

JUDICIAL INDEPENDENCE AND JUDICIAL APPOINTMENTS

- Note of Seminar in University College London -
- 22nd February 2012 -

1. Introduction

This is a note of a seminar that took place at University College London on 'Judicial Independence and Judicial Appointments'. The seminar was the fourth in a series being 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 a number of senior and former judges, politicians, parliamentary clerks, civil servants and journalists. 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. The Judicial Appointments Commission

The importance of the Judicial Appointments Commission (JAC) in lending legitimacy to the process of appointing judges was noted. It is very important that the judiciary avoid the perception that they are a self-perpetuating group and the JAC has helped with this. Although judges are involved as JAC members, one speaker suggested that their influence is important but it is not overwhelming. Another argued to the contrary: that the current arrangements for appointments give too much power to the judiciary. At present judges are involved not just as members of the JAC, but also in designing tests for applicants, in providing references and as statutory consultees. Judicial independence does not require judges to have control over their own selection.

The vulnerability of the JAC was also noted. It is a young organisation but was subject to internal review by the Ministry of Justice in 2010, which resulted in a positive report, and was later included and then excluded from the Public Bodies Bill. As one speaker put it, 'we've planted a daffodil and a number of times we've pulled the daffodil out of the ground to review whether or not it's working'. The JAC needs to be allowed some time to develop.

2. The Role of the Lord Chancellor and of Parliament

One speaker argued for an increased role for Parliament in judicial appointments. The role of judges has become inescapably political and so their legitimacy has become more important. In most common law countries, appointment is done by senior members of the executive. The Constitutional Reform Act moved in the wrong direction by minimising the role of the Lord Chancellor. Those who appoint judges need more democratic accountability. For senior judicial appointments there are political considerations – such as whether a judge is 'liberal' or 'conservative' – that are a matter of legitimate public concern. Several speakers expressed support for changing the Lord Chancellor's role so that he is presented with a shortlist of names by the JAC rather than the single name he is presented with at present. It was also suggested that UK Supreme Court justices should not be appointed without the endorsement of a parliamentary select committee.

Parliamentary involvement, it was suggested, is important not just for the general legitimacy of the judicial system: it is important for judges. If Parliament were involved in the appointment process politicians would feel that they had more investment in this process and would identify more with the judges appointed. This would help to avoid conflict between politicians and judges. One speaker expressed frustration that British debate about the overseas experience of parliamentary confirmation

of judicial appointments is insufficiently nuanced: there is a tendency simply to look at the American experience and recoil.

3. Judicial Diversity

Speakers highlighted several aspects of the problem of judicial diversity. Diversity is important for its own sake – sections of society should not feel excluded from the judicial profession – but also to ensure the independence of the judiciary so that the public do not perceive judges to be drawn predominantly from a ‘middle class, white, male’ background. Greater diversity would also benefit the judiciary as a whole. Talented people from diverse backgrounds see problems in different ways. The ‘business case’, as one speaker put it, for diversity is that the British legal system can only compete on a world stage if it identifies the best and brightest from a spectrum of backgrounds. Two obstacles to diversity were identified. Firstly, the pool of applicants is predominantly white and middle class. Secondly, we expect our judges to have very significant court experience prior to appointment; a particular problem for solicitors.

It was suggested that increasing the number of solicitors who apply was crucial to enhancing the diversity of the bench. Solicitor’s firms need to be encouraged to release partners for advocacy and sitting as recorders by treating this as part of their *pro bono* obligation, and indeed to see that there are commercial advantages to this. Solicitor advocates do not normally succeed in the judicial appointments process and this excludes large numbers of women and BME candidates. The system for appointing recorders could also be overhauled so that it allows a much wider selection of people to demonstrate that they have aptitude for judicial work. It was also suggested that providing the Lord Chancellor with a shortlist of names rather than a single name could improve diversity. If each name on the shortlist was of sufficient merit to be appointed, ministers could orient the appointments process in favour of diversity without endangering the principle of appointment based on merit.

There are, as one speaker pointed out, other measures of diversity that could be relevant. Why, for example, is the Supreme Court populated mostly by commercial lawyers? As Wales is gradually becoming a separate jurisdiction, is the time coming when it should have its own judge on the Supreme Court?

A number of speakers expressed the view that there was some merit to the old ‘tap on the shoulder’ appointments process. One speaker noted that outside of judicial recruitment, the process of head-hunting has become more sophisticated and now routinely involves initiating contact with people who might make good applicants and encouraging them to apply. Another noted that encouraging applications has been important to encouraging diversity in senior civil service positions. It was suggested that perhaps the JAC should nominate a ‘chief tapper’ to encouraging promising candidates to apply for positions on the bench.