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Constitutional Reform: Will the Justice System Benefit?

There seem to be two main themes underlying the current programme of judicial-related constitutional reform. The first is "independence"; the second is "public confidence". At first sight, these are uncontroversial enough - it is axiomatic that justice requires those responsible for dispensing it to be independent; it is also widely acknowledged that justice ought to be seen to be done. It is when one goes beyond these most basic of premises that the reforms run into difficulties.

The attempts to secure independence for the judicial system involve disbanding the post of Lord Chancellor, moving the Law Lords from Parliament into a new "Supreme Court", and the placing of judicial appointments into the hands of a new "independent" commission. All this will supposedly be a great improvement on the current system. This is flawed in three key respects: it suggests a damaging lack of independence in the current system that many observers fail to recognise; the proposed cure may be worse than the disease; and the major principles underlying the reforms are themselves flawed.

The inadequacies of the current system are more apparent in theory than in practice. Whatever the theoretical scope under the current arrangements for executive, or party political, manipulation of judicial verdicts or appointments, it is not seriously being suggested that this is happening.

There are criticisms of the judicial appointments procedure, particularly the supposedly unrepresentative nature of the higher judiciary, which some commentators do see the

putative appointments commission as being able to address. This, however, is a totally different idea from "independence". In many key respects it is actually contrary to this principle, in that it seems to envisage a process that would have non-judicial criteria, however "positive", in mind - quite possibly in line with policy, even quotas, laid down by the executive. This would potentially be disastrous, not only for public confidence, but also the quality of the law, especially in a common law system so dependent on judicial reasoning. That it is not clear how the "independent" commissioners would themselves be appointed, and that the prime minister may retain a veto over their decisions, raises the spectre of a system that may, perversely, be less independent than the one we have now. The very fact of government intervention in the judicial structure on this scale, apparently with little or no consultation, itself raises questions of political interference and may set a highly dangerous precedent whereby any future government may feel able to act unilaterally in this way.

Many of the presumptions about the inadequacy of the current system are based on the concept of "the separation of powers". This is often portrayed as some sort of neutral principle of constitutional or legal theory analogous to some sort of law of science. It is, however, in itself a highly normative idea, and one fundamentally at odds with our current arrangements. The idea that we could make ourselves compatible with European legal or political demands simply by tweaking the upper echelons of the judiciary is a nonsense. It may be that we decide we do need to make such a change, but in the interests of the justice system this ought to be debated openly rather than presumed and imposed. The Lord Chancellorship is clearly a particular anomaly given that, as a

component of all three branches of the state, it sits at the very centre of the Venn diagram so commonly used to illustrate our current lack of separation. Neither he nor the Law Lords, however, are the grossest offence against the principle within the British constitution. The true offender is surely the executive, which dominates the legislature both in theory and in practice, to huge effect. That no one is remotely contemplating addressing this issue can only suggest that a theoretical devotion to the separation principle is not, in fact, at the heart of the current reforms. A cynic might say that this suggests baser motives on the government's part, particularly in the light of recent public rifts with the judiciary, both in paradigm and policy.

What then of public confidence and accountability? What calls for reform there have been are often predicated on the notion that an effective justice system needs to be "representative". Again, like the separation of powers, this is a highly normative idea dressed all too often as incontrovertible principle. Whether a country's judiciary does need to be "representative", of ethnicity or gender or social class, as a prerequisite for justice, is an important concept, which should be debated properly, rather than rushed in through the back door. Many of the arguments surrounding "representativeness" and "accountability" are themselves fallacious - all judges are, for example, going to become, by definition, at least "middle class", whatever their socio-economic origins. It also may well be true, as has also been cited, that most people do not understand the difference between the judicial committee of the House of Lords and the legislature. There must, however, be countless facets of public life which are not known about or understood by many laymen - that in itself cannot possibly be grounds for reform. There is a problem of

public confidence in the judicial system, but it has nothing to do with judges being too white, or too middle class, or selected by the Lord Chancellor: they are ^{seen as} ~~not~~ too "conservative", but rather too "liberal".

In this area the government may well have a point. There are serious questions that need to be resolved, in the interests of justice, about the relationship between the executive's mandate in a representative democracy, and the extra-democratic judiciary. However, like so many other serious questions, these are not being asked, but rather missed in the rush. Whatever the quality of the government's vision, or the highness of its motives, the likely outcome of this flawed, superficial process is poor quality reform, which not only fails to benefit the justice system, but could well leave us worse off than we already are.