research to find the appropriate answer to the problem.

Sir Nicholas' speech was given in the year that I was made a judge. In those days those who were appointed to the Bench received no formal judicial training and certainly no instruction in relation to the administrative machinery for the operation of the courts. I was appointed to the Commercial Court, which sits in London, and was to an extent sheltered from contact with the administration of the court system outside London.

Occasionally I was sent out of London on circuit to try crime, where I did not have the impression that much could have changed since the war. High Court judges were accommodated in lodgings with a large staff, including a cook and butler.

Wives could accompany their husbands, but were not expected to be seen at breakfast. The wife of the senior colleague with whom I first went on circuit would, however, be standing by the front door to bow to her husband as he left for court. You were driven to court in a large limousine, flying the Union flag, wearing your scarlet gown and your wig, preceded by a police outrider. This was supposed to impress the local populace with the dignity of the law.

At court you would be shown to your room, and escorted from there into court. At the end of the court day you were driven back to lodgings, there to host elegant dinner parties for the local dignitaries. Should you be dining on your own, you were still expected to do so in a dinner jacket. No one thought to explain who were responsible for the various aspects of the administration of the court, let alone to introduce you to them. Nor, I am ashamed to say, was I particularly concerned with these matters.

In 1995 I was promoted to the Court of Appeal. In that year a separate Court Service was created, which was responsible for all courts except the Magistrates Courts, which were administered by a separate Magistrates Court Service.

In the Court of Appeal one was even more remote from these matters, a remoteness that became total when, in 1996 I was asked to chair a public inquiry into the government's handling of the outbreak of BSE, an inquiry that lasted the best part of three years. Towards the end of this inquiry I was appointed a Lord of Appeal in Ordinary, but sat only once with the Law Lords.

This was when they were scraping the barrel to make up a quorum for the re-hearing of the *Pinochet* appeal – before, in 2000, I returned to the Court of Appeal as the Master of the Rolls. While I had been away quite a lot had happened. The Labour Government had introduced the Human Rights Act 1998, which came into force just about at the time of my appointment. This requires the courts, if they can, to interpret legislation in a way that is compatible with the European Convention on Human Rights and, if they cannot, permits them to declare it incompatible.

More significantly, it shifts the balance of power significantly from the executive to the judiciary, in that courts now have to apply a test of proportionality to executive action that interferes with human rights, rather than the old *Wednesbury* test. In these circumstances it is more important than ever that the administrative structure of the justice system is one that safeguards judicial independence.

Another change that occurred while I was preoccupied with BSE was the wholesale reform of the rules of civil procedure by Lord Woolf. Finally, Parliament had withdrawn legal aid in the field of personal injury and put in its place a modified system of contingency fees.

This had led to serious satellite litigation about costs that was clogging the civil justice system. It was in attempting to deal with this that I first came into close contact with officials of the Lord Chancellor's Department. At the same time, as a Head of Division, I found myself closely involved in advising the Lord Chancellor on appointments to the High Court Bench. Throughout my time in the law I have only known of one occasion when a judicial appointment, or more accurately the failure to make a judicial appointment, may have owed something to political considerations. Apart from this, appointments were always made on merit after the most rigorous consultation exercise.

Once I had got the weight of my new office I thought that it would be a good idea to for the most senior judiciary to have a long week-end with the senior civil servants in the Lord Chancellor's Department to consider how best we should be working in partnership in the interests of the efficient administration of justice.

Lord Woolf, the Lord Chief Justice agreed and one week-end in June we booked in to a delightful old pub called 'the Swan' in the village of Minster Lovell on the edge of the Cotswolds.

There, on Saturday morning, the news broke that the Government had decided to make some radical constitutional changes. The office of the Lord Chancellor was to be abolished, and the Lord Chancellor's Department had

ceased to exist. In its place was created a new Ministry, the Department of Constitutional Affairs. Lord Irvine, who had served as Lord Chancellor since Labour had come into power, had lost his job. Lord Falconer had been appointed to act as a 'night watchman' Lord Chancellor for the short period that was expected to elapse before the office could be abolished. He was also, and would remain, the Secretary of State for Constitutional Affairs. There was to be a new Judicial Appointments Commission to select the judiciary. The Appellate Committee of the House of Lords was to be abolished, to be replaced by a new Supreme Court.

This news came as a shock to those at Minster Lovell. Sir Hayden Phillips, the Lord Chancellor's Permanent Secretary, may have had an inkling of what was in the wind, for there was nothing that he did not know, but the rest of the civil servants had no idea that both their Department and its head were about to be abolished. Certainly the judges were unaware of this. Not even Lord Woolf had been consulted about the proposed change. Indeed the Queen was not forewarned of the imminent demise of the official who had, for something over a millennium, been the sovereign's most senior Officer of State.

Lord Woolf was quickly on the phone to Lord Falconer. The latter explained that although, so long as he remained Lord Chancellor, he had the right to preside in the Appellate Committee of the House of Lords, he did not intend to do so.

Lord Woolf had been close to retiring, but in the light of these developments he decided to postpone doing so in order to continue to lead the judiciary in the negotiations that would necessarily have to follow these constitutional changes. It would, of course, have been very much better if these had preceded the announcement of the changes.

The Lords Constitutional Affairs Committee was subsequently to criticise the Government for announcing the claim "without any apparent understanding of the legal status of the Lord Chancellor and without consultation with the judiciary (or anyone outside government)" in its Report on Relations between the executive, the judiciary and Parliament, (HL Paper 151 at paragraph 12).

In the event it proved impossible to abolish the Lord Chancellor. He had a huge portfolio of statutory functions and primary legislation would be needed to relieve him of these. The proposal met with opposition in the House of Lords and was eventually dropped. Indeed Lord Falconer himself was subsequently to accept that the abolition of the office of Lord Chancellor had not been a good idea and Tony Blair admitted that the constitutional changes had not been well handled. The Government was, however, determined that its plans for the transparent separation of powers should go ahead and negotiations proceeded between Lord Falconer and Lord Woolf in relation to the division of functions between their respective offices and to the best means of protecting judicial independence in the absence of the support that had been provided by the Lord Chancellor as head of the judiciary. Lord Irvine was subsequently to state that he had had to argue in cabinet in support of judicial independence on 'many, many occasions'.

Lord Woolf was assisted by a judicial working party headed by Lady Justice Arden. The fruits of their labours, and those of their opposite numbers in the Department, was a document published in January 2004 headed 'Constitutional Reform - The Lord Chancellor's judiciary-related functions: Proposals'. It has, however, always been known as 'the Concordat'.

Although it has no formal status, it has been recognised as a document of constitutional significance. Much of it was subsequently embodied in the Constitutional Reform Act 2005, but not all of it. In so far as it has not been subsequently enacted, the Concordat is recognised as embodying binding agreement between the Secretary of State and the Lord Chief Justice. It set out to deal with all aspects of the transfer of the role of head of the judiciary of England and Wales from the Lord Chancellor to the Lord Chief Justice. The Concordat included the following important provisions of principle:

> "26. The Secretary of State, in consultation with the Lord Chief Justice, will be responsible for the efficient and effective administration of the court system. This includes setting the framework for the organisation of the courts system (such as geographical and functional jurisdictional boundaries).
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> 27. The Lord Chief Justice will be responsible for the posting and roles of individual judge, within the framework set by the Secretary of State.
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> 28. 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 or, for those where responsibility must be equally shared, by concurrence."

The Concordat made some express provisions in relation to resources that were not embodied in the Constitutional Reform Act. These included:

> "24...at least two separate bilateral discussions during the year between the Chief Executive of the new [Unified Courts Agency] and representatives of the Judges' Council will be held, concentrating on providing the opportunity for judicial input into future resource planning of the agency.
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> 25. In spending Review years the Director General, Finance and the Permanent Secretary will meet the Lord Chief Justice or his representative when the Departmental bid and the Public Service Agreement is being worked up and then again before the final Departmental allocations are made after the settlement.
> Such meetings will be held at a similar stage in non-Spending Review years, focussing on the delivery arm of the Department.

The reference to a Unified Courts Agency was to the proposal to combine in a single body the Court Service and the Magistrates Court Service. Effect was given to this by the creation, pursuant to the Courts Act 2003, of Her Majesty's Court Service as an executive agency. The new agency commenced

operating in April 2005 under the direction of Sir Ron de Witt as its chief executive.

The Concordat provided that arrangements would be put in place to ensure that the judiciary could be effectively involved in the resource planning of this new agency. In particular it provided that a senior member of the judiciary should be a non-executive member of the Board of the new agency. It further provided that a senior member of the judiciary should be a non-executive member of the Corporate Board of the Department for Constitutional Affairs.

Most of the Concordat was embodied in the Constitutional Reform Act 2005. This came into force in April 2006. I became Lord Chief Justice in October 2005, so I had six months to prepare for the new regime. During this period Lord Falconer continued to act very much in the style of an old fashioned Lord Chancellor.

Under the Constitutional Reform Act I was to have the following responsibilities as head of the judiciary of England and Wales:

(a) representing the views of the judiciary of England and Wales to Parliament, to the Lord Chancellor and to Ministers of the Crown generally.

(b) the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor;

(c) the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales and the allocation of work within the courts.

I was to have quite demanding duties in relation to both judicial appointments and judicial discipline. I was also to have transferred to me about 400 other statutory functions. Examples that I usually cite to give some idea of the variety of these are making arrangements for the use of the Welsh language in the courts of Wales and making arrangements for the valuation of British ships.

It was plain that I would have to share these functions among my senior colleagues by appropriate delegation if I was to continue to have time to sit as a judge, which I was determined to do.

I formed a Judicial Executive Board of the Heads of Division and one or two other senior judges, together with the Director of the Judicial Office of England and Wales, the head of a mini civil service of about 60 that we built up to help with the performance of my administrative functions. Included in these was a novelty for our judiciary, a Communications Office to handle communications within the judiciary and with the media.

The core function of the Judicial Executive Board was and is to enable me to make policy and general executive decisions. More particularly its objectives

include developing policy and practice on judicial deployment, appointments to non-judicial roles and general appointments policy, putting forward the requirements for new appointments of High Court and Appeal Court judges, holding discussions about 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 obtaining the agreement of the Permanent Secretary of the Department to the resources for that Office, and, most importantly, to enable me to play a full part in the negotiations in relation to the resources needed for the administration of justice.

A key member of the Judicial Executive Board is the Senior Presiding Judge. We decided that if I was to continue to sit judicially I would need a First Lieutenant who would largely suspend the performance of his duties as a judge in order to concentrate on assisting me with my administrative responsibilities. The person selected for this was the Senior Presiding Judge, a member of the Court of Appeal who already had responsibility for overseeing the smooth running of the judiciary's involvement in the administration of justice on the circuits. I have been fortunate in having to perform this exacting role first Lord Justice Thomas and subsequently Lord Justice Leveson.

In an attempt to prepare for these new administrative responsibilities, which fell outside the experience of most of us, the members of the Judicial Executive Board enrolled at the appropriately named Judge Institute of Management in Cambridge for a short course in management and leadership. Subsequently the Institute allocated to each of us an individual tutor who shadowed us and gave us advice on our managerial tasks. I personally found this of great value.

The Constitutional Reform Act sets out to enshrine the rule of law and the independence of the judiciary. Its first section provides that the Act does not adversely affect 'the existing constitutional principle of the rule of law' or the Lord Chancellor's existing constitutional role in relation to that principle. Section 3 requires the Lord Chancellor and all ministers concerned with the administration of justice to uphold the continued independence of the judiciary.

The Lord Chancellor is also expressly required to have regard to "the need for the judiciary to have the support necessary to enable them to exercise their functions". Section 17 of the Act requires the Lord Chancellor to take the following oath:

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

The most obvious changes made by the Concordat and the Constitutional Reform Act were the transfer from the Lord Chancellor of responsibility for judicial appointments and judicial discipline.

However, as we have seen, they made provision for the representation of the judiciary in a non-executive capacity in the governance of both the Court Service and the Department itself. While the Lord Chancellor was Head of the Judiciary it was appropriate for the Court Service to owe duties to him both in that capacity and as the Minister to whom it owed responsibility as an executive agency. Once the Lord Chief Justice became Head of the Judiciary, however, it seemed to us that the Court Service should also owe a duty to him.

Its primary function was to provide the judiciary with the infrastructure needed for the efficient and effective administration of justice. We expected to be fully involved, not merely in the fixing of the Court Service's budget for, but in the planning of how the Court Service was to perform its duties.

We envisaged a true partnership between the judiciary and the court service in administering justice in England and Wales.

When the Constitutional Reform Act took effect in April 2006, the transfer of functions from the Lord Chancellor took effect seamlessly, as had been planned. Subject to transitional arrangements, the new Judicial Appointments Commission took over responsibility for judicial appointments and a new Office for Judicial Complaints took over responsibility for processing complaints against judges. Our new Judicial Office took up its duties smoothly. All seemed well. But it was not.

The anticipated partnership between the judges and the Court Service did not develop as it should have done. Officials in the Department did not recognise the need for the judiciary to be involved in a meaningful way in forward planning. Allied to this was a failure on their part to give the new Court Service the freedom from day to day interference that it needed.

This was necessary if it was to be able to work with the judges as we had anticipated. The discussions with representatives of the Judges' Council in relation to the allocation of money to the Service were never more than introductory and all were poorly timed. The meeting I eventually had with the Director General of Finance and the Permanent Secretary was inapposite. Budgetary allocations had already been made and the department could do no more than inform me of its decisions.

There was a gross overspend on criminal legal aid. The Department imposed spending cuts on the Court Service to meet this. All of this was done without consultation with the judiciary. The scenario that Sir Nicholas Browne-Wilkinson had envisaged had come to pass.

Lord Justice Leveson, who was our representative on the Corporate Board of the Department, found that he was given no opportunity to make an input into the taking of decisions. These were not taken at Board meetings, but merely reported to them. He was denied information on proposed court closures and

estate planning or, when he was given such information, told that he could not share this with his colleagues. It was business as before.

The Department was proceeding as if the Constitutional Reform Act had made no change in responsibilities for and duties owed in respect of the running of the court system. We were being sidelined.

Then an event occurred that brought matters to a head. On 21 January 2007 I read an article in the Sunday Telegraph that said that responsibility for prisons and for offender management was to be transferred from the Home Office to the Department for Constitutional Affairs.
This would transform the latter into a Ministry of Justice. I at once discussed this with Lord Falconer, and it was apparent that he had known no more about the proposal than I had. The article proved, however, to be well-founded. It was being planned to move responsibility for prisons, offender management and criminal justice policy from the Home Office to the Lord Chancellor, at the head of a new Ministry of Justice. My understanding of the position, as I was later to state, was that the motive for the change was not the positive one that it would be beneficial to the administration of justice and offender management, but that the Home Secretary, John Reid, wanted to clear the decks at the Home Office so that he could concentrate on combating the terrorist threat. If this appraisal was correct, and I have no reason to think that it was not, it is somewhat ironic that John Reed subsequently decided to resign.

Lord Falconer welcomed the proposals with enthusiasm – an enthusiasm that I found a little surprising as it seemed to me that the enlarged Ministry would be likely to be led by a Minister in the Commons rather than the Lords. The judiciary did not share his enthusiasm. We had a number of concerns. The first related to funding. We had already seen the adverse impact on funding for the courts of the demands of criminal legal aid, that had to be met from the same pocket.

We were apprehensivee that that pocket would not be deep enough to meet also the insatiable demands of the prison estate. This carried the possible risk that the sentencing judge might be looking over his shoulder at the impact that the length of the sentence he imposed would have on the funding available for the courts. Secondly we were concerned that responsibility for the prisons and offender management might dilute the enthusiasm of the Lord Chancellor for his traditional role of protecting the independence of the judiciary and the rule of law. Certainly it would reduce the time and energy that he could devote to this. Finally it seemed to us that the enlarged responsibilities of the Ministry would render it more likely that a Lord Chancellor would be appointed who had no personal knowledge of how the courts worked and who lacked a personal understanding and passion for the rule of law.

Finally we were concerned that the Lord Chancellor's new responsibilities would expose him to frequent public law litigation that would make it more difficult for him to have meetings with the Lord Chief Justice.

We made it plain that we considered that the proposed changes had constitutional implications that needed to be addressed before they took effect.
Provided that proper safeguards were put in place there was no objection in principle to the changes. Lord Falconer did not accept our stance.

He contended that what was proposed was simply a change to the machinery of government that could properly be made without consultation. He accepted none the less that we had legitimate concerns and agreed to the setting up of a joint working party to resolve these. He insisted, however, that there were a number of non-negotiable parameters within which the discussions would take place. These were:

- There would be no change to legislation.
- There would be no change to the concordat.
- There would be no change to the status of the Court Service as an executive agency.
- There would be no ring-fencing of HMCS budgets.
- It would be for the Lord Chancellor to decide, subject to statutory obligations, on budgetary issues.
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I had reservations as to whether it would be possible to meet our concerns within these parameters, but agreed that we should try to do so.

Intense negotiations then took place. These ran into difficulties. The areas of disagreement related to the control that Lord Falconer felt that he was obliged to maintain over the Court Service, as an executive agency, and of the funding provided to it. This conflicted with any form of ring-fencing of the provision of funds to the Court Service. It also conflicted with our desire to have expressly recognised a direct duty owed by the Court Service to the Lord Chief Justice as head of the judiciary.

Without resolution of our reservations the new Ministry of Justice was brought into existence on 9 May 2007. The Lord Chancellor and Minister for Justice found himself at the head of a Ministry whose staff had increased from about 37,000 to 88, 483. Thereafter negotiations with Lord Falconer appeared to have reached an *impasse* and we called for a fundamental review of the position.

The stance of the judiciary came under consideration by two Parliamentary Committees before which I gave evidence. Each was critical of the Government. The House of Commons Constitutional Affairs Committee Report on the Creation of the Ministry of Justice of 17 July 2007 commented:

> "15...Significant changes to the Lord Chancellor's responsibilities as Secretary of State took place as a consequence of the creation of the MoJ. They are of constitutional importance as they may affect, in practice or perception, the exercise of the Lord Chancellor's core statutory function of guardian of judicial independence, both in organisational and budgetary terms.

> They can have potential to upset the carefully balanced arrangements agreed between the judiciary and the Lord Chancellor in the *Concordat* of 2004 which was given statutory footing in the Constitutional Reform Act 2005. Such changes go far beyond mere technical Machinery of Government change and as such should have been subject to proper consultation and informed debate both inside and outside Parliament".

The Report of the House of Lords Select Committee on the Constitution, to which I have already referred, agreed that the advent of the Ministry of Justice had 'significant constitutional implications'. It commented:

> "67. We are disappointed that the Government seem to have learnt little or nothing from the debacle surrounding the constitutional reforms initiated in 2003. The creation of the Ministry of Justice clearly has important implications for the judiciary.
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> The new dispensation created by the Constitutional Reform Act and the Concordat requires the Government to treat the judiciary as partners, not merely as subjects of change. By omitting to consult the judiciary at a sufficiently early stage, by drawing the parameters of negotiation too tightly and by proceeding with the creation of the new Ministry before important aspects had been resolved, the Government failed to do this.
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> Furthermore, the subsequent request made by the judiciary for a fundamental review of the position in the light of the creation of the Ministry of Justice was in our view a reasonable one to which the Government should have acceded in a spirit of partnership."

Later the Committee added

> "87. ..the status of Her Majesty's Court Service is of central importance to the administration of justice, and we urge the Government to engage meaningfully with the judiciary on this issue in order to find a mutually acceptable way forward."

At about the time that this was written Gordon Brown took over from Tony Blair as Prime Minister and immediately formed a new ministerial team. Lord Falconer was replaced by Jack Straw, the first Lord Chancellor to be appointed from the House of Commons. He had a lot on his plate, not least an urgent problem created by a lack of prison capacity and, quite reasonably, asked for a little time to consider his and our relationship with the Court Service. Negotiations proceeded, however, and when, in November of last year, Suma Chakrabarti was appointed as Permanent Secretary, they acquired added momentum. I would like to say how satisfactory my relations have been with both Jack Straw and with Suma.

On 23 January Jack Straw and I announced agreement on a new partnership in respect of the operation of HMCS. At the beginning of April Jack Straw laid before Parliament the Framework Document of Her Majesty's Court Service that puts flesh on the bones of our agreement. This is a document of considerable constitutional significance.

Demand for greater involvement by judges in the creation and administration of the court system has become a world wide phenomenon. We considered the various models for this, which have been helpfully set out in a Report published in September 2006 by the Canadian Judicial Council.

We had no enthusiasm for taking over control and responsibility for the court system, a model that requires a significant number of judges to give up sitting for administrative duties. Instead we sought a partnership model that would leave the Court Service with day to day autonomy and but none the less ensure that the judiciary was properly involved in the decisions that were taken that affected our ability to administer justice efficiently and effectively. We believe that we have achieved this.

The Lord Chancellor and I have placed the leadership and broad direction of the Court Service in the hands of a Board. We have agreed that we will not intervene, whether directly or indirectly, in the day to day decision making of the Court Service. We will be consulted, however, in relation to any operational matter that is capable of giving rise to substantial public, parliamentary, judicial or ministerial concern. The Board has an independent non-executive Chair. Sir Duncan Nicol, the former Chairman of the Parole Board has been appointed to this post. Three judges, including the Senior Presiding Judge, serve on this Board and keep it informed of the views of the Lord Chief Justice and the judiciary. The Board includes a representative of the Ministry of Justice, who will keep the Board informed of the views of the Lord Chancellor and the Department. The Chief Executive, the Chief Financial Officer and two other executive directors serve on the Board.
Finally, there are two non-executive members to provide an independent perspective and expertise.

The Chief Executive is ultimately accountable to the Lord Chancellor and owes a duty both to him and to the Lord Chief Justice for the effective and efficient operation of the courts. Indeed, the Framework Document provides:

> "7.1 All staff of HMCS owe a joint duty to the Lord Chancellor and to the Lord Chief Justice for the efficient and the effective operation of the courts."

There are detailed and important provisions in relation to finance and resource allocation. Under this the judiciary are fully involved in three stages. The first is in making a bid by HMCS for its share of the total which will be submitted to the Treasury by the Department as its claim for its public expenditure allocation. The second is the allocation of resources by the Department to the Court Service once it knows the amount of the departmental settlement. The final stage is the development of the Court Service's budget and spending plans. Importantly the Framework Document provides that no change may be made of the allocations to the Court Service or its budgets or plans other than in accordance with that Document.
These provisions give the judiciary all that I believe that they can reasonably expect. There is, however, a *quid pro quo.* A section of the Framework

Document deals with what are described as 'Performance Standards', which is another way of describing 'targets'.

This provides that the Board may develop performance standards for HMCS which may include 'end-to-end standards such as the time taken from when proceedings are commenced to when they finish. The achievement of such standards places obligations on both administrators and judges and we are agreeing to undertake these obligations "save in any case where it is inconsistent with the interests of justice to do so".

This leads me to the final matter on which I wish to comment, and that is accountability. So far as judicial decisions that we reach are concerned, we can only be accountable by the appellate system. So far as our general behaviour is concerned, we now have an established system that enables complaints against judges to be made and investigated. But in so far as we have claimed a say in the administration of the court system in the interests of the efficient administration of justice, I believe that it is reasonable for us to be prepared to account for the manner in which we perform our share of the partnership. I do not believe that this conflicts with the independence of the judiciary and I do believe that this is necessary if judges are not to invite media attacks that bring them into disrepute.

In our jurisdiction judges are prepared to accede to requests to appear before Parliamentary Committees. 20 such requests have been made in the last 18 months or so. That is rather a lot and I am anxious that such requests should not become commonplace. Judges should not be asked to answer questions that are not appropriate. I have instigated a practice of making a Report to the Queen and Parliament. The first such Report was laid before Parliament this April and I held a press conference in order to answer any questions arising out of it. I also intimated that I was prepared to give evidence in relation to it before appropriate Parliamentary Committees if requested to do so, and I have since received a request from each committee. I believe that by making these arrangements I have taken reasonable steps to account for my role as the head of the judiciary.
