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Constitutional reform: will the justice system benefit?

Last October, during an after-dinner speech held in honour of the new Constitutional Affairs Secretary, a senior judge alluded gently to the gathering momentum of constitutional reform: apologising if his oration was already out of date, he explained that he had not checked up on the consultative papers published since lunchtime. Since the June Revolution, when the Lord Chancellor's Department was all but abolished under the veil of a cabinet reshuffle, much ink has been spilled in the debate over the fine-mesh detail and how exactly the new Department of Constitutional Affairs will benefit the British justice system. This essay will conclude that the new DCA promises no discernible benefit to the justice system in the short term, but that its establishment is in the longer term a prudent step on the way to rationalising the UK constitution.

By abolishing the LCD and setting up a US-style Supreme Court divorced from the Upper House in the legislature, the Blair government will fulfil its legal obligation to guarantee the separation of powers. Expounded in the Enlightenment writings of Montesquieu, the principle that the judiciary must be severed from the legislature and executive in order to secure a safe distribution of power in democratic systems is a fundamental premise of western European and North American constitutions. It is also a domestic common law principle as stated by the House of Lords in *Duport Steels Ltd v Sirs* (1980), and urged by the Human Rights Act 1998 and ECHR Article 6 (right to "a fair and public hearing... by an independent and impartial tribunal established by law"). The removal of the Lord Chancellor – cabinet

minister, member of the Upper House, Law Lord and chief of judicial appointments – will effectively neutralise a latent threat to the independence of the judiciary.

But the latent threat posed by the Lord Chancellor to democracy is just that: latent. Under Lord Irvine of Lairg, the intertwined strands of power invested in the office were already unravelling. By July 2002, Lord Irvine had sat in a total of only eight cases as Lord Chancellor, five of which did not involve questions of public law. As more Law Lords and academics expressed concern over the involvement of a cabinet minister in judicial matters, it became almost a constitutional convention that the Lord Chancellor would choose not to sit if there might be a conflict of interests. Meanwhile, Hansard reveals that the activity of Law Lords to debate in the legislature is moribund. The establishment of the DCA and Supreme Court is little more than a formalisation of the *de facto* separation of powers that is already happening.

The appointment of judges – traditionally the job of the Lord Chancellor – will be entrusted to a proposed Judicial Appointments Commission. The JAC is likely to resemble the Scottish model: a panel (eventually to be put on a statutory footing) composed of five lay and five legal members who nominate judicial candidates for appointment by the executive. Again, this innovation does not address an urgent fault in the justice system, since the traditional process has a good record for producing a judiciary which acts with independence, integrity and intellectual rigour. The robustness of British judges has been particularly striking in human rights cases where judges have been fearless in protecting private citizens from illegal actions by the executive. Most famously, the High Court and Court of Appeal successively ruled in early 2003 that the Home Secretary's refusal to provide support for asylum seekers who had not made their claims "as soon as reasonably practicable" under section 55 of the Nationality, Immigration and Asylum Act 2002 would put them at risk of

destitution and amount to a breach of their Article 3 right to freedom from "inhuman or degrading treatment". Far fom representing "a situation where Parliament debates issues and judges then overturn them" (as David Blunkett reportedly fumed), the decisions were objectively sound – and the sorts of decisions that can be expected of judges who know that their reasoning will be subjected to close scrutiny by colleagues and academics, and whose security of tenure means they can be bold in their protection of liberty and enforcement of the law.

It is generally hoped that the JAC is to promote diversity at the Bench by nominating more female, ethnic minority and ex-solicitor judges, but opinion is divided over its chances of success. The latest annual report of the Commission for Judicial Appointments (CJA) specifically warns that the creation of a JAC will not be enough to correct the "picture of systemic bias" that makes the selection process unfair to minority groups – a bias rooted in the social disadvantages facing lawyers from less traditional backgrounds that can only be corrected through time or radical measures such as quotas. Nor will the panel be invulnerable to the prejudices of those who help set it up, or to the disharmony and factious in-fighting that could compromise the proper selection of candidates. The JAC may present a more satisfactory alternative to the Lord Chancellor's "secret soundings"; but to expect immediate improvements would be unrealistic.

However, the point of constitutional reform is not to deliver instant benefits to the British justice system. The point is to increase confidence in the system, by replacing a settlement regulated by benign conventions and informal checks and balances with well-defined structures where provinces are clearly demarcated. In this way the risk of future corruption will be minimised, while the government and judges will be able to govern and judge respectively, free from the fear of being criticised for

blurring executive and judicial powers. The constitution will therefore be well placed as the State prepares to journey through the legal labyrinths of anti-terrorism and immigration policy-making, devolution and Lords restructuring. If the executive and legislature can be sure that they are served and guided by an independent judiciary of the highest quality, then the justice system can only benefit.

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