

Judicial Independence and Accountability: The Role of Parliament

- Note of Seminar in Parliament buildings -
- 7th December 2011 -

1. Introduction

This is a note of a seminar that took place in Parliament buildings on the topic of 'Judicial Independence and Accountability: The Role of Parliament'. The seminar was the third in a series of seminars being run under the auspices of an AHRC-funded project on 'The Politics of Judicial Independence in Britain's Changing Constitution' by the Constitution Unit at UCL, Queen Mary University of London and Birmingham University. Those participating in the seminar had a professional interest in the issue, with contributions from a number of senior and former judges, politicians, parliamentary clerks, civil servants and journalists. The event was run under the Chatham House Rule and this short note reflects that. It is intended to give a general impression of some of the themes discussed.

2. Comity and the Relationship between Parliament and the Courts

One speaker emphasised that relations between Parliament and the courts should be based on comity: 'a keen sense of mutual respect combined with keeping a certain distance.' A key aspect of this comity on the part of Parliament is the sub judice rule and the requirement that judges not be criticised in debate or in passing by amendments or supplementary questions. However, there is no bar to criticism of a judge provided that it is framed in an orderly motion. There is no constitutional bar to political criticism of the judiciary in the British system. Orderly criticism is rare and good for comity. There seemed to be a general acceptance that criticism of judges by parliamentarians does not affect the independence of judges, even when such criticism is unfair or inappropriate.

Another speaker was sceptical about the appropriateness of comity as the basis for this relationship. Comity 'tends to freeze into a sort of silent, mutual ignoring of each other' in which the two sides neither talk nor understand each other. The qualities of recklessness and foolishness which lead to breaches of comity are qualities that we treasure in parliamentarians and it is necessary to breach the fences regularly to get the conversation going. Those who defy authority, flagrantly abuse the rules of the House and treat the courts with disdain have often been very important in driving forward political and social change'. Another argued that there could be comity with tension and that this could be creative tension. However, the real problem with relationships between Parliament and the courts was a gulf of ignorance – or affected ignorance – about what the other side was doing.

2. Super-injunctions and Sub Judice

Several parliamentarians and officials present noted that the very high profile breaches of super injunctions and anonymised injunctions by parliamentarians in 2011 were not breaches of the sub judice rule. They were breaches of court orders and so distinctly different. Whilst the parliamentarians involved were not disciplined this was not because their actions were approved of and indeed they were ruled out of order. The reaction of their colleagues in Parliament was also hostile.

It was suggested by some that the Houses need to respond to the recent high profile breaches of court orders by passing a resolution delineating a 'no go' area in the context of court orders of the kind that parliamentarians are already familiar with in the context of *sub judice*. A proposal for such a resolution has been made by the Clerk of the House of Commons.¹ In this way the disciplinary powers of the Speaker and the Lord Speaker could be strengthened. However a speaker noted that the category of orders that could be frustrated or violated by privileged speech acts in Parliament is potentially extremely large, including many cases involving purely private litigants and private subject matter (for example, cases involving family law). Another noted that whilst a rule

¹ The text of this proposal is contained within Robert Rogers' written evidence to the Joint Committee on Privacy and Injunctions at p 96 of a document available on the Parliament website here:
http://www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/JCPIWrittenEvWeb.pdf

governing interim court orders is defensible as a means of protecting the judicial process, it might on some occasions be entirely legitimate for parliamentarians to seek to discuss or challenge permanent orders. In this respect, parliamentarians should not be chilled by the fear of disciplinary action.

3. Relations between Parliament and the courts

One participant asked if, given the apparent lack of understanding and comity between them, we need a new 'Concordat' between Parliament and the Judiciary? Several participants did not feel that this was appropriate. It was noted that Parliament is very different to the Executive and the Judiciary, who agreed such a Concordat in 2004. Both the Executive and Judiciary are capable of delivering what they promise in such an agreement, but Parliament is not because it is an 'organism' rather than an organisation. Behavioural changes and constraints within Parliament are possible, but its relationship with the Judiciary is rather different to that of the Executive. There was also some doubt about whether such a Concordat with the Judiciary (or anyone else) is constitutionally possible given the sovereignty of Parliament.

Some participants questioned whether such a Concordat would be worthwhile in any case. One argued that the problems are actually between the Executive and the Judiciary. Another worried that since the Concordat and the Constitutional Reform Act there had been increasing vilification of junior judges in particular. The more we depart from the unwritten Bagehotian constitution, the more we have constitutional rules that are flouted.

4. The Bill of Rights and Absolute Privilege

Art. 9 of the Bill of Rights provides that proceedings in Parliament may not be questioned outside of Parliament. One participant pointed out that this has the unfortunate consequence of preventing the admittance as evidence in court of the proceedings of (for example) Select Committees, even where it simply forms part of a narrative and might allow judges to be better informed. Could there be any wavering on the absoluteness of this principle? Others worried that departure from the absolute rule would be inappropriate because it risked chilling proceedings in Select Committees. Policing the boundaries of a non-absolute rule would become a matter of judgment and as a result it would be difficult to say what might be discussed in court proceedings afterwards.