Judicial Independence, Judicial Accountability and the Separation of Powers

- Note of Seminar at Queen Mary, University of London -
- 11th May 2011 -

1. Introduction

This is a note of a seminar that took place at Queen Mary, University of London on the topic of 'Judicial Independence, Judicial Accountability and the Separation of Powers'. The seminar was the first in a series of seminars being run under the auspices of an AHRC-funded project being run by the Constitution Unit at UCL on 'The Politics of Judicial Independence in Britain's Changing Constitution'. Those participating in the seminar had a professional interest in the issue and there were contributions by a number of senior and former judges, politicians and civil servants, amongst others. The event was run according to 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. Commitment to Judicial Independence

All of the participants spoke about the importance of the principle of judicial independenceand their commitment to it. Several participants referred repeatedly to the importance of judicial independence to the maintenance of the rule of law and to democracy. One participant noted that the principle required the protection of the environment within which judges operate, so that they are immunised against political interference, whilst also observing that Parliament does have a legitimate interest in the substance of the law and the efficient and effective operation of the court system.

3. Relationship between Parliament and the Judiciary

Some participants referred to the difficulty governments face when a piece of legislation is declared by the courts to be incompatible under the Human Rights Act. One noted that sponsoring ministers are required, under the Human Rights Act, to certify that a Bill complies with the European Convention and that they do so on the basis of the legal advice that they are given. If and when the courts take a different view it is very difficult for a Minister to decide what subsequent course of action to follow, because the courts do not provide any advance guidance as to what does and does not comply with the Human Rights Act. As he put it:

> 'What you see is a battling around that can go on for literally years, with different interpretations in that situation despite the fact that the legislation has been through the fullest public and parliamentary debate on these questions.'

He argued that there should be some form of 'dialogue' between Parliament and the judiciary on abstract interpretation of the Human Rights Act. This could perhaps take the form of a procedure for judicial pre-legislative scrutiny, perhaps by a committee of the Supreme Court.Some participants suggested that one model for this dialogue might be the procedure that exists under the devolution settlements for pre-legislative scrutiny of bills from the devolved jurisdictions. However, one participant was concerned about the agenda for such a dialogue, noting that it might be akin to complaints from a pressure group that its arguments were not receiving a sufficiently sympathetic hearing from judges. Another suggested that in some cases Parliamentary debate is insufficient, particularly when it is rushed by the Executive. He gave the example of the passage of the legislation governing control orders, which passed through Parliament in only 19 days. In that case the Second Reading in the House of Lords took place before the printers could print the amendments from the Third Reading in the House of Commons. In those circumstances, he argued,the courts have performed the role of holding the Executive to account.

A participant argued that the relationship between Parliament and the judiciary in Britain has been complicated by the expansive manner in which the European Court of Human Rights has interpreted its jurisdiction. He noted that he was generally at pains to explain to critics of the Human Rights Act that it is about incorporating into British law a statement of rights that was essentially drafted by British lawyers and that there is no reason why Britain should not have a bill of rights. However, he was concerned about the manner in which the

jurisdiction of the Strasbourg Court has been gratuitously widened. This was compounded, he suggested, by the occasionally poor quality of judicial appointments to that court. The fundamental problem, as he put it, is that:

> 'As long as the Strasbourg court was confining itself to what everyone accepted was basic human rights there was broad consent for the fact that you couldn't overturn their decisions, and consent to their judgments. The moment you move into areas of civil rights which are politically contentious and which in every other system can be overridden … you are going to get a train wreck.'

Some of the other participants agreed that this was a very significant and destabilising problem that could, if not addressed, cause serious damage to the ECHR system.

4. Judicial Appointments

Perhaps the most extensive discussion at the seminar concerned the current system for judicial appointments. A number of criticisms were expressed. There was a general feeling that the transition to the new system under the Constitutional Reform Act 2005 had had the ironic and unwelcome side effect of reducing the diversity of new appointments to the senior judiciary and so of slowing progress on the issue of diversity in the judiciary. Under the pre-2005 system, the system was able to promote diversity informally, as high-quality individuals would be informally sounded out prior to a formal appointment being made. This permitted the system to be 'tilted' towards a more diverse intake. The new system of ad hoc selection panels for the UK Supreme Court and for Heads of Division requires that potential candidates formally put themselves forward when a judicial vacancy is advertised and several participants attributed the lack of diversity in appointments under the post-2005 system to reluctance by candidates to put themselves forward. One participant with experience of the recruitment process for the senior judiciary explained that one of the most significant problems is that appointment panels cannot encourage able candidates to apply because they would open to accusation of bias in favour of these invited candidates. This inhibits diversity. As one participant put it:

> 'Under the old system you quite often had unexpected appointments – left-field appointments which turned out to be very successful – of people who would never have got through this system. It is paradoxically producing a more homogenised judiciary than was previously the case.'

The length of time that the new process takes was also criticised, as was the involvement that the current system currently gives to the President and Deputy President of the Supreme Court in the process of selecting their own successors, a feature of the appointment process which, it was pointed out, is almost unique to Britain.

A number of participants expressed their enthusiasm for a system of parliamentary scrutiny of appointments at the highest level of the judiciary. It was noted that the Executive has a genuine interest in appointment of members to the senior judiciary, such as the Lord Chief Justice and Heads of Division, because these posts involve significant administrative functions of public importance, and the expenditure of public funds. Parliament also has an interest in appointments to the Supreme Court because that court has a law-making function. Reference was also made to the appointment process for the US Supreme Court, in which the Senate is involved, and several participants suggested that the involvement of elected politicians enhances the legitimacy of American Supreme Court judges. Some participants suggested that in Britain a special Parliamentary committee might be appropriate for holding confirmation hearings.

However, other participants expressed doubt that such a hearing could be meaningful, with concern also being expressed that such a forum could be influenced by a media agenda on matters such as privacy. In response to this it was suggested that a protocol could be agreed that would keep the process from trespassing into inappropriate areas of questioning. It was pointed out that even now, without such a formal process, it should be possible for the selection bodies to have regard to the views of Parliament and the general public.