

Contemporary Challenges to Executive Power – Relationship between Executive and Other Branches of Government

So who said the courts do not make law?

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Introduction

In the United Kingdom, with its ‘unwritten’ constitution, there is little doubt that an Executive which dominates the House of Commons (as we have had for large parts of these last thirty years) will usually get its legislative way. However vocal, the opposition can be of little effect. In the early-1990s, members of the judiciary¹ wondered whether, in the absence of effective political opposition, the judiciary should seek to fill the void. This paper examines just four of the many cases in which the judiciary, possibly emboldened by the Human Rights Act 1998, have challenged executive power in recent years. No comment is made as to whether this is a good or bad thing, but an Executive which knows it may be challenged, assuming it believes ultimately in the rule of law, may be a more careful Executive, both in terms of the legislation it brings before Parliament and in terms of how it executes the powers it is given.

Human Rights Act 1998

As is well rehearsed, in the UK we do not have a codified constitution that stands superior to all other forms of law. The European Convention on Human Rights was negotiated after the devastating effects of WW2 and the build up to it in the 1930s. Although the UK signed up to this treaty in 1951, thus binding the nation, the process of making treaties part of domestic law in the UK requires an Act of Parliamentand this was not forthcoming until 1998. The Human Rights Act 1998 (HRA) came into force on 2 October 2000.

The rights afforded under the Convention are called Articles, and are listed from 2-18, and the majority of these have been incorporated into HRA. Since 1966 UK citizens have had the right to petition the European Court of Human Rights (based in Strasbourg) but only after 2000 could ‘convention rights’ be litigated domestically.

The provisions of the Act tell the courts ‘*so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*’ (s 3(1)) and that ‘*if the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of incompatibility*’ (s 4(2)). Such a declaration does not render the offending legislation invalid (s4 (6)), but remedial action may be taken by Parliament under s10 (as if a supreme Parliament could not do so in any event!). Thus the theory of Parliamentary supremacy is maintained while, at the same time, potentially

¹ Lords Justice Sedley and Laws, now two of the most senior Court of Appeal judges, being some of the most vocal

giving senior judges, some of whom have never been against the idea of bending the existing law so far that they are in fact 'law makers'², a statutory justification for what they have long been doing.

Tweaking the Executive nose.....

How have the courts taken to the new power given to them under s3 HRA? A leading statement of principle came from the then senior Law Lord³, Lord Bingham, in *Sheldrake v DPP*⁴, deriving itself from comments made in the case of *Ghaidan v Godin-Mendoza*⁵ where he opined that:

- The interpretative obligation under s 3 is very strong and far reaching and may require the judge to depart from the legislative intention of Parliament
- Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility is an exception
- Parliament envisaged (when passing HRA) that the need for a declaration of incompatibility would arise, if only rarely
- There is a limit beyond which Convention-compliant interpretation is not possible. This may be because the interpretation would not be compatible with the underlying thrust of the legislation, would not go with the grain of it, would call for legislative deliberation, would change the substance of a statutory provision completely, would remove its pith and substance, or would violate a cardinal principle of the legislation.

Shortly after HRA came into force, the case of *R v A (No 2)*⁶ came before the Law Lords. This was, of course, some time before the *Sheldrake* case mentioned above. S41 (1) Youth Justice and Criminal Evidence Act 1999 prohibited, in rape cases, evidence of the alleged victim's previous sexual experiences without the court's consent, which could only be given in specified circumstances. It was held that the court could construe the Act so as to permit evidence necessary to make the trial a fair trial as that was the object of the Act. Thus additional provisions 'subject to the right to a fair trial' could be imported and read into the 1999 Act even where the words of the statute was unambiguous, going beyond the limits of normal statutory interpretation even if this strained the usual meaning. This goes rather beyond what is likely now following *Sheldrake* – but it does perhaps indicate what some judges would be prepared to do, especially if they believe a 'declaration of incompatibility' is not likely to be acted on by the Executive.

² As, for instance, much of the development of the law of negligence in *Donoghue v Stevenson* [1932] AC 562 and in the 77 years afterwards

³ The 'Law Lords' being the Judicial Committee of the House of Lords –the senior UK appellate tribunal which will metamorphose on 1 October 2009 into 'The Supreme Court'

⁴ (2004) UKHL 42

⁵ (2004) UKHL 30

⁶ [2001]3 All ER 1

If this may be considered to be more ‘tweaking Parliament’s nose’ than that of the Executive truly, it needs to be remembered that a dominant Executive (Tony Blair’s first administration, elected in 1997, with a majority of over 100 in the House of Commons) had proposed, sponsored and guided through Parliament both HRA and CJYPA. Although this may have been the ‘high water mark’ of judicial law making under HRA, though the more tempered vision spoken by Lord Bingham still allows room for judicial manoeuvre.

Let us turn to examples of pure ‘executive nose tweaking. In *Secretary of State for the Home Department v AF, AN and AE*⁷, it was held by the House of Lords that where, in the interests of national security, the Secretary of State relied on ‘closed material’⁸ in a hearing under s3(10) Prevention of Terrorism Act 2005 to justify his decision to make a control order⁹, Art 6 (1) ECHR¹⁰ would not be satisfied unless the controlee were given sufficient information on the case against him to enable him to give effective instructions to the state approved lawyer appointed to represent him. This was very much what the Secretary of State did NOT want, arguing that giving any such information would jeopardise national security but the courts asserting that Art 6 rights trumped this to a point in any event.

In *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (4)*¹¹, the court ruled on a novel issue, that is the striking of a balance between the public interest in national security and the public interest in open justice, the rule of law and democratic accountability, which lay at the heart of the court’s consideration of whether to restore passages, summarising information relating to an arguable case of torture and cruel, inhuman or degrading treatment (contrary to Art 3 ECHR) of the claimant, which had been redacted from the original judgment at the request of the Foreign Secretary (allegedly at the request of the US government) in the interests of national security. The rule of law required that the determination of where the balance lay was ultimately for the decision of the court. Although the redaction was maintained in this case, the court’s assertion that it was for it to decide, rather than the Executive in the person of the Foreign Secretary, did not sit well with either the Executive or its allies.

The decision to abandon a prosecution because of the victim’s mental instability involved a misapplication by the Executive, in the person of the Director of Public Prosecutions, of its own Code for Crown Prosecutors, was irrational and a violation of the victims Art 3 ECHR rights, according to the High Court in *R (B) v DPP [2009] EWHC (Admin)*. This reflects the wider definition of ‘executive’ but given the ‘State’ role the DPP plays and the interest of the narrower government based Executive in seeing its appointee praised rather than ridiculed in the courts, it again shows judicial independence and lack of fear for careers or lives –something

⁷ [2009]HL 28

⁸ That is, material not disclosed to the defendant

⁹ That is, an order effectively putting a person under ‘house arrest’

¹⁰ The right to a fair trial

¹¹ [2009] EWHC 152 (Admin)

UK judges accept they are fortunate in, as that lack of fear allows them to assert their independence to the border of what some would call arrogance or at least, lack of deference.

Conclusion

So, from the above, what conclusions can be drawn about the relationship of the Executive with other branches of Government? First, with a large majority in the House of Commons, the Executive is only rarely truly distinguishable from the legislature if only because of the former's dominance of the latter.

When it comes to relationships with the judiciary, then security (of tenure and otherwise) enables an independence of mind not possible if there were not this security or indeed if the Executive did not have some deep down reverence for the rule of law. The judiciary do not really see themselves as filling the role of an impotent political opposition and some recent judgments have argued heavily against what can be seen as 'judicial law making', but there is little doubt that judges do make law and are very prepared to do so in certain circumstances – some judges more than others. In the same way as judges expect politicians to have some respect, ultimately, for the rule of law, those same judges accept that they must also respect that Parliament is there to make law, not them – even if it is an Executive dominated Parliament. This does not mean that there is no room for reasonably aggressive interpretation from time to time and if this involves upsetting the Executive, then so be it!