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Constitutional Reform: Will the justice system benefit?

The constitutional reforms proposed by the Government will abolish the position of Lord Chancellor and remove the judicial function of the House of Lords. They are designed to “reflect and enhance the independence of the judiciary” from the executive and legislative arms of government,¹ and to “bring greater transparency and increased public confidence” to the justice system.²

There is no doubt that realising the ends to which these reforms aspire – judicial independence, improved public faith in the justice system – would be beneficial to the justice system. Whilst the present constitutional position has left the justice system in good shape, with a first-class and well-respected judiciary, there is need for change and modernization. Judicial review, in which judges have to rule on the legality of the actions of the executive, is on the rise. European Court of Justice rulings have left UK judges in a position where they may have to suspend the working of a UK law if it clashes with EC law. In both cases, the judiciary is placed in tension with the executive arm of government. It is therefore essential that judges’ capacity to make decisions, independently of any influence from the executive, be safeguarded. Equally, it is fundamental to the functioning of a democratic country like the UK that its justice system enjoys public support. Improved judicial independence and improved public support for the justice system are mutually reinforcing, too. Judicial independence boosts public confidence in the justice system; strong public support for the justice system makes it harder for politicians to place pressure on the judiciary.

¹ *A Supreme Court for the United Kingdom* (Consultation Paper) p. 4

² *Reforming the Office of Lord Chancellor* (Consultation Paper) p. 5

In considering the benefits these reforms may bring to justice, the question, therefore, is not whether they aspire to the right ends. Rather, it is whether these reforms are capable of realising these ends. Examining their substance reveals a danger that these reforms will not advance the causes they espouse but set them back.

A serious question hangs over the ability of these reforms to confer judicial independence. The reforms will introduce a Judicial Appointments Commission to take over the Lord Chancellor's present role in selecting members of the judiciary of England and Wales. The commendable intention is that judges will be appointed entirely independently of the executive, under a process that is fair and transparent.

However, despite the axiomatic truth that judges should be selected solely on the basis of merit, the government has made it clear that it intends to retain control over policy detailing on what criteria judges are chosen. This would be seriously inimical to judicial independence: if the government can control the grounds on which judges are selected, it is well on the way to determining which judges are selected.

Indeed, the reforms set out one area in which judicial selection will clearly be subject to policy considerations. They require the new Appointments Commission to work hard to ensure the judiciary is appropriately representative of the ethnic and gender balance amongst the British population. The effects of this particular policy consideration will almost certainly be entirely benign; but there is no reason to assume that a government able to influence judicial selection will always do so benevolently.

Nor do the reforms secure judicial independence into the future. They propose the creation of a statutory duty, binding on the Minister for Constitutional Affairs, to protect judicial

independence. This proposal, however, does not go far enough. A general and unspecific exhortation to respect judicial independence, even if it is in statutory form, is unlikely to be helpful in practice. Moreover, as judges have suggested, it is not just the Minister for Constitutional Affairs who will come into contact with the judiciary.³ Many ministers, with different duties in the executive, will do so. What is needed, therefore, is a clear and exhaustive setting out in statute of the duties and responsibilities of *all* ministers towards the judiciary; this way, there can be no question as to the limits of ministerial influence over the judiciary.

The reforms are largely silent on other important consequences for judicial independence of the abolition of the position of Lord Chancellor. They say very little about how courts will be administered or resourced, both responsibilities that fall partly under the Lord Chancellor's remit at present. If the executive were to assume any control over these areas after reform, judicial independence could be seriously compromised.

A further question hangs over the reforms' capacity to improve public faith in justice. One aspect of reform that seeks to do this is the creation of a new Supreme Court to replace the judicial function of the House of Lords. The proposals claim that there is a public interest argument in favour of the creation of a new Supreme Court, because it will end public confusion over the dual legislative and judicial roles of the House of Lords. There are certainly few other arguments in its favour, since the move is largely cosmetic: whilst it will take over some Privy Council functions, the new Supreme Court will be of a similar size and carry out similar work to the present Appellate Committee of the House of Lords.

A member of the public is unlikely to have much contact with the highest court in the UK. He or she is much more likely to encounter the justice system in inferior courts, where he or she may

³ *Judges' Council Response to the Consultation Papers on Constitutional Reform*, pp.15-16

pursue an action or undertake jury service. It is therefore arguable that, if public confidence in justice is the goal, the money spent on building and housing a Supreme Court would be better spent improving facilities and efficiency at the lower end of the court structure.

Undoubtedly, then, these reforms set out with the right intentions. Genuine judicial independence and strong public support for the justice system will only benefit the justice system. Yet there is a real possibility that these reforms will fail to realise their ambitions. They may well constrain rather than enhance judicial independence; the justice system, and public confidence in it, is unlikely to benefit and may well be harmed.