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House of Lords

Select Committee

on the Constitutional Reform Bill

Evidence by Francis Bennion

2004

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Evidence to the Select Committee on the Constitutional Reform Bill

Preliminary

I, Francis Alan Roscoe Bennion, submit this evidence on Clause 1 of the Constitutional Reform Bill (the Bill). My qualifications for doing so are as follows. I am a former Parliamentary Counsel, having served in the Office of Parliamentary Counsel in Whitehall from 1953-1965, and again from 1973-1975. This included spells on secondment drafting constitutions for Pakistan and Ghana. In connection with the latter I wrote my first book, *Constitutional Law of Ghana* (Butterworths 1962).On retiring from practice at the Bar in 1994 I resumed academic work at Oxford University, where I am a member of the Law Faculty and a research associate of the University's Centre for Socio-Legal Studies. Earlier I was the first lecturer and tutor in law at St Edmund Hall, a college of the University. I have all-round experience of statute law and interpretation. In 1948, while studying for the Bar, I was employed as an editor of *Halsbury's Statutes.* I have had teaching experience in Oxford University and as a lecturer in statutory interpretation for the Council of Legal Education training Bar students. My other books include three on statute law and interpretation: *Statute Law* (3rd edn 1990), *Statutory Interpretation* (4th edn 2002), and *Understanding Common Law Legislation* (OUP, 2002). I wrote the *Statutes* title in Halsbury's *Laws of England*, and have also written many articles etc on the subject.

Introductory

In connection with the examination of the Bill by the Committee a consultation website has been set up.[1] It invites comments on the following basic question: If a Supreme Court is established, should it be financially and administratively independent of Government? The website continues by pointing out that while the Bill proposes that the new Supreme Court will be separate from Parliament and Government, it also proposes that there will remain a number of "ties" to the Secretary of State for Constitutional Affairs. It says that these include-

- the Court's budget being part of the annual budget of the Department for Constututional Affairs (DCA);

[1] The URL is http://www.tellparliament.net/constitution/node/view/9.

- the Secretary of State for Constitutional Affairs retaining some role in the appointment of Supreme Court judges;
- the Secretary of State having a role in disciplining judges;
- the Court being answerable to the Secretary of State for its administration;
- the Court's rules being subject to regulations drawn up by the Secretary of State.

Each of these five "ties" is a relic of the old system under which the judiciary, together with the legislature and the executive, were treated as an emanation of the Crown and, in relation to the judiciary, the Crown was represented by the Lord Chancellor. Retaining the five "ties", and having them operate through the Secretary of State seems to be an attempt substantially to retain the position and functions of the Lord Chancellor under a different name.

Historical

Here it is necessary to remember that historically the executive and the legislature, together with the judiciary, were emanations of the Crown and operated within a royal palace, the Palace of Westminster. Following Magna Carta, which anchored them in one place, the superior judges sat in Westminster Hall. Parliament still sits in the Palace of Westminster. In their judicial capacity, so do the Law Lords. The executive now operates close by, in and around Whitehall, the site of another royal palace. In all this one might remember the words of Blackstone-

> 'A court is defined to be a place where justice is judicially administered. And, as by our excellent constitution the sole executive power of the laws is vested in the person of the sovereign, it will follow that all courts of justice, which are the medium by which the sovereign administers the laws, are derived from the power of the Crown. For, whether created by act of parliament or letters patent, or subsisting by prescription, the only methods by which any court of judicature can exist, the consent of the Crown is expressly, and in the latter impliedly, given. In all these courts the sovereign is supposed in contemplation of law to be always present; but as that is in fact impossible, the Crown is there represented by the judges, whose power is only an emanation of the royal prerogative.'[2]

For those steeped in these constitutional principles it did not seem surprising or awkward when in certain respects the judiciary deferred to the legislature or the executive deferred to the judiciary, since they were all part of the unity that was the Crown. Under the present reforms it seems that ancient unity is to be broken. Or is it? Nobody quite knows, a constitutional incoherence that bodes ill.

[2] William Blackstone, *Commentaries on the Laws of England* (Oxford, 1768) III 23-24.

Allocation of state legal functions

In a 2003 article[3] I pointed out that in the United Kingdom – or any other common law country – certain state legal functions need to be carried out and financed. I identified 33 functions, falling into six groups. The group headed "Judicial Functions" comprised the following eight items-

1. Acting as a judge (including magistrates and other judicial officers).
2. Appointment, promotion, disciplining and dismissal of judges.
3. Framing and administering other conditions of service of judges.
4. Initial training of, and periodic refresher courses for, judges.
5. Formulating proposals for reform of legal and court procedure.
6. Drafting reforms of legal and court procedure.
7. Provision and administration of court buildings and plant.
8. Appointment, promotion, disciplining and dismissal of ancillary staff.

On the question of how judicial functions are to be financed, the article said-

> "Here we come to the crunch. At present judicial services in the United Kingdom are financed by the Treasury, directed by a senior cabinet minister, namely, the Chancellor of the Exchequer. If he considers that too much is being spent on legal aid or court buildings, then it is reduced. But no public service can be truly independent unless it has control of the purse strings so far as affects its functions."

The five "ties"

This is a convenient point to return to the five "ties" to the Secretary of State with which I began. I will deal briefly with these in turn.

The Supreme Court's budget as part of the DCA's budget

The new Supreme Court cannot be truly independent unless it has its own budget. This, like the salaries of the superior judges, should be charged on the Consolidated Fund so that it is independent of Government-influenced votes of the House of Commons.

The Secretary of State for Constitutional Affairs retaining some role in the appointment of Supreme Court judges

This reflects the previous practice whereby superior judges were appointed by the Crown on the advice of the Prime Minister (in practice the Lord Chancellor). This practice was

[3] *The Commonwealth Lawyer* Vol 12, No 2, August 2003, page 31. For the text of the article see http://www.francisbennion.com/doc/2003/003/requiem-for-a-chancellor.htm

protected constitutionally by the fact that conventions freeing the process from political interference were very strictly observed. Those conventions, having been summarily scrapped by Mr Blair, would no longer apply under the new arrangements. The only possible future practice consonant with judicial independence would then be for the Judges' Council, or some similar body entirely composed of superior judges, to advise the Crown on the making of new appointments to their number. To suggest that they cannot be trusted to do this would be to imply that they are not competent to do their job, which is constitutionally subversive.

The Secretary of State having a role in disciplining judges

This is again reminiscent of the Lord Chancellor, who could only discipline inferior judges. With the Lord Chancellor gone, this power should obviously pass to the head of the judiciary (at present the Lord Chief Justice). As an instrument of the executive the Secretary of State should have no part to play here.

The Court being answerable to the Secretary of State for its administration

In line with having its own budget the Supreme Court should, in order to be truly independent, itself administer the courts service (currently the responsibility of the Lord Chancellor under the Courts Act 2003 Part I).

The Court's rules being subject to regulations drawn up by the Secretary of State.

Here again the Court's rules should be drawn up by the Court itself, by analogy with practice directions.

I acknowledge that under my proposals the department of the Supreme Court would need an enlarged administrative staff. In the main these would be recruited from the present staff of the DCA.

The Concordat

In January 2004 the DCA published a paper setting out details of the 'Concordat', being the Government's proposals relating to the transfer of the Lord Chancellor's judiciary-related functions, as set out in the Secretary of State's Oral Statement to the House of Lords on 26 January 2004. Clause 1 of the Bill is intended to give effect to the following provision of the Concordat, to which I have added numbering for ease of reference-

C1. Judicial Independence
Principle:
C1.1. The new arrangements should reinforce the independence of the judiciary.
Application:
C1.1.1. A general statutory duty will be imposed on the Government, all those involved in the administration of justice and all those involved in the appointment of judges to respect and maintain judicial independence.
C1.1.2. In addition, there will be a specific statutory duty falling on the Secretary of State for Constitutional Affairs to defend and uphold the continuing independence of the judiciary.

Also relevant to clause 1 are the following provisions of the Concordat, to which again I have added numbering.

C2. Key statutory responsibilities of the Secretary of State and the Lord Chief Justice.
Principle:
C2.1. The key respective responsibilities of the Secretary of State and Lord Chief Justice should be set out in statute, so as to provide clarity and transparency in this relationship.

Application:
The Bill will provide that:
The Secretary of State for Constitutional Affairs is:
C2.1.1. under a duty to ensure that there is an efficient and effective system to support the carrying on of the business of the courts in England and Wales, as set out in Part 1 of the Courts Act 2003, accountable to Parliament for the overall efficiency and effectiveness of the administration of the court system, including the proper use of public resources voted by Parliament.
C2.1.2. responsible for ensuring that the public interest is served in decisions taken on matters affecting the judiciary in relation to the administration of justice.
C2.1.3. responsible for supporting the judiciary in enabling them to fulfil their functions for dispensing justice.

C2.2.1. Neither the Secretary of State, nor any other Minister, will have any role in particular judicial decisions of individual judges.

The Lord Chief Justice is:
C2.3.1. responsible for ensuring that the views of the judiciary in England and Wales are effectively represented to Parliament, to the Government, and to the Secretary of State in particular, in such manner as the Lord Chief Justice considers appropriate.
C2.3.2. responsible for ensuring that appropriate structures are in place to ensure the well-being of and training and provision of guidance for the judiciary.
C2.3.3. responsible for ensuring that appropriate structures are in place for the deployment of individual members of the judiciary and for the allocation of work within the courts.

This so-called Concordat does not have the force of law, which is just as well. As will be seen from a comparison with the proposals I make above, it represents a surrender by the Judiciary of the full independence which should be obtainable in the present constitutional settlement. I will elaborate on this contention using the numbering I have given to the Concordat.

C1.1. is correct, but C1.1.1. to C1.1.3. do not carry it into effect. Under a proper system of judicial independence it would not be for officers of the executive to "respect and maintain judicial independence". That would be secured in the Constitution, or in constitutional

conventions clearly recognised, soundly established, and invariably observed. The weakness of the Concordat, and of Clause 1 which is based on it, is demonstrated by the fact that no sanction is proposed for breach of the statutory duties. If the use of Latin in legal matters were still permitted, one might say that clause 1 is a ***brutum fulmen***[4].

C2.2.1. is peculiar. Under particular legislation Ministers do sometimes have a role in judicial decisions of individual judges, as where they refer a matter for judicial decision. On the other hand the wording suggests that the executive may legitimately influence judicial decisions generally, which is surely wrong.

C2.3.1 to C2.3.3. are unexceptionable but do not go far enough. Would the words "in such manner as the Lord Chief Justice considers appropriate" in 2.3.1. enable the Lord Chief Justice to insist on attending at Cabinet meetings, as the Lord Chancellor used to do?

Lost independence

Under the heading "Guarantee of continued judicial independence" the language of clause 1 closely follows the Concordat and is objectionable for the same reasons. By all means let us have true judicial independence under the new arrangements that Mr Blair insists on making. It is my contention, as indicated above, that we do not have it now.

The reference in the heading to "continued" judicial independence implies that under the present system there is in fact such independence. This implication is maintained in the wording of the clause, though the language changes so as to refer to 'the continued independence of the judiciary'. However the implication is true only to a relatively small extent. Much of the judicial function is not at present exercised independently, and the judiciary are not truly independent. I have largely demonstrated this in what has gone before. Here are some additional arguments.

At present an individual judge, however senior, is not even independent of the judiciary collectively or the head of the judiciary. An example is furnished by an item in ***The Times*** for 13 May 2004 reporting that the Judicial Studies Board, headed by Lord Justice Keene, has produced a one-inch thick new edition of the ***Equal Treatment Bench Book.*** This, says ***The Times***, has the following results-

[4] Defined by the Oxford English ictionary (2nd edn) as "a mere noise; an ineffective act or empty threat".

> "Judges must avoid using phrases such as 'asylum-seekers' or 'second generation immigrants' under new guidelines designed to prevent them from making embarrassing courtroom gaffes. Under the guidance, issued yesterday by the Lord Chief Justice, judges will be reminded about the problems of the socially excluded who are not, they are told, 'a homogenous "underclass" with wholly alternative set of norms, values and behaviours from those of mainstream society'. . . . The guidance is the most far-reaching yet in its efforts to keep judges on-message with changing social mores. It . . . is to be issued to every new judge on appointment."

It will be so issued, no doubt, along with much other instruction from the Judicial Studies Board. A judge setting out on his or her path today is far from independent, even from pressures emanating from within the judiciary itself.

Pressures on the judiciary emanating from the executive continue to mount. The present Home Secretary, Mr David Blunkett is clearly ignorant of constitutional theory – or else disdains it. He loses no opportunity of expressing his displeasure whenever a decision of the courts offends him. He shows contempt for lawyers and the law, which form the basis for judicial action.

The Chancellor of the Exchequer has since his appointment in 1997 demonstrated a determination to reduce the earnings of lawyers, especially those working in the legal aid system. The courts are at the mercy of the legislature, usually operating at the behest of the executive. The judiciary operate almost exclusively in the way dictated by various Acts of Parliament. Under the British unwritten constitution there are no effective safeguards against legislation aimed at reducing the power of the judges.

What I have said points in only one direction. Now that the well-understood and scrupulously applied conventions of the unwritten constitution have been recklessly jettisoned we have urgent need, for the first time in our history, of a written constitution.[5]

[5] The threatened advent of a constitution of the European Union also makes this necessary.

Note This evidence can if desired be supplied in electronic form as an email attachment. Further printed copies are also available.

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22 June 2004.

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