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Separation of Powers in Written and Unwritten Constitutions

Francis Bennion

This article was prompted by an interesting survey by an Irish judge contained in a recent issue of this journal, "Socio-economic Litigation and the Separation of Powers" by Adrian Hardiman.[1] Another precipitating factor was a piece by Marcel Berlins, veteran legal correspondent of the *Guardian*, who began the New Year by saying that he feared a continuation in 2006 of the British government's "intemperate assault on basic civil liberties". This, he thought, would "inevitably be accompanied by stout resistance from our judges, followed closely by a thuggish and abusive reaction from whoever is Home Secretary".[2] Both articles raised questions about how the doctrine of separation of powers is working in Britain in the third millennium.

The idea that there is some kind of war going on in Britain between the executive and the judiciary, with the legislative chamber as the arena, was a feature of the year 2005 on which I contributed a series of articles to *Justice of the Peace*.[3] If there is a clearly-established separation of powers in Britain between the executive and judiciary how can such a conflict arise? Yet at the start of the new millennium the doctrine was reasserted at the highest level by Lord Hoffmann in a case where, commenting on an earlier decision of the House of Lords[4], he said:

> 'Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive . . . The refusal of the House to re-examine the executive's decision that having nuclear bombers was conducive to the safety of the state was based purely on the separation of powers'.[5]

The doctrine of separation of powers applies differently under a written and an unwritten constitution. I will start with the former.

Written constitutions

It is common for a written constitution to allocate powers between organs of the state. For example Article 6 of the Irish constitution, originally enacted in 1937, refers to the powers of government as being "legislative, executive and judicial". In a leading Irish case it was held that this meant that all powers of government should be exercised in accordance with the well-recognised principle of the separation of powers, and not otherwise.[6] So the executive powers should be exercised only by the executive, the legislative powers only by the legislature, and the judicial powers only by the judiciary.

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[1] *The Commonwealth Lawyer* Vol. 14 No. 3 (December 2005) p. 38.
[2] *The Guardian*, 2 January 2006.
[3] 169 JP (2005) 651, 812, 913 and 989.
[4] *Chandler v Director of Public Prosecutions* [1964] AC 763.
[5] *Secretary of State for the Home Department v Rehman* [2002] UKHL 47, [2002] 1 All ER 122 at 139.
[6] *Buckley and others (Sinn Fein) v Attorney General and another* [1950] IR 67. I return to this below.

One trouble with this is that no definitions are provided by written constitutions for the three key powers. Either it is assumed that everyone knows what they amount to, or it is found too difficult to frame definitions. What happens? The ultimate meaning, when one has to be found on a particular point, is hunted out and applied by the constitutional organ of last resort, in other words the supreme judicial authority. If you sit on the bench in the highest court of the land you do what you like, for there is no one above you. As H. L. A. Hart said:

> "A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered."

Here Hart quoted Bishop Hoadly: "Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them".[7]

Bishop Hoadly's view is akin to that of the American realist school of jurisprudence, but it is fundamentally mistaken. It is rather like saying that a translator is truly the author of the piece he translates. A conscientious translater, like a conscientious judge, strives to give effect to the intention of the true author. The Hoadly view, plausible as it sounds, places a strain on any judges who are tempted to exceed their constitutional powers. It is not always withstood, as we shall see.

Confusion as to the definition of the three powers is not the entire explanation of the difficulty, or even the main one. It can further be said that an objection to any attempt neatly to

distribute the constitutional powers of the state in this sort of compartmentalized exclusive way is that it misunderstands the nature of those powers.

Exercise of the legislative power cannot in reality be confined to the legislature, because of its nature the judicial power also contains a legislative element.[8] To interpret legislation authoritatively is to legislate further. How much further will depend on the law-making ambitions of the judge and the degree of freedom permitted by the relevant wording. Often this is very great, as with the British Human Rights Act 1998.

Then again the executive also must share in the exercise of the legislative power because under modern conditions legislative policy mostly originates with the executive rather than the legislature. It is the executive that formulates a new legislative proposal and puts it out to initial consultation, then instructs the drafter and presents his or her product to whichever House it selects in which to begin the legislative process. It is the executive whose ministers explain the bill to the legislators and draw up any amendments they ask for and which the executive is willing to concede. It is the executive who will administer the resulting Act of Parliament. B. J. Davenport, a former law commissioner, took such a low view of the amount contributed by the legislature in Britain that he said:

> 'Surely the reality is that the function of Parliament today is to make party political noises about the legislation placed before it by the executive and then, with very rare exceptions, to rubber-stamp it . . . The will, or even the intention, of parliament has, in practical terms, much similarity with the emperor's new clothes. Parliament must surely be about as bad a body for the production of good legislation, in a practical sense, as the ingenuity of man could devise.'[9]

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[7] H. L. A. Hart, *The Concept of Law* (Oxford, second edition 1994), p. 141.

[8] Sedley LJ said of the interpretative function: "There is here a unique interpenetration of the legislative and judicial powers, for what an Act of Parliament means is what the courts decide it means." *London Review of Books*, 2 April 1998.

[9] B J Davenport, *Law Quarterly Review* 10 April 1994.

There is another dimension to the role of the executive in legislating. Treaties are made by the executive, and these often require subsequent legislation to implement them. This is true in spades of the Treaty of Rome and other treaties underpinning the European Union. They have led to an ongoing torrent of European legislation which the Westminster Parliament among others has a duty to recognize and replicate. The same is true of the European Convention on Human Rights of 1950 (the Convention). The executive in Britain has considered it a duty since the Convention came into effect to recognize the decisions made under it of the European Court of Human Rights (the Strasbourg Court). Later the executive caused Parliament to legislate to make this more effective by passing the Human Rights Act 1998.

There is a still further objection to the comprehensive threefold classification of constitutional powers, which may be thought relatively minor but is still important. *The crucial constitutional powers are not three but four*. To the executive, legislative and judicial powers must be added what may be called the prosecutive power.

Nature of the prosecutive power

I will briefly analyse this power because in Britain it is nowadays to be exercised independently and thus resembles the other three constitutional powers I have mentioned. Its nature therefore throws light on the nature of these other powers.

The power to prosecute, or set persons on trial, and to terminate prosecutions by a *nolle prosequi*, is a strong force. So it behoves us to enquire who has the right to set these wheels in motion, and how they are supposed to exercise it. The ultimate answer to the first question, little known,[10] is the Attorney General acting independently of the executive or anyone else. The answer to the second is too complex to pursue here.[11]

The twentieth century saw the emergence in England of the doctrine, now firmly established, that the public prosecutor is independent. Until the *Campbell* case in 1924, which brought down the first Labour government, the official view was that prosecution policy, at least in important political cases, was to be determined by the government and not the prosecuting authorities - who had at most a right to be consulted. This position was reflected in the fact that the Home Secretary had a statutory power to order the Director of Public Prosecutions to prosecute.[12] This was not abolished until 1946.[13]

The *Campbell* case confidence motion which was passed against the Labour Government by the House of Commons on 8 October 1924 was one of only three such motions which have been passed against any British government since the beginning of the twentieth century.[14] The case concerned the abandonment under government pressure of the prosecution of a left-wing newspaper, the *Workers' Weekly*. The Conservative

Opposition put down a censure motion, to which the Liberals added an amendment. The Liberal amendment was carried, and Ramsay MacDonald was granted a dissolution.[15] The present Attorney General Lord Goldsmith QC put it this way-

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[10] A.L. Smith LJ prophetically remarked over a century ago that the constitutional position of the Attorney General 'appears likely to be lost sight of': *R v Comptroller-General of Patents, ex p Tomlinson* [1899] 1 QB 909 at 913-4.

[11] For details of the British and Australian systems of prosecution see Rowena Johns, 'Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey', Briefing Paper 9/2001, Parliament of New South Wales.

[12] Regulations dated 25 January 1886 made under the Prosecution of Offences Acts 1879 and 1884, reg (1)(c).

[13] Prosecution of Offences Regulations 1946 (1946 No 1467) reg 10.

[14] Thomas Powell, *Confidence Motions*, Parliament and Constitution Centre, SN/PC/2873, 23 January 2004, p. 1.

[15] Ibid., p. 9.

> "Most famously perhaps a Law Officer's decision was said to have been the cause of the downfall of the first Labour government in 1924. It was largely brought down because it was alleged that Sir Patrick Hastings, the Attorney, changed his mind about prosecuting Mr Campbell, acting editor of the *Workers' Weekly*, for a serious but politically sensitive offence of inciting mutiny by calling on soldiers not to strike break. It was alleged that the change of mind was brought about by pressure from Ramsay MacDonald's cabinet."[16]

Just before the repercussions of the *Campbell* case began to be felt, Sir Edward Troup, Permanent Under-Secretary of State at the Home Office from 1908 to 1922, wrote: "The Home Secretary has . . . always been the authority who, in consultation with the Law Officers of the Crown and the Director of Public Prosecutions, settles whether a prosecution in the nature of a political prosecution should be undertaken".[17] The dramatic constitutional change effected by the Campbell case is shown by the fact that Troup later found it necessary to append the following footnote to the above passage.

> "This sentence stands as it was written in August 1924 without reference to the Campbell case which later attracted so much attention. It did not then seem necessary to say that the decision to prosecute or not to prosecute, while it might be a question of policy in the sense indicated above, ought never to be influenced by party pressure."[18]

This indicates that, at the time, the Campbell controversy was seen in the Home Office as arising from pressure exerted on party political grounds. Where government action is concerned, it is difficult to distinguish this from other forms of pressure however. Troup's successor Sir Frank Newsam wrote a replacement volume on the Home Office in which his section on prosecutions is very different. The Home Secretary "has no significant concern with prosecutions [and] is not a prosecuting authority".[19]

In theory the change means that those concerned in public prosecutions are immune from interference by other branches of the state. Since this is a recently-emerged condition, it is not so straightforward as that however: relics survive of earlier constitutional views. Moreover present constitutional realities mean that there can be no absolute separation of the prosecutive power from other state powers.

It is now established that apart from legislating, Parliament plays no operative part in the prosecution process. Its role is limited to criticism of what the prosecutor does or does not do, and thus comes under the heading of accountability. Of course, as in other matters Parliament in its capacity as the legislature has unfettered power to change the law governing the prosecutor's role. A wide-ranging legislative intervention was the Prosecution of Offences Act 1985, which set up the Crown Prosecution Service. This carefully retained the overall control of the Attorney General.[20] A recent example of intended statutory interference with prosecution policy is clause 5(1) of the Northern Ireland Offences Bill 2006, which provided that no prosecution could be commenced for certain terrorist offences.[21]

The independence of the English prosecutor appears in its most doubtful light where the judiciary are concerned. From the nature of their function, the criminal courts are bound to exert a strong influence over the prosecutor. Their power over the grant of process, the conduct of trials, the award of costs, and other significant features, necessarily means that judges impinge on prosecution policy in various ways. This is one of several areas where in recent years the British judiciary have shown themselves in expansive mode.

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[16] Rt. Hon. Lord Goldsmith QC, 13th Annual Tom Sargent Memorial Lecture, 20 November 2001.
[17] *The Home Office* (1925) 76-77.
[18] *The Home Office* (1925) 76.
[19] Sir Frank Newsam, *The Home Office* (2nd edn 1955) 133-134.
[20] Section 3(1) of the Act says that the Director of Public Prosecutions, whom the Act places in charge of the CPS, "shall discharge his functions under this or any other enactment under the superintendence of the Attorney General".
[21] The Bill was later withdrawn.

In Britain are the powers separated?

If the doctrine of the separation of powers worked in relation to the unwritten British constitution it might be expected to check judicial expansionism. However the doctrine is not recognised by the wisdom of that constitution, at lease in its crude, monolithic form. (By this I mean the form which says that only the legislature can legislate and this is all they do; only the judiciary can judge and this is all they do; and the executive can do everything else.)

Far from there being full-blown separation of powers in Britain, the executive and the legislature are inextricably mixed. The executive is headed and controlled by the prime minister of the day, who is appointed by the head of state the Queen. She is required by custom to ask the de facto leader of the largest party in the Commons to attempt to form a Government. Choice of the leading members of the Government, the ministers, rests entirely with the Prime Minister, who is in practice obliged to select mainly from elected MPs (legislators) sitting in the Commons.

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The House of Lords is in a transitional state which may continue indefinitely. Some ministers (members of the executive) must be chosen from among the peers simply in order that the House's legislative programme may be serviced. The Prime Minister chooses his or her governing body the Cabinet from among leading ministers.

In practice nowadays the British Cabinet (broadly corresponding to the executive) is mainly composed of leading personalities among the governing party's elected MPs sitting as part of the legislature. The main body of the legislature, the House of Commons, has a majority drawn from the same governing party as, by the decision of the electorate, controls the executive. The marginal distinction between the executive and the legislature manifests itself as important only where there is (rare) dissension over a particular legislative measure. Then, either the majority of MPs, or the majority of peers, or both, may override the wishes of the executive. That happens extremely rarely. As respects the peers, its effect is reduced by the operation of the Parliament Acts 1911 and 1949, the latter Act having been recently rescued from doubt as to its validity and effect by the decision of nine Law Lords[22].

Under the classic form of the unwritten British constitution an important feature, recently destroyed, was that the executive/legislature also possessed a link with the judiciary in the form of a Lord Chancellor with a seat in the Cabinet. I have explained the virtues of the arrangement in an article in this journal, when I suggested that it is unsatisfactory to attempt a complete separation of powers between judiciary, executive and legislature because for one thing this does not allow for the informal sharing of views, smoothing out of disagreements, and spreading of understanding between them.[23]

The British genius had been to evolve, over the centuries, a Cabinet office, that of Lord Chancellor, which allowed its holder to intercede at the centre (the Cabinet) and put forward and defend the views of the judiciary at the heart of government. Under this usefully pragmatic arrangement the views of the executive could also be informally passed, through the Lord Chancellor, to the other leading figures in the judiciary. It seems that the reason for abolishing this arrangement was that the doctrine of separation of powers was mistakenly believed to apply in its full force to the British constitution, and that this doctrine was transgressed by the office of Lord Chancellor in its historic form.

A further useful intermingling of the legislature and the judiciary, still intact, lies in the exercise of legislative power by senior members of the judiciary holding seats in the Upper House of Parliament. For the same mistaken reason as dished the old Lord Chancellor, this is

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[22] *R (on the application of Jackson and others) v Attorney General* [2005] UKHL 56, [2005] 4 All ER 1253.

[23] F. A. R. Bennion, 'Requiem for the Lord Chancellor?', *The Commonwealth Lawyer* Vol. 12 No. 2 (August 2003) p. 31, www.francisbennion.com/2003/003.htm.

unpopular among powerful members of the present political hierarchy in Britain; and is unlikely to survive for much longer.

Another development of great importance is the emergence into full growth of the quango or quasi non-governmental organization[24]. Judges of the Supreme Court which, under the Constitutional Reform Act 2005, will replace the House of Lords in its judicial capacity, will not be selected by the executive but by an irresponsible quango. This breaks a fundamental rule of the British constitution, based originally on the hegemony of the Crown. The break is undemocratic. The consequences, which may prove to be grave, lie in the unguessable future.

True nature of separation of powers

So there is no full-blown separation of powers in Britain. That does not mean the concept is without significance. On the contrary it is of supreme importance, but its shifting nature needs to be understood. That can be gleaned from careful study of a case which serves as an excellent example, the recent decision of Walker J in *R (on the application of Girling) v Parole Board and another*.[25] This was expressly presented by the claimant as a case involving separation of powers.[26] It raised the question of whether there was proper separation between the Home Secretary, a member of the executive, and the Parole Board considered as a court. Counsel for the claimant pointed to the fact that both were represented by the same solicitors and counsel as a sign that there was really no separation at all.[27]

Girling centred on art. 5(4) of the Convention, which runs:

> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by *a court* and his release ordered if the detention is not lawful.

The italicised term obviously signifies a tribunal which exercises the judicial power of the state, or what in art. 5(3) is described as "a judge or other officer authorised by law to exercise judicial power". In *Girling* the question was whether the Parole Board answers this description. Relevant here was a series of successive legislative changes designed to meet objections arising from decisions of the Strasbourg court.

The Criminal Justice Act 1991 altered relevant statutory provisions so as to comply with the Strasbourg court's decision in *Thynne, Wilson and Gunnel*[28]. Prior to 1 April 1993, directions given by the Home Secretary to the Parole Board on

the release, transfer to open conditions, or recall of life sentence prisoners had applied to all lifers. In *Thynne* the Strasbourg court had considered the case of discretionary lifers whose tariff had expired. In the light of that decision the Criminal Justice Act 1991 made the Parole Board's view determinative, cutting down the powers of the Home Secretary.

Following the decision in *Thynne*, subsequent cases in the Strasbourg court widened the circumstances where decisions of the Parole Board were to be determinative in this way. In *Singh v United Kingdom*[29] the court was concerned with those detained during Her Majesty's pleasure. At that time, such prisoners were categorised as "mandatory lifers". The Strasbourg court concluded that once the tariff for such persons had expired, they were in the same position as discretionary lifers. This led to the Crime (Sentences) Act 1997, which gave effect to *Singh* by treating such persons as discretionary lifers falling within s 28 of the 1997 Act,

[24] First debated in the Westminster Parliament by the House of Lords on 15 November 1978.
[25] [2005] EWHC 5469 (Admin), [2006] 1 All ER 11.
[26] See paragraph [18].
[27] Ibid.
[28] [1991] 13 EHRR 666.
[29] [1996] 22 EHRR 1.

while mandatory lifers were dealt with under s 29. In *Stafford v United Kingdom*[30] the Strasbourg court held that mandatory lifers were to be dealt with in the same way as discretionary lifers. Applying this decision, the House of Lords concluded in *R (Anderson) v Secretary of State for the Home* Department[31] that s 29 of the 1997 Act was incompatible with the principle of the separation of powers, which is a fundamental purpose of Article 6 of the Convention. Accordingly the Criminal Justice Act 2003 transferred the power to the trial judge and repealed s 29[32].

The claimant in *Girling* maintained that these changes had not gone far enough. Under section 28 of the 1997 Act the Home Secretary retained a "gateway" power regarding life prisoners' access to the Parole Board, while under section 32(6) of the 1991 Act the Home Secretary could still give directions to the Board. It therefore was not totally independent of the executive, and so could not be considered truly a court. Walker J dismissed this argument on the ground that the latter powers must be construed and applied as administrative not judicial. Although certain directions which were unlawful from this point of view had been given in the case by the Home Secretary they had caused no detriment to the claimant and so would be disregarded.[33] Walker J made a declaration that section 32(6) of the 1991 Act should be construed so as not to apply to the judicial functions of the Parole Board.[34]

So concluded a remarkable series of events whereby the judiciary and the legislature shaped and reshaped provisions relating to the Parole Board to assure its separation from the executive and its status as a court in a way which satisfied the requirements as to separation of powers of the Convention as construed by the Strasbourg court.

Written and unwritten constitutions

What then is the practical difference between the separation of powers under a written and an unwritten constitution? I will take as an example of the former, Article 6 of the Irish constitution, referred to above.

In October 2000, an Irish High Court judge threatened to hold three government ministers in contempt unless they provided a secure place of detention for a disturbed 17-year old girl.[35] The judge laid down a detailed scheme for the treatment and education of the girl, which he ordered to be implemented. There was no statutory or other power authorising him to do this.

In the following year the Irish Supreme Court heard two appeals by the State against similar orders made by the High Court. One was in favour of a person suffering from autism.[36] The other concerned a group of allegedly delinquent minors said to need secure accommodation.[37]

The Irish State had had similar orders made against it in the past and had not appealed against them. Adrian Hardiman J, a judge of the Supreme Court of Ireland, said in the article I have referred to: "It transpired however that such orders had caused grave concern to very senior public servants who advocated an appeal in *Sinnott*, because of the radical change the orders in that case implied in the perception and operation of the separation of powers."[38]

These transgressions by the High Court had received enthusiastic support from the media, and from some academics. The two appeals received much public opprobrium. In one of them Keane CJ said that a Rubicon had been crossed when the High Court undertook "a role which

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[30] [2002] 35 EHRR 32.
[31] [2002] UKHL 46, [2003] 1 AC 837.
[32] Criminal Justice Act 2003, ss 269 and 332 and Sch. 37 Pt. 8. See *R (on the application of Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 All ER 219, at [19], [28].
[33] See paragraph [81].
[34] Paragraph. [83].
[35] *The Irish Times*, 19 and 20 October 2000. This matter went no further.
[36] *Sinnott v Minister of Education* [2001] 1 IR 545.
[37] *T.D. and Others v the Minister of Education* [2001] 4 IR 259.
[38] See Adrian Hardiman, "Socio-economic Litigation and the separation of Powers", 14/3 *The Commonwealth Lawyer* Vol. 14 No. 2 (December 2005) p. 38, where the whole matter is recounted.

is conferred by the Constitution on the other organs of State, who were also clearly entrusted with the resources necessary".[39] Adrian Hardiman J comments:

> "In each of these cases the Supreme Court was offered an

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> opportunity dramatically to extend its own powers . . . in order to make mandatory orders involving considerable public expenditure, in response to an assertion of an alleged socio-economic right . . . But the Supreme Court declined to do so and instead asserted, perhaps more elaborately than ever before, a view of the separation of powers as a strongly demarcated one broadly in the lines the Executive had contended for."[40]

Conclusion

We see that there are considerable practical differences between the separation of powers under a written and an unwritten constitution. The written constitution, bearing in its language the stamp of its own time, is somewhat clumsy in the way it separates state powers. It relies heavily on the judiciary to modernize from time to time through the interstices. It also relies on the senior judiciary to keep in check any desire of lower-court judges to enhance their de facto authority by transgressing the boundaries.

The unwritten constitution is a subtler, more organic, and more flexible framework. Instead of a broad (and crude) separation of powers it operates by ensuring the independence of operation of certain organs of the state *where it really matters*. Until the coming into operation of the Human Rights Act 1998, our courts reflected the requirements of the Convention (which are mainly based on the common law anyway) in developing legal policy. Thereafter, in conjunction with the executive and the legislature, the courts shaped organs such as the Parole Board so as to secure their necessary independence from the executive. When it became clear that the time had come to secure independence for the prosecuting authorities, that was achieved in a similar way. The need for the independence of judicial decisions generally is well understood and respected.

Both written and unwritten systems allot a crucial function to the judiciary as keeper of the ring. What of the so-called war between the executive and the judiciary, with which this article began? We may expect that the judiciary will successfully go on keeping the ring as long as the legislature (prompted by the executive) allows it to do so. In the long run the latter always has the upper hand, as I attempted to show in a recent *Times* article.[41] The ultimate supremacy of the legislature was recognised by Lord Hoffmann when he pointed out that a disadvantage of a system such as the Convention is that it does not take full account of the separation of powers. He said:

> '. . . in making decisions about social and economic policy, particularly those concerned with the equitable distribution of public resources, the Strasbourg court [which administers the Convention] allows member states a generous margin of appreciation (see *James v UK* (1986) 8 EHRR 123 at 142 (para 46)). In a domestic system which (unlike the Strasbourg court) is concerned with the separation of powers, such decisions are ordinarily recognised by the courts to be matters for the judgment of the elected representatives of the people'.[42]

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[39] Ibid.
[40] Ibid.
[41] F. A. R. Bennion, "The great myth of judicial independence", *The Times*, 13 July 2004, www.francisbennion.com/2004/014.htm.
[42] *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2006] 1 All ER 487, at [32].