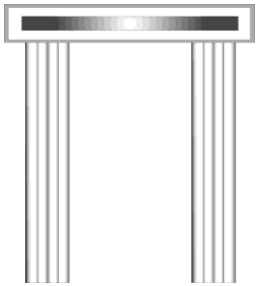

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The Cost to Justice

Government Policy and the Magistrates' Courts

Stanley Brodie

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FOREWORD

By David Howarth*

The lay magistracy is one of the most distinctive and impressive characteristics of the English legal system. Every day, citizens from all walks of life give their time freely to decide the vast bulk of criminal cases that come before the courts. They are the living embodiment of the fundamental principle of citizenship, that one should take part in the government of one's own community, and a longstanding example of the Big Society where it matters most of all, at the heart of the state itself. More than that, even more than the important but comparatively rarely used jury, they anchor the law in the broader society and stand in the way of developing an alienating, purely technocratic legal system.

The lay magistracy also used to run itself – cheaply and effectively. As Stanley Brodie's pamphlet shows, its autonomy has been undermined by the demands of a bureaucratic, rationalising state, which has taken over the administration of the courts at vast expense to the taxpayer. Faced with the requirement for savings, that bureaucracy has, unsurprisingly, produced plans that reduce funding not for itself but for the magistrates, in the form of a programme of local court closures. Court closures, especially in rural areas but also in cities, will reduce, or even destroy, the local connection between magistrates and the communities they serve. It will be increasingly difficult to recruit and retain magistrates outside the remaining centres.

Stanley Brodie calls for a reversal of direction. Removing the bureaucracy and restoring magistrates' autonomy will create savings sufficient not just to satisfy the Treasury but also to halt the erosion of local justice represented by the court closure programme. It is a reversal that many will support and the government should urgently consider before it is too late.

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Stanley Brodie

Stanley Brodie has been a Queen's Counsel since 1975. His practice is in the commercial and financial areas and he has experience of domestic and international arbitration, and public law. He was appointed a Bencher of the Honourable Society of the Inner Temple 1983, was elected Treasurer of the Inner Temple for 2000 and was a Recorder of the Crown Court for 13 years, during which time he served as a Deputy Official Referee. He writes and speaks on constitutional issues and contributed to the Millennium Lecture Series, *The English Legal System in the 21st Century* (Inner Temple, 2001).

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I
Introduction

This paper discusses the constitutional principle of the separation of powers, and explains how that principle has been breached consistently and repeatedly by executive government over the last 40 years by its infiltration of the legal system and the overwhelming control Whitehall civil servants now exercise over it and all its facets. The result has not been beneficial: waste, inefficiency and loss of judicial independence.

It follows that if cuts are required to reduce public expenditure, the Ministry of Justice, and in particular Her Majesty's Courts Service, would be a good place for the elimination of wasteful expenditure. The paper describes how the removal of a huge swathe of unnecessary and unconstitutional bureaucracy within HMCS would save the nation upwards of £1.5 billion annually, by restoring the autonomy and independence of the lay Magistrates and their courts; as compared with the Ministry's proposed annual savings of £41 million by the closure of 93 Magistrates' Courts and 49 County Courts, thus reducing access to justice and damaging the legal system.

Until 2005 the lay Magistrates were autonomous, independent and free from Whitehall control. Giving their services voluntarily and without payment, the Magistrates were an outstanding example of the Big Society in action; the system worked well enough without the imposition of 8,000 to 9,000 unnecessary civil servants.

The paper further proposes that autonomy and independence, free of unconstitutional executive control, should be restored to the Judiciary and the English Legal System as a whole.

II
The Legal System and Executive Infiltration

At the heart of the British Constitution is the principle of the separation of powers. All power is vested in the Sovereign; her legislative, executive and judicial powers are delegated to Parliament, the Government and the Judiciary; that is why we speak of the Queen's Ministers, and her Judges and Courts. In some countries where the 'Westminster Model' has been adopted, the principle is expressly stated. See *Dupont Steel v Sirs* (1980) 1 AER 529, at p. 541; *Hinds v The Queen* (1977) AC 195, at p. 225. For example, the Massachusetts Constitution of 1780 by Article XXX provided as follows:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: To the end it may be a government of laws and not of men.

So the executive is separate from the legislature, to whom it is accountable; and until 1971 the Judiciary, and the legal system for which it was responsible, were separate, independent and autonomous. There were anomalies. The Lord Chancellor was Head of the Judiciary, Speaker of the House of Lords and a Cabinet Minister; the highest appeal court was the Judicial Committee of the House of Lords, so judges, in theory but generally not in practice, were members of the legislature. These and other inconsistencies were understood and accommodated pragmatically; and the system worked. The principle of the separation of powers was respected.

For some centuries until 1971 the judiciary had been independent, autonomous and in complete control of the legal system and legal education. The Inns of Court were, and remain, the four institutional pillars on which the system was built. The result was a legal system which enjoyed public trust and confidence; it was renowned for its fairness,

intellect and probity. It was envied by other nations. Writing in 1929 Lord Hewart, Lord Chief Justice, said this:

> *... every student of history knows that many of the most significant victories for freedom and justice have been won in the English law courts, and that the liberties of English men are closely bound up with the complete independence of the judges.* [1]

In 1971, and in the following thirty years, the autonomy and independence of the judiciary became increasingly compromised by the insidious infiltration of the civil service into the legal system. The Courts Act 1971, which led to civil service management of the courts, was enacted consequent upon the Beeching Report.[2] That Report was the product of a Royal Commission set up under the Labour administration of Harold Wilson; it was published in 1969. The impetus for the Royal Commission was provided by the introduction of legal aid in 1957 and the consequent steep rise in litigation in the years that followed. The courts and the court systems were simply not man enough to cope with the hugely increased workload, principally in personal injury and matrimonial work. The Report proposed a redesign of the courts system**;** hence the shape of the High Court and the Crown Courts as it exists today and the division between High Court judges and Circuit judges. The Report proposed that an efficient, well organised administration should be created to manage and control the enlarged system; the efficient administration of the courts to ensure the speedy despatch of business is just as much in the public interest as the proper determination of the cases themselves. The question was: who was to manage and control the administration? The Report itself recognised the constitutional difficulty inherent in that question, and the need to preserve the overriding autonomous power of the judiciary.

In the event the administration of the courts was placed firmly under the control of the Lord Chancellor and his civil servants, and the Treasury. This was the first step towards the erosion of judicial autonomy, culminating

[1] Hewart, G., *The New Despotism*, London, 1929

[2] *Report of the Beeching Royal Commission on Assizes and Quarter Sessions (The Beeching Report*), Cmnd. 4153, HMSO, London, 1969

nearly thirty years later in the imposition of an unprecedented measure of control by executive government over the legal system, and professions, by the provisions of the Access to Justice Act 1999. The transfer of administrative control of the legal system from the judiciary to the executive was a serious error both constitutionally and structurally; and it is perhaps ironic that so staunch a supporter of judicial independence as Lord Hailsham should have been the Conservative Lord Chancellor when the Courts Act was passed.

As at 2000 the legal system, that is to say the Court of Appeal, High Court, Circuit Bench and the Crown Court, had become entirely in the grip of civil servants, i.e. the Courts Service; the independence of the judges was confined to their decisions in court. Thus the principle of the separation of powers has been breached, and severely breached. As is explained later, independence of the judiciary, as a concept, is not confined merely to determination of cases in a court room. Independence goes far wider and further than that. It includes being in charge and control of the finances of the legal system, court premises, the location, listing and times of court hearings, and staff; and many other facets of the legal system. That is what judicial independence meant before 1971. In the result serious tensions emerged, and persist between the judiciary and the Ministry of Justice, as appears hereafter.

Excluded from the embrace of the Courts Service were the lay magistrates of England and Wales and their courts. They, and their system, remained independent and autonomous. There was, therefore, no breach of the principle of the separation of powers as they were fully responsible for the administration of their courts. Until the events I am about to describe there was little or no interference from Whitehall.

III
Hostile Takeover
The magistrates and their courts

Big Government in action

A paradigm of voluntary public service are the Magistrates of England and Wales, and the high quality of justice they dispense. Justices of the Peace, just as much the Queen's judges as others higher up the scale, have been part of the national culture for centuries. At present they number some 30,000. They give their services free and voluntarily, receiving only reimbursement of their expenses. The quality of their justice is undoubted; they enjoy the respect and confidence of the communities they serve. Sir Robin Auld in his 2001 Report into the Criminal Justice System said this:

No country in the world relies on lay magistrates as we do, sitting usually in panels of three to administer the bulk of criminal justice. I have already mentioned that magistrates' courts deal with 95% of all prosecuted crime. Lay magistrates – about 30,000 of them – handle 91% of that work. Our system is also unique in giving exactly the same jurisdiction to a small cadre of about 100 full-time professional judges, now called District Judges (Magistrates' Courts), supported by about 150 part-time Deputies sitting singly, who deal with the remaining 9% ... I am confident that Magistrates should continue to exercise their established jurisdiction alongside District Judges. [3]

The Magistrates support the principle and concept of the Big Society (as defined in Section VI below). This appears clearly from their 'National Response to Consultation on Court Closures' published in October 2010. The Magistrates not only wish to continue to provide their services free; they wish to expand the scope of their services in respect of both jurisdiction and administration. Their Response is convincing and impressive. That is hardly surprising. The Magistrates are drawn from the

[3] *A Review of the Criminal Courts of England and Wales*, Cm. 5563, HMSO, London, 2001

very best elements of society. Typically, doctors, solicitors, nurses, teachers, trade unionists, businessmen, accountants, well respected housewives – these are the kind of educated, well informed, experienced, intelligent individuals who make up the composition of the benches. In short the Magistrates are a national resource of inestimable value.

Prior to 2005 the Magistrates were completely autonomous and independent, subject only to supervision from the Lord Chancellor's department, and, of course, subject to appeal to a higher court in the case of error. They managed and administered their courts, were responsible for their buildings and had complete control of their system. That system (and its cost) was described by Sir Robin as follows:

Since 1949, they have done so through local Magistrates' Courts Committees ('MCCs') – in effect, local management boards – responsible for the 'efficient and effective administration' of their courts. These now number 42 and correspond to 42 criminal justice areas established for England and Wales. The MCCs are composed in the main of magistrates but act through a justices' chief executive and his staff. Their role is purely administrative.

An MCC may have more than one 'bench' of magistrates within its area, each with its own chairman. His responsibilities are informal, but various and heavy. They include: chairing meetings of the bench and of its sub-committees; regular consultation with the justices' clerk on such matters as sitting rotas and court listings; election of members of the bench to various positions; liaison with the MCC and the various criminal justice agencies; the application of various guide-lines and bench policies; review of sentencing statistics as against national patterns; general encouragement of good practice; pastoral matters; attendance at meetings of various local criminal justice bodies; and maintenance of good public and media relations. The justices' clerk, who in many MCC areas is now responsible for more than one bench, has dual roles, not always readily distinguishable, of principal legal adviser to magistrates and of responsibility for administrative and staff matters to his 'line manager', the MCC's justices' chief executive.

The current annual cost of administration of the magistrates' courts is about £330 million.....

So there they were: for 60 years 42 magistrates' courts committees managing the entire system; 430 local courts disposing of two million criminal cases annually; 95 per cent of all cases coming before the criminal courts. That figure remained the same in 2008/9; by contrast only 150,000 criminal cases, obviously more serious, were heard in the Crown Court. It is therefore self evident that in terms of courts and cases, the Magistrates Courts system was far larger than, and dwarfed, the remainder of the Criminal Justice System. Sir Robin Auld in his Report, in considering the question of there being a unified structure, said this:

Whatever form a unified administrative structure is to take, I am of the view that it should be seen as a fresh start. If, for example, the decision is for a national agency with maximum delegation to local managers, it should not be seen as a modified and enlarged Court Service taking over the Magistrates' Courts Committees. One of the important factors in determining the organisational structure would be the sheer scale of the responsibilities it would be undertaking when compared, say, to those of the Court Service. It would add 435 magistrates' courts and their 95% of all criminal cases to its 78 Crown Court centres and their small, in percentage terms, balance of criminal work.

It should be noted that nowhere in his report did he consider the cost of any unified system. He expressly left that to others. He was not told anything about the intended shape of the Courts Service, its structure or its cost in 2005, or as we now know it.

One might have thought that leaving that excellent, well functioning system alone would have been wise and sensible. Inexpensive, reliant on local volunteers, independent and efficient, it was an outstanding example of the Big Society in action. Historically, a part of the fabric of English society down the centuries; and constitutionally sound.

But that was not to be. In the early years of this new century, the Labour Government became engulfed in what *The Daily Telegraph* has described as bureaucratic frenzy, a product of which was the Courts Act 2003. It

came into force in 2005. Under that Act all the 42 Magistrates Courts Committees were abolished; administration and control of the Magistrates Courts and every aspect of them were removed from the Magistrates; and in their place was imposed a bureaucratic structure requiring some thousands of new civil service jobs. National, regional, area and local bureaucracies were created. That was just what Sir Robin Auld had recommended should not happen. He envisaged, possibly, a national agency with local management preserved and retained. This was the antithesis of the Big Society: it was big government wresting control from local organisations; and most importantly, as I shall shortly explain, it landed taxpayers with the huge cost of thousands of unnecessary civil servants, now performing the functions the Magistrates had discharged for free. There were no criticisms of the Magistrates' Courts system which warranted such an expensive upheaval.

When the legislation was being discussed in 2003, namely in the usual spurious consultation process so much favoured by the civil service, it was bitterly opposed by the Magistrates. At the time I, and others, decried the creation of a colossal army of civil servants, and forecast inefficiency, waste, dissatisfied and demoralised magistrates, and damage to the delivery of justice. We have been proved right.

In September 2009 the then Prime Minister, Gordon Brown, finally admitted that spending cuts would be necessary. On the 18th September *The Times* published a letter of mine in which I pointed out that restoring the autonomy and independence of the Magistrates and cutting out the unwelcome bureaucracy with which they had been burdened, would be constitutionally sound and save the nation a great deal of money. That letter provoked a response from a lady Bench Chairman. She wrote:

The Magistrates on my Bench – prior to the 'takeover' by HMCS – delivered a more efficient and cost-effective service based on, dare one suggest, justice rather than economics. The change whereby each Bench ceased to have its own Justices Clerk signalled the commencement of HMCS pulling the strings and exerting pressure on financial targets and overall control. Ticking the right box is their priority regardless of how

that may distort attention on other aspects of the system. Our independence is constantly being attacked under the guise of consistency.[4]

Those comments have been endorsed by every magistrate to whom they have been shown, including the Chairman of the Magistrates Association.

Now for some figures:

As at 2001 the total cost to the nation of the system of lay-magistrates, independent and autonomous, was £330 million. In April 2003 Sir Hayden Phillips, the then Permanent Secretary to the Lord Chancellor, with some relish, described in an interview with *The Times* the expansion of his department. It would increase in number after the takeover of the Magistrates' Courts to 25,000 at an annual cost of £3bn. As things have turned out, Sir Hayden's estimate of 25,000 civil servants was accurate, as that is the number employed within the Courts system, as confirmed in the Resource Accounts for the Ministry of Justice for the year 2008/2009. As at March 31st 2005 the number of civil servants employed in Her Majesty's Courts Service was 8,487; and of public employees supporting the Magistrates Court system approximately 8,000. Thus the combined total at takeover date was 16,000 or thereabouts. It follows that the increase in the number of civil servants consequent upon the takeover would seem to have been 8 - 9,000, – hardly surprising given the sheer size of the Magistrates' Courts system as described by Sir Robin Auld.

It is not easy to arrive at an accurate, precise figure for the cost of the additional bureaucracy required within HMCS to administer the Magistrates' Courts system, as the accounts for HMCS and the Resource Accounts of the Ministry of Justice are unhelpful. But one can make a fair assessment from the figures revealed. For the year ended March 31st 2009 the total operating cost for the administration of the English Legal System was just under £6bn, of which £2bn was attributable to legal aid, the Community Legal Service and the Legal Defence Service. Making the best estimate one can, it would seem reasonable to infer from the figures disclosed that the real cost of administering the legal system by HMCS is unlikely to amount to less than, say, £3.5bn. That figure is not too far

[4] *The Times*, Letters, 18th September 2009

removed from Sir Hayden Phillips' estimate in 2003. Given the sheer size of the Magistrates' Court system, it is not unreasonable to attribute, say, £2bn to the cost of its administration by HMCS, that is to say about 57 per cent of the total operating costs. If one deducts, say, £500m for the notional cost of autonomous administration by the Magistrates themselves in 2011, that would suggest an additional cost of £1.5bn annually to the nation of the unnecessary bureaucracy provided by HMCS. Of course, I am not suggesting that these figures are accurate to the last penny. But they do give a fair indication of what it may be costing for the Magistrates Courts to be managed and controlled by the Courts Service; and how much would be saved if they were not. The saving may be less than £1.5bn, possibly £1bn or even £900m. One thing is clear: it has to be costing the nation a huge sum of money to finance the expanded Courts Service, an expenditure which cannot be justified when one has 30,000 magistrates of the highest calibre willing to do the job voluntarily and without payment.

All this is known to the Ministry of Justice, to the Lord Chancellor and his Junior Minister Jonathan Djanogly. Before the General Election I was asked by Conservative shadow ministers to develop and prepare a policy paper supporting the restoration of the autonomy and independence of the Magistrates, setting out the huge financial consequences of keeping the Magistrates' Courts system within the Courts Service, and identifying the massive savings to be made by removing thousands of unnecessary civil servants. By the time the policy paper was completed, the election was in full swing. After the election I was told that the policy paper had been sent on to Mr Djanogly in May 2010 for him to consider it, and, as I thought, develop the policy. A deafening silence followed. After the intervention of a very senior Tory Minister, I met with Mr Djanogly on the 24th November 2010.

It soon became clear that the policy was not to be pursued; HMCS was to remain untouched. As for the Magistrates, the Minister was unaware of any dissatisfaction with the Court Service or the Ministry of Justice, which was a little surprising had he read the Magistrates' National Response. In that document there are some trenchant criticisms of the Ministry and HMCS; and the letter from the lady Bench Chairman (above) had been reproduced in the policy paper. Civil servants had succeeded in suppressing the policy

paper; they had triumphed with the aid of an indolent Lord Chancellor and an inexperienced Junior Minister.
So what spending cuts and savings did the Ministry of Justice propose? Under the banner: 'Court Reform: delivering better justice'[5] the Ministry in December 2010 announced the closure of 93 Magistrates' Courts and 49 County Courts in England and Wales. This idea was first floated in June 2010 when it was proposed that one third of the Magistrates' Courts should be closed; it was heavily criticised by the Magistrates, as was the supposed consultation process which followed. It was, of course, policy which was being developed under Labour. Clearly, closure of so many courts will diminish access to justice not improve it. Longer, more expensive journeys for litigants, magistrates, and other services, are some of the difficulties it will create. The Magistrates' view is that one should bring justice to the community, not make access to the courts expensive and inconvenient for the general public and others.

And what savings will accrue from the closures? £41.5m of savings 'for the taxpayer across this spending period'! That is to say, barely one per cent of the entire annual cost of civil service management of the English legal system. That will really make a big impact on the deficit! There will be a 'possible' £38.5m to be realised from the sale of assets, i.e. court houses. That would be a one off capital realisation. But what if they wanted to reverse the process and reopen the closed courts? They would have to build new ones. There would be no money for that, because we are told that the new Magistrates' Court in Liverpool is to be cancelled, because it has become 'unaffordable in the current financial climate'. Summarizing the proposals, there will be significant damage to the system and the delivery of justice with minimal financial advantage.

Yet there is still at least £1bn per annum available to finance thousands of unnecessary civil servants.

This is pure Brown economics. And it is presented, not as a reduction in access to justice which it is, but as a reform which should be welcomed. It is said to deliver a modern, efficient justice system, 'with victims and

[5] Ministry of Justice, *Court Reform: Delivering Better Justice*, Press release, London, 14th December 2010

witnesses at its centre*'*. This is spin of which Lord Mandelson could be proud. It is, frankly, an insult to the intelligence of the British people, and certainly to the intelligence of the Magistrates. So we have Labour policy accompanied by Labour spin, uttered by a Conservative Junior Minister, namely, Jonathan Djanogly. Supported, apparently, by an ineffectual Lord Chancellor. Not much Big Society from them.

IV
Independent and Separate Powers
The legal system under siege

The Judicial Response

The complete domination of the entire legal system by executive government has not gone unnoticed or uncriticised. The Magistrates Association has voiced complaints as is evident from their National Response published in October 2010; it followed criticisms and disquiet expressed by some of the leading members of the legal profession since 1987 including distinguished judges concerned at the violation of the principle of the separation of powers and the consequent sidelining of the judiciary.

In February 1989 R.E. McGarvie, a Judge of the Supreme Court of Victoria, in an article published in the *Australian Law Journal* about judicial responsibility for the operation of the court system in that state, referring to the changes consequent upon the Courts Act 1971 when management powers were transferred to the Lord Chancellor's Department, said this:

> *If the Beeching system of court administration were to continue unchanged in England and Wales, it is my view that inevitable evolution would produce the situation sought by Sir Francis Bacon, that judges 'shall be lions but lions under the throne', Bacon's objective of executive domination of the judiciary would be attained, after a pause of 350 years, not by Royal despotism but by executive infiltration. Such a development would see the judiciary of England and Wales occupying a position similar to that of the judiciary in some other Common Market countries where it is part of the civil service.*[6]

[6] McGarvie, R.E., 'Judicial Responsibility for the Operation of the Court System', *Australian Law Journal*, Vol. 68, p.79, Melbourne, 1989

McGarvie was prophetic. For executive infiltration has resulted in far greater power being exercised by the Ministry of Justice and the Treasury over the legal system and professions than was ever envisaged by the Beeching Report. The constitutional error is self evident if the separation of powers means anything at all. The structural error arises from the uncomfortable division of responsibility for the administration of justice between the judiciary and the executive, and the tensions, resentments, and sometimes hostility it creates.

In his Mann Lecture given in November 1987 Sir Nicholas Browne-Wilkinson (as he then was) raised this very question. In the opening paragraph he said this:

But I do see a different and more insidious threat to the independence of the judiciary as a collective body, as opposed to the independence of each judge as an individual: a threat to the independence of the legal system, as opposed to the judges who operate it. The threat arises by reason of the executive's control of finance and administration.[7]

And later he said of the Beeching Report:

The third change has flowed from the reorganisation of the court system in 1971 following the Beeching Report. This reorganisation has produced a very substantial shift in the control of the administration of the courts from the judges to civil servants in the Lord Chancellor's Department. This process has given rise to stresses between the judiciary and the administrators as to their different functions. Those stresses are normally contained by common-sense resolution between Heads of Division and presiding judges on the one hand, and Circuit administrators and higher civil servants on the other ... But this is not always the case, and there appear to be those in the Lord Chancellor's Department who perceive its role as being far wider than is consistent with any concept of the independence of the judiciary.

And he summed up the matter like this:

[7] Browne-Wilkinson, N., *11th Annual F.A. Mann Lecture*, Lecture to Lincoln's Inn, London, 1987

To sum up my argument so far, it seems to me that the old machinery regulating the administration of justice no longer ensures the independence of that system from executive control. Judges are sitting in an environment only determined by executive decision in the Lord Chancellor's Department, which in turn is operating under the financial constraints and pressures imposed by the Treasury. The yardstick for decision-making is financial value for money, not the interests of justice. What constitutes value for money is being determined by executive, not judicial decision. The Lord Chancellor's own position, representing as he does simultaneously both the independent judiciary and the interests of Government, is becoming more and more difficult, since the price to be paid for obtaining funds for the administration of justice is dependent upon satisfying the Treasury that any particular course represents, in their terms, value for money. The practical manifestation of this change is the increasing stress arising in the relationship between the judiciary and the Lord Chancellor's department as to their respective responsibilities, the Lord Chancellor's department being forced by the demands for financial economy to move more and more into areas which the judges consider to be their exclusive concern.

Since 1987 the position has got worse, not better. The Ministry of Justice (having subsumed the Lord Chancellor's Department) is a civil service department with over 90,000 employees, of whom 25,000 are employed in the Courts' service and the administration of justice. The Ministry controls all the courts, their staff, the buildings and every aspect of the legal system save for determination by the judges of the cases before them. Listing officers up and down the country are answerable to their superiors, not the judges. Even appointments are substantially under the control of the civil servants.

By 1989 the Treasury was looking for ways and means to contain the national expenditure on the law and the legal system. The Green Paper it produced[8] proposed that in addition to the Bar, solicitors, the Crown Prosecution Service, employed barristers and solicitors, and lay persons

[8] *The Work and Organisation of the Legal Profession*, Cm. 570, HMSO, London, 1989

could be granted rights of audience. Paragraph 5.13 of the Green Paper proposed that the Lord Chancellor should have the power of final decision on rights of audience; any such decision would, it was suggested, be put into effect by means of subordinate legislation.

In the event the Lord Chancellor backed off in the face of severe opposition from the senior judiciary. In May 1989 the judges pointed out that the independence of the judiciary and the independence of the Bar are inextricably interwoven. The judges then stated:

It is of fundamental importance that the existing degree of separation of the powers and functions of the judiciary from those of Parliament and the Government, evolved gradually over the centuries, should be maintained. The independence of the Judiciary and of advocates is perhaps more important now than ever, because one of the great constitutional tasks of the Courts today is to control misuse of powers by Government ministers and departments.

The Government is proposing that in future the Lord Chancellor should make the final decision on standards of education and training for advocates, prescribe the principles to be embodied in codes of conduct for advocates, and be empowered to make decisions on rights of audience in the High Court and Court of Appeal by means of subordinate legislation. These proposals represent a grave breach of the doctrine of separation of powers.

Until now no Government minister has had and no Government has sought power to exercise ultimate control over the profession of advocacy in the courts. Once a power is given, the risk that it may be misused by some future Government cannot be disregarded.

The Government should recognise that it has gone too far in making these proposals...

If it was unconstitutional in 1989 to interfere with the power of judges over the Bar, rights of audience, legal education and professional conduct, it cannot have been any less so in 1999, or in 2011. The proposals which Lord Mackay failed to get through in 1990, were enacted by the Access to

Justice Act in 1999. As Lord Browne-Wilkinson had remarked in his Mann Lecture:

The result is that the executive is considering a change in rights of audience without even so far consulting the judiciary. The whole question has been raised and discussed not on the basis, 'What is in the best interests of justice?', but on the basis, 'What will be cheaper?'.

The Lord Chancellor now has the power of decision through his civil servants as to who shall have rights of audience in the courts, and the nature of the rules of professional conduct of the authorised bodies to whom advocates must belong. Thus the power and autonomy of the judiciary have been marginalised as is self-evident from the provisions of Schedule 5 to the Act. The Act and its provisions represent a grave breach of the doctrine of the separation of powers. That was the opinion of the judges in 1989; I do not understand their opinion to have changed.

The tensions and complaints created by the dominance of the Courts Service over the judiciary and the legal system surfaced again on the 9th February 2011. In a speech delivered in London,[9] the President of the Supreme Court, Lord Phillips of Worth Matravers, warned that the Supreme Court's independence cannot be properly guaranteed because of the way it is funded by government. In his speech entitled 'Judicial Independence' Lord Phillips said that its very independence was threatened by the funding arrangements currently in place. There was a tendency on the part of the Ministry of Justice to try to annex the Supreme Court as an outlying part of its empire. He further complained that the Court's Chief Executive, Jenny Rowe, should owe her primary loyalty to him, but some in the Ministry of Justice clearly felt she should answer to them.

Those criticisms are entirely consistent with the opinions expressed by Lord Browne-Wilkinson in his Mann Lecture in 1989.

It is significant that remarks of that kind should have come from Lord Phillips. As Lord Chief Justice at the time, he reaffirmed an agreement, the

[9] Phillips, N., *Judicial Independence and Accountability: A View from the Supreme Court*, Lecture to UCL, London, 8th February 2011

Concordat, with the Lord Chancellor for the future arrangements between Her Majesty's Court Service and the Judiciary announced in January 2008, and presented to Parliament in April 2008.

V
The Concordat
An uneasy and unrealistic compromise

In January 2004 the Concordat was published by the Labour Government. It set out proposals first announced orally in the House of Lords on the 26th January 2004. It was agreed between the Lord Chancellor and the Lord Chief Justice as a means of creating lines of demarcation between the functions of the controlling civil service and those of the judiciary. In essence it seemed to be an attempt to resolve or reduce the tensions created by the invasion and takeover of the English legal system by executive government in breach of the doctrine of the separation of powers. Under the heading 'Overview' the document contained the following statements:

Abolition of the office of Lord Chancellor was announced in June 2003 as part of a suite of constitutional reforms, which also includes establishment of an independent Judicial Appointments Commission and a new Supreme Court. The overall aim of these reforms is to put the relationship between the executive, legislature and judiciary on a modern footing, ***respecting the separation of powers between the three****. This paper sets out the Government's proposals relating to the transfer of the Lord Chancellor's judicial and judiciary-related functions in England and Wales that is intended to be affected (sic) by the Constitutional Reform Bill. These proposals are, of course, conditional on Parliamentary approval.* [10] (Emphasis added)

What was meant by 'a modern footing'? And how would the arrangements then existing, and the continued control of the legal system by the Government, respect the separation of powers? The judiciary may have retained some residual power, but it was nothing compared with the overarching intrusive power exercised by the executive. In particular the Secretary of State was awarded the power and duty of ensuring a system

[10] *The Lord Chancellor's Judiciary-Related Functions: Proposals*, Oral statement, The Department of Constitutional Affairs, London, 26th January, 2004

was in place 'to support' the business of the courts, whereas the judiciary was confined merely to being 'involved' in the Courts Agency's planning.

Under the heading 'Provision of Resources' it was stated:

19. As set out in Part 1 of the Courts Act 2003, the Secretary of State will be under a duty to 'ensure that there is an efficient and effective system to support the carrying on of the business of the courts in England and Wales' and 'that appropriate services are provided for those courts'. The Secretary of State is responsible for the provision and allocation of resources for the administration of justice (including resourcing the judiciary and the education and training of the judiciary within that system). Resources cover financial, material and human resources. The Secretary of State is accountable to Parliament for his decisions as to the allocation of resources and for the effectiveness and efficiency of the system.

20. Arrangements will be put in place to ensure that the judiciary can be effectively involved in the resource planning of the Unified Courts Agency and the Department for Constitutional Affairs, to ensure that the judiciary is enabled to have early engagement with a new agency and Department at a strategic level, including on issues concerning resource plans and bids.

In short, the Secretary of State (Lord Chancellor) would be responsible for the staff and the administration of the courts; the organisation of the system and its boundaries; the number and function of judges; the running of courts, including location and sitting times. The Lord Chief Justice would be responsible only for the role and posting of the judges within the framework set; and the judiciary would 'consult' on such matters with the government.

22. The Secretary of State will be responsible for providing the staff and resources, including financial resources, necessary for the Lord Chief Justice to carry out his functions including his relations with the media. It is not intended to provide specifically for this responsibility in the Bill. The office of the Lord Chief Justice will be

responsible for accounting to the Department for the expenditure allocated to him.

26. The Secretary of State, in consultation with the Lord Chief Justice, will be responsible for the efficient and effective administration of the court system. This includes setting the framework for the organisation of the courts system (such as geographical and functional jurisdictional boundaries).

27. The Lord Chief Justice will be responsible for the posting and roles of individual judges, within the framework set by the Secretary of State.

28. Real and effective partnership between the Government and the judiciary is seen as being paramount, particularly in this area. Therefore, all significant issues should be decided after consultation or, for those where responsibility must be equally shared, by concurrence.

29. The Secretary of State will be responsible, after consulting the Lord Chief Justice, for determining the overall number of judges required, including the number required for each Division, jurisdiction and region and the number required at each level of the judiciary; and for the provision of the courts, their location and sitting times and consequent administrative staffing to meet the expected business requirement.

If it was appropriate to describe the relationship between the Government and the Judiciary as a partnership, the latter had become a very junior partner. The notion that judicial power in accordance with the doctrine of the separation of powers had been retained and preserved by these arrangements, was patently unrealistic. On the contrary the language and purpose of the Concordat made it clear beyond doubt that the principle had been violated. The powers are meant to be separate; not exercised in partnership. A partnership is the very antithesis of the separation of powers. The civil service may like the concept of partnership because it masks its overpowering control over the judiciary beneath a veneer of apparent benevolent cooperation: but it cannot work constitutionally. That apart,

HMCS domination was, and continues to be, resented and poorly regarded at all levels of the judiciary; though unsurprisingly the judges are careful not to express their views publicly, or too often.

It January 2008 a further agreement between the Lord Chief Justice, then Lord Phillips, and the Lord Chancellor was announced. On the 28th January 2008 a Joint Statement by them was published 'on a partnership model for the operation of Her Majesty's Courts Service'.[11] In April 2008 a 'Framework Document'[12] was issued which explained the implementation of the principles contained in the Joint Statement. There is no need to refer to those two documents in detail. Three significant features of the Joint Statement and the Framework Document should be noticed.

First, the partnership model which was the foundation of the January 2004 Concordat was reaffirmed. The Joint Statement stated:

We have been exploring the most appropriate arrangements for the future operation of HMCS following the creation of the Ministry of Justice. Following an open and constructive consideration of a number of possible models, we have agreed the main principles of a partnership between the Lord Chancellor and the Lord Chief Justice in relation to the governance, financing and operation of HMCS. We hope that the steps necessary to launch a new model for HMCS, based on these principles, will be complete early in the New Year. The courts are by their nature a shared endeavour between the Judiciary, who are responsible for the judicial function to deliver justice independently, and the Government which has overall responsibility for the justice system, within the framework and resources set by Parliament. Within this overall structure the Lord Chancellor and the Lord Chief Justice have specific, but different roles. These were described in part in the Concordat finalised in January 2004 between our predecessors as Lord Chancellor and Lord Chief Justice.

Our recent discussions have built upon this work.

[11] Ministry of Justice, *Joint statement by the Lord Chancellor and Lord Chief Justice on a partnership model for the operation of Her Majesty's Courts Service*, Press release, London, 23rd January 2008

[12] *HM Courts Service Framework Document*, Cm. 7350, HMSO, London, 2008

The new arrangements for HMCS will structurally embed the spirit and principle of partnership that already exists...

Thus the failure in January 2004 to respect the true and proper application of the doctrine of the separation of powers was perpetuated by the Lord Chief Justice and the Lord Chancellor.

Second, 'this new and unique partnership' was to be implemented by means of an agency, namely HMCS. It was to have a Board of eleven members, of whom only three were to be 'judicial representatives'. The 'Chair' was to be independent and non -executive; the remainder of the Board was to be composed of civil servants, namely the Chief Executive of HMCS, its Finance Director and two others, and two 'non-executive' directors. The Chief Executive was to manage the HMCS under the general direction of the Board. Patently, managerial control over every aspect of the legal system, was comprehensively in the hands of the civil service, the judiciary providing merely a minority opinion which could easily be ignored. Judicial power as previously understood, and described in the Mann Lecture of Lord Browne-Wilkinson, was effectively eliminated.

Third, the Joint Statement contained this provision:

A joint duty for all HMCS staff to the Lord Chancellor and the Lord Chief Justice for the effective and efficient operation of the courts; the staff will continue to be line managed within HMCS.

If that does not give the game away, I do not know what does! A joint duty, but answerable as employees up the line to the Lord Chancellor and his civil servants. Lord Phillips could hardly have been surprised to find that the independence of the Supreme Court was threatened by the civil servants within the Ministry of Justice. Nor was it unforeseeable that problems of divided or uncertain loyalties were likely to arise, of which his concern about the loyalty of his Chief Executive, Jenny Rowe, provides a good example. It is to be hoped that Lord Phillips has now woken up to the inherent contradictions and conflicts within the Concordat, and to the

tensions a supposed 'shared endeavour' between Executive Government and the Judiciary for the administration of the Courts is likely to create.

There can be no doubt that many judges find control and management by HMCS of the English Legal System, and themselves, irksome, invasive and inefficient. Judges do not willingly speak publicly about these kinds of problem, and take care not to enter the political arena. But I do know that many members of the judiciary would welcome the restoration of their independence and autonomy, and of a proper respect for the separation of powers. I return to McGarvie who began his article with these words:

> *The balance of opinion has moved strongly to the view that, while the primary judicial obligation is to hear and decide cases satisfactorily, that is not the full measure of a judge's responsibility. Judges also have an inescapable responsibility to the community to ensure that their courts operate with such economy, efficiency and effectiveness as is consistent with the maintenance of an independent judiciary and high standards of justice*.[13]

He went on to explain how that approach had been successfully adopted in the State of Victoria of which he subsequently became Governor.

[13] McGarvie, R.E., 'Judicial Responsibility for the Operation of the Court System', *Australian Law Journal*, Vol. 68, p.79, Melbourne, 1989

VI
What Implications for the Big Society?

The Big Society is a concept much promoted and supported by the Prime Minister. It has been endorsed by a large number of voters at the last election. The label might not be up to much, but the concept is clear. Its application is directed towards dismantling substantially the Whitehall civil service; reducing bureaucratic interference in as many aspects of national life as possible; devolving power and responsibility to local institutions, organisations, authorities and bodies so as to encourage voluntary action and service for the public good. Recently the Prime Minister reiterated his commitment to the concept; he attacked the weight of bureaucracy and the unnecessary regulations it breeds. In my view he is completely right. There is no difference within the Coalition Government on this issue; it is Liberal Democratic as well as Conservative policy. Yet aspiration is not the same as realisation. While the Prime Minister may wish this kind of policy to be applied, there may be some doubt as to whether all his ministers agree with him, as the events described in Section III of this paper may illustrate.

As I have described in Section III, the Magistrates of England and Wales, and their courts system, until 2005 were an outstanding example of the Big Society in action. Given the clear expressions of Government policy, there can be no valid reason for not restoring their independence and autonomy; and compelling, valid reasons for doing so. Here is an obvious opportunity for the Coalition Government to apply and put into practice the principles of the Big Society.

First, there can be no justification for continuing to employ some thousands of civil servants in HMCS whose functions were competently and effectively undertaken by the lay Magistrates until 2005; and the Magistrates are more than willing to undertake the responsibility for those functions again. That would be constitutionally sound in accordance with the separation of powers.

Second, the saving for the nation would be at least £1 billion annually. That is a huge price to pay for less than impressive administration by the Civil

Service. There can be little doubt that the Magistrates would do the job at least as well as the Civil Service, and probably very much better. And their services are given voluntarily and without payment, save for reimbursement of expenses.

Third, the Coalition Government is committed to devolution of power and responsibility to local bodies, societies and voluntary entities. Restoration of autonomy and independence to the lay magistrates would be in keeping with that policy.

Fourth, the proposals of HMCS for savings and property realisations are unsound; and positively damaging to the legal system, and access to justice. The annual savings to be made are miniscule compared with the financial benefit to the nation of removing an unnecessary bureaucracy. Over £1 billion unnecessary annual expenditure approximates to the savings to be made from the intended discontinuance of child benefit; or would assist in reducing the cutbacks to be made in defence spending.

It remains to be seen whether the Coalition Government has the political will to implement the policy and principles of the Big Society.

Just as independence and autonomy should be restored to the lay magistrates, so should independence and autonomy be re-established for the judiciary and the English legal system. My argument for that has already been explained, and I do not repeat it. It is sufficient to point out that the removal of HMCS from management and control of the system would be consistent with the policy and principles of the Big Society, and in accordance with the doctrine of the separation of powers.

It seems likely that there would be substantial financial savings were the administration of justice and the legal system to be restored to the judiciary. For example, what is the economic justification for an 'agency', namely HMCS, with a Board composed of eleven members? Why are so many Board members required – executive and non-executive? What is the reasoning which leads to there being a minority of only three judicial representatives on a Board whose ostensible purpose is to support the judiciary?

The administration of the English Legal System could be undertaken, as it should be, by the Lord Chief Justice and his Council of Judges. In my lecture given at the Inner Temple in February 2000, I described how that could be realised; and I repeat what I said then.

The system in Victoria (as described by McGarvie), and I believe other states in Australia, shows us the way. The judiciary should retake full possession of the English legal system and the profession; take responsibility for the overall management and control of the courts and the administration; and deal with financial and budgetary matters. That means the judges would have to negotiate with the Treasury and make a case for any provision of financial resources. They should concern themselves with public funding of litigation, and in consultation with other interested bodies be fully responsible for deciding who should have rights of audience. Above all, they must be prepared to provide effective leadership, something which has been sadly lacking for the last 40 years.

I am encouraged in my views by the expression of a similar opinion by Lord Browne-Wilkinson in his Mann Lecture. Under the heading 'A Possible Solution' he said this:

Although the ultimate fixing of the total budget must be a political act, if there is to be any judicial independence the Judges must at least be involved in the preparation of the estimates on which the total budget is voted. More important, the judges must be involved in the allocation of that budget, once voted, amongst the various functions of the legal system so as to ensure that, subject always to the supremacy of Parliament, the administration of justice is under independent control.

If, as I think essential, the judiciary are to resume an important role in the administration of the legal system, it will be essential either to appoint the Lord Chief Justice as a person who can speak on behalf of the whole judiciary or establish some form of collegiate body, like the American Judicial Conference, which has authority to act on behalf of the judges. Such body would be responsible for those administrative functions which are to be controlled by the judges.

It seems to me that there should be little difficulty in creating the necessary administrative arrangements in this country. Instead of being answerable to

the Lord Chancellor, the administration would be accountable to the Lord Chief Justice and a Council of Judges. A Director-General could be appointed, not a civil servant, to manage and control the system. As a first step he could take over the existing system and then reshape it as he thought fit. Thought might be given to the creation of an Executive Committee composed of judges, senior members of the Bar and experienced solicitors so as to ease the burden upon the judiciary.

It is, of course, not possible to calculate the savings likely to be made by removing the Whitehall bureaucracy from the legal system, and transferring its management to the judiciary. The first saving would be the expense of the HMCS Board, whose functions at no additional cost would be performed by the Lord Chief Justice and his judges. It seems likely, given the inefficiency and over manning usually associated with the civil service, that a new tighter administration controlled directly by a Director-General answerable to the Lord Chief Justice, would be more cost effective than the cumbersome arrangements now in place as embodied in the Concordat.

VII
The Way Forward

The Coalition Government, in accordance with its stated policy and principles, should give priority to the restoration of autonomy and independence to the English legal system.

It could and should make an immediate start by removing the unnecessary civil servants from the Magistrates Courts' system, and restore its management and control to the Magistrates themselves. That would save the nation at least £1bn pounds annually, and probably more, and eliminate bureaucratic waste of resources. It should halt the planned closure of 93 Magistrates' Courts and 49 County Courts, thus ensuring continued access to justice to those who need it.

In the longer term the Government should make plans for the restoration of power and control of the legal system to the Judiciary. The concept of a 'shared endeavour' and a partnership with Whitehall in the organisation and management of the courts' system should be abandoned.

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