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Public Legal Education - its time has come

The bar and judiciary have long been supporters of public legal education.

To take one example: as long ago as 1988, when a solicitor and a barrister were contemplating the foundation of a charity to promote law related and citizenship education, the barrister decided his contribution would be to organise a mock trial for young people to take place in court before a real judge. That first year, two schools participated in Reading crown court.

Today over 200 hundred schools and 3000 students take part each year in the Bar National Mock trial competition run across England, Wales, Northern Ireland and Scotland and each school, each year has access to a barrister* mentor to help them.

The General Council of the Bar in England and Wales, The Bar Council in Northern Ireland and the Faculty of Advocates in Scotland all sponsor and support the competition. The barrister whose original idea it was is now a Lord Justice of Appeal; the Lord Chief Justice, the Master of the Rolls and the Lord Advocate have each judged the finals in recent years; the Lord Chancellor attended the finals in Birmingham in 2004 and presented the awards.

Dan Mace
Solicitor and Trustee, Citizenship Foundation

This is just one way in which a small section of the public learn something about our criminal justice system through the active engagement of the legal profession.

The research report Causes of action, published earlier this year, underlines,

Crucial constitutional reform must not be delayed, says Law Society

The House of Lords is being urged not to delay the creation of the Supreme Court and Judicial Appointments Commission.

The legislative passage of the Constitutional Reform Bill has been hampered by protracted debates over the future role of the Lord Chancellor and accommodation for the Supreme Court.

Peers debated an amendment to the Bill that would ensure the Lord Chancellor is a lawyer and member of the House of Lords.

Edward Nally, Law Society president, says politicians must not miss the opportunity to modernise our constitution:

"Politicians must not lose sight of the reasons for this Bill. We need a modern constitution, under the supervision of a senior Cabinet Minister, with a judiciary selected on merit and a court system free from political interference. The Supreme Court and the Judicial Appointments Commission have important roles to play in upholding the rule of law and protecting judicial independence.

"Whether or not the Cabinet Minister is called Lord Chancellor, we do not believe the Minister needs to be a lawyer although it could be beneficial for the post holder to be a member of the House of Lords. However, these issues are not crucial and should not derail the implementation of this Bill."

Features

News

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Where Now Constitutional Reform?

By Austen Morgan, Barrister, 3 Temple Gardens,

Continuing Constitutional Reform?

With Lord Falconer of Thoroton QC, the lord chancellor and secretary of state for constitutional affairs, struggling with the Constitutional Reform Bill ('CRB'), government managers must be wondering what, if anything, will be enacted by May 2005 when the general election is expected to be held.

Tony Blair's new labour, which has brought us since 1997 devolution, human rights, partial reform of the house of lords, freedom of information and changes in the house of commons, will go down in history as a government of constitutional reform.

One presumably takes a conservative or progressive view on such measures without examining the details.

However, when it comes to the provisions of the CRB - abolition of the office of lord chancellor, a supreme court for the UK, and a judicial appointments commission for England and Wales - radicals and reactionaries seem to be coalescing against the prime minister's back-of-an-envelope proposals of 12 June 2003, when he suddenly dropped from the government his former pupil master and head of chambers, Lord Irvine of Lairg QC.

A number of factors goes to explain 6/12 (as defenders of judicial independence put it). One, continuing incremental constitutional reform, as a diversion from problems at home and abroad. Two, the ideology of modernization, the essence of new labourism, based on the ministerial mantra: 'We want a [enter the public service] fit for the 21st century.' Three, treasury financial controls, including on the administration of justice. Four, a general executive mindedness regarding the legislature and the judiciary. Five, a particular rivalry between David Blunkett as home secretary and the former lord chancellor, regarding judicial decisions and policies. Six, stalled house of lords reform, with the bishops and law lords still members. And seven, recovered radical theories (the separation of powers) and proposals (a judicial appointments commission to promote new social groups) from the early 1990s.

The Constitutional Reform Bill

Lord Falconer had an early success, when he won over Lord Woolf, the lord chief justice, with the concordat announced on 26 January 2004. However, this was followed by two setbacks. On 8 March 2004, the former law lord, Lord Lloyd of Berwick, successfully moved that the bill should be referred to a select committee. Then, on the first day of the committee stage (13 July 2004), the opposition and cross benches, on the first amendment, secured the restoration of the lord chancellor to a bill designed to abolish the office.

Each of the government's three principal proposals may be examined in turn. However, what has become clear in the past year or so, is that changing one bit of an uncodified constitution may have unforeseen consequences.

I have - while preparing to annotate the CRB - concluded that: (1) the office of lord chancellor should be reformed (and the constitutional affairs secretary abolished); (2) a supreme court for the UK would be a change of form but not content; and (3) a judicial appointments commission would increase the risk of an executive-minded career judiciary.

The Lord Chancellorship

This office - which dates from 605 - integrates the executive, legislative and judicial branches of government; while the lord chancellor began as the sovereign's secretary, he has become the protecting head of the judiciary. Lord Mackay of Clashfern and Lord Irvine, both Scots from modest backgrounds, and both lawyers, defended it, with the tory less enamoured of flummery than the labour man.

Montesquieu's separation of powers was wheeled out to justify the prime minister's patricide. The government said it was uneasy about ministers appointing judges. But Lord Irvine had represented the judiciary in the cabinet, and the home secretary continues to seek to bend judges to his will. The government wants also to take the judiciary out of the legislature (which is happening already), but the doctrine of the separation of powers seems to cause no difficulty for an executive dominating the commons.

The lord chancellorship was being reformed. Lord Bingham had only allowed Lord Irvine to sit as a law lord twice in three years; the latter being excluded from criminal, human rights and judicial review appeals. His role in the house of lords (which Lord Falconer still plays) could have given way to a proper speaker elected by peers. The lord chancellor is a beneficiary of prime ministerial patronage (but so are all ministers). There is a crucial difference between a senior lawyer being allowed to sit in cabinet, and politically ambitious junior ministers being appointed to the department for constitutional affairs ('DCA') to administer civil and criminal justice.

The one problem about a reformed lord chancellor is: how could he remain as head of the judiciary? It would be an anomaly (like many others), but the government's solution - transferring functions from the lord chancellor to the lord chief justice - is already creating the new problem of the latter becoming an administrator (while destined to lose his seat in the lords).

The Supreme Court

At present, the 12 law lords secrete themselves in the upper house of parliament. In 2000, Lord Bingham announced a self-denying ordinance about participation in debates and votes.

The government's proposal for a supreme court would, if enacted, mean one of the few UK-wide institutions created since 1801. However, it would still administer English, Scots and Northern Ireland law.

But why have a change of name to supreme court, when - unlike the US Supreme Court - the UK justices could not behave like a constitutional court (a point made by Lord Woolf in his Cambridge lecture in March 2004)?

The law lords split on the proposal in October 2003, with Lords Nicholls, Hoffman, Hope, Hutton, Millett and Rodger (plus Hobhouse) opposed, and Lords Bingham, Steyn, Saville and Walker supporting what had been the senior law lord's suggestion. Three of the antis have since retired, and views are now thought to be more balanced. The debate has focussed on the question of a building, with Middlesex Guildhall being opposed by law lords, and Somerset House considered by the Scots too close to the English inns of court. The diarchy of numbers 10 and 11 plagues the proposal:

the prime minister may have acted on 6/12 without consultation; now, his chancellor of the exchequer will not release the purse strings.

The Judicial Appointments Commission

Do we have a good senior judiciary? Yes. How was it appointed? Pretty much like brain surgeons. True, there were many rough edges in the lord chancellor's department. But it is not inevitable that a statutory quango, a judicial appointments commission, is necessary.

In the generally favourable debate, I have not heard anyone ask: what is a judiciary for; are judges entitled to equality of opportunity; and how do we ensure a judiciary which will stand up to the executive when necessary?

No one has looked critically at Prof Sir Colin Campbell's non-statutory commission for judicial appointments (put together by Sir Colin, a civil servant and a Northern Ireland solicitor), whose private-sector members think commercial headhunting, with closet reverse discrimination practised by new-technocratic patrons, is the way to appoint the best men and women.

The work of the commission for judicial appointments revealed very little in the way of complaints. So why did Lord Irvine waver, fall from grace, and allow the judicial appointments commission to become the cornerstone of the CRB?

Conclusion

The tragedy of the CRB was, when the DCA took over the court service in August 2003, the lord chief justice - acting like a leader - moved to protect the judiciary. Thus, he negotiated the judicial appointments commission through the concordat, and called for enactment sooner rather than later. Meanwhile, opposition was growing to the abolition of the lord chancellorship, and there was little enthusiasm for a supreme court.

It remains to be seen whether the government will split its bill, or persist with the full 6/12 project in the last, short session of parliament - at the cost of considerable constitutional damage.

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