

**Conference on *The Paradox of Judicial Independence***  
**Held at Institute of Government**  
**22nd June 2015**

This is a note of a conference to mark the publication by Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien of a book on [\*The Politics of Judicial Independence in the UK's Changing Constitution\*](#) which was the primary output of an AHRC-funded [project](#). The conference was also funded by the AHRC. Those participating in the conference had a professional interest in the issue, with contributions from current and retired judges, civil servants, journalists and others. The conference opened with a lecture by the Lord Chief Justice on "[Judicial Leadership](#)", and was followed by panels on: (i) judicial engagement with the executive, (ii) judicial engagement with Parliament and (iii) the challenges for the judiciary and the court system over the next five years. The conference was conducted under the Chatham House Rule. This note is intended to offer an impression of the main themes discussed.

**Closer Judicial Engagement with the Executive**

An academic summarized how relationships between judges, ministers and civil servants in England and Wales have changed. Before the reforms introduced by the Constitutional Reform Act 2005, judicial-executive engagement tended to focus on a narrow range of policy questions, with the terms of that engagement regulated largely by convention and tradition. Only a small number of actors were involved, with most of their interaction occurring behind closed doors. Much of this interaction focused on the Lord Chancellor, with judicial-executive relationships marked by relatively high levels of stability, with neither judges nor ministers keen to change the system. Today, the interaction between judges and ministers is more formal, institutional and transparent. It is also fragmented, a much wider range of actors involved in shaping judicial-executive relations (e.g. the JAC, JACO, JCIO). This may mean that more actors help to safeguard judicial independence, but it might also blur lines of responsibility and accountability. The stability of the pre-2005 regime might have been lost in the short term (see e.g. the frequent tinkering with the judicial appointments regime). But the new arrangements have been stress-tested by the financial crisis and seem to have a fairly stable foundation. Overall, there is a more mature relationship between the executive and judiciary. At the heart of this relationship is the paradox of judicial independence: a greater formal separation of powers requires much greater day to day interaction between judges and politicians to define, nature and maintain the terms of that separation.

A senior civil servant agreed that although the context in which engagement occurs has changed, the need for engagement in order for both the executive and judiciary to fulfil their duties has not. A common purpose between the executive and judiciary in ensuring the successful delivery of an effective justice system requires a sound basis for engagement at all levels. There is now a range of ways in which judges, ministers and officials can

engage with each other and these present both challenges and advantages. Engagement happens routinely in a whole variety of ways. There are more formal engagements such as the Civil Procedure Rule Committee which operates under statutory engagement, or non-statutory bodies such as the Family Justice Board. Informal engagement includes workshops between civil servants, judges and other key stakeholders in the justice system. Engagement can be a very powerful force for progress and whether it occurs by way of formal, informal, statutory, ad-hoc, carefree or careful engagements, a golden thread of respect for judicial independence runs throughout. Judges and ministers must recognise, be mindful of and respect their different perspectives. Policy is always for the better when a product of bringing together different perspectives. Tensions might arise from time to time, but these are usually healthy tensions, and might ultimately lead to better outcomes. Understanding where the appropriate perimeters between judges and ministers lie can still be a challenge that requires awareness and skill on both sides. The civil service have sought to promote this awareness through an education programme (e.g. workshops).

A senior judge commented that judges do not wish to engage in the formation of policy beyond the development of the common law. Nevertheless, there are areas where judges can and do help in regard to the technical and procedural elements of policy proposals that might impact on the work of the courts and tribunals. Judges do not tell the executive what to do, but can inform them of the potential impact that the changes may have. The line judges must not cross is sometimes unclear, but judges have a duty to be constructive and exert influence through appropriate formal ways. Although this is nothing new, the extent of judicial interaction with the executive has changed. One reason for this is that the nature of the civil service has changed, with civil servants moving within and between departments. This has meant there can be a loss specialist's knowledge. The Ministry of Justice is a much larger department than the pre-2003 Lord Chancellor's Department. Many issues will not cross the desk of the Lord Chancellor as the position focuses more on the bigger issues. This judge explained that the Constitutional Reform Act has resulted in the judiciary playing a larger administrative role. The Act, coupled with recent cuts to public finance have created a strong need to collaborate with the executive. The changes brought about by a combination of the 2005 Act and present austerity vividly illustrate the need for judges to recalibrate their relationship with the Executive. The judges know how the cuts have affected the system. Although the judges may not have always been listened to, they nonetheless were able to say something about practical implication of the policy. The government should not be reluctant to engage with the judiciary. It is infinitely better to deal with these issues as a matter of routine as early as possible. Judges will not dictate to the Government, but they may just inform the Government's approach on policy questions relating to the courts and tribunals.

Several participants were sceptical about the transparency of the current system. It was suggested, that as judges play a more important role in managing the justice system, the public should be entitled to know who is influencing policy.

## **Closer Judicial Engagement with the UK Parliament**

The *Politics of Judicial Independence* project has produced a database documenting judicial appearances before parliamentary committees between 1979 and 2014 (i.e. from the date that the select committee system was introduced). By the end of 2014 there were around 296 judicial appearances. Such appearances before legislative committees do not occur in many other countries, but have developed into an important site of judicial-legislative engagement in the UK. (There is some evidence of appearance occurring fairly frequently in the United States and occasionally in New Zealand). The critical turning point in the UK appears to be 2003, which coincides with the events leading to passing of the Constitutional Reform Act. Several reasons may explain this rise. Since the millennium there has been the creation of committees such as the HL Constitution Committee and the Joint Committee of Human Rights in 2001, along with the HC Justice Committee in 2003. There was also the introduction of pre-legislative scrutiny. Finally, the judges felt a stronger need to be heard during the parliamentary debates on the 2003 reforms. Judges mostly appear as experts of law. A small number appear in relation to their role as chairs of public enquiries. They also appear now in relation to their leadership functions within the judiciary. Committees are keen to hear from judges and they tend to make excellent witnesses (e.g. they draw on relevant evidence and make well-reasoned points). However, there are some risks. Though rare in practice, judges could be subject to hostile questions. There is also a risk that committees may become too deferential to judges or misinterpret a judge's opinion as representative of the judiciary as a whole. For the judiciary, frequent appearances also have resource implications (since judges appearing before committees lose at least a couple of sitting days, i.e. including preparation time).

A parliamentary clerk agreed that judicial appearances before committees are increasing. The tone and framework of engagement between the judiciary and committees is mainly governed by historical conventions and principles. This practice has established a culture of mutual respect and deference, and strongly discouraged incursions by either side into the territory of the other. When they appear before a select committee, judges are subject to Guidance published by the Judicial Executive Board, which guidance performs a similar function to the Civil Services Osmotherly rules. But as with the Osmotherly rules, the JEB's Guidance has not been formally accepted by Parliament. Similar to Osmotherly rules, most select committee members are probably unaware of them. Committees want to hear from judges because their place and role in the justice system makes them expert witnesses. There are differences of view over the appropriateness of judges who chaired public inquiries being invited to give evidence before select committees (e.g. requests by the Media and Culture Select Committee over Justice Leveson's enquiry into regulation of the press; and the Northern Irish Affairs Committee over Lady Justice Hallett's enquiry on Northern Ireland). Generally speaking, judicial appearances not only help committees, but Parliament as a whole, in understanding the potential impact in its law making.

A senior judge observed that judicial appearance before select committees are examples of explanatory accountability. If judges are persuasive, the committee's resulting report may support the view of the judiciary about the implications of legislation on the rule of law or judicial independence. The JEB's Guidance replaced and built on guidance issued by the Lord Chancellor. Before 2003, however, there was a lack of clarity about what was permissible. Today, appearances are regular rather than exceptional, with an attendant move from informality and misunderstanding about the proper constitutional boundaries to a more structured engagement coupled with emerging conventions to guide how the engagement should work. This process is similar to the development of the common law, an incremental process that leaves room for both sides to retreat if something does not work. This permits greater engagement without imperilling constitutional fundamentals. Committee clerks and officials in the Judicial Office have worked together to ensure that there is awareness on both sides of the limits of appropriate engagement. That said, there remains uncertainty about the appropriate approach to judges who have chaired public enquiries. If select committees are correct in that chairing an enquiry is a non-judicial function, then perhaps someone other than a judge should chair them. The LCJ should perhaps consider refusing to allow judges to chair an enquiry in the future.

Some questioned whether there was a need for greater protection of judges who appear before committees. Some pointed to the important role that committee clerks and chairs in protecting judicial witnesses. Others suggested the judges could do more themselves. It was suggested that discipline and self-restraint are a two way street. If some judges stray into political territory (e.g. via extra-judicial speeches), it makes it harder to protect the judges before the committee from being asked impermissible questions. One participant claimed the judge was free to not respond to any inappropriate questions asked by MPs. Indeed, evidence presented showed that in around 1 to 2% of questions asked, judges had chosen not to answer. Nevertheless, it was also noted that a judge may be embarrassed by this. It was also suggested judges could submit written as opposed to oral evidence, and that as a result of their professional backgrounds judges are adept at dealing with hostile questions.

Much of the subsequent discussion was on the role of judges in chairing public inquiries and the implications of this on appearances before committees. Some asked if chairing an inquiry is aptly characterized as a non-judicial role, then judges should not be appointed as chairs. Another participant suggested a key reason was branding: a judicial led inquiry helps brand an inquiry as independent and well-organised. Another participant suggested that there are other qualities needed to chair an enquiry and that judges may not always meet those standards. There was discussion of whether the LCJ could refuse to allow a judge to chair where the inquiry's scope and nature was inappropriate. The consensus was that, under current system, the Lord Chief Justice would most likely be able to refuse, with it likely that the Government would respect that decision. It was suggested that if the LCJ could point the government in the right direction of finding a suitable non-judicial chair, it might reduce any tensions. Others pointed to practical problems. Ministers might

promise a judge-led inquiry in the heat of the moment without consultation and, in such circumstances, it would be harder for the LCJ to refuse. However, in such circumstances, the LCJ could negotiate with the Government to reduce the scope of the inquiry to avoid the more inappropriate areas.

## **Challenges for Judges and the Justice System in the New Parliament**

### *Transforming the Courts*

For one senior judge, the main challenge ahead is implementing the most transformative court reform programme in a generation. This will include modernising IT, reforming procedures and consolidating the court estate. Making greater use of digital technology is vital to improving the system (e.g. a common digital platform for criminal justice which will embrace the criminal courts and judges, the CPS, the police and others). In the civil sphere, a new IT system will be tested later this year. This system will enable all cases to be issued and filed online anywhere in the world, 7 days a week 24 hours a day and, if successful, it will be rolled out across the courts. A key feature of the reform programme is that it will involve a true partnership between HMCTS, the MoJ and the Judiciary.

One participant observed that it is far better that any reforms are led by the judges who operate the justice system than by external decisions making. However, this will present a unique problem for the: how far can the judges go in endorsing and encouraging reform? On the one hand if the judges do not shout loudly enough and do not push hard enough, including publicly, the government might believe the reforms are not that important or might reduce the finance available for the reforms. On the other hand, if they appear to supporting these reforms too far, they will be perceived to be sacrificing their neutrality. It will be a difficult balancing act for the judiciary to support these reforms without losing their political neutrality.

It was generally agreed that reforming the courts is a complex issue. However, some were more positive than others. One participant suggested there was a risk the reforms placed too much faith in technology, and another participant worried that some citizens might not be technologically competent enough to upload their disputes via an online service. There was some concern that, for this reason, the project might become another failed initiative that wastes public money rather than saving it. Other participants appeared more optimistic about the reforms.

### *Access to Justice in an Age of Austerity*

A senior judge commented that austerity will bring challenges to delivery of these goods. Financial stringency will bring challenges but they also may be regarded as opportunities. There is always scope for improvement, to lower costs and find new ways. There is scope for greater efficiency in the deployment of judicial resources. For example, we have the

opportunity to improve case management systems and develop judicial career strategies. Access to justice is vital, but access to justice and access to lawyers are not the same. The judicial system should be accessible to people who have no access to lawyers. Thought is required about who really does need access to lawyers, not only or even mainly for the purpose of going to court, but also for the purpose of not going to court. Inexpensive legal advice and help now may save a great deal of legal time and expense and court time later.

Another senior judge agreed that it is important to distinguish between different types of cases. Small disputes, should either never come to court, or where they do, be resolved in a simple, speedy and inexpensive way. On the other end of the spectrum there are High value, complex and length disputes which might involve business and property matters, disputes between companies and some international elements. Between the two extremes lies the vast bulk of litigation. The critical issue here will be the allocation of litigation to the right level of court and judge. Re-alignment can only take place if there is the capacity and administrative and judicial resources at the county court level to enable work to be devolved from the High Court so that the High Court can in turn take work from the Court of Appeal. This will inevitably mean investment at the county court level.

The reduction in legal aid has resulted in a far greater number of litigants in person. There is therefore a greater need than ever to ensure that cases are dealt with fairly and proportionately when one or more of the parties is not legally aided. To reduce this, several initiatives have been implemented but huge challenges remain, particularly in the context of family law.

A senior politician agreed that the Lord Chancellor will have challenges in stemming the fall in standards within the legal system.

### *Reform of the Human Rights Act*

There was a discussion of the planned reform of the Human Rights Act. It was noted that devolution was a very real hurdle for the government's plans. As it stands, the devolved governments across the UK appear to be supportive of retaining the Human Rights Act in its current form. It was argued that although Westminster could proceed without the consent of the Scottish Parliament, in the context of the current constitutional tensions over the United Kingdom, some felt it was unwise to proceed without consent. Several participants argued that the Conservative Party's approach to reform was the biggest problem. One participant argued the Party has so far failed to present a British Bill of Rights as a more desirable alternative to the current system. Nor has the Party presented a clear message, with the Party described as sending mixed messages over the UK's future relationship with the ECHR and the Strasbourg Court.

### *Defending the Rule of Law*

A Justice of the Supreme Court noted that it is essential to determine the constitutional limits to what the judges can say and do, both publicly and privately, when engaging with other branches of the government. The judiciary has a right and arguable duty to engage with other the branches of government when the rule of law is under threat.

### *Judicial Appointments*

There was disagreement over the extent to which judges are able to influence the Judicial Appointments Commission's recommendations and the possible consequences that might arise out of this. It was agreed that judges have a legitimate role in judicial appointments, but some participants worried that judges have too much say over selection decisions, and especially in the most senior appointments. One participant pointed out that 99.9% of the time the Lord Chancellor has accepted the JAC's recommendations, and that it was thus important that the public has confidence that judges do not have excessive influence over JAC decisions. Others strongly rejected this argument. They were keen to argue that the JAC had not sold out its agenda to the judges; rather, the JAC hold the judges to account (e.g. lay members help to ensure that judges have justified and provided evidence for why one candidate is stronger than other). There were also concerns regarding the judicial influence in the drafting of the job specification. Some argued that this was necessary, since only the judges had the experience to know what was required of a judge. However, there was a concern the job specification may become too formulaic in its approach. As a consequence, it may only allow a certain type of candidate to be appointed. Some argued that this might continue to prevent greater diversity. Some felt the Government and the judiciary needed to consider more radical reforms including affirmative action. Others felt there was scope for greater political consideration in the process. Another participant was concerned by the lack of statistics concerning the candidates reviewed by the Judicial Appointment Commission. However, other participants suggest there were some statistics published. However, it only appeared to be in circumstances where there were a large number of vacancies. It was accepted that where there are a small number of vacancies the anonymity of candidates might be at risk.