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Requiem for the Lord Chancellor?

Francis Bennion

Introductory

On 12 June 2003 it was officially announced that the UK Prime Minister Tony Blair had reshuffled his Government. It was the most remarkable ministerial reshuffle in living memory for by a sidewind it appeared to abolish the most ancient office under the Crown, that of Lord High Chancellor, keeper of the Queen's conscience. Instead, Lord Falconer of Thoroton, Mr Blair's old room-mate, was appointed to the new post of Secretary of State for Constitutional Affairs. The official announcement of these changes was accompanied by the following brief statement: "For the transitional period, Lord Falconer will exercise all the functions of Lord Chancellor as necessary. However, Lord Falconer does not intend to sit as a judge in the House of Lords before the new Supreme Court is established."

That was all. Nothing about the nature of the new Supreme Court, or how its judges were to be appointed. Nothing about exactly how, and by whom, the numerous statutory and other functions of the Lord Chancellor were to be carried out under future permanent arrangements. Answering the resultant uproar the Prime Minister's official spokesman said that "inevitably he did not have the answer to every question immediately and some things had been a little hazy"[1].

While we wait for the details to be developed in Parliament and elsewhere (which will take months if not years) I thought I would go to the root of the matter and try to work out, in bare outline rather than detail, just what state legal functions amount to in a common law country, and how they should best be dealt with. However before starting on that I will set the scene by reproducing my first reaction to the news of the Lord Chancellor's demise at the hands of Mr Blair. It took the form of a letter to the London *Times*-

> If we abolish the office of Lord Chancellor we shall deprive the unwritten British constitution of one of its most brilliant and useful features. It is unsatisfactory to have a complete separation of powers between judiciary, executive and legislature, because this does not allow for the settling of disagreements between them.
>
> The British genius has been to evolve, over the centuries, a Cabinet office, that of Lord Chancellor, which allows its holder to intercede at the centre and put forward and defend the views of the judiciary at the heart of government. This is of inestimable value constitutionally.
>
> Those who consider this office an anomaly, and want to get rid of it, do not understand its nature. I fear that applies to many of the so-called 'reforms' instituted by Mr Blair.[2]

One correspondent replying to this letter said it was beside the point and smacked of the smooth Whitehall fixer.[3] Another, Mr Stanley Brodie QC, said my assessment was "entirely correct".[4] I shall return to that matter at the end of this article.

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1 10 Downing Street website.
2 *The Times*, 14 Jun 2003 (lead letter).

The six groups

In the United Kingdom – or any other common law country – the following state legal functions need to be carried out and financed.[5] They fall into six groups.

A. The law

1. Acting as a legislator.
2. Consulting on and formulating proposals for changes in substantive law (including constitutional law).
3. Drafting changes in substantive law.
4. Enacting primary law.
5. Consulting on and formulating proposals for delegated legislation.
6. Drafting delegated legislation.
7. Consulting on and formulating proposals for reform of 'lawyers law'.[6]
8. Drafting reforms of 'lawyers law'.

B. Judicial functions

1. Acting as a judge (by which term I include magistrates and other judicial officers).
2. Appointment, promotion, disciplining and dismissal of judges.
3. Framing and administering other conditions of service of judges.
4. Initial training of, and periodic refresher courses for, judges.
5. Formulating proposals for reform of legal and court procedure.
6. Drafting reforms of legal and court procedure.
7. Provision and administration of court buildings and plant.
8. Appointment, promotion, disciplining and dismissal of ancillary staff.

C. Legal services

1. Practising as a barrister, solicitor or other legal officer.
2. Pre-admission and post-admission training of legal officers.
3. Appointment, promotion, disciplining and disbarring of legal officers.
4. Providing legal advice to central and local government.
5. Administering legal aid schemes (civil).
6. Administering legal aid schemes (criminal).

D. Prosecution of offences

1. Acting as a prosecutor.
2. Deciding on and applying prosecution policy.
3. Deciding on and applying sentencing policy.

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E. Police

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[3] *The Times*, 18 Jun 2003.

[4] *The Times*, 23 Jun 2003.

[5] The impact of the European Union and other international matters is beyond the scope of this article.

[6] By 'lawyers law' I mean technical law which concerns the machinery rather than the substance of the legal system.

1. Acting as a police officer.
2. Appointment, promotion, disciplining and dismissal of police officers.
3. Framing and administering other conditions of service of police officers.
4. Provision and administration of police services.

F. Prisons etc

1. Acting as a prison or probation officer.
2. Provision and administration of prisons etc.
3. Appointment, promotion and dismissal of prison and probation officers.
4. Framing and administering other conditions of service of such staff.

Analysing the functions

Each of these 33 functions raises five main points:

- What is its nature?
- Who is to carry it out?
- How far does it need to be independent?
- How is its carrying out to be supervised?
- How is it to be financed?

Nature of the functions

The nature of the functions listed above can be characterised as wholly or partly legislative (A1-A8), judicial (B1-B8), quasi-judicial (D1-D3, E1), professional (C1-C4) or administrative (C5-C6, E2-E4, F1-F4).

Who is to carry them out?

This is a more complex question, because there are different types of functionary under each head. For example in the United Kingdom (apart from Mr Blair's proposed changes) we have at present primary legislation enacted by MPs elected democratically and peers appointed on the advice of the Prime Minister or the heirs of such peers where the title is hereditary, while delegated legislation is created by Ministers of the Crown acting under statutory powers. Judicial powers are exercised by a variety of office holders from the Lord Chancellor downwards, the Lord Chancellor also being a member of the cabinet. And so on.

How far does a function need to be independent?

Mr Blair's recent juggling of the British constitution was postulated on the basis that there should be complete separation of the legislative, judicial and executive powers. In particular it was thought that the position of the Lord Chancellor as both a senior cabinet minister and head of the judiciary effectively appointing judges and sitting as a judge himself was anomalous and contrary to the Human Rights Act 1998. No cabinet minister should sit as a judge, it is now thought, and judges should be appointed by a Judicial Commission.

However this may be found illusory. Who is to appoint the members of the Judicial Commission? It seems that it will be the Prime Minister, the head of the executive. Who is to control the legislation governing the exercise of the judicial function? Why, Parliament acting at the prompting of the executive, as it has always done. The judicial functions labelled B2 to B8 above are all vital to the exercise of the judicial function, but no one suggests they should be under the control of the judiciary. The Victorian days when each petty chief justice

controlled his own court and ran it by means of fees paid by litigants are long gone. It is the executive which carries out functions B2-B8, and that will continue.

How is its carrying out to be supervised?

Until Mr Blair intervened, the carrying out of judicial functions was to a large extent supervised by the Lord Chancellor. Will it in future be supervised by the judges of the new Supreme Court? We do not yet know, but seems unlikely that learned judges will wish to spend much of their valuable time on that matter – or that it would be sensible for them to do so.

How is it to be financed?

Here we come to the crunch. At present judicial services in the United Kingdom are financed by the Treasury, directed by a senior cabinet minister, namely, the Chancellor of the Exchequer. If he considers that too much is being spent on legal aid or court buildings, then it is reduced. But no public service can be truly independent unless it has control of the purse strings so far as affects its functions.

Conclusion

I said above that Mr Stanley Brodie QC supported in *The Times* my contention that the office of Lord Chancellor is of inestimable constitutional value. However he criticised the way recent Lord Chancellors have exercised their powers. In particular he said that Lord Mackay of Clashfern[7] "gave the impression of being in thrall to the Treasury". But the harsh fact is that, like all modern Lord Chancellors, Lord Mackay *was* in thrall to the Treasury, or rather its head the Chancellor of the Exchequer, as I have explained above.

Another matter impinges on the independence of the judiciary. The way it functions is entirely governed by legislation, which is constantly being changed. The changes are proposed by the executive and enacted by the legislature. No one proposes that we should change that; and the present right of senior judges to influence the legislature from within as members of the House of Lords is to be removed if Mr Blair has his way.

So in the United Kingdom the separation of powers is an illusion, and will remain so. For the sake of that illusion it seems we are about to exchange a system of appointment which in practice works well, giving us judges of utter impartiality and the highest intellectual attainment, for one which will give us – who knows what?

[*Francis Bennion is a former UK Parliamentary Counsel and the author of several books on constitutional and legal matters.*]

The Commonwealth Lawyer Vol 12, No 2, August 2003, page 31. My own title for this was was 'Allocation of State Legal Functions'.

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[7] Lord Chancellor, 1987-97.