SCL SOCIETY OF CONSERVATIVE LAWYERS

NO PLACE FOR JUDICIAL APPOINTMENT HEARINGS

Continuing the Society series on issues of constitutional reform, this week three members address the question whether public judicial appointment or confirmation hearings should be held in Britain. Earlier pieces included Robin de Wilde QC's suggestion that the Lord Chancellor should always be a member of the upper House, and Martin HoweQC's proposal of a Restoration of the Constitution Bill.

Lord Sandhurst QC, who as Guy Mansfield QC was Chairman of the Bar, argues against the suggestion of such public hearings. Writing from slightly differing standpoints Anthony Speaight QC and Oliver Sells QC have reached similar conclusions.

NO PLACE FOR ORAL HEARINGS IN THE APPOINTMENT OF SUPREME COURT JUDGES

Guy Sandhurst QC

Lord Sandhurst QC (who practised at the Bar under his family name as Guy Mansfield QC) was Chair of the Bar Council in 2005.

The Conservative manifesto stated that the Conservatives want a review of "the broader aspects of our constitution" including "the relationship between the Government, Parliament and the courts; the functioning of the royal prerogative . . . ." It pledges that in its first year, a Conservative government would set up a "Constitution, Democracy & Rights Commission that will . . . come up with proposals to restore trust in our institutions and in how our democracy operates".

Some have suggested that this may mean a change to the methods of appointing Supreme Court Justices, in particular by the introduction of oral hearings in parliament. This paper argues that whatever other changes might be desirable, the introduction of public hearings to the process of such appointments is not desirable. The idea should be buried without any further discussion.

It would be a radical change to hold oral hearings. Presumably these would be held by a Parliamentary committee, whether a combined committee of both Houses, or a committee of one or other House.

It would be impractical for appointment to be based entirely on the selection and appointment by Parliament. That would not be remotely practical or wise. The committee would not be able to assess the judicial skills and learning of the candidate; it would simply not be equipped to do so. No more would we entrust the appointment of a professor of medicine to a parliamentary committee.

So, before the Parliamentary Committee got to work, there would have to have been a provisional/preliminary selection by a suitably qualified panel such as the present selection panel. Perhaps that selection panel would send forward more than one candidate for each vacancy? Any such committee's role could effectively be only by way of confirmatory hearing subject to a power to reject outright or to ask the selection panel to reconsider its selections(s) and/or to bring forward another candidate.

In summer 2019, what would have been the make-up of the Parliamentary committee involved in the approval/appointment hearings? I ask this because in the summer of 2019, when Parliament was struggling with a minority government and the Brexit issues, there were competitions to appoint a number of Supreme Court judges. By September 2019 new Justices had been appointed.

Would the Committee have had Scottish and Welsh nationalist MPs? As well as Labour representatives, would it have had a Liberal Democrat and an Ulster Unionist? It seems doubtful that the Conservatives would have been in a majority. Even if nominally in a majority, these latter would have been split on European issues amongst themselves. We cannot assume there will not be minority governments in future.

Having seen the disharmony (not to say disorder) into which the House of Commons fell last year, one can only speculate how orderly, calm and measured such (important) approval hearings would have been.

Leaving those difficulties to one side, what questions would be asked? What would be the tone of the committee and the tenor of its questions?

I assume such Committee might want to examine the candidate's political views and opinions on constitutional issues. But it is likely that any candidate of substance would decline to express political views. As for legal issues, prudent candidates would say that it would be inappropriate to address issues yet to fall to be decided[1]; they should be addressed on their merits as they arise and not on a hypothetical basis. As for commenting on an already decided matter, it is doubtful that the questioners would be taken much further by a (no doubt) textbook answer on some already decided issue.

Further, members of the judiciary will naturally have political views. Some will previously have been members of political parties and may have taken part in political activity. Others will never openly have given vent to such views. Either way they may decline to express those views at this stage.

Further still, if already on the Bench (which most will be) and having taken the judicial oath they put political involvement behind them. If the candidate is someone who has previously held high judicial office, it seems rather late now when on the verge of appointment to the Supreme Court to bring possible past politics into play.

Next, we have seen over the years the unattractive nature of the hearings in the US Senate Judiciary Committee hearings. These US hearings do not simply investigate the political and constitutional views of the candidate, but explore private lives right back to time at university – see the hearings in respect of Justice Kavanagh. These were unedifying and unhelpful. They created a miasma. They did not result in a satisfactory conclusion but damaged the institution as well as the individuals (judge and complainants) personally.

It cannot be contemplated that the UK would go down that route.

A further difficulty we have is that in many cases the politics of a judicial candidate or (practitioner or academic) under consideration are simply not known, and speculation may not be accurate.

Furthermore, people's political opinions change. People move across the political firmament over time. Those who may start as radicals become more conservative. Sometimes people thought to have been of a conservative ilk prove to be quite radical in their maturity. We can all think of well-known people in public life whose stances have moved with time. New circumstances challenge the beliefs of thoughtful people.

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1 This I recall was the line taken by the late Lord Bingham of Cornhill when invited by Charles Clarke, Home Secretary, to comment on the possible terms of Terrorism Legislation: what might or might not be acceptable.

Would a Parliamentary Committee decline to appoint someone because of something they said 10 years previously? Intelligent, thoughtful people of the type under consideration, with years of judicial or academic life operating at the highest levels, strive to keep an open mind on both factual issues and legal issues. That is in accordance with the judicial oath, training and upbringing. The Supreme Court decides only the most difficult and novel points. To seek accurately to predict what its members will do in a novel situation is not sensible.

Finally, but most importantly, who would wish to submit themselves to such process? We would know who were to be candidates for appointment to the Supreme Court, if there were to be any public hearing. Some no doubt would be prepared to go through this process. But others, who might be the better, if quieter and more modest, candidates, might well refrain from entering the competition. They would see it as an ordeal not to be risked. Far from improving the quality of the bench of the Supreme Court, it is likely that it would be diminished by the absence of those who did not wish to be investigated and possibly humiliated. Distinguished candidates with successful careers to date do not relish the risk of public rejection or humiliation.

Conclusion

In short, public appointment hearings in whatever form and however conducted will do no good and risk causing real damage. The reputation of our Supreme Court would be diminished, not enhanced.

JUDICIAL APPOINTMENT HEARINGS. A STEP IN THE WRONG DIRECTION

Oliver Sells QC

Oliver Sells practises at the Criminal Bar in London. He is a Recorder at the Central Criminal Court and a member of the Court of Common Council of the City of London and a past member of the Bar Council.

Pre appointment hearings are not new in the UK, they have been part of the process of public appointments since 2008. Indeed, there are guidelines in place which set out the structure of such scrutiny and importantly, in appendix D, the range of appointments covered by the Governance Code for Public Appointments 2016.

They all have one thing in common, they are political or regulated public appointments.

It is important to note the nature of these appointments in order to fully comprehend the fundamental difference between these and judicial appointments.

Public appointments are however made for a specific period, by a minister, for a wide range of offices which are subject to government oversight.

Judicial appointments are quite different. They have a very different purpose and a very different history of appointments. Judges forswear politics, they take an oath of real solemnity, they may have a past of long service in a profession, in academia or elsewhere: they may have expressed a range of views on a range of topics or indeed none at all. It is difficult to see why any candidate would wish to subject themselves to

such an intrusive examination or what would be the benefit. It is more likely that some possible candidates would in fact be deterred from applying at all or even that some activist lawyers would wish to pursue their campaigns from the bench. Neither is an attractive outcome.

For many years in the 20th century these senior appointments were made by the Lord Chancellor in person, having taken soundings within the legal profession. That process was altered in 2006 when the Judicial Appointments commission was set up. It is not a body which attracts universal support. There is a body of thought that asserts that some senior members of the judiciary have been encouraged in their activism by a number of features of the current environment including the role of the JAC and the very existence of a court which bears the name Supreme, which of course it is not.

But the key factor that has not changed is that judicial appointments are and should remain utterly nonpolitical, in the broadest sense of that word. Candidates should be chosen on merit alone; this is simple to state but not so easy to achieve. The superior courts will on occasions have to hear matters which directly affect the role of the government, indeed 2019 has provided recent and striking examples of the genre, and the ides that the justices of the Supreme Court should be questioned by a committee composed of politicians prior to appointment seems both unwise and misconceived.

There are a number of reasons why such an idea is flawed.

Firstly, such a process will inevitably introduce a form of political testing of candidates.... their views on a range of topics will be sought...abortion, euthanasia, press freedom are just a few examples. The risk is that candidates will either have their past utterances trawled through or dissected and political fashion will be bound to infect the process. Who will want to subject themselves to such a process...only those with soft left, human rights credentials and politically correct views are likely to find favour...what chance the Roger Scrutons of this world...? Some candidates may have expressed views over many decades, some not...what is their relevance to their suitability for a judicial post?

Secondly the whole process would further politise the senior judiciary. There has been a trend in recent years for senior judges to become involved in matters of legal policy and departmental matters. This is not in my view a good trend and it will become embedded and reinforced if the senior judiciary have to go through a process of vetting by member of parliament. Further who will be the inquisitors? The makeup of the relevant committee will be highly contentious, the scope for grandstanding will be real and eventually this country risks having a superior court in which political balance becomes a subject of public debate. A quick view of the arrangements across the Atlantic should be enough to warn of the inherent risks.

Thirdly I see a danger of the judges themselves becoming even more political. There is some scope even now for such conduct, recent events are not encouraging, but the real risk is of judges becoming public personalities of the type which we have so far largely avoided in the UK. It is arguable that recent reforms have already had the effect of encouraging judges to enter the political arena too often and this change will do nothing to halt that trend.

I should add that in my view the introduction of a court called the Supreme Court has in itself done damage to the concept that we are in fact governed by the Queen in Parliament and the idea that members of that Court should have in some way to be approved by members of that parliament is a further step along a path which sound be avoided in the country.

Conclusion

At a time when the new Government has indicated that it proposes to review our current constitutional arrangements including the existence and role of the Supreme Court, the arrangements for a second

chamber, the appointment of judges and the role of the Lord Chancellor (all of which leave something to be desired) it would be both premature and unwise to indicate pre appointment hearings of this kind.

Such a wide review is very much to be welcomed but it needs to be able to consider all these matters and more in the round without any indications such as are mooted here.

SHOULD BRITAIN HOLD PUBLIC JUDICIAL APPOINTMENT HEARINGS?

Anthony Speaight QC

The author is a practising barrister, and is the Chair of Research of the Society of Conservative Lawyers.

From the point of view of those of us who believe in conservative judicial philosophy the introduction of public judicial appointment or confirmation hearings would be a mistake.

The case for doing so, particularly in respect of Supreme Court appointments, is based on the belief that it would enable the identification of prospective senior judges who would perform their office with proper restraint. This assumes that there exists in Britain, as the United States, a cadre of conservative-minded lawyers and less senior judges who espouse conservative jurisprudence, and who represent a counterpoint to an opposed group which espouse what Americans would call liberal, and we might call soft-left or activist, jurisprudence. But no such two groups exist amongst the ranks of prospective judges in Britain.

The reason why British judges in the last 20 years have behaved in an increasingly activist manner was succinctly explained at a recent dinner of the Society of Conservative Lawyers by the outgoing President of the UK Supreme Court, Lord Neuberger. It was, he said, because Parliament has asked them to do so. That, at any rate, is how judges have interpreted the Human Rights Act. This belief has become a prevailing legal orthodoxy.

Therefore, to hope that greater scrutiny of prospective appointees will supply a solution is to attack a symptom rather than the cause. Addressing the cause requires replacing the Human Rights Act by a UK Bill of Rights in which rights will be based, not on a 20th century European treaty, but on our common law heritage of rights and freedoms. It requires the fostering of a different legal orthodoxy.

Such an exercise will require sensitivity to existing legal attitudes, just as the Human Rights Act was initially presented as representing no radical departure. It is unlikely to be successfully undertaken by taking a blunderbuss to accepted practices – and a blunderbuss is certainly what public confirmation hearings would in many quarters be seen to be. With one notable exception, the legal profession and the judiciary have been deeply opposed to the idea of public appointment hearings.

That one exception has been located amongst the activist judiciary. Its exponent has been Baroness Hale, albeit that she has now recanted. Whilst her motives for floating the idea can be only a matter of speculation, it is not hard to imagine how public hearings could rapidly become sounding boards for every current faddish lobby. If Conservatives create such a procedure, they may soon find that it is their own kind who get excluded by the shrill voices of public correctness.

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