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CLOSER ENGAGEMENT WITH PARLIAMENT:
THE IMPORTANCE OF DEVELOPING NEW CONVENTIONS

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The thesis of chapter 5 of Gee, Hazell, Malleson and O'Brien's *The Politics of Judicial Independence in the UK's Changing Constitution* ("*The Politics of Judicial Independence*"), the publication of which this conference is celebrating, and of Patrick O'Brien's remarks today is that the relationship between the judiciary and Parliament has undergone a structural change (92) and (112) that Select Committees "have developed into key guardians of judicial independence and the rule of law".

I shall primarily address appearances by judges before Parliamentary committees but we should not forget another aspect of the relationship of the judiciary with Parliament. It is the practice of the Lord Chief Justice (generally as a prelude to an appearance before a Committee of one or other House, or a Joint Committee), to publish a review of matters concerning the administration of justice and laying it before Parliament pursuant to section 5 of the Constitutional Reform Act 2005. These are both principally aspects of explanatory accountability. It is also true that when judges give evidence on a topic, such as relations between them and the executive, or the effect of the creation of the MoJ, if they are persuasive, the resulting conclusions of the Committee in its report may provide support for their view of what judicial independence and the rule of law require. If they are not persuasive, the converse is true. Whether

what judicial independence and the rule of law require should be contingent in this way is a large question which I do not address.

Before the last quarter of the 20th century there were virtually no appearances by judges before Parliamentary Committees. I would trace the change to the late 1990s. It was about then that the old Lord Chancellor's Department developed guidance for judges asked to appear. The guidance is now given by the Judicial Executive Board and is thus addressed only to English and Welsh judges, and not to the UK judges in the Supreme Court, or the judges in the two other jurisdictions in the UK. The latest 2012 version states that "such appearances should be regarded as exceptional". They are, however, regular rather than exceptional. The book" states (101) that between January 2003 and December 2013 72 judges appeared on a total of 148 occasions. Allowing for the occasions on which more than one judge attends a single hearing, as they often do, these figures suggest that the average is very roughly 8 occasions a year. This is consistent with the figures given by Nick Walker in his remarks.

The principal point I wish to make is that the experience since the 2005 reforms, and the greatly increased number of occasions on which Select Committees, mainly the House of Commons' Justice and Home Affairs Committees, and the House of Lords' Constitution Committee, invite judges to appear, has been of movement from relative informality and some misunderstandings of the constitutional boundaries within which judicial appearances must take place, to a more structured system coupled with the emergence of nascent conventions about how those boundaries should operate in practice. The experience is similar to the development of legal doctrine in the decisions of the courts. It produces progress by cautious and incremental steps which leave an opportunity to retreat if something does not work. It is that incremental progress which has enabled greater engagement without imperilling constitutional fundamentals.

When I first became involved with these questions over 10 years ago, there was informality in the way Committees invited judges. They were sometimes approached directly because of their involvement in a particular case and without reference to their expertise in the area, or which judges were experts or responsible for it, or to the office of the relevant Head of Division or the Lord Chief Justice. There were different expectations about what assistance a judge might be able to give, and there was generally less advance preparatory groundwork with the Committee's officials about the scope of the questions to be asked and what the "no go" areas might be. There were also examples, particularly with members of the circuit and district bench who were treated with less respect, of quite inappropriate behaviour including persistent questioning on the sentence imposed by the judge-witness in a particular controversial case. One reason may have been that, as Joshua Rosenberg has perceptively observed, the boundaries between technical and procedural assistance and advice on a topic, which is permissible, views on the merits of policy questions which are not permissible are, at the margin, difficult to pin down.[1]

The move to more structured arrangements enabled a relationship to be built up between Committee clerks and members of the Judicial Office and, during the tenure of the last Clerk of the House of Commons, between him and the last two LCJs. One manifestation of that structure, the channelling of invitations through the office of the LCJ or the head of the relevant division has, in my view been vital in the improvement that we have seen in recent years. Its deeper importance, in my view, is that it is fundamental to the creation of necessary

[1] He was referring to the difference between expressing views to the executive on technical and procedural aspects of a proposal (permitted and indeed desirable) and expressing views on the policy itself, particularly if it is politically sensitive (generally not permitted, save possibly where it concerns the administration of justice).

constitutional conventions to guide this new and sensitive area and constrain what is done in practice.

I believe the reason for the improvement and the movement towards new constitutional understandings has been because of the "to-ing" and "fro-ing" between Westminster and the RCJ before a hearing. This has enabled the boundaries of constitutional propriety to be identified. I believe that it has also led to a wider appreciation of the conventions, the reasons for them, and in most cases acceptance of the constitutional position and the boundaries. It is, I suspect, partly for this reason that the authors of *The Politics of Judicial Independence* can now say in chapter 5 (112) that "only rarely do committees ask questions about a specific judicial decision in a clear breach of convention".[2] That may understate the position and be a tad optimistic in the sense of not recognising success in dissuading Committee members who wish to ask such questions from doing so.[3] It has to be said that there appears to be more unwillingness to regard those questioning a serving or retired judge who has chaired a sensitive inquiry as subject to the same constraints as when questioning other judicial witnesses.

In my evidence to the Select Committee on the Inquiries Act 2005, and in talks since,[4] I have suggested that questioning judges who chaired an inquiry about their recommendations (as opposed to the inquiry procedure and administrative arrangements) was inappropriate. The LCJ made the point more strongly in his Bangor Public Law lecture last year.[5] The general constitutional principles about what is required to protect judicial independence mean that judges are not to be

2 p. 112, n. 75.

3 I am aware of other cases where Committees wished to ask such questions and were either dissuaded or asked them anyway. There are, for example, the attempts to obtain a judicial witness in 2007 to deal with the *Governance of Great Britain* White Paper and in 2008 to give evidence about which bodies qualify as "public bodies" within the HRA, and whether an amendment was needed to the Act because of the decision in *YL v Birmingham CC* [2007] UKHL 27.

4 "The New Model Judiciary and the other two branches of the State", December 2014 and May 2015, https://www.judiciary.gov.uk/announcements/the-new-model-judiciary-and-the-other-two-branches-of-the-state/

5 "The future of public inquiries", [2015] PL 225.

questioned about cases which they have decided or in which they have been involved, and do not comment on such cases. Those principles apply to a judicial chair of an inquiry and require a constitutional convention that he or she should not be questioned about the recommendations they have made. It is something of a paradox that although the chair has been chosen because it is considered that the particular inquiry needs a judge and a substantially judicial process, some committee members (and possibly the authors of *The Politics of Judicial Independence*) do not accept that chairing the inquiry is a judicial function. If that is so, there is no need for a judge, but if having a judge-chair is necessary, this has post-report consequences, particularly for those who will continue to sit as judges thereafter. If Select Committees do not recognise this is the consequence of having a judge to chair an inquiry,[6] the LCJ may be more reluctant to agree that a member of the judiciary of England and Wales should do so. While section 10 of the Inquiries Act 2005 requires only that the LCJ be consulted before such a judge is appointed, the practice is that his consent is sought. A judge asked to chair an inquiry is, of course, not obliged to accept.

The experience of the two recent high profile cases about inquiries shows how the clear identification of the boundaries can assist the development and refinement of a constitutional convention. It also shows how incremental development may be able to work in other contexts where judges appear before Committees. As the number of invitations increase, so does the need for clarity

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[6] The House of Commons Northern Ireland Affairs Committee, 2nd Report 2014-15 HC 177 (24 March 2015) paras 9-11 stated that it did not consider that when Lady Justice Hallett chaired the government's independent "On the Run Inquiry" she acted in a judicial capacity. Save in the passage quoted here, the Committee referred to her as Dame Heather Hallett. Lady Justice Hallett declined the Committee's invitation to give evidence but wrote to the Committee giving her answers to a number of the questions it had raised. The Committee stated (at para 11)" We chose not to summon Lady Justice Hallett to attend, but we consider it to be a regrettable discourtesy to Parliament that she declined our initial invitation to give evidence to the Committee, especially as she had not acted in a judicial capacity when carrying out her review. **We urge the Government to ensure that, in future, all parties that carry out inquiries or reviews on behalf of the Government are instructed from the outset that they would be required to explain their findings to Parliament if invited to do so."**

in the boundary of what is permissible and what is not. A conventional approach will afford this while leaving an escape route. There is a lesson for all in the statement by the Supreme Court of Canada in 1982 that "the main purpose of constitutional conventions is to ensure that the legal framework of the constitution is operated in accordance with the prevailing constitutional values of the period".[7]

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[7] *Re Objection by Quebec to a Resolution to Amend the Constitution* [1982] 2 SCR 791, 803.