JUDICIAL INDEPENDENCE AND THE SUPREME COURT

Note of Seminar held at the Supreme Court

3rd October 2012

1. Introduction

This is a note of a seminar on ‘Judicial Independence and the Supreme Court’ that took place at the Supreme Court on 3rd October 2012. The seminar was the fifth in a series run under the auspices of a 3-year AHRC-funded project on The Politics of Judicial Independence in Britain’s Changing Constitution by the Constitution Unit at UCL, Queen Mary University of London and the University of Birmingham. Those participating in the seminar had a professional interest in the issue, with contributions from senior and former judges, civil servants, journalists and others. The event was run under the Chatham House Rule and this short note reflects that. It is intended to give a general impression of some of the themes discussed.

2. Scotland and the Supreme Court

The Supreme Court has been on the receiving end of some inappropriate criticism for some of its decisions since its establishment, including criticism made by the Prime Minister. Criticism has been most acute from the Scottish Government, with the Justice Secretary in particular threatening to end Scottish contributions to its budget following the decision in Nat Fraser. As one contributor explained, the legal nationalist case against the Court rests on a perception that the devolution settlement and the creation of the Supreme Court has actually increased the power that London has over the Scottish legal system. The statistics do not really bear this impression out. Although there has been an increase in Scottish cases going to the Supreme Court since it replaced the Appellate Committee of the House of Lords – 17% of the total – the success rate for cases from Scotland was not significantly different from that for other cases between 2000 and 2009. Since the creation of the Supreme Court the proportion of successful appeals from Scotland has declined while the success rate for non-Scots cases remains stable. Given that there can be a tendency for English members of the Court to defer to the opinion of Scots judges on matters of Scots law, so that to some extent the deciding judges are effectively Scottish, the nationalist critique presents, it was argued, something of a catch-22.

Several speakers noted that an important part of the job of the Scottish members of the Supreme Court is to engage with people in Scotland to ensure that they understand the role of the Court and so that the court itself knows what’s going on in Scotland.

3. Funding and Relations with Government

One speaker noted that while the Supreme Court is ‘small enough’ to be independent, the degree of independence enjoyed by the Court would not necessarily be appropriate or possible for the wider court system. The House of Commons has never been willing to give substantial resources to individuals it could not ultimately dismiss. The trend towards excluding the executive from all matters relating to the courts might be self-defeating. The creation of the Ministry of Justice (MoJ) and changes to the role of the Lord Chancellor seem to have resulted in a ‘sort of drifting apart of the continents’ of the executive and the judiciary, so that they are now less familiar to one another. It is important for civil servants to meet judges and talk to them, to understand their point of view. However, another speaker disputed this impression and maintained that there is a great deal of contact between the Ministry and the judiciary. Others suggested that the independent position of the Supreme Court (and of the judiciary more widely) is not always properly understood by civil servants – in particular, by civil servants outside of the MoJ.
Several speakers noted that the funding arrangements for the Court have not proven to be ‘watertight’. Notwithstanding the Scottish Government’s threat to withhold funding from the Supreme Court, monies have always been paid over by the Scottish Government and the Northern Ireland Executive on time and in full. However, one participant suggested that the MoJ has ‘not always behaved honourably’ in finance discussions. Partly, this was attributed to the complex negotiations that must go on between the court, the MoJ and the Treasury. Since the MoJ assumed responsibility for prisons and children in addition to courts, the judiciary feel that they have had to develop ‘very sharp elbows’, as one participant put it, to secure even a basic service for the courts: ‘Negotiations in England and Wales are completely dominated by the Treasury bottom line’. Another speaker noted that departments of government are never hermetically sealed from one another: each part makes itself a nuisance to the other parts.

4. Appointments to the Court

Participants noted the changes to the appointment scheme for the Supreme Court contained in the Crime and Courts Bill, which proposes to remove the current automatic participation by the President and Deputy President of the Court in the process (replacing this with participation by at least one Supreme Court judge) and to permit the Lord Chancellor to sit on the appointment commission. There were mixed views on this. One judicial speaker felt that it was important to retain strong input from Supreme Court judges because they were best placed to understand the needs of their courts. Others were sceptical, one in particular noting that although judges would no doubt choose the best candidate for a judicial position, it was not appropriate in a democracy for any part of government to be self-replicating.