

Parliamentary Monitor IV

Omar Khan considers whether the Government's constitutional reforms are producing the 'big ideas' that might have been expected when the role of Lord Chancellor was brought to an end.

The most recent shuffle in the Labour Cabinet attracted a great deal of media and public interest, especially the elimination of the role of Lord Chancellor and its incumbent, Derry Irvine, Tony Blair's important ally and first mentor. At the time, the Tory policy of attacking Blair for conducting constitutional reform 'on the back of an envelope' first succeeded and later foundered, following the Prime Minister's accusation that the Conservative party was merely defending archaic symbols such as the woosack without offering any positive statements regarding the reform measures they might support, if any.

Such debate barely touched on the important issues surrounding the constitutional situation in the United Kingdom and the necessary reform of the relationship between the executive, legislative and judicial branches. Now that the post of Lord Chancellor – formerly a member of the Cabinet, the upper chamber and the judiciary – has been abolished, the most serious and obvious anomaly among the three branches of government has been eliminated. Of course, this created an immediate need to reconsider the role of the judiciary in particular, the prime focus of the Government's current attention and thus the subject-matter for this issue's 'Parliamentary Monitor' slot.

In order to demonstrate its commitment to constitutional restructuring and to counteract suggestions that the cabinet shuffle caused Labour's reformist zeal, the Government published three separate consultation documents in July 2003.¹ Together they argued for a substantial reform of the legal system, focusing on a Supreme Court to replace the law lords, a new policy for appointing judges, and the future of Queen's Counsel respectively.² Will our concerns be reflected in these reforms? Will they advance egalitarian goals and, in particular, will black and minority ethnic individuals and

communities have better access to and understanding of justice in their country?

A Supreme Court for the United Kingdom (commenting on CP 11/03 July 2003)

Establishing a Supreme Court is the most transparently reformist measure in these documents, though some might argue that it will be less revolutionary in the actual application of the law than other suggestions. In any case, the government document does an admirable job of clarifying constitutional questions, both in charting the history and development of the law lords and in explaining the present situation. As the document notes, 'It is not always understood that the decisions of the "House of Lords" are in practice decisions of the Appellate Committee and that non-judicial members of the House never take part in the judgments' (11). It further quotes the Chairman of the Bar Council: 'Judges should have no part of the legislature... It is very difficult to understand why our Supreme Court (the law lords) should be a committee of the second house of Parliament'. (10)

Though the document does not provide any evidence as such, it seems undeniable that the public is confused by the role of the law lords as the highest judges and members of the upper legislative chamber. The fact that the law lords sit in a Committee in the House of Lords only adds to this confusion, as did the triple role of the Lord Chancellor. For many, their seemingly dual role casts doubt on the impartiality of decisions made by the law lords and 'the appearance of independence from the legislature' (11), as the document repeatedly recognizes. According to the Government, 'the present situation is no longer sustainable' and it is time to move the UK's highest court 'out from the shadow of the legislature' (12).

Given that a number of organisations, including professional legal associations, have supported this measure, it is likely to be uncontentious and speedily implemented.

Further sections of this document elaborate particular questions regarding the relationship between the various regions of the United Kingdom, the size and tenure of the court, and the role of the Privy Council. Although these are important questions, the most crucial issue is probably that of selection or appointment. Following the model considered below in *Constitutional Reform: a new way of appointing judges*, the Government proposes a Commission that would be able to operate in a transparent way. The essential goal is for a more representative and thus democratic court, while maintaining current qualifications such as merit and judicial independence. The consultation document supports a Commission that would make recommendations to a Minister who would then appoint the judge (see pp. 30–1). Although the Minister would only be able to pick among very few candidates (perhaps merely one or two), some will feel that the Commission should directly appoint judges, an option on which the Government seeks further views.

In order to maintain the independence of a future Supreme Court, the document rejects a US-style confirmation process or any means by which the Commons or Lords could choose judges, particularly since 'MPs and lay peers would not necessarily be competent to assess the appointees' legal or judicial skills' (33). Furthermore, prospective Supreme Court judges should not serve in any capacity in the House of Lords, though they may be recommended for the peerage once they have reached retirement age. All in all, these are reasonable recommendations, but it will be important to ensure a more representative body in the future. This,



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¹ *Constitutional reform: a Supreme Court for the United Kingdom* (CP 11/03, available at www.dca.gov.uk/consult/supremecourt/). *Constitutional reform: a new way of appointing judges* (CP 10/03, available at www.dca.gov.uk/consult/jacommission/) and *Constitutional reform: the future of Queen's Counsel* (CP 08/03, available at www.dca.gov.uk/consult/qcfuture/), all published by the Department of Constitutional Affairs.

² In the analysis of these documents that follows, I have benefited greatly from discussing these issues with members and experts of the judicial system, particularly Lord Lester, though all opinions and any errors that might appear are my responsibility.

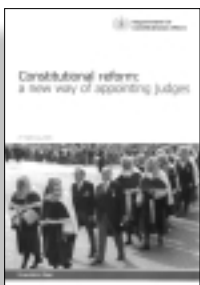


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³ Just published in September 2003, but not able to be discussed here, are: *Reforming the Office of the Lord Chancellor* (CP 13/03) and *Next Steps for the House of Lords* (CP 14.03) from the Department of Constitutional Affairs.

⁴ Among others, Runnymede has recommended that 'a Judicial Appointments Commission be established to oversee all promotions within the magistracy and the higher judiciary' CFMEB (2000) *The Future of Multi-Ethnic Britain: The Parekh Report*. London: Profile Books, for the Runnymede Trust, p. 135.

⁵ For a good account of this issue see *Factors affecting the decision to apply for Silk and judicial office* by Kate Malleson and Fareeda Banda. Lord Chancellor's Department, 2000.



in turn, depends crucially on the appointment of judges more generally as the potential applicant pool for the highest court in the country.

A New Way of Appointing Judges (commenting on CP 10/03 July 2003)

Many members of the public are probably unaware of how judges are chosen. Until 2003, all appointments involved various degrees of input from the Lord Chancellor who ordinarily maintained prime responsibility up to the level of the law lords. With the abolition of his post, it is clearly necessary to devise a new way of appointing judges, and this document (CP 10/03) propounds a number of views on the substance and aims of the process.³

Three motivating points underline the Government's proposals. First, 'In a modern democratic society it is no longer acceptable for judicial appointments to be entirely in the hands of a Government Minister'. Second, 'the current judiciary is overwhelmingly white, male, and from a narrow social and educational background'. Third, 'the fundamental principle in appointing judges is and must remain selection on merit' (3-4).

The document proposes the establishment of an independent Judicial Appointments Commission,⁴ and describes three possible models:

1. a Commission that directly makes appointments;
2. a Commission which would make recommendations to a Minister;
3. a Commission which directly makes junior appointments and recommends more senior appointments.

As stated in this consultation, the Government is inclined towards the second model, namely a Commission that makes recommendations to a Minister who then selects a candidate based on the short-list. It also proposes a separate Ombudsman and that the Commission should be a fully independent Non-Departmental Public Body (see pp. 9-10). Although there are a number of concerns with all of these choices, both on questions of independence and of competence, the section most relevant to this

review is paragraphs 93-7 concerning the diversity of candidates.

The consultation document is clear in stating that the judiciary 'is currently not reflective of the society it serves' (45). It also commendably suggests specific ways in which to improve this scenario, and requests further suggestions, especially in terms of the appointments process. First, however, the Government recognizes three factors that are 'significant obstacles to increasing diversity in judicial appointments' (45), including:

- (1) the terms and conditions of judicial office and workloads;
- (2) factors affecting the willingness of women and minority ethnic lawyers even to apply for appointment;⁵ and
- (3) factors affecting retention of women in the legal profession and difficulties of re-establishing a career after breaks.

The above obstacles are probably familiar to anyone who has worked in human resources or dealt with hiring and promotion policies. The Government suggests that the traditional pattern of entry into the judiciary might be amended so that a wider range of competent potential judges is identified. While it does not believe in a fully career judiciary, an option some might worry would check independence in early career, it does recommend 'an identifiable career path' enabling barristers or solicitors 'to apply for a first judicial post after a number of years in practice, with a realistic prospect of progression to higher office through that route as an alternative to remaining in practice and entering the judiciary at the higher level' (46).

Some of these changes might also allow those who have left their professions for a career break to mitigate their lack of experience. Many of these might be highly competent judges and the document tentatively suggests reserving a few places at lower judicial levels, though not in a manner that would be contrary to the principle of merit. While some would undoubtedly wish to suggest more extensive recommendations, it is clear that the above proposals would increase diversity in all levels of the judiciary. In order for this to come to

fruition, however, it will be necessary that the appointing commission is itself composed of a diverse staff and of course knowledgeable of and sensitive to the issue of diversity more broadly.

The Future of Queen's Counsel (commenting on CP 08/03 July 2003)

Outside the legal profession, many know only that QCs are more prestigious legal professionals who also seem more likely to wear wigs. In fact, QCs play an important role in the judicial system, one that is drawing increased scrutiny and causing some to question its utility. Perhaps the biggest issue is that the appointment of Queen's counsel is done by the Government itself, thus creating a potentially enormous conflict of interest. Therefore, the document proposes a new system for determining the qualifications of advocates without necessarily assuming that the current system would have to be scrapped altogether.

At present there are roughly 1150 members of Queen's Counsel. The background, development and role of QCs is well summarized in document CP 08/03, but the key distinction is the rank it bestows upon recipients. The resulting privileges are fairly extensive, but perhaps most significant are the ability to charge substantially higher fees and to engage in more complicated cases. Any profession probably needs to establish expertise at least partially on the basis of efficiency, but critics of the QC system view it as market distorting. Some even assert that they are able to determine good advocates independent of the QC system, which can sometimes err in providing a quality mark, particularly when 20 or 30 years have elapsed since the initial award.

Compared to the above two documents, here the Government seems much more tentative in spelling out its view, merely stating that 'its continued involvement in the appointment of Queen's Counsel needs strong justification' (35). While the document reviews almost all the advantages and disadvantages of the present system, and stresses the need

for greater transparency and objectivity, it does not make any explicit recommendations. Appendices chart how similar systems work in other countries and how quality marks are determined in other professions, though many seem to lack such standards. It notes that the Law Society in particular is in favour of eliminating what it sees as a 'mark of patronage' but merely reports such findings earlier published in *In the Public Interest*, a Government response (July 2002) to criticisms made of the Silk system by the Director General of Fair Trading in March 2001 (*In Competition in Professions*).

Although the Government is not actively in favour of retaining the quality mark, it seems likely that some form will remain, even if appointed by a separate agency or commission. From the point of view of race and diversity, it will remain important that the selection process is able to take into account diverse experiences while sustaining commitment to merit.

The present document offers no statement on diversity and it is therefore difficult to make further suggestions, much less analyse any implications. As a result, it is unclear whether abolition, modification or maintaining the status quo would be more progressive, at least on the basis of this consultation document.

Conclusion

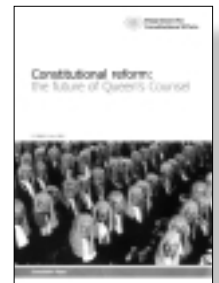
Although the Labour party in government is to be commended for its initial haste and relative depth in explaining its proposed reform of the judicial system, without a more systematic connection to reform of the executive and legislative branches, particularly the House of Lords, it is unlikely that all of the undemocratic and curious aspects of the constitution will be amended by considering judicial reform independently. Nevertheless, it is clear that the Government is committed to these reforms, even if some will always view the circumstances

surrounding them as suspicious. It is further evident that the Government understands the urgency and potentially positive democratic dividend they might obtain – the photographic covers of both the Judges and Queen's Counsel documents portray rows or processions of mostly elderly white male judges in full ceremonial garb and wigs.

For all this attention, Runnymede, other organisations and ordinary citizens will want to ensure that the primary aims of judicial reform are not blocked. In other words, we must confirm that the reviewed proposals are able to expand the understanding of and access to justice by all members of society, especially those from black and minority ethnic backgrounds. The complexity of the law and the legal system must not dissuade individuals from insisting on the representativeness of one of the most important organs of a democratic society. □



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Challenging Discrimination with International Law

Race, Religion and Ethnicity Discrimination: Using International Human Rights Law

Authors: Karon Monaghan, Max du Plessis and Tajinder Malhi
Edited by Jonathan Cooper for JUSTICE, London, 2003
Pp. 80; £12; ISBN: 0 907247 37 7 [www.justice.org.uk]



JUSTICE has recently produced this useful booklet – a report which aims to answer basic questions in a very clear and comprehensive way regarding international and European legal instruments that protect individuals from discrimination.

Part 1 analyses the importance of international law in challenging discrimination and explains how it can serve equality at the domestic level. It goes over the main concepts of anti-discrimination (direct and indirect discrimination, positive action, etc.) and explains in detail the way international treaties are enforced.

Part 2 reviews various international Conventions or Covenants that address, from one direction or another, religious and race discrimination (i.e. Convention for the Elimination of all forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights). For each treaty, there is a section that looks at its provisions in relation to religious, ethnic and racial discrimination and how these provisions are enforced, thus providing a useful picture of the range and extent of protection that can be expected from each of these treaties.

Part 3 provides the same kind of analysis as Part 2, this time of European treaties that cover racial, ethnic or religious discrimination.

This guide is particularly useful for three reasons. First, it takes full account of religious discrimination, and therefore provides an excellent composite of available instruments – the kinds of instruments that can be used, for instance, by UK nationals who experience discrimination on the grounds of religion. This provision is all the more useful since the UK still has no legislation to protect people from religious discrimination as such. A new piece of legislation to be implemented by the end of 2003 will outlaw religious discrimination only in employment and training (and it is worth bearing in mind that this legislation will have been brought into being in response to a European Directive). It is therefore important, with regard to religious discrimination, to have as much information as possible regarding legal recourse outside of domestic legislation.

Second, this guide does not limit itself to coverage of only those treaties that most directly affect racial, ethnic and religious discrimination, but goes wider and makes links with treaties such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), thereby providing a more comprehensive tool. This allows for a more integrated approach to protection against discrimination, in considering its multiple forms in particular.

Finally, it does stress the importance of using international treaties in these areas to hold the UK government to account by including not just the binding treaties that have been incorporated into UK legislation, but also non-binding treaties that still allow for individual petitions. As argued in the book: 'To fail to use [these international human rights treaties] effectively, or to ignore them, means that a rich vein of knowledge and wisdom goes untapped' (p.68). This publication goes a long way towards making these treaties more accessible and therefore more useful in the fight against racial, religious and ethnic discrimination.

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