Justice Committee

Judiciary and Courts (Scotland) Bill

Written Submission from Lord McCluskey

Unnecessary and Misconceived: Some Reflections on the Judiciary and Courts (Scotland) Bill

A. INTRODUCTION

It is difficult to understand the point of this Bill. Much of it is unnecessary; some misconceived. If enacted, it will do little good; it may well do some harm. Sadly, it seems to have been prepared with scant regard to the history, traditions and ethos of the Scottish judicial system. The Policy Memorandum and Explanatory Notes fail to disclose the real background to those of the provisions that are genuinely new.

The Scottish Executive’s first “consultation” paper, foreshadowing this Bill, is silent about the true origins of the underlying decisions taken before the “consultation” process began. These were decisions about remedying supposed weaknesses in the existing constitutional basis of judicial independence, about the need to “modernise” aspects of the judiciary, about following the English in creating a new statutory creature entitled “Head of the (Scottish) Judiciary” and about new systems for investigating and dealing with any allegedly unsatisfactory conduct by judges.

Consider the provenance of the provisions contained in Part 1, and Chapters 1 and 2 of Part 2, of this Bill. It derives from one of the most remarkable events in modern constitutional history.

On 12 June 2003, Downing Street, without previous consultation or announcement to Parliament, issued a press notice saying that the office of Lord Chancellor had been abolished. The Lord Chancellor, the fourth-ranked member of the Cabinet, had left the Government and some of his responsibilities were to be transferred to Lord Falconer of Thoroton. Given a new title, “Secretary of State for Constitutional Affairs”, he entered the Cabinet as its most junior member. The details of the surrounding events are a matter for historians; but it is understood that the then Home Secretary had insisted on including in his Asylum and Immigration Bill an “ouster” clause, excluding the jurisdiction of the courts in asylum appeals. Lord Irvine, arguing that such a

1 SP Bill 6, Session 3 (2008), available at www.scottish.parliament.uk/s3/bills/06-JudiciaryCourts/.
4 Lord Irvine of Lairg.
5 David Blunkett.
provision would be an unacceptable violation of the rule of law, in effect said, “Over my dead body!” The Prime Minister sided with the Home Secretary.\(^6\)

Instead of announcing that the Lord Chancellor had been removed for defending the rule of law, it was asserted that the role of Lord Chancellor had become an unacceptable constitutional anomaly: the message was that “modernisation” had suddenly become compellingly urgent, following the incorporation into UK law by the Human Rights Act 1998\(^7\) of the 50-year old European Convention on Human Rights. Initially the authors of the announcement failed to appreciate that the 800-year-old office of Lord Chancellor could not be abolished by an informal briefing to the press, not least because the Lord Chancellor had unique statutory responsibilities under nearly 400 Acts of Parliament, was Speaker of the House of Lords, and was alone responsible for appointing many office holders in England and Wales\(^8\), including judges.\(^9\)

Soon, however, it was embarrassingly realised that the Lord Chancellor, as well as being a member of the Cabinet, was head of the judiciary in England: accordingly if the office were to be abolished and the functions transferred to a purely political minister\(^10\) then somebody else would have to fill this vacant post, and a new system created to appoint judges. That realisation led to urgent and secret discussions with Lord Woolf, the Lord Chief Justice, resulting, in January 2004, in a “Concordat” between Lord Woolf and Lord Falconer. The Concordat governed some 700 matters affected by the changes. Lord Howe of Aberavon said of the original announcements, “[t]he overwhelming fact is that this package of proposals, whatever their intrinsic merits, arrives in the form of a pre-emptive bunch of products, produced as a mismanaged political change of governance”.\(^11\)

For Scotland, what is important to note is that the secret discussions did not involve the Lord President, the Lord Advocate, the Advocate General, the Law Lords, the Scottish judges, the Faculty of Advocates or the Law Society of Scotland. In one sense, that is not surprising because the changes – apart of course from the decision to create a Supreme Court\(^12\) – hardly affected Scotland. The relevant effects in England of abolishing the office of Lord Chancellor were that the previous method of appointing judges had to be scrapped, that the English judiciary lost the main bulwark of their independence from the executive, and that the disciplinary system for English judges effectively ceased to exist.

\(^6\) The ouster clause survived only until 4 May 2004 when, in deference to the views of Lord Irvine, the government abandoned it at the Committee stage of the Bill in the House of Lords. Thus the issue that generated the constitutional big bang expired unremarked and unmourned.

\(^7\) The leading protagonist of which was Lord Irvine, when Lord Chancellor.

\(^8\) In this article the term “England” is usually intended to embrace England and Wales.

\(^9\) And QCs, in England and Wales.

\(^10\) Not necessarily a lawyer or a member of the House of Lords.


\(^12\) This is a separate issue not dealt with in this article.
However, in Scotland, the Lord Chancellor had no functions in relation to the appointment of judges to the Court of Session. The independence of the Scottish judiciary equally owed nothing to the role of the Lord Chancellor: it depended upon a separate, distinct and pre-1707 convention that no one had dreamt of challenging for centuries: indeed, that independence had recently been buttressed by the Human Rights Act 1998 and the Scotland Act 1998.\(^\text{13}\) If it had been thought necessary to modify that convention by legislation, then the time to do it was when the Scotland Act 1998 was passed. That Act contained new provisions about the appointment and removal of judges; and it also dramatically altered the constitutional role of the Lord Advocate who, until then, had been seen as having a role as protector of judicial independence. The Lord Chancellor had no role in relation to disciplining the Scottish judiciary: that was a matter for the Lord President, and section 95 of the Scotland Act.

The changes rendered necessary in England by the abolition of the office of Lord Chancellor were given effect to in the Constitutional Reform Act 2005.\(^\text{14}\) The provisions of the 2005 Act in relation to the new mechanisms for appointing, removing or disciplining judges did not apply to Scotland.\(^\text{15}\) The novel statutory “guarantee” of judicial independence contained in the 2005 Act specifically did “not impose any duty which it would be within the legislative competence of the Scottish Parliament to impose”.\(^\text{16}\) Thus the position of the judiciary in Scotland was virtually unaffected by the constitutional upheaval in England.

It is therefore something of a surprise that the Scottish Executive’s consultation paper of February 2006\(^\text{17}\) presented its proposals as if ministers and civil servants had been thinking freshly and deeply about constitutional issues affecting the Scottish judiciary, when in truth the relevant proposals were slavishly copied from the Constitutional Reform Act.\(^\text{18}\)

However, the issue is not a surprise. The issue is whether or not it makes any sense now to introduce into Scotland a series of changes that were deemed, in England, to be necessitated by developments peculiar to that jurisdiction, given that they had little or no bearing on the Scottish judicial system, its history, tradition, conventions and needs. To address that issue, it is necessary to examine some of these changes as contained in the Bill.


\(^{14}\) Which received Royal Assent on the 24\(^\text{th}\) March 2005. It is not necessary to notice here any separate Northern Ireland legislation that was enacted. The title “Lord Chancellor” has survived, on the same basis as “Captain of the Yeomen of the Guard”.

\(^{15}\) Apart from a few minor provisions that have no bearing on the issues discussed here.

\(^{16}\) Section 3(2).

\(^{17}\) Scottish Executive, Strengthening Judicial Independence in a Modern Scotland (n 2).

\(^{18}\) It may, for some, be a surprise, that a Scottish government led by the SNP adopted these “English” solutions plagiarised by their predecessors.
B. JUDICIAL INDEPENDENCE

Section 1 of the Bill, cribbing the 2005 Act, announces a “[g]uarantee of continued judicial independence”, and lists some persons who “must uphold the continued independence of the judiciary”. The word “continued” acknowledges that judicial independence is not a creature of this legislation. So the creation of the new duty begs the question, “Have those upon whom the duty is imposed had any such duty hitherto?” One would have thought that the Lord Advocate, the First Minister and the others specified would adamantly assert that, of course, they had such a duty. Would they “seek to influence particular judicial decisions through any special access to the judiciary” if the new legislation were not enacted? “Certainly not!”, they would chorus. Anyway, regardless of the terms of this section, would it not be a crime to seek to exercise such influence? It surely would. And if the statutory duty is imposed only upon those specified, does that mean that others not specified are free to influence “particular decisions”? Could the Lord Advocate’s spouse or the First Minister’s uncle seek, with impunity, to influence a judge’s “particular” decision? What about a developer, like Donald Trump?

Surely the duty sought to be imposed by this section already exists at common law? If so, why enact it? Is there not a danger that some might argue that they are free to exercise influence because they are not covered by the section and that the section replaces the pre-existing common law? It is important to note that there is no sanction whatsoever for breach of this duty. The common law makes it a crime to attempt to interfere with the course of justice: this Bill creates no corresponding crime or offence.

Section 1(2)(b) imposes on the First Minister, Lord Advocate and Scottish Ministers a special duty to “have regard to the need for the judiciary to have the support necessary to enable them to carry out their functions”. This, however, does no more than require the named ministers to take notice of that need; they are not obliged to provide the support, so in no sense does it improve the legal power of the Lord President to obtain adequate resources.

C. HEAD OF THE SCOTTISH JUDICIARY

Section 2 provides that the Lord President “is the Head of the Scottish Judiciary”. At first blush, this looks a bit like enacting, “The Pope is a Catholic”, or “Hens lay eggs”. Of course the Lord President is the head of the Scottish judiciary: everybody knows that: so why enact it? Does it change anything? It does.

Whether or not this enactment, by defining what he is “responsible” for, detracts from the Lord President’s traditional powers and functions remains to be seen. But what it clearly does do is to confer on the Lord President a new statutory post entitled “Head of the Scottish Judiciary”. It thereby adds very significantly

19 The limited content of the duty is made clear by s 1(2).
20 Words quoted from s 1(2) para (a).
21 N.B. the capital letters used in Head and Judiciary: contrast s 2 (2) [c] [I] & [3]
to the burdens already resting upon him.\textsuperscript{22} As I said in my responses to the 2006 paper:\textsuperscript{23}

There is a very fundamental point here that the authors of this Bill do not seemed to have grasped. It is this. The Lord President is primarily a judge. Unless the holder of that office has been a Law Officer of the Crown, it is quite likely that he has little hands-on experience of administering institutions or persons: his whole career will have been spent in the study, understanding and applying of the law. What this whole paper tends to do is to transform the Lord President into a super administrator. That can only mean that he will have to recruit civil servants to do all the nitty gritty and to provide him with advice and possible courses of action. It will necessarily diminish his capacity to give a \textit{judicial} lead in matters of law, as has been the tradition. It looks like another example of “empire-building” by civil servants.

The only saving grace is the Bill’s acceptance of the Lord President’s right to delegate certain functions to “a judicial office holder”\textsuperscript{24}.

\textbf{D. JUDICIAL APPOINTMENTS}

The provisions on judicial appointments\textsuperscript{25} unnecessarily turn an administrative body into a statutory one. However, there is, I believe, a contradiction between section 12(2) (“Selection must be solely on merit”) and section 14(1) (“In carrying out its functions, the Board must have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to judicial office.”).\textsuperscript{26}

Either the selection is “solely” on merit or it is not. The only acceptable criterion for appointment is merit. Judges are not in the business of \textit{making} the law, except in very rare instances where it is necessary to make good a \textit{lacuna}. Those who \textit{make} law – legislators – should obviously reflect social diversity. But judges are not chosen to decide what the law should be. Their job is to discover what the law \textit{is} and to apply it objectively to the case in hand: their personal perspectives on such matters as religion, sexuality or politics should have no bearing whatsoever on how they do their job. The \textit{Explanatory Memorandum} suggests that new candidates should be selected as “representative of the communities in which they will serve”. It is a novel idea that judges should be chosen to “represent” communities. If we want more judges from social categories that provide few judges at the present time that object must be achieved through measures to ensure that such people acquire the necessary “merit” in the first place. Positive discrimination is a powerful and sometimes necessary tool for social engineering. It may well be a sound basis for selecting

\textsuperscript{22} For the full list of statutory functions, see \textsection\ 2(2) and others created by this Bill.
\textsuperscript{23} Available at \url{www.scotland.gov.uk/Publications/2006/06/13143517/0}.
\textsuperscript{24} Section 3, as suggested by me in my responses to the 2006 Paper. Part 2, Chapter 2 of the Bill re-enacts the Senior Judiciary (Vacancies and Incapacity) (Scotland) Act 2006 and is not discussed here.
\textsuperscript{25} Chapter 3 of Part 2 (ss 9-25).
\textsuperscript{26} Both provisions are lifted from the Constitutional Reform Act 2005.
entrants to higher education (as in the USA) or to Parliament; but it cannot be a sound basis for selecting High Court judges.

If section 14(1) is simply intended to encourage people from outside the traditional pool of candidates to become qualified to apply for selection, it is difficult to see how the Judicial Appointments Board can sensibly give it effect. It would be hypocritical for the Board to encourage applications from people who cannot jump the “merit” hurdle: there is no virtue in encouraging people to apply if their applications are bound to fail for lack of “merit”. So, if the government wants people from outwith the traditional catchments to have a realistic chance of being appointed, then it is up to the government to supply the means and the resources to enable such people to acquire the skills and experience that constitute “merit” within the (undefined) meaning of section 12(2). But the Board is given no resources for this purpose. There is no machinery whereby people who do not practise law at the highest level can acquire the skills that create and constitute “merit”. The Board has no resources or skills itself to create machinery for enabling those without “merit” to acquire it. Accordingly, if 14(1) is not contradictory of 12(2), it is nothing more than gesture politics, designed to pretend that people from “diverse” communities will have some prospect of elevation to the bench, even if they lack “merit”.

E. FINAL THOUGHTS

It is impossible in a short note to do justice to the weaknesses in the provisions, not yet mentioned, for regulating judicial conduct and removing judges.27 The existing systems have not been shown to be inadequate. The system for sheriffs has worked for over a century. That for senior judges has never been used at all. The case for creating new, expensive bureaucratic structures for regulating these matters28 is not made out. Alas, it all smacks of empire-building quangoism.

27 Chapters 4 and 5 of Part 2 of the Bill.
28 Including creating a new regulator – the “Judicial Complaints Reviewer” – to review investigations carried out by those inquiring into judicial conduct: he cannot be a qualified lawyer. See ss 28-31 of the Bill.
ADDENDUM

Col 636 narrates: Lord McCluskey: I am happy to do so. First of all, the so-called duty in the bill is laid on a very select number of people. However, Donald Trump, whom I have mentioned in a couple of articles that I have written, is not obliged to respect the judiciary's independence—and nor, indeed, am I. I am not a serving judge; I am not concerned with the administration of justice. The bill also ignores eight or nine other ways that I have listed in which judges can be influenced.

The ways I had in mind include:

The example that I gave of a request by a Minister to the Lord President to stop a particular judge sitting in a particular type of case, e.g. relating to the sending of terrorist suspects to England for trial.

The attempt to influence the selection of a particular judge, or of a particular bench of judges, to hear cases of particular interest to the person(s) making the attempt: e.g. terrorist cases, human rights cases brought by prisoners etc. This is what happened in the Trades Union cases a century ago.

The attempt to prevent particular judges sitting in the type of case in which the person(s) making the attempt are interested e.g. tax cases, planning appeals, human rights claims against the government, police powers, etc.

Attempts to intimidate the judiciary as a whole, e.g. by reducing salaries and/or pensions (There has been concern about this in Canada last decade). Such attempts might follow public speeches (like those made 5/6 years ago by the Home Secretary, David Blunkett) highly critical of the judiciary's decisions in Home Office and ultra vires cases.

Attempts to persuade the Lord President not to promote to the Inner House (the appeal court) a judge whose judgments Ministers did not like.

Similarly, attempting to persuade the Lord President to promote to the appeal court a judge thought by Ministers to be favourable to the government of the day.

(These are not academic examples) Members of the Committee may recall that some years ago the previous Government consulted senior judges in England to learn whom they would like to see appointed as the new Lord Chief Justice. By an overwhelming majority they chose Lord Justice Rose. The government did not choose him but appointed someone else.

It is also widely believed that the promotion of Lord Donaldson of Lymington between 1974 and 1979 was blocked by the Labour Government because of hostility to Lord Donaldson by the Trades Unions who disliked his role as President of the National Industrial Relations Court, which had been created by the Heath Government (1970 – 74); that court was abolished by the incoming Labour Government in 1974. Lord Donaldson was later promoted by Prime Minister Thatcher to be Master of the Rolls. There is always a danger that politicians will tempted to seek to influence the judiciary in order to avoid perceived interference with the implementation of their policies.)