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Constitutional Reform: Will the Justice System Benefit?

The government proposes a number of constitutional reforms concerned with the question of who judges us. What is it that we want from our justice system in this respect? The answer must be that we want capable and fair judiciary. These requirements entail appointment on merit, freedom from bias and independence from pressure in the exercise of their function. Article 6 of the ECHR reflects these concerns in demanding an "independent and impartial" tribunal. The question is whether these exigencies could be better met after constitutional reforms.

It is proposed to create a "Supreme Court. The proposal seems essentially to be move the machinery of the existing judicial House of Lords lock, stock and barrel to a new building, and to rename it. The principal reason for this lies in the principle of separation of powers – judicial and legislative powers in this case.

Why does this principle exist? It is agreed that judges should not make law because they are not part of the democratically mandated and accountable body. However, the contribution of the Law Lords in their personal capacity to debate on legislation can be valuable. Nor is there a real danger, in this participation, to impartiality of judicial decisions. The fact that a Law Lord publicly declares an opinion on a law in debate should not influence his application of the law once in force and is unlikely to.

The only real issue raised by judges' participation in legislation is the possibility of the *appearance* of bias. This is an important consideration since confidence in the justice system is imperative. However, the fact that a judge *has* an opinion on legislation does not jeopardise his ability to apply it fairly. Therefore the fact that a judge has *expressed* such an opinion should not be a threat. And of course Law Lords can express an opinion about legislation in many forums, and the recent elevation of Dame Brenda Hale, ex-member of the Law Commission, shows that such expression is not seen as a threat to impartiality.

Reform can of course be valuable, but is expensive and leads to a lack of continuity, it can prejudice the public perception of the institution reformed, especially if reforms are numerous. It should only be undertaken for a significant change for the better, and the changes proposed to the House of Lords seem superficial and unnecessary.

Of more account is the proposed reform in the method of appointing judges. To ensure real and perceived independence and impartiality of the judiciary it is proposed to set up a Judicial Appointments Committee.

The office of Lord Chancellor having been abolished something is certainly needed to replace its function. The government favours a Commission to recommend to a minister whom to recommend to Queen, the minister having discretion, but limited discretion, over which recommendation to pass on. From point of view of appearance to the public, this solution is no better than having a minister appoint judges. Why involve a minister in the process at all?

The most potent reason is to allow for accountability to Parliament for the decisions over which judges to appoint. However, bearing in mind the expected existence of an ombudsman to oversee the work of the Commission, it is difficult to see why responsibility of a minister before Parliament is necessary in addition.

The principle that the judiciary should be independent from pressure from the executive means that it is not really appropriate for a government minister to make or have a veto over, the decision on whom to appoint as a judge. We must also remember that if the Commission is selected properly, it will have greater expertise than a minister in the matter of judicial appointments, and so it will be better placed than a minister to make a final decision on whom

to appoint. All in all it would be a better idea for the Judicial Appointments Commission to have a real power, and to recommend directly to the Queen for senior appointments, making more junior appointments alone.

This solution might appear to be just replacing the Lord Chancellor with another body, and so to be not much better than the proposed superficial change to the House of Lords. However the whole point of change in this area is to stop the executive control of the judiciary and so putting the power into different hands really is worthwhile.

The question remains as to who the members of the Commission should actually be. Those with most experience of the judicial system are judges and so they should make up a proportion of the Commission. The government also proposed there should be other lawyers and laymen. As the other constitutive part of the justice system lawyers, especially academic lawyers, do have a valuable contribution to make. The inclusion of laypeople will help to ensure public confidence in the process.

The key point is that their appointment should be free from political influence, to ensure the lack of bias in their choice of judges. The government recommends that a recommending body should recommend to the Prime Minister who should recommend to the Queen, those who should become members of the Commission to recommend judges.

Evidently the appointment to the position of appointor of judges should be based on a decision about who will be best placed to choose judges based on merit and nothing else. That is why political appointments to this important Commission, and so political appointors, should be avoided. Once the first Judicial Appointments Commission has been fairly constituted, the solution for future Commissions that immediately presents itself is to have the (by definition unbiased) Commission select future members. The initial Commission, however, presents a problem. The government's idea of having a panel of people from different backgrounds to decide on the members of the Commission should mean that the ideas raised by any one of them will be challenged, which is the surest way to ensure the fairest possible outcome. This complete separation of the executive from the process of appointment of judges is a very desirable outcome.

The conclusion must be, then, that in so far as the "constitutional reforms" proposed are no more than cosmetic, the benefit to the justice system will be minimal and not worth the cost. The fundamental values of capability and fairness are already the driving aims of the judicial system, but in order to bring appearance into line with reality and to protect it from the possibility of lack of impartiality and independence, the proposed reforms have a truly useful role to play.