Accountability in the Contemporary Constitution

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Parliamentary Accountability and the Judicial System

*Andrew Le Sueur**

A. Introduction

Tensions between political and legal accountability are a backdrop to many debates about the character and future direction of the British constitution.[1] This essay explores a juncture of these two modes of accountability by examining how the UK Parliament exercises accountability in relation to the judicial system of England and Wales.

Part A defines 'the judicial system' and what may be meant by parliamentary accountability and judicial independence in this context. Part B takes an institutional and procedural approach to examining the opportunities Parliament has for engaging in accountability activities in relation to the judicial system, focusing in particular on the evolving role of Select Committees. Part C uses an inductive approach to map current accountability practices in Parliament in relation to particular aspects of the judicial system by drawing on examples from the parliamentary record to develop an explanation of what is and ought to be the reach of MPs' and peers' accountability functions relating to judges and courts.

1. The judicial system

The term 'judicial system' is used in this study to define an area of state activity that is narrower than the whole legal system (so, for example, legal aid and the legal professions are left out) but broader than 'the judiciary' or 'the judicial power of the state'. Deciding cases and, for the higher courts, judgment writing to create precedents are the core activities of the judicial system. Closely connected to these are the practices and procedures of courts. Around this core is a penumbra

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[1] An overview of the debates can be found in A Le Sueur, M Sunkin and J Murkens *Public Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2013), ch 2.

of other activities and features that support and facilitate the judicial role. This includes the foundational texts (legislation and 'soft law') creating new courts and shaping the governance of the judiciary; decision-making about judicial careers (appointments, terms and conditions of service, salaries and pensions, discipline and dismissals); deployment; training; and the management of the physical estate and infrastructures of the courts and tribunals.

Viewed as a set of institutions and decision-making processes, the judicial system comprises judges, ministers (in particular the Lord Chancellor/Secretary of State for Justice), officials, and holders of public office (such as the commissioners of the Judicial Appointments Commission for England and Wales)—all of them potential targets of accountability according to their responsibilities.

2. Parliamentary accountability

Parliamentary accountability centres on formal questioning, comment, and critical evaluation of past decisions or changes to existing or proposed practices or policy by MPs and peers, as reported in *Hansard* and other parliamentary publications. The occasional criticism of judges by ministers and other parliamentarians in interviews, conference speeches,[2] and extra-parliamentary writing[3] are important in setting the tone of relations with the judiciary but they fall outside the scope of this essay, as they are not part of the formal parliamentary record.

The constitutional imperative for *some* kind of accountability in relation to *some* aspects of the judicial system cannot now be seriously doubted.[4] As a relevant principle, parliamentarians have accepted it,[5] as have the judiciary of England and Wales,[6] and ministers.[7] This reflects the general importance now attached to clear lines of accountability across all public services; the legitimacy of most kinds of public power now depends on satisfactory accountability mechanisms. The challenge that remains is to define more closely the circumstances in which

[2] See eg. Home Secretary Theresa May's remarks at the 2011 Conservative Party conference disparaging a tribunal judge whom, she claimed, had ruled that an illegal immigrant could not be removed from the UK because of a pet cat: Adam Wagner, 'Cat had nothing to do with failure to deport man' (*UK Human Rights Blog*, 4 October 2011) <http://ukhumanrightsblog.com/2011/10/04/cat-had-nothing-to-do-with-failure-to-deport-man/> accessed 10 March 2012.

[3] For example, in 2012 steps were taken by the Northern Ireland Attorney General to prosecute Peter Hain MP (a former Secretary of State for Northern Ireland) for the ancient form of contempt known as 'scandalizing a judge' over remarks he made about a judicial review judgment of Lord Justice Girvan in his memoirs *Outside In* (London: Biteback 2012). The charges were dropped in May 2012 after Hain wrote to the Attorney General to explain and clarify his remarks.

[4] See Andrew Le Sueur, 'Developing mechanisms for judicial accountability in the UK' 24 *LS* (2004) 73.

[5] See eg. House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament* (HL 2006-7, 151), para. 121; House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament: Follow-up Report* (HL 2007-8, 177).

[6] 'The Accountability of the Judiciary' (2007) <http://www.judiciary.gov.uk> (accessed 22 April 2013). The essay focuses on England and Wales and addresses issues relating to the UK Supreme Court only in passing.

[7] Department for Constitutional Affairs, *Constitutional Reform: a new way of appointing judges* (CP 10/03, 2003).

parliamentarians may legitimately operate in relation to the judicial system, which accountability tools are best for the job, and what aspects of the judicial system should remain off-limits, or subject only to light-touch accountability oversight, by reason of the need to respect the constitutional principles of independence of the judiciary and separation of powers. This essay is a contribution to that debate.

a. The orthodox approach

The conventional account of the limits of parliamentary accountability for the judicial system rests on two main ideas. The first is that the constitutional principle of judicial independence prohibits parliamentary scrutiny of the core aspect of the judicial system (deciding cases and setting precedents). In 2004 Chris Leslie MP, a junior minister, explained the point as follows :

> Judicial decisions are taken and explained in public (save where the circumstances of a case demand confidentiality) and any decision which a judge makes is liable to be scrutinised, and if necessary overturned, on appeal, which is also a public process. Judges are therefore fully accountable for their judicial decisions through the appeal system. Judges are not, however, accountable through a political process for the decisions they take, as this would not be consistent with judicial independence. The Lord Chancellor and Secretary of State therefore does not monitor appeals against decisions made by individual judges, and it is not his role to intervene in judicial decisions or consider complaints about judicial decisions.[8]

The constitutional principle of judicial independence is a multifaceted concept.[9] It relates to individual judges (who should not be placed under such personal pressure through inquiries or criticism by politicians as to influence or risk influencing their decision making) and to the judiciary as a whole (which as an institution of the state should enjoy a relatively high degree of autonomy vis-à-vis government and parliament). Orthodox thinking priorities judicial independence over accountability: the latter must yield to the former in day-to-day practices and in constitutional design. It will be argued later that the broad *cordon sanitaire* around the judicial system that is often called for in the name of orthodox approaches to judicial independence is out of step with actual developments in the UK Parliament. Parliamentarians believe they can, and they do, question aspects of the judicial system more than orthodox thinking suggests is proper.

The other main idea in the orthodox approach is the assumption that accountability practices associated with ministerial responsibility are adequate to scrutinize other aspects of the judicial system beyond the prohibited zone. In other words, ministers are and should be answerable through parliamentary questions, in debates, in Select Committee inquiries; and this delivers a satisfactory level of accountability. Before 2005, the Lord Chancellor was the member of government

[8] HC Deb 22 January 2004, vol 416, col 1448W (answering a question from Vera Baird QC MP).

[9] For a detailed statement of the particular norms contained under its umbrella, see *The Mount Scopus Approved Revised International Standards of Judicial Independence* (March 2008) <http://www.jwp.org> (accessed 30 July 2013).

responsible for judicial appointments, for allocation of resources to the courts, and so on—and he was answerable to Parliament for these matters. Whether in practice, ministerial responsibility was an effective form of accountability is open to question, not least because the Lord Chancellor's Department was the last of the major government departments to become shadowed by a House of Commons Select Committee.[10]

b. Recent innovations

This approach to accountability of the judicial system (that is, a prohibited zone plus ministerial accountability for the penumbra) is no longer satisfactory. First, remarkable changes to the scope of the 'judicial power of the state'[11] have taken place, through the development of common law powers of judicial review, the impact of the Human Rights Act 1998, and of European Union law. Judicial decision-making now impacts on government policy-making and parliamentary legislation in ways unthinkable two generations ago. It is unrealistic, against the background of these developments, to imagine that Parliament and parliamentarians will or should want to maintain a *cordon sanitaire* around judicial decision-making. Insofar as court decisions impact on the national interest and the lives of constituents, parliamentarians will want to debate and criticise them.

Second, since 2005 there have been equally remarkable changes to the governance arrangements for the judicial system. The radical reforms to the office of Lord Chancellor mean that traditional notions of ministerial responsibility are no longer adequate to secure accountability for leadership roles, budgets, and decision-making powers that have been transferred or shared beyond the government department responsible for the judicial system—which was the Lord Chancellor's Department ('LCD') up to 2003, the relatively short-lived Department for Constitutional Affairs 2003-7 (nicknamed 'DeCaf' by some wags but more respectfully 'the DCA') and the Ministry of Justice ('MoJ') since May 2007.

The Lord Chancellor/Secretary of State provides political leadership in the Ministry of Justice, with four junior ministers. The Lord Chancellor and Secretary of State are two distinct ministerial offices to which the Prime Minister appoints the same person. Legislation dealing with judiciary-related matters normally specifies the Lord Chancellor to be the responsible minister, though on occasion there has been debate as to which is the appropriate minister.[12] The distinction is of constitutional importance as the Constitutional Reform Act 2005 places broad duties on the Lord Chancellor to 'have regard' to 'the need to defend' the independence of the judiciary and 'the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly

[10] See generally Dawn Oliver and Gavin Drewry *The Law and Parliament* (London: Butterworths 1998).
[11] The turn of phrase used in the Contempt of Court Act 1981, s 19.
[12] The bill that became the Legal Services Act 2007 initially had the Secretary of State as the responsible minister; it was amended to Lord Chancellor: see HL Deb, 9 January 2007, vol 688, col 136.

represented in decisions affecting those matters'.[13] Other ministers have the lesser duty to 'uphold the continued independence of the judiciary'.[14] The Ministry is a major department of state (no longer the sleepy backwater that the LCD once was), with an annual budget of £8.58 billion in 2011-12, of which £1.21 billion is allocated to HM Courts and Tribunals Service. The Ministry employed over 78,000 FTE staff in 2009-10.

In the new governance arrangements, several important functions are now carried out by public bodies that have an arm's length relationship to the Ministry, some with executive powers, some dispute resolution and inspection roles, and some advisory. This judicial comitology is set out in Appendix 1 below. Several have been or shortly will be abolished under the Public Bodies Act 2011 as part of government policy to reduce the number and cost of quangos.

Other roles have been transferred directly to the judiciary, under the ultimate leadership of the LCJ; a network of boards and committees carry out executive decisions and advisory work (see Appendix 2). The Judicial Office consists of approximately 190 FTE civil servants who report directly to the Lord Chief Justice rather than to ministers.[15] It has five groups of staff: strategy, communications, and governance; human resources; senior judicial support through private offices and jurisdictional teams; the Judicial College; and corporate services. There are plans to transfer decision-making power to accept, reject, or ask for reconsideration of selections by the Judicial Appointments Commission for some judicial posts from the Lord Chancellor (in the Ministry of Justice) to the Lord Chief Justice (in effect, to the Judicial Office); presumably a transfer of staff from the Ministry of Justice will accompany this.[16] The Judicial Executive Board (JEB), 'which appears to be envisaged as a sort of judicial Cabinet',[17] is chaired by the Lord Chief Justice and comprises nine senior judges with management responsibilities and the chief executive of the Judicial Office.

A more varied range of accountability mechanisms is needed to respond to these redistributions and fragmentations of responsibility. This essay focuses on what happens (or does not happen) in Parliament, but it is instructive to note developments in accountability elsewhere. One is that as head of the judiciary of England and Wales, the LCJ holds an annual press conference, the transcript of which is published online. In December 2011, Joshua Rozenberg, Frances Gibb (*The Times*) and other journalists from the *Daily Telegraph*, the *Guardian, Daily Mail, Evening Standard,* BBC, ITV News, and the Press Association questioned Lord Judge for 45 minutes.[18] The LCJ expressed diffidence in answering several

[13] CRA 2005, s 3(6). [14] CRA 2005, s 3(1).

[15] <http://www.judiciary.gov.uk/training-support/jo-index> (accessed 22 April 2013).

[16] Ministry of Justice, *Appointments and Diversity: 'A Judiciary for the 21st Century'* (London: Ministry of Justice 2011); Crime and Courts Act 2013.

[17] HLConstitution Committee, *Relations between the executive, the judiciary and Parliament* (6th report of 2006-7) para. 100.

[18] 'Press conference held by the Lord Chief Justice of England and Wales' (London, 6 December 2011) <http://www.judiciary.gov.uk/Resources/JCO/Documents/News%20Release/lcj-press-conference-06122011.pdf> (accessed 22 April 2013).

questions on matters of current political controversy (legal aid reform, mandatory life sentences for murder) or because they dealt with particular cases (contempt of court). Other questions related to parliamentary privilege, sentencing after the summer 2011 riots, and the prison population. Asked about a controversial public lecture given by Jonathan Sumption QC shortly before his swearing in as a Justice of the Supreme Court,[19] Lord Judge said he was 'very sympathetic with Mr Sumption and the views he has expressed', telling Steve Doughty of the *Daily Mail* that 'I would love to give you something to write down'. Lord Judge said 'Judges have to be careful to remember that we are enforcing the law. As to that, we have no choice. We enforce the law as we find it to be. I think we have to be careful to remember that we cannot administer the responsibilities which others have'.

Since the 2010 coalition government came to power, new political priorities for accountability across the whole of government have been articulated. In a speech to civil servants, David Cameron MP outlined the Conservatives' approach:

> We want to replace the old system of bureaucratic accountability with a new system of democratic accountability—accountability to the people, not the government machine. We want to turn government on its head, taking power away from Whitehall and putting it into the hands of people and communities. We want to give people the power to improve our country and public services, through transparency, local democratic control, competition and choice.[20]

Courts boards provide an illustration of the new approach in relation to the judicial system. The Courts Act 2003, s 4 provided that 'England and Wales is to be divided into areas for each of which there is to be a courts board'. Boards had the duty 'to scrutinise, review and make recommendations about the way in which the Lord Chancellor is discharging his general duty in relation to the courts with which the board is concerned'.[21] Boards consisted of at least one judge, two lay magistrates, and at least four others, two of whom were 'representative of the people living in the area'.[22] Over time, their number was reduced from 42 to 19. They are abolished under the Public Bodies Act 2011; during the passage of that bill, the minister explained 'there are now other structures in place such as the Justice Issues Group and area judicial forums to ensure that magistrates' views are heard. There are also strong local relationships with magistrates' bench chairs' and 'there are other ways to ensure that the needs of the community are met, such as customer surveys, open days and more effective use of court user meetings'.[23]

[19] Jonathan Sumption, 'Judicial and political decision-making: the uncertain boundary' (The FA Mann Lecture, London, 9 November 2011) <http://www.guardian.co.uk/law/interactive/2011/nov/09/jonathan-sumption-speech-politicisation-judges> (accessed 22 April 2013). For a response, see Stephen Sedley, 'Judicial Politics' *London Review of Books* Vol.*34*, No.4, (2012) 15.

[20] David Cameron, 'We will make government accountable to the people' (8 July 2010) <http://www.conservatives.com/News/Speeches/2010/07/David_Cameron_We_will_make_government_accountable_to_the_people.aspx> (accessed 22 April 2013).

[21] Courts Act 2003, s 5. [22] Courts Act 2003, sch 1, para. 2.

[23] Minister of State, Ministry of Justice (Lord McNally), HL Deb 11 January 2011, vol 747, col 1305-6.

Transparency has swept through the judicial system in recent years. The Ministry of Justice's business plan makes a commitment 'to ensure that the Department can be held to account as it moves this work forward and we will do this through our information strategy. Along with the rest of government, the Department will publish an unprecedented amount of data so the public can hold us to account. This will cover who we are, what we spend and what we achieve'.[24] The Ministry now publishes, by court: what sentences are given for each type of offence; conviction rates; how long it takes for cases to be decided; the number of sitting days; and financial allocation and spend.[25] A similar commitment to transparency can be seen in the arm's length bodies, down to trivial expense claims.[26] More significantly, the whole judicial selection process is described in great detail on the Judicial Appointment Commission's website and in its publications.

B. Opportunities for parliamentary accountability

Against this background of dramatic increases in the judicial power of the state, changes in governance and new approaches to accountability, what role does Parliament have in oversight of the judicial system? What role should it have? Finding answers to these questions is not straightforward, not least because of the need to protect judicial independence from inappropriately targeted accountability claims.

1. The accountability toolkit

Parliament has at its disposal a variety of accountability mechanisms that can be deployed for oversight of the judicial system. Examples of how these are used are provided below:

i. There are opportunities to scrutinize legislative proposals. In relation to bills, this now includes the possibility of pre-legislative scrutiny (if the government publishes a bill in draft), the legislative process in each House (with the parallel scrutiny of committees including the Joint Committee on Human Rights and the House of Lords Constitution Committee), and relatively new practices of post-legislative scrutiny (where the responsible government department reviews legislation five years or so after enactment and reports to a Select Committee).

[24] Ministry of Justice, *Business Plan 2011-15* (London, 2011) <http://www.number10.gov.uk/wp-content/uploads/MOJ-Business-Plan1.pdf> (accessed 22 April 2013).

[25] See <http://www.justice.gov.uk/statistics/previous-stats/criminal-annual> (accessed 22 April 2013).

[26] Anybody interested can, for example, find on the JAC's website detailed information on expenses such as that Dame Lorna Kelly claimed £4.25 for meals on 28 July 2011 in relation to a selection and character committee and diversity forum: JAC, 'Senior Management Team and Commissioner Expenses Q2' <http://jac.judiciary.gov.uk/about-jac/1112.htm> (accessed 8 March 2012).

ii. A variety of different kinds of debate may be held on the floor of the House, including government motions, topical debates, substantive motions for the adjournment, and daily adjournment debates.

iii. Ministers are obliged to answer oral and written questions. 'The purpose of a question is to obtain information or press for action; it should not be framed primarily so as to convey information, or so as to suggest its own answer or to convey a particular point of view, and it should not be in effect a short speech'.[27]

iv. Early Day Motions proposed by backbench MPs drawing attention to an event or cause, which MPs sign to register their support. Hardly any are actually debated.[28]

v. Select Committee inquires enable MPs and peers (usually working in a non-partisan, cross-party manner) to carry out detailed evidence-based investigations, receiving oral and written evidence. Reports may be debated on the floor of the House or in Westminster Hall. The relevant government department is expected to make a formal response to the committee's findings and recommendations.

vi. Pre-appointment Select Committee hearings for appointments to various senior public offices.[29] In relation to the judicial system, the House of Commons Justice Committee is responsible for scrutinizing the government's preferred candidate for the chair of the Judicial Appointments Commission and the Chair of the Office of Legal Complaints. Some commentators have argued in favour of extending pre-appointment scrutiny to senior judicial posts but so far Parliament has viewed this as anathema.[30]

These may form a network of interconnected activities: for example, what a judge says in oral evidence to a Select Committee may be quoted in the committee's report, which in turn will prompt a debate in the House and a response from ministers; another illustration of the connectedness of the mechanisms is that information obtained by an MP from a written parliamentary question may be used to lobby a minister or in a speech on the floor of the House.

2. Select Committees

Select committees have acquired a central role in accountability practices relating to the judicial system. They provide the most rigorous sort of parliamentary scrutiny, conducting thematic inquiries based on oral and written evidence.

[27] M Jack (ed), *Erskine May's Treaties on The Law, Privileges, Proceedings and Usage of Parliament* (24th edn, London: LexisNexis, 2011), 357.

[28] See <http://www.parliament.uk/edm> (accessed 22 April 2013).

[29] House of Commons Liaison Committee, *Pre-appointment hearings by Select Committees* (2007-8, 384); Paul Waller and Mark Chalmers, *An evaluation of pre-appointment scrutiny hearings* (London: UCL Constitution Unit 2010).

[30] See section C3 below.

On occasion, the launch of an inquiry makes front-page news.[31] Sometimes a Select Committee oral evidence session ends with the publication of a transcript on the relevant committee's web page. Normally, however, the Select Committee produces a report containing findings and recommendations, often accompanied by a press release. The government is expected to make a formal written response within two months, which in turn is published by the Select Committee (with or without further comment). Subject to the pressures on the parliamentary time-table, a Select Committee will attempt to secure a debate on the floor of the House for a significant inquiry. Thus, on 18 November 2008 the Constitution Committee's two reports on relations between the executive, judiciary and Parliament were the subject of a 'take note' debate in the 'dinner hour' during which ten speeches were made.[32] They are able to engage in follow-up inquiries if it is thought desirable to return to an issue. The practice of the Constitution Committee and the Justice Committee of having periodic meetings with the LCJ and the Lord Chancellor also enables some 'triangulation' to take place, whereby one is able to comment on the evidence previously given by the other.

One of the most notable developments in recent years is the phenomenon of judges appearing to give oral evidence to Select Committees and submitting written evidence.[33] Appendix 3 summarises the inquiries at which judges have appeared to give oral evidence on 38 separate occasions between 2006 and August 2012. Eight different Select Committees received evidence, though appearances were concentrated in the House of Commons Justice Committee and the House of Lords Constitution Committee. During the passage of the Constitutional Reform Bill there was discussion about the pros and cons of establishing a Select Committee on the judiciary. This might be a joint committee of both Houses and have a statutory basis.[34] So far, this has not been thought necessary or desirable.[35]

The 35 individual judges contributing to the work of Select Committees come from all levels of the court hierarchy, from the magistrates' courts to the Supreme Court. Unsurprisingly, it is those judges with leadership responsibilities who appear most frequently (in particular the LCJ and Heads of Division); there is now an expectation, firming up into a constitutional convention, that the LCJ will meet the House of Commons Justice Committee and the House of Lords Constitution Committee on an annual basis. Clearly, Select Committees are also keen to hear from judges with experience of the coalface in the lower courts and tribunals. From time to time, judges have expressed or implied concerns about the amount of time it takes to prepare and appear before committees—time away from other

[31] eg. *The Times* led with the launch of the House of Lords Constitution Committee's 2011 inquiry into the judicial appointments process: Frances Gibb and David Brown, 'Too male, white and elitist? Too right, admit top lawyers' *The Times* (London, 6 July 2011) 12-13.

[32] HL Deb 18 November 2009, vol 705, col 1102.

[33] Judges may also appear before House of Commons public bill committees: Dame Janet Smith (Smith LJ) gave oral evidence to the Health and Social Care public bill committee drawing on her experiences as the chair of the Shipman inquiry (2007-8, 8 January 2008).

[34] Select Committee on the Constitutional Reform Bill, *Report* (2003-4,125-I), para. 420.

[35] HL Constitution Committee, *Relations* (2006-7, 151) para. 129.

administrative responsibilities or sitting in court. In *The Lord Chief Justice's Report 2010–12*, Lord Judge notes that 'Since the General Election, there has been an increase in the number of judges invited to assist Parliament with their enquiries' and continued:

> Judges are able to provide valuable technical advice to Parliament, which is particularly useful in an era of increasingly complex legislation. However, for appearances to be mutually beneficial both the judiciary and Parliament need to be mindful of their respective roles—as Parliamentarians are aware, there are some areas of enquiry in which it is not appropriate for judges to become involved, for example in relation to political matters or issues relating to a particular case. Being drawn into such matters would be damaging for both future involvement in the work of committees and for the impartiality and reputation of the judiciary. For this reason, care is exercised by those involved when responding and in considering invitations to judges to appear before Parliament.[36]

There appears, however, to be a feeling on the part of the judiciary and parliamentarians that meetings with Select Committees are generally valuable experiences for both sides.

Over time, the judiciary has taken a more coordinated approach to requests to appear before committees. The Judicial Office explains:

> Should a Select Committee feel they require a judge to appear before them, the normal process is for the relevant Committee to contact the Lord Chief Justice's Office seeking for an appropriate judge to be identified, or to approach the judge directly. On some occasions judges are unable to attend Committee hearings due to sitting and other prior commitments. On other occasions it may be suggested to the Committee that judicial attendance would not be appropriate, as the issues to be discussed are 'political' in nature or might require adjudication at a later date. This has never caused difficulties in the past; either the Committee accepts an alternative judge, or it would be inappropriate for a judge to give evidence. Neither the Lord Chief Justice, nor the Judicial Office acting on his behalf, has ever prohibited attendance of a judge before a Select Committee.[37]

In July 2008, the Judicial Executive Board issued 'Guidance for Judges appearing before or providing written evidence to parliamentary committees'.[38] The document provides a list of types of questions which judges may not be willing to answer or in respect of which they will need to exercise caution: 'the merits of individual cases'; 'cases over which they have presided'; 'the merits or personalities of particular serving judges and politicians'; 'the merits of Government policy'; and bills or proposed legislation, 'save where the policy in question affects the administration of justice within his or her area of judicial responsibility'; the administration of justice which falls outside the judge's area of responsibility or previous responsibility; and matters on which the government is consulting to which the judiciary will but has not yet responded. In fact, it is rare for a judge to be asked a

[36] Lord Chief Justice of England and Wales, *The Lord Chief Justice's Report 2010-12* (Judicial Office 2012) paras 23-4.

[37] Letter to the author, 13 December 2011.

[38] <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/select_committee_ guidance0708.pdf> (accessed 22 April 2013).

question during a Select Committee hearing that the judge feels it inappropriate to answer. The committee clerk drafts lines of questioning, often with the assistance of a part-time specialist adviser.[39] The practice in the House of Lords is for witnesses to be sent the proposed lines of questioning several days in advance of the hearing, though this does not happen routinely in the Commons. The extent to which members of a committee depart from the suggested lines of question varies, but for the most part the interview proceeds along the pre-prepared lines.

Judicial appearances before Select Committees have different kinds of function. In some inquiries the judiciary is the focus of scrutiny. As the Constitution Committee states, Select Committees 'can play an important role in holding the judiciary to account by questioning the judges in public'.[40] Into this type fall the annual appearances of the LCJ. Where necessary, committees may be critical of the judiciary: thus, in 2007 the Constitution Committee gently suggested that the LCJ needed to re-appraise his media and public communications strategy and that the judges needed to make the Judicial Communications Office 'more active and assertive in its dealing with the media in order to represent the judiciary effectively'.[41] Later in the essay, two further examples of inquiries which included a focus on the judiciary are considered in which judges *did not* give evidence: the Joint Committee on Human Rights' inquiry into how the judiciary were interpreting s 6 of the Human Rights Act 1998 (wrongly, the committee found);[42] and an inquiry by the House of Commons Culture, Media and Sport Committee which considered the judgments of Mr Justice Eady in relation to privacy (finding that the judge had not, contrary to the assertions of a newspaper editor, departed from precedent in cases on privacy rights).[43] One possible reason for not hearing from judges in these inquiries is that any lines of questioning would have quickly taken the committees into forbidden territory—the merits of cases and the merits of particular serving judges.

A further function of judicial evidence is to comment on or criticize government policy or action in relation to the administration of justice or areas of public policy in which judges have particular experience or expertise. Thus, Sir Nicholas Wall (President of the Family Division of the High Court) was quoted in a committee's report on the government's proposed reform of legal aid as saying that the government 'is very ill-advised to concentrate on violence' rather than use the term 'domestic abuse'; and he said that the proposals created 'a perverse incentive' to take out injunctive proceedings against a former spouse.[44] His predecessor, Sir Mark Potter, described earlier proposals as 'a series of extremely crudely averaged

[39] To declare an interest: the author has served as specialist adviser to the House of Commons Constitutional Affairs Committee, the House of Lords Select Committee on the Constitutional Reform Bill, the House of Lords Constitution Committee, and the House of Commons Justice Committee in relation to judiciary-related matters.

[40] HL Constitution Committee, *Relations* (2006-7, 151) para. 124.

[41] HL Constitution Committee, *Relations* (2006-7, 151) paras 160, 171.

[42] See Example 1.1. below.

[43] See Example 1.4 below.

[44] House of Commons Justice Committee, *Government's proposed reform of legal aid* (HC 2010-11, 681) paras 83-4.

fixed fees', concluding that 'the whole thing has to be radically revised'.[45] In relation to inquiries of this sort, Select Committee evidence is one way in which judges may make known to Parliament their misgivings about government proposals.

A third function of judicial evidence is educative: to explain to parliamentarians what the judges' role involves and what the limits of that role are. Examples include Baroness Hale's evidence to the JCHR on a British bill of rights (about adjudication on social and economic rights)[46] and Ryder J's evidence to the Justice Committee on the operation of family courts (on the difference that hearing the voice of the child could make).[47] The Constitution Committee has suggested that there might be more of this kind of interaction, with judges 'encouraged to discuss their views on key legal issues in the cause of transparency and better understanding of such issues amongst both parliamentarians and the public'.[48] As the committee noted, judges discuss issues such as the interpretation of the Human Rights Act 1998[49] or the use of *Pepper v Hart*[50]in public lectures and in academic writing.

Measuring the concrete influence of the work of Select Committees is far from straightforward.[51] This is as true of inquiries in relation to the judicial system as it is in other contexts. It may be that the importance lies in the activity of engagement by parliamentarians with judges and others about the judicial system (rather than any specific 'wins' in influencing policy or practice). Select committee hearings now provide the only official forum in which parliamentarians and judges may have a public conversation. Before the CRA 2005, the senior judiciary who were peers (the Law Lords and the Lord Chief Justice) were able to make contributions to debates on the floor of the House and, the conscientious objectors apart,[52] did so until disqualified in the new constitutional arrangements.[53] A sense of proportion is, however, needed: concern for judiciary-related matters is something of a niche interest among parliamentarians. Except perhaps where an MP's constituency is affected by court closures or reorganisation, the judicial system barely registers on

[45] HC Justice Committee, *Implementation of the Carter review on legal aid* (HC 2006–7, 223) para. 107.

[46] Joint Committee on Human Rights, *A bill of rights for the UK?* (2007-8, 165) paras 170, 189–90.

[47] HC Justice Committee, *Operation of the family courts* (2010–12, 518) para. 146.

[48] HL Constitution Committee, *Relations* (2006–7, 151) para. 126 (but noting that 'under no circumstances must committees ask judges to comment on the pros and cons of individual judgments'.

[49] Examples of lectures by serving judges on the HRA include: Lord Justice Elias, 'The rise of the Strasbourgeoisie: judicial activism and the ECHR' (Annual Lord Renton Lecture, Statute Law Society, 24 November 2009); Lord Bingham, 'The way we live now: human rights in the new millennium' (Earl Grey Memorial Lecture, University of Newcastle-upon-Tyne, 29 January 1998), and Baroness Hale, 'Salford Human Rights Conference' (4 June 2010) <http://www.supremecourt.gov.uk/docs/speech_100604.pdf> (accessed 22 April 2013).

[50] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (holding that ministerial statements reported in *Hansard* made during the passage of a bill could be used as an aid to interpreting ambiguous statutory provisions); the judgment was criticized by eg. Lord Steyn '*Pepper v Hart*: a re-examination' (2001) 21 OJLS 59.

[51] See Meg Russell and Meghan Benton, *Selective Influence: the policy impacts of House of Commons Select Committees* (UCL Constitution Unit 2011).

[52] Some, such as Lord Bingham in his role as Senior Law Lord, Lord Steyn and Baroness Hale took no part in legislative proceedings in the House of Lords while serving Law Lords.

[53] CRA 2005, s 137.

the political agenda of most parliamentarians. Some Select Committee hearings with judges have been poorly attended by MPs.

C. Mapping accountability practices in Parliament

The previous section focused on the institutional mechanisms through which Parliament exercises accountability functions in relation to the judicial system. To develop a more nuanced and contextual understanding, attention now shifts to particular aspects of the judicial system. Five areas have been selected: (i) court judgments on points of law; (ii) the legislative and other texts that form the foundations of the judicial system; (iii) judicial appointments; (iv) judicial discipline; and (v) judicial leadership. An inductive approach is adopted to map out current accountability practices based on observation of the parliamentary record and to sketch out some basic principles that emerge from the realities of work in the Palace of Westminster. In several different ways there is tension between what happens, what the 'rule book' indicates ought to happen (or not happen), and understandings of how basic constitutional principles such as the independence of the judiciary ought to operate.

1. Scrutiny of court judgments on points of law

The parliamentary rulebook discourages parliamentary scrutiny of the core judicial function of deciding cases and setting precedents. *Erskine May* states that questions to ministers 'seeking an expression of opinion on a question of law, such as the interpretation of a statute, or of an international document, a Minister's own powers, etc, are not in order since the courts rather than Ministers are competent in such matters'.[54] *Sub judice* rules adopted by each House seek generally to prevent references being made to active court proceedings in any motion, debate or question (subject to the discretion of the Speaker or committee chair).[55] Moreover, questions 'which reflect on the decision of a court of law' are not in order.[56] As already noted, the Judicial Executive Board guidance to members of the judiciary appearing before Select Committees urges judges to avoid answering questions which deal with the 'merits of individual cases'. In between these obstacles, there is, however, scope for parliamentary scrutiny of judgments.[57] Parliamentarians, from time to time, have reason to consider rulings of the courts and have the ultimate power to change the law if a majority of both Houses agree, in legislation, that the law as enunciated by the courts is not in the public interest. Consider the following examples.

Example 1.1. The Joint Committee on Human Rights (JCHR) issued two reports critical of the way in which courts had interpreted the meaning of 'public function'

[54] M Jack (ed.), *Erskine May's Treaties on The Law, Privileges, Proceedings and Usage of Parliament* (24th edn, LexisNexis, 2011).
[55] *Erskine May*, pp 364, 441-2. [56] *Erskine May*, p 365. [57] See section B2 above.

in s 6 of the Human Rights Act 1998. The first report criticized the case law as 'in human rights terms, highly problematic', finding that the 'development of the case law has significant and immediate practical implications'. It called for the government to intervene in a future case to argue for a change in the courts' approach to interpretation.[58] The second report was made while an appeal on the relevant point of law was pending before the House of Lords, preventing the committee from commenting on the particular case.[59] Both reports drew on written evidence from a variety of public bodies and interest groups. The reports led to an unsuccessful private member's bill seeking to reverse the precedent set by a series of judgments, including House of Lords authority; a change of law was brought about by s 145 of the Health and Social Care Act 2008, resulting in care homes being subject to the Convention rights.

The methodical work of the JCHR in reviewing case law and bringing together a body of evidence about the impact of the approach taken by the courts to interpreting the HRA 1998 should not be regarded as undermining judicial independence, so long as parliamentarians are clear that their views expressed in reports and debates are opinions expressed in a political arena. In the UK, it is safe to assume that the courts will exclude politicians' views as generally irrelevant to their adjudicatory task. This can be seen in the leading case of *YL v Birmingham City Council* in which the Law Lords had to consider the same issue canvassed by the JCHR. Lord Mance, noting the existence of the two reports, said 'such statements must be left to one side' and 'So far as these reports proceed on the basis that Parliament had any particular intention, that is the issue which the [Appellate Committee of the] House has to determine according to the relevant principles of statutory construction'.[60] Reference was also made to the written evidence to the JCHR from Age Concern England.[61] A majority of their Lordships gave an interpretation of the HRA at odds with the desired approach advocated by the JCHR.

Example 1.2. The Compensation Act 2006, s 1 sought to ensure that 'desirable activities' were not discouraged because of fear of liability under the common law of negligence or breach of statutory duty if it resulted in harm by clarifying the approach of courts to assessing what constitutes reasonable care in individual cases. During its passage as a bill, a Select Committee took evidence and reported on the 'compensation culture'.[62] In carrying out post-legislative scrutiny[63] of the Act in 2012, the Ministry of Justice told the Justice Select Committee it had not carried out any detailed examination to assess the impact of s 1. To do so would, the Ministry said, be 'impractical in resource terms' but also would not be appropriate

[58] Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 2003-4, 39; HC 2003-4, 382).
[59] Human Rights, *Public Authority* (HL 2006-7, 77; HC 2006-7, 410).
[60] [2007] UKHL 27, [2008] 1 AC 95, [90]. [61] [2007] UKHL 27, [2008] 1 AC 95, [117].
[62] HC Constitutional Affairs Committee, *Compensation Culture* (HC 2005-6, 754-I).
[63] See Office of the Leader of the House of Commons, *Post-legislative Scrutiny: The Government's Approach* (Cm 7320, 2008).

'as it could be seen as undermining the independence of the judiciary and casting doubt on the way in which they have interpreted the law'.[64]

Clearly there is a difference between the Ministry's and the JCHR's understanding of the constitutional propriety of a body other than the courts discussing the case law flowing from relatively recent legislation. The judiciary did not seem to share the Ministry's concerns when the idea of post-legislative scrutiny was first being worked out in recommendations of the House of Lords Constitution Committee and the Law Commission.[65] The Law Commission heard from the Association of District Judges that the 'most important considerations for review were likely to be "difficulties in interpretation and unintended legal consequences" '.[66] The Judges' Council envisaged that 'individual judges might send any comments they have made about legislation in judgments to the body undertaking the scrutiny work and that judges should be made aware of this possibility but not obliged to follow this route'.[67] So long as Parliament does not trespass into retrospective interference with individual cases (which must remain exclusively for the courts), the sort of corrective instigated by the JCHR in relation to s 6 of the HRA ought to be viewed as a welcome tool of accountability for Parliament, which does not undermine judicial independence.

Example 1.3. In May 2011, the High Court interpreted provisions of the Police and Criminal Evidence Act 1984 on police bail in an unexpected way, a judgment that was reported as leaving the position of 85,000 suspects in doubt.[68] In June, the Minister for Policing and Criminal Justice (Nick Herbert MP) made a statement saying 'There seems to be general agreement that this was an unusual judgment, which overturned 25 years of legal understanding. We cannot wait for a Supreme Court decision, and emergency legislation is therefore sensible and appropriate'. Responding to a question ('Does my right hon. Friend agree that judgments such as this, which fly in the face of common sense, run the risk of bringing our justice system into disrepute?'), the minister said: 'I think that the best way that I could respond would be by quoting the legal expert Professor Michael Zander QC, whom my hon. Friend may have heard on the "Today" programme this morning. He said: "The only justification for the ruling is a literal interpretation of the Act which makes no sense" '.[69] The House of Lords Constitution Committee criticized the Government's decision to introduce a bill while an appeal to the Supreme Court was pending; this gave rise to 'difficult issues of constitutional principle as regards both the separation of powers and the rule of law' (a point that government appeared not to accept).[70] The minister responsible for the bill in the Lords

[64] Ministry of Justice, *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Compensation Act 2006* (Cm 8267, 2012) paras 62-3.

[65] The Law Commission, *Post-legislative Scrutiny* (Law Com No 302, Cm 6945, 2006).

[66] Law Comm, *Post-legislative Scrutiny* para. 2.4.

[67] Law Comm, *Post-Legislative Scrutiny* para. 3.67.

[68] *R (Manchester Police) v Hookway* [2011] EWHC 1578 (Admin), [2011] 3 All ER 521.

[69] HC Deb 30 June 2011, vol 530, cols 1133-42.

[70] HL Constitution Committee, *Police (Detention and Bail) Bill* (HL 2009-11, 143); and subsequent correspondence with the minister <http://www.parliament.uk/business/committees-a-z/lords-select/constitution-committee/correspondence-with-ministers1/parliament-2010/bill-scrutiny> (accessed 22 April 2013).

responded that the government 'really do not believe that we are undermining the constitutional separation of powers by asking Parliament to legislate to reverse the effect of a High Court decision in advance of the issue having been decided by the Supreme Court'.[71] The fast-tracked bill, which had retrospective effect, became the Police (Detention and Bail) Act 2011 and the Greater Manchester Police withdrew their appeal.

The parliamentary response to the PACE ruling highlights the question of timing: the general rules of *sub judice* discourage Parliament from scrutinizing judgments or commenting on cases which are actually pending before the courts while retaining the ultimate right to legislate on any matter.[72] Comity and practical coordination between the judicial, legislative and executive limbs of the state require a principled approach to be taken in relation to cases that are awaiting decision on appeal to the Supreme Court; it is far from clear that this happened.

Example 1.4. The House of Commons Culture, Media and Sport Committee, carrying out an inquiry into press freedom and privacy, reported under the heading 'Mr Justice Eady and Privacy Law' that they had 'received no evidence in this inquiry that the judgments of Mr Justice Eady in the area of privacy have departed from following the principles set out by the House of Lords and the European Court of Human Rights', adding that 'If he, or indeed any other High Court judge, departed from these principles, we would expect the matter to be successfully appealed to a higher court'.[73] In reaching that conclusion, the committee heard from journalists, judges and lawyers. The review into the jurisprudence and ideology of Mr Justice Eady is probably best seen as turning on the specific circumstances of a particular Select Committee inquiry: the committee was faced with allegations made by an editor of a national newspaper and they felt could not, in the context, be ignored. The committee's report was carefully worded and favourable in outcome to the judge. There is, however, a significant threat that *individual* judicial independence is compromised if a Select Committee embarks on a line of inquiry into a body of case law by a named judge.

2. Foundations

In the absence of a written constitution, the constitutional framework of the judicial system has to rest on ordinary legislation (primary and secondary), 'soft law' and constitutional conventions. Under the new architecture, the principal statutes are the Constitutional Reform Act 2005 and the Tribunals, Courts and Enforcement Act 2007. (Provisions intended by the government to be included in the Constitutional Reform and Governance Act 2010 were dropped to enable the bill to receive royal assent before the 2010 general election). Examples of 'soft law' include: the 2004 concordat between the Lord Chancellor and the

[71] HL Deb 12 July 2011, vol 000, col 603 (Baroness Browning).
[72] *Erskine May* 441-2.
[73] House of Commons Culture, Media and Sport Committee, *Press Standards, Privacy and Libel* (2009-10, 326-I) para. 76. Paul Dacre, editor of the *Daily Mail*, was a consistent and vitriolic critic of Eady J, labelling his judgments 'arrogant' and 'amoral'.

LCJ;[74] the 'Memorandum of Understanding between the Office for Judicial Complaints, the Ministry of Justice and the Directorate of Judicial Offices for England and Wales';[75] Her Majesty's Courts and Tribunals Service Framework Document;[76] and the list of 'qualities and attributes' required for judicial office—in other words, how 'merit' is defined—published by the JAC.[77]

The following two examples provide contrasting approaches to policy formation and legislative scrutiny:

Example 2.1. In 2003, the government made a surprise announcement of plans to abolish the office of Lord Chancellor, create a Supreme Court in place of the Law Lords, and establish a new system for judicial appointments in England and Wales. There had been no consultation with the senior judiciary. The proposals were subject to protracted parliamentary debate and scrutiny before the bill was published: in an unusual move, the Conservative Opposition in the House of Lords successfully moved an amendment to the Loyal Address after the Queen's Speech (calling on the government 'to withdraw their current proposals and to undertake meaningful consultation with Parliament and the senior judiciary before proceeding with legislation'); a major inquiry and report by the House of Commons Constitutional Affairs Committee; and a 'take note' debate in the Lords.[78] The House of Commons Constitutional Affairs Committee criticized the Government for not publishing a draft bill.[79] At second reading of the Constitutional Reform Bill in March 2004, the Lords voted to refer the bill to a special committee with powers to take evidence and amend the bill before recommitting it to a Committee of the Whole House (a procedure that had lain dormant for several decades). Several members of the judiciary took part in Lords debates and one voted in a division (Lord Hoffmann, against the government). 'Carried over' to the 2004-5 session, the bill was modified in significant ways in both Houses before receiving Royal Assent five days before Parliament was prorogued for the 2005 general election.

Example 2.2. In 2000, the government appointed an independent panel, chaired by retired judge Sir Andrew Leggatt, with broad terms of reference to undertake a review of 'the delivery of justice through tribunals other than ordinary courts of law' leading to a report in 2001.[80] The Department for Constitutional

[74] *Constitutional Reform: The Lord Chancellor's judiciary-related functions: Proposals* (2004). <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/lcoffice/judiciary.htm> accessed 9 March 2012.

[75] <http://judicialcomplaints.judiciary.gov.uk/docs/Memorandum_of_Understanding.pdf> (accessed 22 April 2013).

[76] HM Courts & Tribunals Service, *Framework Document* (Cm 8043, 2011).

[77] JAC, 'Qualities and abilities' <http://jac.judiciary.gov.uk/application-process/112.htm> accessed 7 March 2012.

[78] See Andrew Le Sueur, 'From Appellate Committee to Supreme Court: A Narrative' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009), ch 5.

[79] HC Constitutional Affairs Committee, *Judicial appointments and a Supreme Court (court of final appeal)* (HC 2003-4, 48) para. 118 ('The Constitutional Reform Bill is a clear candidate for examination in draft').

[80] Andrew Leggatt, *Tribunals for Users One System, One Service* (2001) <http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm> (accessed 22 April 2013).

Affairs responded in 2004 with an equally wide-ranging White Paper, accepting the thrust of the Leggatt recommendations and proposing a new principle of 'proportionate dispute resolution' to avoid disputes arising and to encourage Alternative Dispute Resolution (ADR).[81] In 2006, the Government published a draft Tribunals, Courts and Enforcement Bill.[82] Neither the House of Commons Justice Committee nor the House of Lords Constitution Committee felt able to find time to carry out pre-legislative scrutiny of the draft bill. As well as completely re-designing the tribunal system (or 'maze' as critics dubbed it), the bill would amend the eligibility criteria for all judicial appointments. The House of Lords Constitution Committee successfully called for a provision on ADR included in the draft bill but removed from the bill 'proper' to be reinstated.[83]

The legislation in these two examples was of great practical and constitutional importance. In the first, 'back of the envelope' policy-making and a government decision not to publish a draft bill was countered by careful (albeit often partisan) parliamentary scrutiny that left few clauses unturned. In the second, careful policy making with judicial involvement, a White Paper and a draft bill were met with relative indifference by parliamentary Select Committees.

Example 2.3. In January 2004, the Lord Chancellor (Lord Falconer) and the LCJ (Lord Woolf) announced that agreement had been reached on the principles and practices governing the transfer of functions from the former to the latter under the government's proposals. This came to be known as 'the concordat'. In their 2007 report, the House of Lords Constitution Committee stated that, although many aspects of the concordat had been put on a statutory footing by the CRA 2005, 'it is clear to us that the concordat continues to be of great constitutional importance'.[84] In a debate on the Constitution Committee's report, Baroness Royall of Blaisdon (President of the Council, speaking for the government) said 'The Government will consult and work with the judiciary to ensure that the concordat remains live and relevant, and that changes to both the framework document and the concordat are properly put before this House'.[85] In February 2011, Lord Judge told the House of Lords Constitution Committee that in the event of the LCJ failing to negotiate a satisfactory annual settlement for funding the judicial system:

I think we would have to renegotiate a new concordat, and I would expect that this Committee would be following very closely how we were reaching the concordat that we were trying to reach. I do not regard the concordat agreement between the Lord Chief Justice and the Lord Chancellor of the day as private between them. It is a public document, and anybody can look at it at any time. If the situation were to reach such a parlous state that it broke down completely, I suspect the Lord Chief Justice of the day—because this will not happen in my time—would be very anxious to exercise such power as is left

[81] Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (White Paper, Cm 6243, 2004).
[82] *The draft Tribunals, Courts and Enforcement Bill* (Cm 6885, 2006).
[83] HL Constitution Committee, *Tribunals, Courts and Enforcement Bill* (2006-7, 13).
[84] HL Constitution Committee, *Relations* (2006-7, 151) para. 13.
[85] HL Deb 18 November 2008, vol 704, col 1124.

to him in the context of the parliamentary process: (a) this Committee, (b) the Justice Committee and (c) the exercise under Section 5 of the Constitutional Reform Act of, in effect, writing to Parliament and setting out his or her concerns.[86]

Example 2.4. In January 2007, the Home Secretary (John Reid MP) wrote an article in the *Sunday Telegraph* hinting strongly that the government was minded to create a Ministry of Justice (merging some policy areas of the Home Office and the Department for Constitutional Affairs).[87] The senior judiciary had not been consulted at that point. The Prime Minister announced the creation of the Ministry of Justice by a written statement to Parliament on the day it rose for the Easter recess.[88] The House of Commons Constitutional Affairs Committee carried out an inquiry into the decision, taking evidence from Lord Phillips CJ, Lord Justice Thomas, then twice from the Lord Chancellor (Lord Falconer) and permanent secretary (Alex Allan). The committee's July 2007 report criticised the government for having failed to learn lessons from the way changes to the Lord Chancellor's office had been announced in 2003 and for causing 'a highly undesirable public conflict between the senior judiciary' and the government.[89] The House of Lords Constitution Committee, which was midway through an inquiry on relations between government, judges and Parliament, also considered the handling of the creation of the new ministry.[90]

These two examples demonstrate the importance of non-statutory foundations for the judicial system. In relation to the concordat, there are several statements about its perceived importance, but parliamentarians have not been specific about what exactly their continuing role might appropriately be in scrutiny of the future developments of the concordat. This uncertainty is a reflection of doubts about the constitutional status of the concordat. On one view, its importance has faded since most of its provisions have been put on a statutory footing by the CRA 2005 and the conventions and institutional arrangements that have subsequently developed. Example 2.4 shows the mediating role Parliament is able to play when fundamental disagreements arise between government and the judiciary. A carefully planned campaign by senior judges allowed them to use Select Committee hearings to vent their concerns about the manner in which the government had acted in setting up the MoJ as well as the substance of the government's plans.

3. Judicial appointments

The 2005 constitutional settlement gave responsibility for selecting candidates for judicial office to an arm's length body, the Judicial Appointments Commission

[86] HL Constitution Committee, *Meetings with the Lord Chief Justice and Lord Chancellor* (2010-11, 89) Q11.
[87] Patrick Hennessy, 'Reid wants to split the Home Office in two', *Sunday Telegraph,* (London, 21 January 2007) 1.
[88] HC Deb 39 March 2007, vol 458, col 133WS.
[89] HC Constitutional Affairs Committee, *The Creation of the Ministry of Justice* (2006-7, 466).
[90] HL Constitution Committee, *Relations* (2006-7, 151) para. 3.

(JAC) while reserving powers to the Lord Chancellor to have the final say on accepting, rejecting or asking the JAC to reconsider a recommendation.[91] Parliament has no role in individual appointments; its function (unstated on the face of the CRA) is to exercise overarching accountability functions in relation to the process as a whole. As the following examples show, a range of methods is used to achieve this.

Example 3.1. Lord Marks of Henley-on-Thames (a QC) asked an oral question 'To ask Her Majesty's Government what progress is being made in improving gender and ethnic diversity in judicial appointments'. After the minister's reply, five other peers asked supplementary questions.[92]

Example 3.2. During 2011-12, the House of Lords Constitution Committee carried out a major inquiry into the judicial appointments processes in England and Wales and for the Supreme Court.[93]

Example 3.3. In the calendar years 2010 and 2011, 37 written questions in the Commons dealt with aspects of the appointments process and judicial careers.

Example 3.4. The House of Commons Justice Committee has held evidence sessions on the work of the JAC: two sessions in 2007;[94] and in 2010, hearing from Baroness Prashar (the chair), Jonathan Sumption QC (as he then was), and Edward Nally (legal practitioner members).[95]

The picture that emerges is of some parliamentarians in both Houses keen to have oversight of the judicial appointments system as a whole, and to exercise scrutiny on a regular and rigorous basis. So far, however, parliamentarians have consistently rejected suggestions that they should have any role in individual senior appointments, as House of Commons Select Committees now have in relation to several public offices for which they carry out pre-appointment hearings with the preferred candidate.[96] One of the main reasons for eschewing this direct form of accountability is that parliamentary involvement would risk undermining judicial independence, in fact or perception, if appointment hearings were to be conducted along partisan lines. This is a concern that needs to be taken seriously, though in an era when the LCJ subjects himself to an annual press conference and judges are content to give public lectures openly critical of government, the concern may be overstated.[97]

[91] CRA 2005, Pt 4.

[92] HL Deb 17 March 2011, vol 725, col 347.

[93] HL Constitution Committee, *Judicial Appointments*, 25th Report of 2010-12 (HL Paper 272).

[94] <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/cmconst.htm>(accessed 22 April 2013).

[95] HC Justice Committee, *Minutes of Evidence: The work of the Judicial Appointments Commission* (HC 2009-10) <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/449-i/10090701.htm> (accessed 22 April 2013).

[96] See eg. Select Committee on the Constitutional Reform Bill, *Report* (2003-4,125-I), paras 412-14; HL Constitution Committee, *Relations* (2006-7, 151) para. 131.

[97] See eg. Lord Phillips, 'Judicial independence and accountability: a view from the Supreme Court' (UCL Constitution Unit launch of research project on the politics of judicial independence, London, 8 February 2011).

4. Judicial discipline

The British constitution allocates to Parliament alone the power to dismiss judges of the High Court, Court of Appeal and Supreme Court: judges hold office 'during good behaviour, subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament'.[98] No judge has been subject to this procedure in modern times, but it is important to recognise that Parliament has this ultimate 'sacrificial' tool of accountability. Dismissal of judges below the level of the High Court on grounds of misbehaviour is by the Lord Chancellor with the concordance of the LCJ. *Erskine May* is clear that 'Unless the discussion is based upon a substantive motion, reflections must not be cast upon the conduct of… judges of the superior courts of the United Kingdom, including persons holding the position of a judge, such as circuit judges and their deputies, as well as recorders'.[99] The parliamentary record reveals MPs do, from time to time, want to criticize the conduct of individual judges.

Example 4.1. An Early Day Motion by Mildred Gordon MP called for the dismissal of Judge Sir Harold Cassel QC over sentencing remarks in a child abuse case.[100] It seems that the judge had, in fact, already tendered his resignation.

Example 4.2. Mark Todd MP led a debate on 'Judicial Error (Compensation)' in Westminster Hall. He dealt in detail with the case of a constituent who had been convicted of indecent assault, which was subsequently held to be unsafe by the Court of Appeal. The MP was critical of the trial judge (whom he did not name) and went on to say:

> The straight answer is that I do not know what happened to the judge after his decision was corrected. Although I can appreciate that the objectivity and independence of the judiciary might be harmed by, say, the ability of a complainant to sue the judge for damages where their error causes harm, I would expect some accountability to be exercised for judicial error. On my observation, we instead enter into a polite and largely private world. Some of the texts that I have read, which were written by learned lawyers, point out that it can be argued that the appellate process offers some accountability, in that it demonstrates where a correction is required of a judge.[101]

For the government, Harriett Harman MP accepted that this individual case 'raises a number of important and difficult points of principle' and went on to explain the compensation schemes available for wrongful convictions (which did not apply) and the new Office of Judicial Conduct.

Example 4.3. An MP used the daily adjournment debate to raise the 'somewhat esoteric subject of ex parte applications in the family courts' and a specific case involving constituents. He said that 'I understand that in 2006-7… two

[98] Senior Courts Act 1981, s 11; Constitutional Reform Act 2005, s 33. [99] *Eskine May*, 443-4.
[100] EDM 83, 1988-9 (29 November 1988); Anon, 'His Honour Sir Harold Cassel, Bt (obituary)', *Daily Telegraph,* (London, 21 September 2001) <http://www.telegraph.co.uk/news/obituaries/1341145/His-Honour-Sir-Harold-Cassel-Bt.html> (accessed 22 April 2013).
[101] HC Deb 8 March 2006, vol 443, col 312WH.

complaints were upheld out of the 938 complaints made against judges. That tells us how much accountability m'learned friends in that high office have. It seems that judges have power without responsibility to anybody but themselves and one another'.[102]

Example 4.4. The annual report of the Office for Judicial Complaints is published by the Lord Chancellor, with the concurrence of the LCJ. This event is put on the parliamentary record by a written statement.[103] It appears that there has never been Select Committee scrutiny of the report or any debate of it in Parliament.

It is difficult to see how individualized censure can ever be appropriate in the light of (a) the principle of independence of the judiciary and (b) the existence of the Office for Judicial Complaints, established as part of the new CRA arrangements. Parliament's attention would be better directed at ensuring effective systematic scrutiny of the general work of the OJC, but this it has failed to do despite the availability of a detailed annual report.

5. Judicial governance

The final aspects of the judicial system that will be examined are the new institutions of self-governance, with the LCJ at its apex. As noted above, there has been a transfer of management and leadership power to the judiciary under the CRA 2005.[104] The making of annual reports is an accountability tool in its own right but is also capable of being the basis of further parliamentary scrutiny.

Example 5.1. The LCJ has no statutory duty to make an annual report. In May 2006, Lord Phillips CJ told the House of Lords Constitution Committee that this 'is something we are considering'. In July 2007, he announced that the Judicial Executive Board would publish an annual report.[105] The House of Lords Constitution Committee welcomed this, as 'the report will provide a useful opportunity for both Houses of Parliament to debate these matters on an annual basis, and for the Lord Chief Justice to engage effectively with parliamentarians and the public'.[106] The Lord Chancellor told Parliament that 'The Lord Chief Justice views this as a way to demonstrate the judiciary's accountability to the public and parliamentarians without compromising judicial independence'.[107] There then followed uncertainty about the procedural mechanism whereby such a report could be made to Parliament. CRA 2005, s 5 provides that the LCJ 'may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice'. Initially, this had been seen as a 'nuclear option', to be used only in circumstances approaching

[102] HC Deb 20 January 2010, vol 504, col 408 (Peter Kilfoyle MP).
[103] See eg. HC Deb 25 February 2010, vol 506, col 78-9WS.
[104] See section A2b above.
[105] HL Constitution Committee, *Relations* (2006-7, 151) para. 136.
[106] HL Constitution Committee, *Relations* (2006-7, 151) para. 139.
[107] HC Justice Committee, 'Jack Straw MP: Memorandum submitted by the Ministry of Justice', *Minutes of Evidence* (2007-8) <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/913/8070201.htm> (accessed 22 April 2013).

a constitutional crisis.[108] The first report was published in March 2008, covering the period April 2006 to September 2007. It was neither published in Hansard nor debated. In 2008, Lord Phillips appeared to have 'resiled from the commitment to publish such a report on a strictly annual basis', though that seemed to be to avoid binding his successor, Lord Judge (who was to assume the office of LCJ in October 2008).[109] Lord Judge told the Constitution Committee that he felt 'it may not be sensible to produce [a report] every year'.[110] Two further reports have been published: one in February 2010 for the legal year 2008-9; and the other in August 2012 for the period January 2010 to June 2012.[111] These have not been debated in Parliament. The judiciary website states: 'Future reviews will be produced to provide information about the preceding Legal Year'.[112]

Example 5.2. In February 2010, the Senior President of Tribunals presented his first annual report. The foreword explained that it was 'not intended as a formal report under section 43 of the Tribunals, Courts and Enforcement Act 2007' under which the Senior President 'is required to report annually to the Lord Chancellor, specifically about "cases" rather than the function of the new system of tribunals in general'.[113] The report is succinct but informative. It deals with organisational matters and with tribunal law and jurisprudence. It includes contributions from different tribunal judges. A second annual report appeared in February 2011. There was no discussion of either report on the parliamentary record.

These two examples reveal uncertainty about the scope and purpose of the reporting duties contained in legislation. The examples also show varying degrees of eagerness by Select Committees to follow-up annual reports with evidence sessions.

D. Conclusions

It has been argued that the orthodox approach to parliamentary accountability practices in relation to the judicial system—a prohibited zone plus ministerial responsibility—is no longer viable given the dramatic changes that have taken place in the judicial power of the state, the governance of the judiciary, and rising expectations about the degrees to which all public bodies are held to account. Additional tools of accountability are needed. This study has sought to examine the ways in which MPs and peers have and use opportunities to exercise an accountability role: all the accountability procedures at their disposal are used to some

[108] Joshua Rozenberg, 'Lord Phillips prepares to gain more power', *Daily Telegraph,* (London, 19 July 2007); HL Constitution Committee, *Relations* (2006-7, 151) para. 113.

[109] HL Constitution Committee, *Relations: Follow-up Report* (HL 2007-8, 177) para. 22; Lord Goodlad, HL Deb 18 November 2008, vol 705, col 1105.

[110] HL Constitution Committee, *Relations: Follow-up Report*.

[111] Judiciary of England and Wales, *The Lord Chief Justice's Review of Administration of Justice in the Courts* (London, 2010) and *The Lord Chief Justice's Report 2010-12* (London, 2012).

[112] <http://www.judiciary.gov.uk/media/media-releases/2010/0510> (accessed 22 April 2013).

[113] Senior President of Tribunals, *Annual Report: Tribunals Transformed* (Ministry of Justice, 2010) 12.

extent. Select committees appear to be regarded as especially important, both for parliamentarians and the judiciary.

Although constitutional principle and standing orders discourage parliamentary scrutiny of the core activities of the judicial system (deciding individual cases and setting precedents), parliamentarians can and do inquire into case law and approaches to statutory interpretation, though there are unresolved questions about the constitutional propriety of doing so, for example in carrying out post-legislative scrutiny. Parliament's record in examining legislative change is mixed: the CRA 2005 shows Parliament responding in a thorough if rather partisan way to poorly prepared government policy; the failure of any Select Committee to undertake pre-legislative scrutiny of the draft Tribunals, Courts and Enforcement Bill demonstrates the difficulties parliamentarians have in finding time and enthusiasm for effective legislative scrutiny. There seems no appetite among MPs or peers for involvement in individual judicial appointments. From time to time, MPs seek to criticize individual judges for their conduct but there has been little or no interest in scrutinizing the work of the complaints system that now exists. In relation to judicial leadership and governance, there is a lack of clarity about when and why statutory duties to make annual reports should exist and variations in practice in making and scrutinizing reports.

Effective parliamentary accountability mechanisms, respecting the independence of the judiciary, are important for the legitimacy of the judicial system. They may also help to dissuade ministers and their speechwriters from taking cheap shots at judges and judgments.[114]

[114] See n 2 above.

Appendix 1
Arm's length bodies relating to the English judicial system

Body	Function	Status	Governance	Reporting duties/activities
HM Courts and Tribunals Service	'responsible for the administration of the criminal, civil and family courts and tribunals in England and Wales and non-devolved tribunals in Scotland and Northern Ireland'	Executive agency of the MoJ	Board, including 3 judicial members and senior MoJ official 'It uniquely operates as a partnership between the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals as set out in our Framework Document'	Annual report presented to Parliament: Courts Act 2003, s 1(4) Pages on MoJ website
Judicial Appointments Commission for England and Wales	'We select candidates for judicial office on merit, through fair and open competition, from the widest range of eligible candidates'	NDPB sponsored by the MoJ	15 Commissioners; 'leadership team' of a chief executive and two directors	Annual report presented to Parliament: CRA 2005, sch 12 para 32 Own website
Judicial Appointments and Conduct Ombudsman	Deals with complaints about the judicial appointments and discipline process.	Appointed by the Queen on the recommendation of the Lord Chancellor	Corporation sole 'completely independent of Government and the judiciary'	Annual report presented to Parliament: CRA 2005, sch 13 para 15 Pages on MoJ website
Office for Judicial Complaints	Deals with complaints from members of the public about judge's conduct	Up to 2011: an 'associated office' of the MoJ, set up to support Lord Chancellor and LCJ in their joint responsibilities for judicial discipline. From 2011:part of the Judicial Office	Civil servants work 'jointly and equally to the Lord Chancellor and LCJ'. Head is senior civil servant appointed by open competition	Annual report published by Lord Chancellor and LCJ; announced by Lord Chancellor in written statement to Parliament Own website

Body	Function	Status	Governance	Reporting duties/activities
Civil Justice Council	'We promote the needs of civil justice in England and Wales and monitor the system to ensure that progress to modernise it continues'	Advisory NDPB funded by MoJ: Civil Procedure Act 1997	Since October 2010, sponsored by Judicial Office	Business plan, news and reports regularly appear on pages on judiciary website
Civil Procedure Rules Committee	Makes rules of court for the Civil Division of the Court of Appeal, the High Court and the county courts	NDPB created by Civil Procedure Act 1997	Chaired by Master of the Rolls; 15 other members, mostly legal practitioners	Annual report published by MoJ Page on MoJ website
Family Justice Council	'We promote better and quicker outcomes for the families and children who use the family justice system'	Advisory NDPB funded by MoJ; since October 2010 sponsored by Judicial Office	The national Council of 30 members meets quarterly; 39 local FJCs	Page on judicial website
Family Procedure Rules Committee	Makes rules of court governing the practice and procedure to be followed in family proceedings in the High Court, county courts and magistrates' courts	NDPB created by Courts Act 2003 s 77	Chaired by President of Family Division; 16 other members	Page on MoJ website
Criminal Procedure Rule Committee	'Responsible for modernising court procedure and practice and making the Criminal Procedure Rules'	NDPB created by Courts Act 2003 s 70	Chaired by LCJ with membership of judges, lawyers and police officers	'What's new?' page on MoJ website but no annual report
Sentencing Council	'To promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary'	NDPB sponsored by the MoJ created by Pt 4 of the Coroners and Justice Act 2009	LCJ is president; chaired by a CA judge with 13 other members appointed by LCJ or LC	Annual report: Coroners and Justice Act 2009 s 119(2)Own website

Key: CA = Court of Appeal of England and Wales; LC = Lord Chancellor; LCJ = Lord Chief Justice; MoJ = Ministry of Justice; NDPB = non-departmental public body; quotations taken from organisations' web pages. 'MoJ website' is < http://www.justice.gov.uk>; 'Judiciary website' is <http:// www.judiciary.gov.uk>. Several bodies have been or are planned to be abolished under the Public Bodies Act 2011: Court boards; Crown Court Rule Committee; Her Majesty's Inspectorate for Court Administration; Magistrates' Courts Rule Committee.

Appendix 2
Judicial self-governance

Body	Role	Governance	Reporting duties/activities
Lord Chief Justice of England and Wales	Head of the judiciary and president of the courts of England and Wales; representing the views of the judiciary to Parliament and ministers; welfare training and guidance of the judiciary; deployment and allocation of work within the courts Decision-making about judicial appointments: see Crime and Courts Bill 2012	New functions conferred on office of LCJ by CRA 2005 s 7	Periodic formal reports (latest one covers period January 2010 to June 2012); annual 45 minute press conference, transcript published; information on judiciary website Power to lay written representations before Parliament on 'matters of importance relating to the judiciary, or otherwise to the administration of justice': CRA 2005, s 5
Senior President of Tribunals*	'the independent and statutory leader of the tribunal judiciary' Decision-making about deployment and appointments to the tribunal judiciary: see Crime and Courts Bill 2012	Office created by Tribunals, Courts and Enforcement Act 2007, s 2. 'The office . . . is independent of both the Executive and the Chief Justices'	Formal annual report to LC: Tribunals, Courts and Enforcement Act 2007, s 43 Other annual report (see above); page on judiciary website
Other judicial leadership posts, not set out in detail here, include: the Master of the Roles, Heads of Division, Head and deputy head of criminal justice; head and deputy head of family justice, senior presiding judge.			
Judicial Executive Board (JEB)	To support LCJ in executive and leadership responsibilities	LCJ, 8 other senior judges and chief executive	Page on judiciary website
Judicial Office	To support LCJ by civil servants including 'professional trainers, legal advisers, HR and communication experts, policy makers and administrators'	Led by a chief executive 'who reports to the LJC rather than to ministers, and its work is directed by the judiciary rather than the administration of the day'	Annual business plan published on judiciary website

Body	Role	Governance	Reporting duties/activities
Judicial College (part of Judicial Office)	'to ensure that high quality training is delivered to enable those who discharge judicial functions to carry out their duties effectively, in a way which preserves judicial independence and supports public confidence in the justice system'	'an independent judicial body and part of the Judicial Office' it 'draws its funds, staff and much of its corporate support directly from the MoJ'	Prospectus published on judiciary website
Judges' Council	• 'to be a body broadly representative of the judiciary as a whole which will inform and advise the Lord Chief Justice on matters as requested from time to time' • Selects judicial members of JAC • Judicial input on resourcing of courts	Meets 4 times a year; Standing Committees and working groups meet as required. Membership: JEB members plus 17 other judges from all levels	Annual report published in 2009 (but none in 2010 or 2011).
Association of HM District Judges	'gives pastoral advice and assistance to its members. It also represents the district bench in varied discussions and meetings with the senior judiciary, HMCS and many other organisations'	National committee, with six officers	Web page judiciary website

(*Continued*)

Appendix 2 Continued

Body	Role	Governance	Reporting duties/activities
Association of High Court Masters	'The association will represent the views, interests, opinions and resolutions of the Masters to the Lord Chief Justice and other judicial office-holders'	No information	Brief statement on judiciary website
Council of HM Circuit Judges	'collects the views of circuit judges, and acts on their behalf by negotiating with the government on matters such as salaries and other terms of service'	National committee	Web page judiciary website
UK Association of Women Judges	'The UKAWJ is the only organisation for the judiciary that is primarily concerned with issues that affect women'	Unofficial membership organisation. President: Baroness Hale	Own website

* The LC and judiciary have agreed that there should be a single head of the judiciary in England and Wales; functions of the Senior President of Tribunals will be transferred to the LCJ in forthcoming primary legislation.

Appendix 3
Judicial evidence to Select Committees 2006 to August 2012

Accountability purpose	*Oral evidence*	*Committee and date of hearing*	*Written evidence*
Scrutiny of the office of Lord Chief Justice	Lord Phillips, Lord Judge CJ, Goldring LJ	HLCC Dec 2010, HCJC Oct 2010, JCJC Jul 2008, HLCC May 2006,	
Scrutiny of constitutional relationships, inc. creation of Ministry of Justice	Lord Phillips, Lord Judge, Thomas LJ, Judge LJ, Lord Mackay of Clashfern,* Lord Lloyd of Berwick*	HLCC Jul 2008, HLCC Dec 2007, HLCC May 2007, HCJC May 2007, HLCC Feb 2007, HLCC Jan 2007	Lord Phillips CJ (HCJC 2007)
Scrutiny of government proposals for human rights	Baroness Hale, Maurice Kay LJ	JCHR March 2008, HCJC Oct 2006	
Scrutiny of operation of family courts	Sir Nicholas Wall P, Pauffley J, Ryder J, Sir Mark Potter P, John Thomas LJ, Munby J, District Judge (Magistrates' Courts) Nicholas Crighton	HCJC May 2011, PAC Oct 2010, HCJC May 2006	HH Judge Clifford Bellamy (HCJC 2011)
Scrutiny of legal aid reforms	Sir Nicholas Wall P, Sir Anthony May P, Judge Robert Martin, Lady Butler-Sloss,* Sir Mark Potter	HCJC Feb 2011, HCJC June 2009, HCJC Jan 2007	Sir Anthony May (HCJC Dec 2010), Sir Mark Potter P (JCJC Jul 2009)
Scrutiny of sentencing	Leveson LJ,*** Sir Igor Judge P, HH Judge Julian Hall, Lord Phillips CJ, Lord Woolf*	HCJC Jun 2011, HCJC Dec 2010, HCJC Jan 2008, HCJC Jul 2007, HCJC Jun 2007, HCHA Apr 2007	Leveson LJ (HCJC Jul 2011, JCJC Jan 2011)
Scrutiny of reform of coroner's system	Smith LJ	HCJC Feb 2006	

(*Continued*)

Appendix 3 Continued

Accountability purpose	*Oral evidence*	*Committee and date of hearing*	*Written evidence*
Scrutiny of judicial appointments process	Lord Mackay LC,* Lord Phillips PSC, Lord Judge CJ, Baroness Hale JSC, Lord Neuberger MR, Hallett LJ, Lord Woolf,* Lord Carswell,* Toulson LJ,**** Auld JL	HLCC Dec 2011, HLCC Nov 2011 (three meetings); HLCC Oct 2011 (two meetings); HCJC Jul 2006	Baron J, Sir Konrad Schiemann,** Baroness Hale, Judge Hugo Storey, Judge Robert Martin, Arden JL, Lord Mance, Carnwath LJ; Judicial Executive Board—all to the HLCC 2010.Lord Judge CJ and Lord Phillips, jointly (JCDCRB 2008)
Ombudsman and the Equitable Life affair			Lord Judge, PASC 2009
Tribunals	Hodge J, Andrew Collins J, HH Judge Robert Martin	HCJC Mar 2006, HCWPC Nov 2010	
Domestic violence	District Judge Marilyn Morgan, Wall LJ	HCHA Jan 2008	
Privacy and injunctions	Sir Nicolas Wall P, Baker J, Lord Neuberger MR, Tugendhat (recently retired Sir Stephen Sedley also gave evidence)	Joint Committee on Privacy and Injunctions, 2012	
Extradition	Judge Riddle (Senior District Judge, Westminster Magistrates' Court)	HCHA, February 2012	

Key: HLCC = House of Lords Constitution Committee; HCJC = House of Commons Justice Committee; JCHR = Joint Committee on Human Rights; PAC = Public Accounts Committee; PASC = Public Administration Select Committee; HCHA = House of Commons Home Affairs Committee; JCDCRB = Joint Committee on the Draft Constitutional Renewal Bill; HCWPC = House of Commons Work and Pensions Committee.

* Retired judge.

** Justice of the Court of Justice of the European Union.

*** Chair of the Sentencing Council.

**** Member of the JAC.