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Constitutional Revolution in the English Legal system

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Constitutional Revolution in the English Legal system

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Lord Justice Of Appeal

Senior President of tribunals

Abstract

I will start with a short introduction to the court system of England and Wales, including the historic role of the Lord Chancellor, as both head of the judiciary and a leading member of the government. Against this background, I will set the dramatic constitutional changes announced in June 2003. I will outline the main steps from that announcement to the new settlement embodied in the Constitutional Reform Act 2005. I will then describe the main features of the new system which came into effect in April 2006. I will then turn to the parallel reforms in respect of tribunals. We have a distinct system of specialist tribunals, separate from the courts, dealing principally, but not exclusively, with disputes between citizens and government. They have grown up piecemeal over more than one hundred years. A programme of reform was announced in a Government White Paper in July 2004. At the same time, I was asked by the Lord Chief Justice to take on the new role of “Senior President of Tribunals”, in preparation for legislation. The purpose is to create a more coherent and logical structure for the continued development of tribunals, as an alternative form of dispute resolution.

Key-words

Courts, Tribunals, Constitutional Revolution, English Legal system

Constitutional Revolution in the English Legal system[1]

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Introduction

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2. I will then turn to the parallel reforms in respect of tribunals. We have a distinct system of specialist tribunals, separate from the courts, dealing principally, but not exclusively, with disputes between citizens and government. They have grown up piecemeal over more than one hundred years. A programme of reform was announced in a Government White Paper in July 2004. At the same time, I was asked by the Lord Chief Justice to take on the new role of "Senior

[1]This lecture was originally held at Sant'Anna School of Advanced Studies (Pisa) on Friday, 4 April 2008.

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Reform in the courts

An overview of the court system in England and Wales

3. For first instance hearings, the main division is between criminal, civil and family cases. Criminal cases are heard in Crown Courts or (for the less serious cases) in Magistrates' Courts. Such courts are found all over the country. In the Crown Courts, cases are heard either by locally based Crown Court judges, or by High Court judges from London who go "on circuit". The most famous Crown Court is at the "Old Bailey", in the City of London, where very important criminal cases are usually heard. In addition we now have special secure courts in London for terrorist cases. Civil cases are heard in the High Court, or in County Courts around the country. The High Court is based in London (at the Royal Courts of Justice in the Strand), but High Court judges from London also visit the main regional centres to hear important civil cases. Family cases are heard in the High Court, the County Courts, and Magistrates' Courts.

4. There is no separate system of administrative courts, as such. However, there is a special division of the High Court, known as "the Administrative Court", which deals with applications for judicial review of administrative decisions. Similarly, there is a special division called "the Commercial Court", which deals with complex commercial cases. Judges of both divisions also sit on other aspects of the High Court's work.

5. Appeals in both criminal and civil cases go to the Court of Appeal, which normally sits in the Royal Courts of Justice in London, but occasionally sits in other regional centres. The Court of Appeal has a civil and a criminal division, but the same judges may sit in both. Permission to appeal is required, either from the first instance judge or from the Court of Appeal itself.

6. The High Court of Justice consists of about 100 judges, the Court of Appeal of 36 judges (known as “Lord Justices”). There are many more County Court and District Court judges, who hear cases in the lower courts. Cases in the magistrates’ courts may be also be heard by lay magistrates (or “justices of the peace”). The senior judge in England and Wales is the Lord Chief Justice (now Lord Phillips, formerly Lord Woolf). He acts as president of the High Court and the Court of Appeal.

7. Appeals from the Court of Appeal go to the House of Lords. The “House of Lords” in its judicial role is technically a committee of the Upper House of Parliament, and is housed in the same building in Westminster. But it operates entirely independently. It consists of 11 senior judges (or “Law Lords”). The Lord Chief Justice is a member of the House of Lords, but is not the president. That role goes to the Presiding Law Lord (currently Lord Bingham). It is the final appeal court for all types of case, civil, criminal, administrative or constitutional. It is also the final appeal court for civil cases from Scotland, and all types of cases from Northern Ireland. Permission to appeal is required, and is only given for cases raising points of general importance. The House hears only about 70 cases each year. The same Law Lords also constitute the Judicial Committee of the Privy Council, which used to be the final appeal court for countries

in the British Empire, and still hears appeals from a few Commonwealth countries which do not have fully developed appeal systems of the own.

8. The most important judge in England and Wales is the Lord Chief Justice (now Lord Phillips, formerly Lord Woolf). He is in effect president of the High Court and the Court of Appeal. He also sits on occasion in the House of Lords, but does not preside there. That task normally goes to the Presiding Law Lord (currently Lord Bingham).

The Lord Chancellor

9. Until last year the head of the Court System was the Lord Chancellor. That was an office with a history stretching back for many centuries (including such great figures as Sir Thomas More, executed under Henry VIII).

10. On one view the office was an extraordinary anomaly, judged against the principle of the separation of powers. He was the Head of the Judiciary of England, Wales and Northern Ireland. He was entitled to preside in hearings of appeals by the House of Lords. As Head of the Judiciary he was responsible for the appointment of the judiciary from the Lord Chief Justice down to the lay magistrates. He was also responsible for judicial discipline and for dealing with judicial complaints.

11. As a legislator, the Lord Chancellor was, ex officio, the Speaker of the House of Lords and took a full part in the legislative business of that House. As a member of the executive the Lord Chancellor was the senior member of the Cabinet after the Prime Minister. He was also the head of a Government department that had in effect become a Ministry of Justice, and was steadily growing in size and importance.

12. These diverse roles gave the Lord Chancellor a pivotal role in the UK constitution. In recent times, the post has normally been held by a senior legal figure, who recognised a duty to safeguard judicial independence and the rule of law that overrode political considerations and carried great weight in the Cabinet. The last Lord Chancellor on the traditional model was Lord Irvine, who had been a successful practising barrister, and also head of the barristers' chambers in which the young Tony Blair met his future bride.

Sudden change

13. In June 2003, late one busy afternoon, the Prime Minister suddenly announced the Government's intention to carry out a constitutional revolution. They would abolish the office of Lord Chancellor as head of the judiciary, and transfer most of his judicial functions to the Lord Chief Justice; 'they would create a new Department of Constitutional Affairs to take over his ministerial functions, and establish a new independent Judicial Appointments Commission, to conduct competitions for appointment to all judicial offices; and they would create a new Supreme Court to take over the appellate functions of the House of Lords.

14. This announcement came as a surprise to almost everyone, including the Lord Chief Justice, Lord Woolf. Three and half years on, the mystery has not been fully explained. The present Lord Chief Justice, Lord Phillips, commented in a speech last year:

> "It seems that not even the Queen had been informed of the imminent demise of the official who had, for a millennium or more, been the sovereign's most senior Officer of State. Precisely what chain of events led to the sudden decision to introduce such dramatic constitutional changes is still a matter of speculation, for

> those in the know, and in particular Lord Irvine, have kept a discrete silence. The shadow leader of the House of Lords, Lord Strathclyde, described the changes as 'cobbled together on the back of an envelope'."

15. Once the shock of the announcement had been absorbed, those concerned, in a traditionally British way, set to work to make the most of what was left, and to build a viable constitutional structure from these skeletal ideas. A period of sometimes fraught negotiations followed between the government and the judiciary was crowned by the agreement in January 2004 of a so-called "Concordat" between the new Secretary of State for Constitutional Affairs (Lord Falconer) and the Lord Chief Justice. That can be seen as a historic constitutional document. It sought to define on a principled basis, and in considerable detail, the relationship and division of functions between the judiciary and the executive. In due course its main terms were embodied in the Constitutional Reform Act 2005. Most of the new arrangements came into force on 1 April 2006.

The judiciary in the new constitutional settlement

16. Central to the new settlement under the 2005 Act is the affirmation of "the existing constitutional principle of the rule of law"; and a statutory guarantee of judicial independence. The office of Lord Chancellor remains, but with a much reduced role. He is required to uphold "the continued independence of the judiciary", and to ensure adequate support to enable them to exercise their functions. On the judicial side, the pivotal role is that of the Lord Chief Justice, who is President of the Courts of England and Wales, and Head of the Judiciary. He is responsible for representing the views of the judiciary to Parliament and Ministers, for "the welfare, training and guidance" of the judiciary; and for the

"deployment of the judiciary and the allocation of work". He is also responsible for conduct and discipline, under a more formal structure established by the Act working through a new Office for Judicial Complaints.

17. To support him in carrying out these tasks, the Lord Chief Justice has had to establish a large new administrative team, led by a Chief Executive, based in the Royal Courts of Justice. He is assisted by a Judicial Executive Board, consisting of six senior judges, and a Judges' Council, on which all elements of the judiciary, from the House of Lords to the magistracy and tribunals, are represented. A new Judicial Communications Office was been established, to improve communication between judges, and to support them in their relations with the press and public.

18. The Act also provided for the creation of the new "Judicial Appointments Commission" for appointments in England and Wales (There are separate bodies in Scotland and Northern Ireland). The composition of the 15 members of the Commission is laid down by the Act, and is designed to achieve a very precise balance between judicial, professional and lay elements. The Commission also began work in April 2005. The Act provides that selection for judicial offices must be based on merit, but the Commission must have regard to the need to encourage diversity in appointments.

19. Last, but not least, the Act provided for the establishment of a new Supreme Court, to take over the UK appellate functions of the House of Lords and the Judicial Committee of the Privy Council. The implementation of this part of the Act has been delayed until September 2009, to give time to provide and adapt a suitable building for the new court. The government has selected a building on the north side of Parliament Square, known as "the Middlesex Guildhall". It is

an elegant Gothic building, dating from the beginning of the 20th century, with some interesting period features. In the meantime, the House of Lords continues to operate as before.

Tribunal reform

Background

20. Tribunals have a long history in the UK justice system, starting in the 17th C with special panels set up to deal with disputes over taxes and excise duties. In more recent times specialist tribunals have been created dealing with such diverse issues as social security, tax, property rights, employment, immigration, mental health and many other subjects. Between them they handle more than half a million cases each year. Most of these tribunals are concerned with claims by the citizen against the state, either claims for benefits of some kind, or appeals against impositions or regulatory decisions. However that is not true of all of them. For example, employment tribunals are concerned for the most part with disputes between private individuals and their employers, whether public or private. Some of the most important tribunals, notably those concerned with tax, immigration and social security, have jurisdictions extending to the whole of the United Kingdom; others are more limited. A weakness of the system was its lack of perceived independence. The tribunals were often administered by the government departments whose decisions were under challenge.

21. The main hallmarks of tribunals, as compared to the courts, are the specialist expertise and experience of the members, who usually include non-lawyers with specialised qualifications or experience; and the flexibility which enables

each tribunal to develop and vary its procedures to suit the needs of its users, whether unrepresented individuals or sophisticated City institutions. For example, Mental Health Review Tribunals consider appeals against orders for compulsory detention under the mental health legislation. The tribunal usually has three members, a lawyer, a psychiatrist and a social worker; and it will usually sit in the hospital where the patient is detained.

22. The former Lord Chancellor, Lord Irvine, recognised the importance of tribunals to the Government's programme for modernising the justice system. Long before the events of June 2003, he had initiated a review by a team under Sir Andrew Leggatt, a former Lord Justice. They recommended that the tribunals should be brought together in a single, coherent tribunal system to be administered by a new agency reporting to the Lord Chancellor. Those recommendations were broadly accepted by the Government, which issued a White Paper in July 2004, *"Transforming Public Services: Complaints, Redress and Tribunals"*.

23. Unlike the constitutional reforms, the preparation of the Tribunals White Paper had been the subject of unusually close co-operation between judges, tribunals and government. In July 2004 I was invited by Lord Woolf to act as "Senior President of Tribunals Designate", pending the creation of the statutory post. Almost my first task was to participate in the selection of a shadow Chief Executive for the new tribunal service, and since then I have worked closely with him on all aspects of implementation.

24. The new Tribunal Service was launched in April 2006, as an "Executive Agency", reporting to the newly established "Department for Constitutional Affairs." It has already taken

over the management of the most important tribunals, and others will follow this year and next year. The Tribunal Service is currently planning a new regional arrangement of administrative and hearing centres. The structural changes to the tribunal system require legislation. The new Act became law in summer 2007. Implementation will be completed between autumn 2008 and spring 2009.

25. The Act will create two new tribunals; the First-tier tribunal and the Upper Tribunal. They will form a framework into which most of the existing tribunal jurisdictions will be transferred. They will be divided into a number of "Chambers", reflecting the different specialisations. The Upper Tribunal will be primarily a specialist appellate tribunal hearing appeals from the First-tier tribunals. However, it will also hear some first instance matters, such as complex tax and finance disputes. There is the possibility of appeal, with permission, from the Upper Tribunal to the Court of Appeal, and thence to the House of Lords.

26. It is a key feature of the Act that the new statutory guarantee of judicial independence is extended to all tribunal judiciary, and they are given the same status and protections as the judges in the courts. The Act also creates the new statutory office of "Senior President of Tribunals" (to which I was formally appointed in November 2007). He will be judicial head of a unified tribunal judiciary, and will work in co-operation with the Lord Chief Justice and the other chief justices. The Senior President's general duties are to ensure that tribunals are accessible, proceedings are handled efficiently, that the members have specialised expertise, and innovative methods of resolving disputes are developed. He will also be responsible for the training and guidance of tribunal judges, and for representing the views

of tribunal judges to Parliament, the Lord Chancellor and other Ministers. The Lord Chancellor for his part is under a duty to ensure there is an effective system of support and services for the reformed tribunal system.

CONCLUSION

27. In this brief overview, I hope I have been able to give you some idea of the extraordinary changes that are taking place in the constitutional structure of our justice system. Tribunal reform is an important, if less dramatic, part of those changes. In any other country, I suspect, changes of this magnitude would have been impossible without fundamental revisions to a written constitution. In the UK we lack the protection of a written constitution, but instead we have a special combination of tradition and pragmatism, which seems to serve us quite well. The constitutional reforms started badly in 2003, but have been put back on track under the energetic and enlightened leadership of two Lord Chief Justices. Looking back in 20 or 50 years time we will see this as a period of remarkable and historic change. I believe they will be seen as beneficial.

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