Written evidence from the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd (SCC0013)

SELECT COMMITTEES AND CONTEMPT

Introduction

1. I have read with interest the Memorandum prepared by the Clerk of the House detailing the three principal options under consideration. I would like to thank the Committee of Privileges for inviting me to provide written submissions as part of its inquiry into *Select Committees and Contempt*.

2. I limit my submissions to the possible involvement and role of the courts and their interaction with Parliament. In so doing, I bear in mind that the Committee is particularly interested in the role the courts could play in enforcing any Parliamentary Orders for attendance or production in light of comparable practice in other situations.

Constitutional considerations

3. There are perhaps three important constitutional principles that these proposals engage:

    a. Parliamentary Privilege, as protected by Article IX of the Bill of Rights 1688: *That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.*

    b. Judicial Independence, in determining cases according to law "without fear or favour, affection or ill-will".

    c. The Rule of Law and Fundamental Rights (whether rooted in the Common Law, international treaties or Statute), in particular the important and long-established right to be free from arbitrary decision-making. The right to a fair trial and no punishment without law are now enshrined in the European Convention on Human Rights and given domestic effect by the Human Rights Act 1998.

4. These are all fundamental principles underpinning our modern constitutional arrangements and any modifications, alterations or refinements must be done with extreme care.

A statutory regime?

5. On reviewing the constitutional history of the interactions between Parliament and the courts on matters of privilege, it is clear that the principle of comity guides. In short, the settled position is that Parliament retains exclusive cognisance in relation to purely internal matters; however, where matters have an external quality, the courts may be called upon to adjudicate disputes and, as with any other statute, to determine the extent of the exclusion provided for in Article IX of the Bill of Rights.

6. A Parliamentary Order for attendance or production against a non-Member is plainly an area with such an external quality. Therefore, whilst legislation might not be necessary, a statutory framework is much to be preferred to avoid any breach of comity. Any legislative provisions detailing the role of the courts and the procedures to be followed would need to be drafted with great clarity, therefore it would be prudent for me, or

rather my successor, to nominate a judge to be consulted during the drafting in accordance with established Guidance. Although only illustrative, I do not think the draft clause in the Annex to the Clerk's Memorandum is sufficient.

The possible role of the courts

7. If the courts are to be given a formal role in such matters by legislation, judicial independence and the rule of law must be protected to enable individual judges to act independently and impartially according to law. The courts could not, for instance, simply be instructed by Parliament to give judicial effect to a Parliamentary Order. In addition to failing to address the procedural concerns relating to fundamental rights that no doubt underpin this inquiry, such an approach would also be contrary and damaging to judicial independence and the rule of law. Necessarily, therefore, the courts will have to be able question that which Parliament is seeking to achieve by its Orders.

8. There are various comparable instances where the inherent enforcement powers of the High Court are available to assist in other contexts. The most notable of these are perhaps:

    a. Section 25 of the Tribunals, Courts and Enforcement Act 2007.
    b. Sections 42 to 44 of the Arbitration Act 1996.
    c. Section 36 of the Inquiries Act 2005.

    None of these provisions in any way fetter the discretion of the High Court.

The possible role of Parliament

9. Notwithstanding the move towards a greater separation of powers, the High Court of Parliament and the attached judicial functions remain as a facet of Parliamentary Sovereignty. The power of Parliament to summon witnesses to attend or to produce documents is an exercise of such judicial functions. In cases of breach, Parliament retains the power to determine and punish contempt – the penal jurisdiction – even if the same has not been used for some time and the House has resolved only to use this jurisdiction sparingly.

10. Doubtless the Committee is, very understandably, concerned with whether the exercise of such penal powers is appropriate in modern circumstances. In my view, respectfully, the modernisation of this jurisdiction, together with providing for the involvement of the courts, may provide a satisfactory settlement where the respective roles and functions of Parliament and the courts are respected.

A combined solution

11. The Clerk's Memorandum suggests such a middle ground, perhaps involving a two-stage process where Parliament issues an Order in the first instance. Only if compliance is not forthcoming would enforcement be pursued through the courts, including possible contempt proceedings.

12. The practice adopted by statutory inquiries could be a useful blueprint. For example:

    a. A Select Committee Clerk (or Chair) could issue an informal request initially.

    b. If this is not complied with, the Select Committee Chair (or, say, the Committee

of Privileges) could, acting judicially with advice from a legal assessor, issue a formal Order with a Penal Notice.

c. If compliance is still not forthcoming, an appropriate Officer of the House could bring contempt proceedings in the High Court as a last resort. (I would think it preferable for Parliament to petition the courts for support rather than be in the position of defending appellate proceedings brought by the alleged contemnor.)

d. On trying the contempt the court could:
   i. make a finding of contempt and punish the contemnor accordingly;
   ii. adopt the Parliamentary Order as a Court Order to provide a final chance for compliance (whilst reserving the possibility of further contempt proceedings);
   iii. dismiss the application.

e. An appeal to the Court of Appeal, with permission, could be provided for both parties.

An alternative solution

13. If Parliament was strongly opposed to the involvement of the courts in the manner suggested, the court's function (as suggested above) could instead be exercised by the High Court of Parliament. I am sure that a better course could be to revive a Committee composed of Peers who have held High Judicial Office, who could then determine such contempt issues in a judicial manner.

Conclusion

14. In summary:

a. This issue is one for Parliament to decide.

b. If the courts are to be involved, a statutory framework would be prudent to ensure the respective roles of Parliament and the courts are respected.

c. A senior judge should be consulted during the drafting of any legislation, in terms of the technical and procedural aspects.

d. A two-stage approach, where the courts are used as a last resort, could provide a constitutionally balanced solution.

e. Alternatively, if Parliament wanted to avoid recourse to the courts, the judicial expertise within the House of Lords could be used to exercise the inherent penal jurisdiction of Parliament in a modern manner.

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