SEMINAR ON ISSUES OF COMMON INTEREST FOR ITALIAN AND ENGLISH JUDGES AND JURISTS

CONSTITUTIONAL CHANGE IN THE UK COURTS AND TRIBUNALS

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Introduction

1. 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, and has culminated in the recent opening of the new Supreme Court.
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, and is now largely complete.

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 Judge). He acts as president of the High Court and the Court of Appeal.

7. Appeals from the Court of Appeal used to go to the judicial committee of the House of Lords ("the Law Lords"). Although they were technically a committee of the Upper House of Parliament, and were housed in the same building in Westminster, they worked entirely independently. They consisted of 11 senior judges (including one woman), appointed from the ranks of the Court of Appeal. They were final appeal court for all types of case, civil, criminal, administrative or constitutional, from the whole of the United Kingdom (save for criminal cases from Scotland). Permission to appeal was only given for cases raising points of general importance, and in practice the Law Lords only heard about 70 cases each year. The same Law Lords also constituted 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. Until 2006 the head of the judiciary was "the Lord Chancellor", an office with a very long history going back to mediaeval times. He was responsible for judicial appointments. He was also a member of the Government, and Speaker of the House of Lords. The last Lord Chancellor on the traditional model was Lord Irvine, who had been a close associate of Tony Blair. This combination of judicial and government roles had been subject to some criticism, particularly in the context of the European Convention of Human Rights.

Constitutional change

9. Since the UK (perhaps uniquely) has no written constitution, such arrangements for the courts are in theory capable of being altered by any government with a bare Parliamentary majority. In practice however they have proved very stable. It was therefore a great surprise to most when in June 2003 the Prime Minister suddenly announced the Government's intention to abolish the office of Lord Chancellor as head of the judiciary, and to carry out a number of other radical changes to

the constitutional arrangements. They included the enactment of a new statutory guarantee of judicial independence, a new independent Judicial Appointments Commission, and a new Supreme Court to take over the appellate functions of the House of Lords. According to Lord Phillips (now President of the Supreme Court):

> "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…."

10. Once the shock of that announcement had worn off, a period of intense work began to give practical shape to the new constitutional arrangements. This was largely a co-operative effort between the judges and the relevant government ministers. In 2004 a "Concordat" was agreed between the new Secretary of State for Constitutional Affairs (Lord Falconer) and the then Lord Chief Justice (Lord Woolf). 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 establishment of the new Supreme Court took longer, because it had been agreed that the change would not be made until a suitable building was found to house them. The new court finally opened for business on 1st October 2009. The main constitutional changes are now complete.

The judiciary in the new constitutional settlement

11. 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. The wording of this historic statutory provision is worth quoting in full -

> **"3 Guarantee of continued judicial independence**
>
> (1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary…
>
> …
>
> (5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
>
> (6) The Lord Chancellor must have regard to—
>
> (a) the need to defend that independence;
>
> (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;

(c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters."

12. On the judicial side, the pivotal role is that of the Lord Chief Justice, who is President of the Courts of England and Wales,[1] 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. 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. At the same time there was created the new "Judicial Appointments Commission" for appointments in England and Wales 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 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.

The Supreme Court.

13. As I said, the establishment of a new Supreme Court was delayed by the need to find a suitable building for the new court. The government eventually 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, previously used as a Crown Court. It has been described as "the perfect location", with the other three sides of Parliament Square, taken up by the legislature (Palace of Westminster), the executive (the Treasury) and the church (Westminster Abbey). The building has been imaginatively adapted and modernised at very considerable cost (more than £50m), and is well worth a visit.

14. The former Law Lords have now become the first Justices of the new Supreme Court. Although the facilities are much improved, it seems that for the time-being the working methods will continue much as before. However, the President (Lord Phillips) has indicated that he expects more cases to be heard by larger panels. Formerly most cases were heard by five members of the House. It is now becoming more common for panels of seven or nine justices to hear cases of special importance. The Supreme Court's website is a great improvement on

[1] For simplicity, I have not included any account of the corresponding but not identical arrangements for Scotland and Northern Ireland (presided over respectively by the Lord President of the Court of Sessions and the Lord Chief Justice for Northern Ireland).

what was available before,[2] and provides full information about the history of the court and the new building.

Tribunal reform

Background

15. While all this dramatic change was going on, a less prominent reform programme was underway – the reform of the tribunal system.

16. 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.

17. 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.

18. 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 a senior judge, Sir Andrew Leggatt. 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. In July 2004 I was invited by the Lord Chief Justice to act as "Senior President of Tribunals Designate", to lead the judicial side in the reforms. A new Tribunal Service was launched in

[2] http://www.supremecourt.gov.uk/index.html. It is also worth consulting the unofficial "blog": http://www.ukscblog.com/

April 2006, as an "Executive Agency", reporting to the Lord Chancellor. The Tribunals Courts and Enforcement Act 2007 provides the legal framework for the new system. The first part of the new tribunal structure came into operation in November 2008, and the main arrangements are expected to be completed by Easter 2010.

19. The Act creates two new composite tribunals; the First-tier tribunal and the Upper Tribunal. They are the framework into which most of the existing tribunal jurisdictions have been or will be transferred. The Upper Tribunal will be primarily a specialist appellate tribunal hearing appeals on points of law from the First-tier tribunals. Each tribunal is divided into a number of "Chambers", reflecting the different specialisations.[3] There is the possibility of further appeal to the Court of Appeal, and thence to the Supreme Court, but only with permission and on points of general importance, [4]

20. 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". I was appointed first "Senior President of Tribunals" in November 2007. The Senior President is the judicial head of the unified tribunal judiciary, and works 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 is also 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.

Continental comparisons

21. It is interesting to compare these developments with the evolution of the continental systems of administrative tribunals, separate from the ordinary courts. The French model of "administrative justice", in which the pre-eminent role has been played by as "Council of State", has been followed in many other countries, including Italy. In France the original jurisdiction of the Council of State has undergone a gradual evolution to adapt it to modern conditions. Thus in 1953 first instance jurisdiction in most cases was transferred from the Council to administrative tribunals (now forty-one), and in 1987 six (now eight) administrative courts of appeal were established, to hear appeals from administrative tribunals, subject to the final review by the Council.

22. In the UK, we have started from the other end. The new Act has brought together a large number of separate administrative tribunals into an integrated, hierarchical structure with first instance and appellate levels, separate from the ordinary civil courts. True perhaps

[3] The First-tier is divided into six chambers: Social Entitlement; Health, Education and Social Care; War Pensions and Armed Forces; Tax; General Regulatory; and (in the future) Land and Housing. The Upper Tribunal is divided into three Chambers: Administrative Appeals, Tax and Chancery, and Land.
[4] More details can be found on the web-site: http://www.tribunalsservice.gov.uk/

to the classic Gallic/British stereotype, the French process of evolution has been principled and top down, whereas ours has been haphazard, pragmatic and bottom up. But the end results, at least in few years time, may not be wholly dissimilar.

CONCLUSION

23. In this brief overview, I hope I have been able to give you some idea of the extraordinary changes that have taken 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, changes of this magnitude would have been impossible without fundamental revisions to a written constitution. The constitutional reforms started badly and controversially in 2003, but are now generally accepted. The opening of the new Supreme Court a few weeks ago is the final step in this historic process. I feel privileged to have played my own part in the process.

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