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## **Where now for the Lord Advocate?**

LORD McCLUSKEY

I HAVE been quoted selectively in various newspapers expressing views in relation to the appointment of the new Lord Advocate. Let me make my position clear in my own words.

I am delighted that the office of Lord Advocate is to be filled by a woman. Every post should be filled by the best candidate, man or woman. I have a very high regard for Elish Angiolini. She brings to the post a freshness, a directness, a wealth of experience and an individuality that all augur well.

I have no objection in principle to the appointment of a lawyer who is not a member of the Faculty of Advocates. I make no point about the alleged narrowness of the new Lord Advocate's past career. On the contrary, her considerable experience in the Fiscal service and Crown Office will be invaluable for her responsibility as head of the public prosecution service. She may lack any deep experience of civil practice or of the intellectual challenge of pleading in the highest courts; but many have been appointed to the office of Lord Advocate without experience of the whole field of legal practice; indeed, many had little experience of criminal practice before becoming the political head of the prosecution service. In that respect, she is better qualified than some of her predecessors.

My only reservation is a constitutional one. The interests of the state or government are often in conflict with the interests of justice. Guantanamo Bay is the clearest 21st-century illustration of the reality of that conflict. Hundreds are imprisoned there without charge, without trial and without free access to the courts; yet the law officers of the United States support the White House in this denial of the basic rights of persons imprisoned by a state that claims to live under the rule of law. Their independence has been fatally compromised.

In this country, law officers, including the Lord Advocate, have a unique responsibility for the integrity of the system of justice. In the United Kingdom, the courts share that responsibility and are not prevented from doing so, as the recent Belmarsh cases show. My constitutional concern is that the Lord Advocate must enjoy and exercise an independence of judgment in relation to all matters of the administration of justice. She is not just a human tool of the executive power, seeking legal means to effect political decisions. The Lord Advocate must both bridge and preserve the constitutional gap between the Executive and the justice system. The Separation of Powers demands it. The justice system is not an arm of government: it must independently hold the ring between the government and the citizen.

So my concern can be expressed in this way. Advocates and other lawyers who are in private practice before the courts live in a culture of independence. Their master is the law itself. Any duty to the client is secondary to that. The duty to the client is circumscribed by the overriding duty to the proper administration of justice. That is an extremely difficult lesson to learn. For most practitioners, the only successful teacher is practical experience; even then, not all learn it. But grasping that fundamental concept - and living it - is immensely more difficult for lawyers who spend their whole career as employees in the public service, with promotion and other career opportunities dependent on not upsetting one's superiors. Such an employees must tend to see themselves as primarily responsible to their superiors. They, not the employees, carry the can. The culture in such employment is not one of independence but of service.

The office of Lord Advocate has been diminished as a result of the arrangements prescribed in the Scotland Act, 1998. When the Lord Advocate sits in the Scottish Cabinet, alongside the political power, preserving the necessary independence of perspective is rendered more difficult still. To acquire and exercise that independence after a career in the public service is a daunting challenge. It becomes difficult to avoid the perception that the role of the Lord Advocate is wholly subservient to that of the Executive.

But the truth is that the Lord Advocate is not just a team player carrying out the manager's instructions. The Lord Advocate has to nourish and assert the independence of the law officers' role in the administration of justice. The threat to that independence invariably comes from the political power.

Uttering the rhetoric of independence is easy enough. Espousing good intentions is equally easy; but, alas, the road to "Heil!" is paved with good intentions. What is needed is a clear, public step that entrenches and cements that independence. The Lord Advocate and the First Minister can take that step together. They should introduce a convention that the Lord Advocate does not sit as an ordinary member of the Scottish Cabinet, but has the right, and the duty, to attend when it is necessary to give, or to reinforce, her legal advice, especially relating to the administration of justice. Such a step would reintroduce a long tradition that the Scotland Act thoughtlessly ignored.

The Lord Advocate is in a powerful position to take the initiative: she has earned unqualified praise from the First Minister. Her position is uniquely unassailable. She should use it to assert the role of the Lord Advocate as guardian of the Separation of Powers.

All lawyers wish the new Lord Advocate well. If she can resolve our misgivings on this one constitutional fundamental, then those who have voiced their concerns will be the first to salute her success.

**JIM GALLAGHER says the office is not some old relic to be preserved, but a dynamic post - one which has to change with the times**

LORD McCluskey's article about the Office of Lord Advocate turned out to be a lot more topical than expected, but it still merits a pretty stiff corrective. He is right to begin with Dundas, the definitive Lord Advocate of the post-1707 settlement, but our legal institutions need to move on. To be fair, he acknowledges things did change for the Lord Advocate in 1885 when the Secretary for Scotland intruded on the scene, but one can't escape the impression he thinks that was enough innovation to be going on with.

The Office of Lord Advocate is not an interesting relic: it is a functioning Office of State and, like other legal institutions, needs to reflect change and development in government and wider society. Sensible change has been made, some of it accompanied by a bit of spluttering into the claret offstage.

Now we have a Scottish Parliament, the Lord Advocate sits at Cabinet with other Scottish ministers. Quite right too: the Lord Advocate is their principal legal adviser. It would be wrong to pretend that, before devolution, Lords Advocate sat in a legal bubble insulated from ministers of the old Scottish Office. They were, quite properly, part of the business of government - advising, ensuring legislation was drafted and representing ministers in important court cases - all the while taking entirely independent decisions on the prosecution of crime.

The office is evolving, like any successful institution. The last Lord Advocate, for example, rightly withdrew from a role in the appointment of judges. This avoided a number of problems, like explaining to foreign lawyers why it was thought reasonable that the head of the prosecution service also made judicial appointments. More importantly, it avoided the criticism - often voiced - that judges were appointed in a closed, self-serving process.

Choosing people for these jobs is difficult as well as important, but there is no serious suggestion that the new, more open, procedure has resulted in less well-qualified judges than in the past.

Similarly, the appointment of a career prosecutor as Solicitor General caught many by surprise, but as well as being a success, it is a clear signal of the importance and professionalism of the fiscal service.

And it was accompanied by a big programme of change in that service.

Lord McCluskey refers to the McKie case: this is not the place to explore the rights and wrongs of that saga. And it is wrong to link the serious questions it has thrown up to some shift in the constitutional or political position of the Lord Advocate. Have we forgotten cases sometimes went wrong before devolution?

He throws into the balance the legislation on regulating the legal profession. Those policy proposals, like any others, need to be looked at on their merits, but the apocalyptic language used about them is remarkably similar to the reaction when Westminster last put its toe in the water of legal regulation in

the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 - when the Office of Lord Advocate enjoyed its pre-devolution splendour.

Lord McCluskey is right to draw attention to the proposals for change in relation to the judiciary. These are important, and need to be right. For understandable reasons, legislation on that is likely to be delayed. But the proposals can hardly be called hasty, when, as long ago as 2000, the Executive published material on judicial issues and there was a careful consultation and pre-consultation process.

Change in legal issues is not automatically for the worse. The Scottish legal profession is full of able, forward-looking people serving clients and the wider public when dealing professionally with 21st-century legal issues. They need to be able to do that in living and developing legal institutions, not carefully preserved monuments.

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