The Constitution Unit

A New Supreme Court for the United Kingdom

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A NEW SUPREME COURT FOR THE UNITED KINGDOM

I think it is generally true, in the lives of nations as of individual human beings, that many significant events, if not the product of pure chance, are certainly not the product of considered decision or deep design. Such is surely true of the supreme judicial power exercised by the House of Lords. It seems unlikely that any person or body of people consciously decided to devolve the ultimate judicial authority within the country formerly vested in a personal monarch on this chamber of the legislature. But by Tudor or Stuart times it had come to be recognised that this transfer had been effected.

By that time of course there existed a corps of professional judges who, at a lower level, exercised judicial power on behalf and in the name of the crown. It must always have been faintly anomalous to entrust a legislative body, largely made up of members with no judicial experience or legal knowledge, with the power to review the decisions of these judges. The usual justification for such an arrangement is that whatever the theoretical anomaly it works well in practice. But in this instance, at any rate by the eighteenth and nineteenth centuries, the arrangement did not work well at all. One may point to the year 1811 in which the House heard 23 appeals but had a backlog of 266 waiting to be heard. Even this however compared well with the Judicial Committee of the Privy Council which normally sat for judicial business only on 9 feast days but was said in 1828 to have 517 cases awaiting disposal. The Solicitor General was perhaps guilty of understatement when he said of the House of Lords in 1855 that “judicial business was conducted before the Supreme Court of Appeal in a manner which would disgrace the lowest court of justice in the kingdom”.

A situation so dire could not endure indefinitely. But repeated attempts during the nineteenth century to merge the House of Lords and the Privy Council in their judicial capacities were thwarted, and there was—not surprisingly—a strong body of support for a proposal, which was enacted but never brought into force, that the appellate jurisdiction of the House of Lords in relation to England and Wales should be abolished. In the event, the right of appeal was preserved, largely because the loss of its appellate jurisdiction was seen at the time as damaging to the prestige of the House of Lords. But the jurisdiction survived only because its exercise was professionalised pursuant to the Appellate Jurisdiction Act 1876, as the Privy Council had been professionalised five years earlier.

In the years since 1876 the House of Lords in its judicial capacity has by no means escaped criticism. But I know of no final court in any major jurisdiction which has escaped criticism and that directed to the House of Lords has not, I think, by international standards, been particularly severe. Most would, I think, agree that the House has, not least in relatively recent times, included among its members judges of outstanding distinction, erudition and wisdom.

The suggestion, raised by influential and authoritative voices as recently as the 1960s, that there should be no appeal beyond the Court of Appeal is now rarely, if ever, heard. But the

future of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council have again, for the first time since the 1870s, become a topic of continuing debate, addressed by distinguished academic commentators, including Andrew le Sueur and Richard Cornes and others, discussed by professional bodies and commentators and seen by the Constitution Unit as part of the current national agenda of constitutional reform.

impartiality of a judicial tribunal but also of anything which might, on its face, appear to do so. In this country in recent years the separation of the judicial authorities on the one hand from the executive and legislative authorities on the other has been all but total. But the Convention is concerned with risks and appearances as well as actualities.

In *Findlay v United Kingdom* [1997] 24 EHRR 221 a soldier who had pleaded guilty at his court martial successfully challenged the court martial procedure on the ground that the same senior officer had convened the court martial, appointed its members (junior to him but within his chain of command), appointed the prosecuting and defending officer, had had power to dissolve the court martial and had had power to ratify the court martial's decision. The European Court said (paragraph 73):

> "In order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.
>
> As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect".

It has more recently been held (*Morris v UK*, 26 February 2002, Application No 00038784/97) that there were insufficient safeguards to exclude the risk of outside pressure being brought to bear on the two relatively junior officers who had sat on a court martial, although there was nothing to suggest that any outside pressure of any kind had in fact been brought to bear on them. In *Starrs v Ruxton* 2000 JC 208 there was no reflection on the conduct, propriety or integrity (pages 213D, 234C) of the temporary sheriff whose role was successfully challenged, but Lord Reed (at page 250E) said:

> "The effect given to the European Convention by the Scotland Act and the Human Rights Act in particular represents, to my mind, a very important shift in thinking about the constitution. It is fundamental to that shift that human rights are no longer dependent solely on convention, by which I mean values, customs and practices of the constitution which are not legally enforceable. Although the Convention protects rights which reflect democratic values and underpin democratic institutions, the Convention guarantees the protection of those rights through legal processes, rather than political processes. It is for that reason that Article 6 guarantees access to independent courts. It would be inconsistent with the whole approach of the Convention if the independence of those courts rested upon convention rather than law."

So, in *Millar v Dickson* 2002 UKPC 30 the challenge under article 6 succeeded even though the conduct of all the temporary sheriffs involved was accepted as having been impeccable and there was no reason to think that any of the accused had suffered any substantial injustice. It was again the duality of his role, as legislator and judge, which undid the Bailiff of Guernsey: *McGonnell v United Kingdom* (2000) 30 EHRR 289. It was held that the applicant had legitimate grounds for fearing that the Bailiff might have been influenced by his prior

participation in the adoption of a planning policy: that doubt, however slight its justification, was sufficient to vitiate the impartiality of the court (page 308, paragraph 57.)

As with independence, so with impartiality. The public are increasingly sceptical of a judge's ability to lay his or her personal views and opinions to one side when sitting judicially. I myself consider that this scepticism is largely misplaced. But cases can occur, and have occurred, when a statement has been made out of court in terms so outspoken and uncompromising as to throw doubt on the judge's ability to be objective and impartial in court: see *Locabail (UK) Limited v Bayfield Properties Ltd* [2000] QB 451, 496; *Hoekstra v Her Majesty's Advocate* [2000] Scot HC 32. The result has been to fortify the tradition, already strong, of judicial reticence and to strengthen the steadily growing reluctance of the Law Lords to participate in the legislative business of the House. If however, a habit of reticence makes for good judges, it makes for poor legislators and debaters, and serves to weaken the justification for including the Law Lords among the members of the House.

The third reason why the supreme court question has attracted attention is perhaps more tenuous. It relates to the devolution settlement and the new role of the Privy Council as the arbiter of demarcation questions between the central government and the devolved institutions. Until relatively recent times, even to the minority who had heard of it at all, the Judicial Committee of the Privy Council had, I think, come to be seen as a body in its death throes. In some respects its jurisdiction was recognised to be plainly anomalous and overdue for transfer elsewhere, for example in hearing medical disciplinary appeals. Its overseas jurisdiction was seen to be steadily shrinking: New Zealand, the surviving jewel in its crown, had more than once announced its intention to abolish the right of appeal; a number of Caribbean jurisdictions had announced their intention to establish their own court of appeal locally; what remained could scarcely keep the Judicial Committee in business. But its new role in the devolution settlement plainly gives the Judicial Committee an enhanced role and much greater prominence in the United Kingdom context. Thus, for instance, the Advocate General for Scotland, the Lord Advocate or the Attorney General may refer to it a question whether a bill or any provision of a bill would be within the legislative competence of the Scottish Parliament (section 33(1) of the Scotland Act 1998). Even more significantly, the three devolution statutes relating to Scotland, Northern Ireland and Wales all provide (section 103 of the Scotland Act, section 82 of the Northern Ireland Act and paragraph 32 of schedule 8 to the Government of Wales Act) that any decision of the Privy Council in proceedings under the relevant Acts shall be binding in all legal proceedings (other than proceedings before the Privy Council) involving devolution issues, which may concern the compatibility of a governmental act with the European Convention, and so involve a ruling on human rights, as several devolution issues have already done. While the volume of business generated so far has been relatively modest, this may or may not continue to be so. It is not inconceivable that the number of challenges will increase as the devolved institutions progress from infancy to boundary-testing adolescence. In any event, this new role has inevitably and rightly prompted the question whether it would not make sense in

effect to amalgamate the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council into a single supreme court of the United Kingdom.

Before reviewing the merits of that and other possible models for change, I would like to touch on four matters. First, I recall a cartoon dating from the early 1830s which showed King William IV looking at a placard which bore the words "Reform Bill" and asking "Does that mean me?" It is not immediately flattering to be told that reform is needed either of oneself or of an institution which one serves. So talk of "reforming" the Appellate or Judicial Committee naturally arouses some apprehension among those who sit on them. A call for reform is normally, after all, a response to perceived failure; the police must be reformed because the detection rate is said to be too low and the incidence of sick leave too high; the civil service must be reformed to improve the delivery of government policy; the NHS must be reformed to give quicker, better, more cost-effective treatment; and so on. While of course recognising the undoubted imperfections of our highest courts and laying no claim (personally or collectively) to any infallibility beyond that conferred by finality, I do not myself understand those who call for reform of these courts—or for change, which may be a more neutral term—to be inspired to any great extent by a sense that they are falling down on their duty or failing to fulfil the function they exist to serve.

That leads on to my second point: what function does the Appellate Committee exist to serve in the United Kingdom? This question could be answered at some length, but I will answer it very summarily. The function of the Appellate Committee is, first, to act as the ultimate legal guardian of the constitution; subject to the role of the Judicial Committee in devolution matters; secondly, it is to act (subject to certain qualifications and exceptions) as the ultimate authority on the interpretation and application of the law in these islands. Given the other matters I wish to touch on, I must resist the temptation to elaborate.

Thirdly, I welcome the research which has been done, and is being done, into the structures and working practices of supreme and constitutional courts in other countries. It would be presumptuous and stupid to assume that we have nothing to learn from the experience of others. But it would equally be naïve to suppose that an institution which has developed organically in one country—drawing strength from the tradition, culture and history of that country—can be transplanted to another without a high risk of rejection. Whether one looks at common law countries superficially closest to the United Kingdom—Australia, Canada, New Zealand and the United States—or to our closest European neighbours—France, Germany, Spain—immediate differences spring to mind. We should be willing to learn, but should place no order for carbon paper.

Fourthly, I should acknowledge that many distinguished and knowledgeable people consider that no persuasive case has been made out for any structural change. They include a number of my colleagues, and a number of our predecessors. They include the present government, which has been publicly dismissive of the arguments for change. They include commentators with experience of other systems abroad. There are those who feel, quite

strongly, that it is a positive advantage for judges at the highest level to have some exposure to the process of legislation and the conduct of government, an experience in much shorter

Scottish criminal appeals. So it would seem clear that, whatever form a restructured supreme court may take, there will for the time being continue to be two tribunals, one of them exercising a slightly lop-sided jurisdiction.

In many countries one may find successful and respected constitutional courts, and examples readily spring to mind of courts which perform the functions of a constitutional court although otherwise named. It is therefore right that this option should be considered. Advocates of this model would see virtue in a specialised court which would recruit expert judges and develop a knowledge of the subject more profound than the generality of senior judges could aspire to. I do not myself warm to this suggestion. It would seem to me hard, in the absence of a written constitution, to distinguish clearly between an issue which is constitutional and one which is not, and we could revive the public/private formalism which has disfigured the administration of judicial review. If, as in this country, a constitution is not entrenched, the case for entrusting its final interpretation exclusively to a single tribunal is in my view much weakened. If the existing cadre of supreme court judges is felt to lack constitutional knowledge and expertise—which would perhaps be surprising given their experience in the Privy Council—it can be strengthened. It is, however, salutary, in my opinion, for specialists to be called on to justify their views to sceptical colleagues who may lack their expertise but can bring a more general intelligence to bear on the point at issue and who may be less in thrall than the experts to received opinion and current orthodoxy. To establish a constitutional court would inevitably, I think, be to downgrade the supreme court or courts entrusted with the power of ultimate decision on all non-constitutional questions, and that would in my opinion be a loss. In our own constitutional context I see no advantages in this proposal which would begin to compensate for the disadvantages.

I do not warm either to the proposal that our supreme court be reconstituted on the Luxembourg model, to give binding opinions on issues referred to it by lower courts. That model, as it seems to me, works very well in the European Union: uniformity of interpretation is ensured between one member state and another—an essential condition of an effective union—and the independence and sensitivities of national courts are respected. But the model has little to offer in a domestic context. Appellate courts are usually and rightly restive if asked to decide questions of law without reference to detailed findings of

the Judicial Committee continuing alongside (perhaps with an effectively unified administration) so long as the demand for its separate services continues.

To many, mention of a supreme court conjures up visions of the world's best-known

This form of words highlights three features of the current test, all of them important. First, the function of the House is to resolve vexed questions of law. Where the law is clear the House has ordinarily no role to play. It is not its function to correct misapplications of settled law. That is one function (among others) of the Court of Appeal, which should be relied on to discharge it. Second, the point of law should ordinarily be one of importance to the wider public and not simply to the immediate parties. Third, the case should provide a suitable vehicle for deciding the point of law in question. A case may be thought not to do so, whether because of findings of fact made in the case, or because it may be decided on other

(3) Should all the law lords (by which I mean the 12 Lords of Appeal in Ordinary) sit together to hear every case? This is of course the practice in many, perhaps most, supreme courts, as in the United States. It contrasts with our own practice of hearing appeals before committees of 5, and on relatively rare occasions 7. Those who favour the whole court approach rely on an essentially very simple argument. They point out that judges are individual human beings, not automata or slot-machines. However true they may be to their judicial oaths, they inevitably bring their own individual philosophies, thought processes and casts of mind to the judicial bench. Thus if a case is heard by a sub-group of judges, the outcome may depend on the membership of the sub-group. The only way of ensuring that the ultimate decision represents the opinion of the court is to ensure that all members of the court are party to it.

The rate of dissent in the House of Lords is in fact very low, much lower than in the US Supreme Court or the High Court of Australia. The great majority of decisions are unanimous. So they are in the Privy Council, where the right to dissent is now recognised but not very often exercised. But cases do arise, however few in number, in which the presence of X or the absence of Y could affect the outcome of a case decided on a bare majority. This possibility could indeed be excluded if all the judges, including X and Y, heard every case.

It would in some ways be attractive to adopt this practice. But it would be subject to any one or more of a number of drawbacks. The cadre of 12 appointed Lords of Appeal in Ordinary (a cohort usually reduced to 11 and often to 10 through absences in Londonderry or Hong Kong or elsewhere) currently provides the nucleus of one or two appellate committees in the House and one in the Privy Council. If all the law lords were to hear every case, the most immediate and obvious result would be a savage reduction in the number of cases heard, probably by well over half. It would be possible to mitigate this result to some extent by resorting to one or other or both of two expedients much relied on elsewhere: drastic reduction of oral hearing times; and heavy reliance on legal assistants, not only as researchers, collators and note makers but also as the authors of judgments. Now I would accept that in a number of cases the time allowed for oral argument, already reduced as compared with 30 or 40 years ago, could be reduced further without severe loss, and the introduction of legal assistants (both in the Court of Appeal and the House of Lords) has proved so obviously successful that in future we are likely to seek the help of more of them. It would, however, be a source of profound regret to me, and I feel sure a large majority of my colleagues, if we were constrained to restrict oral argument to 30 minutes or so a side and if we reached the point where the written judgment in the case was wholly or substantially the work of a law clerk or legal assistant. However well these practices work in other legal systems—and I cast no aspersion on them—I would wish to cling to the tradition of full, but lean, oral argument (building on written arguments already supplied) and to the tradition that the eventual judgment, however poor a thing, is the judge's own.

There is in my opinion a further potential drawback to the whole court approach. If all the members of a court decide all the cases, the opportunity arises for the appointing authority to seek quite deliberately to influence the course of the court's decision-making in one direction or another when filling vacancies in the court. Examples readily spring to mind of jurisdictions in which this is avowedly done. Here, for the last half century at least, the practice has been to make appointments on the basis of an appointee's perceived merit, record and experience, without regard to his or her position on any political, social or other spectrum. The question how a potential appointee might be likely to decide any major legal issue of the day is not considered. For us, in our situation, this seems to me a source of strength.

I would accept, as has been suggested, that the House should perhaps be more ready than it is to sit in enlarged committees where the case for whatever reason warrants it. But I think on balance that any advantage of an invariable practice of hearing all cases before all the law lords (even if the overall number were reduced, as it would have to be) would be heavily outweighed by the disadvantages. That conclusion leads on to my fourth and last question.

(4) How are the law lords selected to sit on particular appeals? I think it important that the procedure be clearly understood. Forthcoming appeals are allotted dates, taking account of counsel's time estimates, by the Judicial Office of the House of Lords and the Registrar of the Judicial Committee. Officials then prepare a draft programme assigning law lords to cases. This draft programme is given to the two most senior law lords with enough material to enable them to understand the nature of the cases listed. A meeting is then held attended by these two law lords, the head of the Judicial Office and the Registrar (but no one else) to review the draft programme. The object of this meeting is to match horses to courses, that is, to try and ensure that so far as possible every committee includes members with specialised expertise and experience in the field to which the appeal relates, in addition of course to members with more general experience. There are a number of other matters which affect the outcome: the desirability of including Scottish and Northern Irish law lords in committees hearing appeals from those jurisdictions respectively; unavailability; any conflict to which any law lord may be subject; the desirability of achieving some balance, for individual law lords, between sittings in the House and in the Privy Council; the work loads of individual law lords; and so on. The likely outcome of any appeal, or the possible effect of it, is not considered. Neither in its draft nor in its revised form is the programme the subject of consultation with or approval by anyone I have not mentioned. Inevitably, the programme, even in its final form, may have to be changed, sometimes at short notice, for a variety of reasons of which illness is the most obvious. The constitution of forthcoming committees is not a secret: any litigant or practitioner wishing to know the constitution of a committee due to hear a particular appeal can, on telephoning the relevant office, receive the best information then available.

I am very conscious that I have failed to touch on a number of interesting and important questions discussed in the literature and other addresses on this topic. But I have tried to

indicate why, in my opinion, change is desirable and to describe the course which change should take. Our object is plain enough: to ensure that our supreme court is so structured and equipped as best to fulfil its functions and to command the confidence of the country in the changed world in which we live. The Constitution Unit has performed an invaluable service by stimulating debate on the form which change should take. But inertia, I suggest, is not an option.

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