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## The great myth of judicial independence

### **Judges are subject to interference now, and will continue to be under the proposed constitutional changes, writes Francis Bennion**

A game of 'let's-pretend' is going on. The pretence is that our judges are independent and will remain so under the new arrangements. The strange thing is that the judges are playing along with the pretence.

So far as the judiciary is concerned, we are in the middle of a constitutional revolution. It is important we get it right. The vehicle of the revolution is the Constitutional Reform Bill, which has just been examined by a select committee of the House of Lords. Under the heading 'Guarantee of Continued Judicial Independence', clause 1 of the Bill imposes duties on government ministers to respect this. They do not amount to much.

The reference to 'continued' judicial independence implies that under the present system there is such independence. This is largely untrue. Much of the judicial function is not at present exercised independently. There is interference from all angles.

This was so even before Tony Blair summarily decided to abolish the office of Lord Chancellor last summer. It is still truer now because the Lord Chancellor was head of the judiciary and, as a member of the Cabinet, also had a powerful constitutional position. His department, known as the Lord Chancellor's Department, was partly a judicial administrative department. Now it has been replaced by the Department of Constitutional Affairs (DCA), which is wholly a branch of the executive. Why?

Things could easily have gone the other way. The Lord Chancellor having been replaced as head of the judiciary by the Lord Chief Justice, Lord Woolf, the LCD could have become the Department for the Supreme Court under the control of Lord Woolf. That would have echoed the position regarding the US Supreme Court. Of course the day-to-day administrative control would need to be delegated to a chief executive officer, but the Chief would be in charge. That's what Chiefs are for.

In the negotiations for the Concordat on redistributing the Lord Chancellor's functions, drawn up between the Government and the judiciary, it seems that this possibility was not raised. Lord Woolf meekly acquiesced in the hegemony of the DCA. Again, why?

Instead of having a separate budget, the courts will share in the DCA's budget. So judicial services will go on being financed by the Treasury, directed by a senior Cabinet minister, the Chancellor of the Exchequer. If the Chancellor thinks that too much is being spent on legal aid or court buildings, it will be reduced. That does not square with judicial independence.

No public service can be truly independent unless it has control of the purse strings, so under our present constitution none is. The new Supreme Court should have its own budget. This, as the salaries of the superior judges are now, should be charged on the Consolidated Fund so that it is independent of government-influenced votes of the House of Commons.

Under the Bill, Supreme Court judges are to be appointed on the advice of a quango of fifteen, of whom six (including the chairman) must be lay people. This is a great insult to the judiciary, and affects their independence. What do lay people know about the qualities needed in a judge? The Judges' Council, or some similar body entirely composed of senior judges, should advise the Crown on the making of appointments to their number. That would indeed protect judicial independence. To suggest that the senior judges cannot be trusted to do this is to imply that they are incompetent, which if true would be worrying.

Pressures on the judiciary emanating from the executive continue to mount. David Blunkett, the Home Secretary, is clearly ignorant of constitutional theory – or else disdains it. He loses no opportunity to express his displeasure whenever a decision of the courts offends him. The Chancellor of the Exchequer has, since his appointment in 1997, demonstrated a determination to reduce the earnings of lawyers.

Again, the courts are at the mercy of the legislature, almost invariably operating at the behest of the executive. So the judiciary operates in the way dictated by innumerable Acts of Parliament.

What are the guarantees of judicial independence contained in the Constitutional Reform Bill? In line with the Concordat, clause 1 contains various vague provisions. Ministers of the Crown, and all with responsibility for matters relating to the judiciary, must uphold the 'continued' independence of the judiciary.

Under a proper system of judicial independence it would not be for officers of the executive to 'uphold the independence of the judiciary'. That would be secured by 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 that no sanction is proposed for breach of the duty to protect judicial independence. It is not a real duty, but a pious wish.

This is a serious situation. We shall pay a grave price if we allow this takeover bid by government to succeed. That we are faced with a formidable new constitution of the European Union makes it vital that the security and independence of our own judges, although operating in a diminished sphere, should be safeguarded.

It is not too late to achieve this, but the prospects are poor. In its recent report, the House of Lords select committee on the Bill seems oblivious to the dangers.

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