

ADMINISTRATIVE BAR LAW ASSOCIATION

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THE CONSTITUTIONAL IMPLICATIONS OF OUSTER CLAUSES

On 17th February Lord Falconer, who has the oxymoronic job description of being at the same time Lord Chancellor and Secretary of State for Constitutional Affairs (but not Minister of Justice) explained his views about the Human Rights Act in a speech to the Law Society and Human Rights Lawyers Association. It was the last part of his speech, dealing with Clause 11 of the latest Asylum Bill, that gives cause for real concern, when Lord Falconer appeared to speak for the Home Secretary rather than in the tradition of previous Lord Chancellors, such as Lord Mackay of Clashfern.

Lord Falconer said

“The ECHR does not say that there must be multiple levels of review. The debate needs to acknowledge that.”

I readily do so.

Then, after describing the new statutory tribunal system, Lord Falconer turned to judicial review and said this:

“Judicial Review is ousted for many but by no means all decisions. We will keep judicial review for habeas corpus challenges. And we will keep it for cases where IND does not allow a person who has exhausted their appeal rights to make a further claim because they have not produced new grounds for doing so. The system ensures independence, experience, scrutiny. To include Judicial Review in relation to that aspect of it introduces 3 further stages. Is this necessary to ensure justice? I think not. As a result the system will be faster – still delivering a fair and just decision – but within 18 weeks rather than 65 weeks plus that it can take now. Those fleeing persecution will know much earlier that their claim has been allowed, that they can put the past behind them and start to rebuild their life in the UK. And for those seeking to exploit the system we will have minimised the burden and reduced the numbers it involves.”

That reference to including judicial review is, of course, erroneous. It is not a matter of including but of excluding judicial review in this class of case.

Nowhere in his speech did Lord Falconer mention that the Joint Select Committee on Human Rights (of which I am a member) had published a unanimous report¹, a week before, dealing in detail with these arguments. I hope you will find it useful for me to quote extensively from the report. This is what we wrote:

57.Ousting the review jurisdiction of the High Court over the executive is a direct challenge to a central element of the rule of law, which includes a principle that people should have access to the ordinary courts to test the legality of decisions of inferior tribunals. Clause 11 of the Bill seeks to make the immigration and asylum process operate outside normal principles of administrative law and legal accountability. This sets a dangerous precedent: governments may be encouraged to take a similar approach to other areas of public administration.

58. Apart from the fact that the rule of law is a fundamental principle inherent in international human rights law, it is inherent in the fundamental law of the British constitution. It includes the civil right of everyone within the jurisdiction of the United Kingdom to have unimpeded access to the ordinary courts to test the legality not only of administrative decisions but also of the decisions of inferior tribunals. That is an essential element in the British system of government under law.

59. In India and Bangladesh, Commonwealth countries with written constitutions expressly empowering the legislature to amend the constitution, the Supreme Court of each country has decided that the power of amendment, even when exercised in accordance with the letter of the constitution, cannot be used to abrogate or destroy an essential feature of the constitution, for example, by preventing access to the ordinary courts by way of judicial review, or by interfering with judicial independence.

60. The issues raised by the statutory ouster of judicial review may raise similarly important and controversial issues under the unwritten British constitution in reconciling the fundamental principles of parliamentary sovereignty and the rule of law.

At the height of the Second World War when our nation was facing a threat of imminent invasion, a clash between these fundamental constitutional principles was avoided by preserving judicial review of the use of emergency powers of detention without trial. It is highly important for Parliament to consider whether cogent and convincing reasons have been advanced in accordance with the

¹ Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc) Bill*, Fifth Report of Session 2003-04, HL Paper 35, HC 304, 10 February 2004.

principle of proportionality to justify the ouster of judicial review contemplated by Clause [11] not in wartime and not in the context of terrorism but in relation to asylum appeals.

....

Presumably the Government does not regard the Immigration Appeal Tribunal as infallible.

70. [The Government's] argument requires an especially compelling justification where the rights at stake involve protection against well-founded fears of torture and persecution by those seeking asylum and protection as refugees under international law. Although the Government is right to say that relatively few immigration and asylum cases determine rights and obligations which would be regarded as "civil" for the purpose of ECHR Article 6.1, we note that many asylum and all human rights claims concern people who claim to be at risk of having their human rights violated if they are not allowed to remain in the United Kingdom. As the Refugee Legal Centre pointed out, several articles of the ECHR (including Articles 2, 3 and 8) impose positive obligations on the State to take reasonable steps to protect rights against infringement. Accuracy of decision-making is therefore vital to the protection of their Convention rights.

71. We have carefully considered the Government's arguments, but consider that it could be strongly argued that the ouster of judicial review of tribunal decisions contemplated by clause 11 has not been justified by any argument advanced by the Government. There is a real danger that this would violate the rule of law in breach of international law, the Human Rights Act 1998, and the fundamental principles of our common law. "

....

75. [There would be] many cases in which there could be a serious threat to fundamental human rights yet clause 11 would exclude the jurisdiction of the courts. For example, habeas corpus protects only the right to liberty of the person. There would be no access to courts to protect other Convention rights from being violated by immigration and asylum decision. Some of these rights are of even greater importance than the right to liberty of the person, including the rights to life and to freedom from torture and inhuman or degrading treatment or punishment, to say nothing of the right to a fair trial and the right to respect for family life.

Under clause 11, it would be impossible for an applicant to initiate a challenge before the ordinary courts to a decision of the Tribunal

which fails to protect any Convention right other than the right to liberty of the person.... Equally, it would be impossible for a person whose Convention rights are violated by an immigration decision and who cannot obtain redress from the Tribunal to seek other judicial remedies, including damages, for the violation it has resulted in the detention of the person in violation of ECHR Article 5.

When I asked Lord Falconer (during the debate on 12 February on the Government's constitutional reform proposals) whether he was aware the the Joint Committee had unanimously concluded that Clause 11 is incompatible with the Convention, his reply (col 1317) was that he was aware of that but that the Home Secretary had signed a compatibility statement indicating "on the basis of proper and legitimate advice that the Home Secretary has come to the view that this is a perfectly legitimate thing to do in the context of the Human Rights Act." That reminds me of the answer given by the impatient father to his why-pest daughter in Ring Lardner's comic writing: "'Shut up', he explained."

Incidentally, this use of a Human Rights Act compatibility statement as a shield against criticism illustrates the danger of treating the Convention rights as the only constitutional rights protected by our system of law and government. The Human Rights Act was meant, in the words of Lincoln's Gettysburg Address, to enable our nation to have "a new birth of freedom". But the legislation cannot do so if it is interpreted by Ministers with the austerity of tabulated legalism.

Neither in his speech last week nor otherwise has Lord Falconer yet replied to the critique made by our Committee. We will have to wait until the Bill reaches the Lords to discover whether he will continue to treat the Home Secretary's assertion in the compatibility statement as a sufficient response to the criticisms made from so many well informed individuals and organisations.

I now turn to the wider question of the conflict that Clause 11 creates between two fundamental principles of the British constitution: the principle of Parliamentary sovereignty and the principle of the rule of law by the Queen's Courts. If Clause 11 is enacted in its present form, it will raise in an acute form the ancient seventeenth century question of how under our system of constitutional government these two fundamental principles are reconciled. Is Parliament literally omnipotent or are there legally enforceable limits on how it exercises its legislative powers where it does so in a way that destroys the basic structure or essential features of the British constitution? That in turn raises the question: what is the source of the legislative powers of Parliament?

Plainly it cannot be Parliament that confers powers upon itself since that would be to pull itself up by its bootstraps? Is it the Monarch who confers power on Parliament? That would be a strange conclusion in a modern democracy. Is it the Treaty of Union with Scotland? Or is it, as I would argue, by virtue of the recognition by the common law of the legislative supremacy of Parliament? If it is the common law which is the legal (as distinct from the political) source of the legislative powers of Parliament, then it must be open to the courts, in an extreme case, to decide that those powers have been exceeded.

Usually, the question is academic, because usually Governments are wise enough not to introduce as blatantly unconstitutional a measure as Clause 11. But if Clause 11 is enacted and challenged, the Law Lords may well be called upon to answer this and other fundamental questions. Could Parliament – in reality the Executive in Parliament – enact constitutionally valid legislation to abolish the High Court and Court of Appeal in England and Wales or the Court of Session and Court of Justiciary in Scotland? Could it abolish elections and perpetuate its own existence indefinitely?

Questions of this kind have been raised in the past by Scottish jurists who have argued that the Parliament of Westminster does not have unlimited legislative powers. The Treaty and Acts of Union with Scotland sought to ensure the continued existence of the Scottish legal system, with its own courts and legal profession. The Westminster Parliament is prevented under the Treaty and the Act of Union with Scotland from abolishing the Court of Session (Article XIX) or from altering (Article XVIII) “laws which concern private rights” “except for the evident utility of the subjects within Scotland.”

The best known exponent of the English authoritarian concept of Parliamentary supremacy was Dicey who argued that all statutes are in law of equal legal force, so that the Act of Union can be repealed by the Dentists Act. According to Dicey, “the one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament.”² Dicey himself did not remain loyal to that dogma when faced with Asquith’s Irish Home Rule Bill. He argued in 1913 that if it were enacted it would have no constitutional validity.³

Dicey’s despotic dogma is surely unsustainable in a modern democracy under the rule of law; and the Scots have the better of the argument. But if the Westminster Parliament is a legislature whose powers are limited by the Treaty of Union and the Acts of Union, why cannot its powers be further limited to

² AV Dicey, *An Introduction to the Study of the Law of the Constitution* 145 (10th ed 1959).

³ See Anthony Lester, “Fundamental Rights in the United Kingdom: the Law and the British Constitution”, *University of Pennsylvania Law Review*, Vol 125 (1976), 337, at 344, note 17.

secure compliance with other essential features of the British constitution? Lord Justice Laws stated in *Thoburn v Sunderland City Council*⁴ that “there is a class of “constitutional” enactments which, by reason of their importance, are to be regarded as having a particular strength which puts them, for example, beyond the reach of the traditional doctrine of implied repeal.” These include the Magna Carta, the Bill of Rights, the Claim of Rights, the Act of Settlement, the Acts of Union with Scotland, and the Human Rights Act. If that is correct, it overthrows one part of the Dicey heresy, for it means that some statutes are more constitutionally potent than others, and that the courts will not impute to Parliament the power to amend or repeal a constitutional statute by mere implication.

But the question raised by Clause 11 is more fundamental. It is not about implied repeal of a constitutional measure. It concerns an all too clear and unequivocal attempt to repeal the ancient common law supervisory jurisdiction of the Queen’s Courts over statutory tribunals, in one particular class of case, a class involving one of the most vulnerable groups – men, women and children seeking asylum and refuge from persecution.

The maintenance of the rule of law is, as Lord Bridge of Harwich once observed,⁵ “in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen’s courts in interpreting and applying the law.”

In my view, it is strongly arguable that there are implied limits imposed by the common law, and by a purposive reading of our ancient constitutional statutes, upon the apparently absolute powers of the Queen in Parliament. Parliament cannot validly destroy or alter the essential features of the basic structure of the constitution, for example, by purporting to deprive the Queen’s Courts of their supervisory jurisdiction over statutory tribunals, where they lack jurisdiction, commit errors of law, or act in breach of the principles of natural justice. That view is supported by the Commonwealth case law from the Supreme Courts of India and Bangladesh referred to in the Fifth Report of the Joint Committee on Human Rights, at page 24, note 42. In those cases, the courts have denied constitutional validity to amendments to their written constitutions which violate the essential features or basic structure of the constitution. Why should not a similar doctrine apply to maintain the essential features and basic structure of our own constitution?

⁴ [2002] 4 All ER 156.

⁵ *X Ltd v Morgan-Grampian Ltd* [1991] 1 AC 1 (HL), at 48E.

I cannot do more than sketch the line of argument in my remarks. I hope we never have to make them in our courts because Parliament refuses to enact such an obnoxious measure and because future Governments will be too wise to repeat the attempt. But if Mr Blair's Government successfully rams Clause 11 on to the statute book, if necessary by invoking the Parliament Act, the courts will be available to decide these grave issues for the first time for almost three centuries.

If the argument is attempted and fails, the case will be overwhelming for the United Kingdom to do as is done in the rest of Europe and almost all of the democratic Commonwealth, and to introduce a written constitution defining and limiting the powers of each branch of government - legislative, executive and judicial. In my view, the case is already strong enough, not least because of this example of the abuse of legislative power.