

Parliamentary power to override judicial independence by Francis Bennion

Constitutional Reform Act 2005 Section 3 (Guarantee of continued judicial independence) of the Constitutional Reform Act 2005 purports to guarantee judicial independence as a feature of our constitution. It says: ‘The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary . . . The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary . . . The Lord Chancellor must have regard to—

- (a) the need to defend that independence;
- (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
- (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.

2013 appointment of new Lord Chief Justice Until very recently great respect was accorded to the office of Lord Chief Justice. That is so no longer. In an article published in *The Times* on 15 May 2013 their Legal Editor Francis Gibb exposed the new situation. The previous LCJ Lord Judge was appointed in 2008. As previously, the selection was a low-key and discreet process conducted by a small panel led by the late Lord Bingham of Cornhill. This one will be very different. It will be conducted by a Panel chaired by the little-known Christopher Stevens. Ms Gibb’s article says the candidate will be asked to submit a 2,000-word essay to demonstrate their intellectual and analytical abilities. She continues:

‘For the first time in legal history, a judge’s reputation — honed through years of sitting on cases right up to the Court of Appeal — is not a sufficient credential. Instead, would-be contenders for the top job must complete an 18-page application form, undergo an interview and write an essay on a subject to be decided . . . applicants must detail their career and ability to deal with the executive, legislature, media and professional bodies. They must also include the name of the most senior civil servant with whom they have had most contact, who will be asked for a reference. Candidates must list two recent judgments, and can include “one other piece of significant and recent work”, saying why this is interesting or important for the development of the law. They must demonstrate their “understanding and vision” of European, international and devolution developments within the UK and how these may have an impact on the administration of justice. There are also 19 selection criteria, under the headings of highest judicial competence, outstanding leadership skills, contextual awareness of the administration of justice and personal qualities. Finally, there is a self-assessment section, in which candidates must give examples of their ability to sit in “important, high-profile and legally complex cases”; “write high-quality judgments” and “hear significant criminal and civil appeals” . . .’

The website of the Judicial Appointments Commission (JAC) gives the flavour:

‘Today (Tuesday 7 May 2013) we are launching an exercise to identify a successor to the Lord Chief Justice, Lord Judge, who retires later this year . . . As soon as possible and by Thursday 9 May (noon) candidates should email their intent to apply to the JAC. After this date no further notifications will be accepted as the panel could not guarantee having received the consultation responses in time for shortlisting.’

Hard cheese if a brilliant potential candidate didn't happen to be looking at the website on 7 or 8 May, or before noon on 9 May. Even if they did there wouldn't be a chance to consult family and/or friends before taking such a momentous decision. Candidates who had a scrap of concern for their dignity wouldn't be bothered to apply anyway. The most suitable candidates out there have almost certainly been lost to the nation because of this cavalier manner of proceeding.

On the day after Ms Gibb's article appeared my own response was published in *The Times*, under their editor's heading 'The independence of the judiciary is at the heart of the rule of law, and this is now being put at risk':

'Loss of respect for senior judges

Sir, It is outrageous that candidates for the office of Lord Chief Justice should have to jump through the hoops you describe (report, May 15). Moreover, it is unconstitutional. Our unwritten constitution has at its base the separation of the executive, the legislature and the judiciary. The independence of the judiciary is at the heart of the rule of law.

A candidate for the office of Lord Chief Justice is required to produce a reference from a senior civil servant (a member of the executive). The final decision is taken by the Secretary of State for Justice (another member of the executive) and the Lord Chancellor. The same person (Chris Grayling) holds both offices. Before appointment he had no legal experience.¹

What has become of judicial independence?²

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For full version of abbreviations click 'Abbreviations' on FB's website

References:

None

¹ Section 2(1) (Lord Chancellor to be qualified by experience) of the Constitutional Reform Act 2005 says: 'A person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience'. For my letters in *The Times* objecting to his appointment on this ground see www.francisbennion.com/2012/017.htm and www.francisbennion.com/2012/018.htm.

² *The Times* Letters 16 May 2013.