"Judges' opinions and the law"

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Judges' opinions and the law

Sir,

I have the greatest respect for Lord Mackay of Clashfern (letters 29 April 2011) but after sixty years in the law I am bound to say that he has not got things quite right in his letter. He says correctly that the judge is bound to apply the law of the land, but mistakenly adds "not his or her own opinions". This is mistaken because the law of the land can only go so far in laying down detail. The rest it deliberately leaves to the judges' opinions, formed in the light of previous statements of that law by Parliament and the judges. This is particularly true of the Human Rights Act 1998 and its accompanying Convention, which largely consist of broad terms.

Lord Mackay rightly says that we appoint judges "for their ability to form opinions after taking into account the arguments advanced before them". This does not mean that they have no opinions of their own to start with. They are supposed to be learned in the law. The Supreme Court, which settles disputed points of law at the highest level, is staffed by people who are of the greatest distinction in legal learning.

One must also bear in mind that "the arguments advanced before them" may be advanced by highly expensive advocates, whose skilled oratory needs to be carefully evaluated. Or they may be advanced by advocates less skilled, whose deficiencies need to be rectified in the light of the judge's experience. Or they may be advanced by unskilled litigants appearing without any professional assistance and perhaps needing help from the court.

All this does not mean that I support Daniel Finkelstein in suggesting a need for examination of prospective Supreme Court appointees' opinions by the legislature. It is not its business to interfere in such a way.

Francis Bennion, author of *Bennion on Statutory Interpretation*.

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References

None