

Reforming the Lords: the Role of the Law Lords

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Executive Summary

Law Lords in Parliament

- Up to twelve Lords of Appeal in Ordinary (Law Lords) are appointed by the Queen on the recommendation of the Prime Minister.
- The primary task of the Law Lords is to sit as judges on the Appellate Committee of the House of Lords and on the Judicial Committee of the Privy Council.
- The Law Lords do however also have the same rights as other Life Peers, including the right to speak and vote in the House of Lords in legislative matters.
- There is a convention that Law Lords will not speak or vote in controversial matters. There is evidence that this convention is not always observed.
- The Law Lords also carry out non-controversial legislative work, chairing a number of Parliamentary Committees, such as subcommittee E of the European Committee.
- The role of the Law Lords will come under increasing scrutiny as they begin to deal with potentially controversial Human Rights Act and devolution cases.
- No other major democracy allows its highest judges to also sit in its legislature. The unique position of the Law Lords in this respect may soon become untenable, and, with the House of Lords undergoing reform generally, it may be time to consider removing the Law Lords from the House.

The Lord Chancellor as a Judge

- The position of Lord Chancellor is also unique to the UK legal system. He is the head of the judiciary in England and Wales, may sit as the presiding judge in the Appellate Committee of the House of Lords or the Judicial Committee of the Privy Council, chairs the House of Lords and is a senior member of the Cabinet.
- His position has been defended as a bulwark between the executive and the judiciary: he is said to be a conduit of communication between the three branches of government.
- For reasons similar to those applying to the Law Lords generally, it will be increasingly difficult for Lord Chancellor's to continue to combine their three roles of minister, legislator and judge.

Separating the Appellate Committee from the House of Lords

- If the Law Lord's right to speak and vote in the House of Lords as legislators were removed then the issue of separating the court itself would for the most part be answered.
- The Appellate Committee could be set up as a new top court for the UK.
- If the Privy Council, with its jurisdiction in devolution matters, were not combined with the Appellate Committee, it could serve as a new constitutional court, along the lines found in countries such as France, Germany or Spain.
- A model more in keeping with the common law world would be for the Appellate and Judicial Committees to be combined into a single, omnipotent court for all matters from all UK courts (with the possible exception of Scottish criminal appeals).

Introduction

Background

Up to twelve Lords of Appeal in Ordinary are appointed by the Queen, on the recommendation of the Prime Minister. By convention two are Scots and in practice one is usually Northern Irish. They are appointed primarily to act as judges in the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council¹, but may also, and do, take part in the legislative work of the House of Lords. As judges they hear appeals from all the United Kingdom (with the exception of Scottish criminal appeals), usually in two panels of five members. Five of them are also frequently used to form the Judicial Committee of the Privy Council, a role which will be of increasing importance as that body faces its new tasks in relation to devolution matters.

With the old exception of Scottish criminal appeals, and the new exception of devolution disputes decided by the Judicial Committee of the Privy Council, the Lords of Appeal in Ordinary, sitting as the Appellate Committee, form the final court of appeal for the United Kingdom. They are the equivalent of the justices of the supreme courts in the United States and Canada, and the justices of the High Court of Australia. Sitting as members of the Judicial Committee of the Privy Council, especially when hearing prelegislative challenges to Scottish, Welsh or Northern Irish legislative matters, their role will be akin to that of the judges of the constitutional courts in Germany, Spain or South Africa.

Present and past Lord Chancellors may sit on either the Appellate Committee or the Judicial Committee of the Privy Council. When the Lord Chancellor does sit he is the presiding judge, otherwise the Senior Law Lord presides. No other significant democracy allows a senior member of the executive to also sit as its most senior judge. The Lord Chancellor used to be responsible for choosing the panel to sit in each case; in practice this task is now delegated to the Senior Law Lord. Lay peers are not barred by statute from sitting on appeals, but by convention do not do so.

The Law Lords enjoy the same rights as any other life peer, and accordingly they have a right to take part in all the business of the House of Lords. Their legislative work includes introducing law reform bills (for example on behalf of the Law Commission), speaking on legal matters, chairing subcommittee E of the House of Lords European Committee (dealing with law and institutions) and the Consolidation Bills Joint Committee.² In this role they are widely regarded as a

¹ Constitutionally two quite separate bodies, the Appellate Committee of the House of Lords being a committee of the House of Lords and the Judicial Committee of the Privy Council being a committee of the Privy Council. As a matter of fact though, the judges who make up each committee (which are, although their names do not suggest it, courts) are almost always the Law Lords. The Judicial Committee of the Privy Council does have a wider potential membership, but further consideration of it is outside the scope of this briefing.

² This is a joint committee of the Houses of Commons and Lords. As its name suggests it is responsible for bills which consolidate the law, dealing bills prepared by the Law Commission which

valuable and non-partisan source of expert commentary on bills. Their acknowledged value needs to be set off against the tension inevitably created by having the country's most senior judges sitting in the legislature, a novelty not found in any other western democracy.

The recent series of decisions in the *Pinochet* matter is indicative of the sort of increased publicity the Appellate Committee can expect as it deals with cases under the Human Rights Act 1998 and devolution disputes under the statutes establishing the Parliament in Scotland and the Assemblies in Wales and Northern Ireland. The increased publicity will arise because under those Acts the courts will have the power to declare Acts of the devolved legislatures as void (in effect, 'unconstitutional') if the devolved legislatures act outside of the powers granted to them.

In relation to Westminster legislation, while the courts will not be able to declare Acts void, if they find they breach the Human Rights Act they can issue a declaration of incompatibility. Such a declaration will put significant pressure on the government to amend the Act in question. This significantly enhanced judicial scrutiny of the substance of legislation is likely to turn the spotlight on the courts generally, and the highest courts in particular. As the public takes a greater interest in the judges, the mixed legislative and judicial roles of the Law Lords will attract more notice than has previously been the case.

Scope of this Briefing

This Briefing presents a summary of arguments on the following issues:

1. views for and against the Law Lords sitting in the House of Lords as legislators,
2. the position of the Lord Chancellor who, in addition to being a senior cabinet member, and presiding in the House of Lords, may also sit as the presiding member of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council, and
3. views for and against establishing a separate supreme or constitutional court. This question first requires a consideration of the difference between a supreme court of general jurisdiction and a constitutional court of specialist jurisdiction, before passing on to whether either such a supreme or constitutional court ought to be more separate from the House of Lords.

A final section notes other issues which necessarily arise if the positions of the Law Lords or the Lord Chancellor are altered, including the matter of appointment and the role some upper houses have in relation to supreme or constitutional courts.

In providing an assessment of these matters we have reviewed recent debates in the House of Lords on the Appellate Committee, the Judicial Committee of the Privy Council, the Lord Chancellor and the issue of separation of powers in the United

might, for example bring together related provisions from several Acts into one Act. The bills it deals with do not amend the law in any substantive way, and part of its role is to ensure this is the case. It hears evidence from the drafters of bills and officials. The highly legal and technical nature of its work means that the Law Lord who chairs it does a great deal of the Committee's work.

Kingdom constitution. Keeping the briefing to a reasonable length has necessarily meant that the issues are covered succinctly. This should not be interpreted to mean there is not a great deal more that could be said, particularly in relation to constitutional reform and the United Kingdom's higher courts.

Lastly, in presenting arguments for and against in summary form it is inevitable that some of the propositions for either side suggest their own refutation, and that in some cases arguments used on one side may be turned around for use on the other. In writing this briefing we have followed the Commission's instructions to present the arguments, and have not proceeded to comment on them at length, or to suggest our own conclusions.

Should the Law Lords Sit in the House of Lords as Legislators?

Factors in Favour or Neutral in Relation to the Law Lords as Legislators

A non-controversial legal resource

By convention the Law Lords, when speaking in the House of Lords, speak only on non-controversial matters, either introducing law reform bills, or raising technical legal issues in relation to general bills. While there have been instances of Law Lords speaking on controversial matters these might be said not to outweigh the benefit of having their contributions in the greater number of matters where their involvement is not controversial. Recently the Law Lords made useful contributions during passage of the devolution Acts, and the Human Rights Act, all statutes of constitutional significance where the opinions of eminent jurists have self evident merit.

One of the Law Lords usually chairs subcommittee E of the House of Lords European Committee (concerned with law and institutions) and the Consolidation Bills Joint Committee. In relation to Europe they also maintain contact with the European Court of Justice, providing Westminster with another avenue of communication to European institutions. So long as the Law Lords remain within the area of technicality, and away from broader controversial topics, although in theory breaching the principle of separation of powers, they in practice cause no harm.

Gives the Senior Judiciary an Insight into Parliamentary Affairs

Both the physical fact of the Appellate Committee being housed in the Palace of Westminster, and the participation of the Law Lords in the legislative business of the House of Lords gives the senior judges the opportunity to maintain direct contact with legislative policy making. This contact may enhance the Law Lords' understanding of the rationales behind the statutes they may later deal with in their judicial role.

Overlap Largely Symbolic

The position of the Law Lords in the House of Lords may be said to be largely symbolic. The conventions which govern their activities as judges and legislators have resulted in a relatively clear distinction between their two roles, with their judicial role predominating. While there have been some tensions at the margins, and academic controversy about the apparent breach of the separation of powers doctrine, in reality the current arrangements work well. They provide the House with a valuable resource, and, historically at least, have not damaged the Law Lords' standing and integrity as the United Kingdom's senior judges.

Factors Against the Law Lords as Legislators

Breach of the Principle of Separation of Powers

A rigid application of the doctrine of separation of powers in relation to the Law Lords would require not only the conceptual separation of their legislative and judicial roles but the actual separation. The usual position is for there to be a clear line between the judiciary, and the legislature and the executive. This is seen as necessary to maintain the integrity and independence of the judiciary. While the Appellate Committee of the House of Lords has dealt with controversial issues before, the likelihood of a significant increase in interest in the Appellate Committee as it makes determinations under the Human Rights Act 1998 and in relation to devolution disputes, may mean it is more and more difficult to allow the Law Lords to sit in the House. A clear division between the Law Lords and Parliament may become necessary to ensure the Law Lords not only are, but also clearly appear to be, an impartial and independent branch of government.

Danger of Controversy

There have been incidences of Law Lords speaking in the House of Lords in controversial matters. One example was the 1996 amendment moved by Lord Hoffman to the Bill of Rights 1688 to enable a former Conservative minister to pursue a defamation action against *The Guardian*. That is not the only incident. The current Lord Chancellor has commented that:

there was a period under the previous Administration when the public would have been forgiven for thinking that on occasions the Executive and the judiciary had ceased to be on speaking terms. In the latter two years or so of the previous Administration there was unprecedented antagonism between the judiciary and the Government over judicial review of ministerial decisions.³

One of the ministerial decisions in question was criticised by some members of the Law Lords in the House, actions which later precluded them from sitting on the panel which held the ministerial decision in question to be illegal. The matter highlighted the difficulties Law Lords may face when they engage in controversial matters as legislators. Recalling the case in question Lord Lester noted in a recent debate:

³ The Lord Chancellor, Lord Irvine of Lairg, House of Lords, 17 February 1999, column 734.

Several Law Lords spoke opposing Home Secretary Michael Howard's...controversial use of the prerogative to introduce a new scheme to compensate members of violent crime, instead of bringing into force a statutory scheme, thereby disqualifying themselves from being members of the Appellate Committee which subsequently decided that the Home Secretary had acted unlawfully.⁴

And even when providing the Lords with expert legal knowledge Law Lords have been involved in politically significant amendments to government bills, as Lord Goodhart notes:

Going back some two years, the noble and learned Lord, Lord Browne-Wilkinson, played a leading role in removing from the Police Bill in early 1997 the quite improper power for chief constables to authorise their own forces to carry out bugging and other forms of surveillance.⁵

Of course there will be people on one side or the other of politics who welcome such interventions because from their point of view they protect their concept of constitutionality in the United Kingdom. However this is itself an argument for not having the Law Lords in Parliament. It is potentially corrosive to their reputation as non party-political to be seen as either for against the government, whether the matter is avoiding improperly authorised police surveillance or any other less emotive topic. Increasingly, as cases come to the Law Lords invoking the Human Rights Act 1998, they will have to deal judicially with such civil and political rights issues. That in itself may cause public comment, but at least then the judges will be acting within the known environs of the Appellate Committee, as judges, and not in the chamber as judge legislators.

Danger of Expressing a View Which Precludes Sitting

Expressing a view on the meaning of a statute may later preclude a Law Lord from sitting in a case in which that statute and provision are at issue. As in the case mentioned above concerning the actions of the then Home Secretary, Michael Howard. In one new area where the Law Lords' opinions might be particularly useful, the compliance or otherwise of bills with the Human Rights Act 1998, it may be more important than ever that they not speak, in view of the possibility that Acts may soon be impugned in court for breach of the Human Rights Act.

Similar issues may arise in relation to devolution disputes. It will be nearly impossible to predict the range of possible challenges to Acts of the new devolved legislatures. Such challenges may allege the devolved legislature has acted outside the powers delegated to it in its Act (e.g. the Scotland Act 1998 in relation to Scotland). Also, because Westminster remains supreme in all areas, regardless of the powers delegated to the new assemblies, if a Westminster Act covers an area which

⁴ Lord Lester, House of Lords, 17 February 1999 column 714.

⁵ Lord Goodhart, House of Lords, 17 February 1999, column 730.

has been devolved to one of the new legislatures, inconsistent Acts of the devolved legislatures will be open to challenge in the courts.

The Law Lords Position in Parliament May Adversely Affect their Ability to Hear Devolution Matters

Although the Judicial Committee of the Privy Council is not itself a part of the House of Lords, two aspects of using it as the final court of appeal in devolution matters may still make it inappropriate for the Law Lords to continue to sit in Parliament. First, the Judicial Committee of the Privy Council is almost always made up of the Lords of Appeal, and second, the devolution Acts do not make the Privy Council the exclusive supreme arbiter in devolution disputes. Devolution disputes may arise in litigation alongside other issues. Where a case with a mixture of issues comes to the Appellate Committee of the House of Lords, the Committee may, according to the three devolution Acts, decide to deal with the devolution matter itself, and not refer it to the Privy Council. As devolution disputes will frequently deal with a controversy about the extent of power devolved from Westminster to the new Parliament, the Law Lords, as members of the delegating Parliament, may not be perceived as independent.

Article 6 of the European Convention on Human Rights

Article 6 of the European Convention on Human Rights provides for the right to determination of one's rights by a fair and impartial tribunal. A recent successful challenge to the Bailiff of Guernsey in the European Commission of Human Rights may have implications for the both the Law Lords generally and perhaps even more so for the Lord Chancellor. The Bailiff of Guernsey presides over the Royal Courts of Guernsey as well as the legislature, and acts as head of the island's administration. In *McGonnell v United Kingdom* the applicant successfully argued, under Article 6 of the European Convention on Human Rights, that his right to a determination of his civil rights by a fair and public hearing, before an independent and impartial tribunal, was breached by the combination of judicial, executive and legislative roles in the Bailiff.⁶

A Compromise Position

A compromise position might be to provide that currently serving Law Lords do not take part in legislative business in the House of Lords, but, once retired from active judicial service, they could then take part. Such a compromise would still provide the House of Lords with judicial expertise in legislative matters, but avoid the possibility of Law Lords who are still sitting as judges becoming involved in political controversy. Another possibility would be to develop and formalise the pre-legislative scrutiny role of the Judicial Committee of the Privy Council, so that in addition to hearing references concerning legislation from the devolved legislatures,

⁶ *McGonnell v United Kingdom* European Commission of Human Rights, report of the Commission, adopted 20 October 1998. The case was decided by a vote of 25 to 5. Opinions of the Commission are not binding and the case has now gone to the European Court of Human Rights, the ruling of which is binding on the UK in international law.

it also received references concerning Westminster legislation.⁷ Pre-legislative scrutiny could, generally speaking, take the form of particular aspects of bills being referred to the Judicial Committee for its opinion of for example, whether a provision contravened the Human Rights Act 1998. Such a compromise would not of course provide the House with the same immediate and convenient access it currently enjoys when the Law Lords sit and take part in debate.

Should the Lord Chancellor Continue to Sit as a Member of the Appellate Committee?

This section of the briefing deals with the Lord Chancellor's judicial role. The question addressed here is whether, assuming the Lord Chancellor continues to be a member of cabinet, and presides in the House of Lords, he should also sit in the Appellate Committee.

Factors For

A Conduit for Communication

The Lord Chancellor provides a key link between the executive, legislature and the judiciary. His position in cabinet, as well as the Appellate and Judicial committees means he may represent the views of the executive to the senior judiciary, and *vice versa*. Associated with this argument is the concept that the Lord Chancellor has a key role to play as a *defender* of the separation of power between the executive and judiciary. The current Lord Chancellor summarises this view of his office:

It is the nature of great offices, and the values which historically inhere in them, that they provide at least as sure a guarantee of our traditional rights and liberties as any transient constitutional text.⁸

The office of Lord Chancellor has in this sense been viewed as a key resource to avoid conflict between the executive and judiciary, promoting 'mutual understanding in order to avoid collisions at a major intersection in the separation of the powers.'⁹ The Lord Chancellor went on in his address in the Lords on 17 February 1999 to maintain that one of his highest duties was to be a buffer between the executive and the judiciary in order to preserve judicial independence.

Acting as a Judge is Integral to the Role of Lord Chancellor

Sitting as a judge may be said to be integral to the position of the Lord Chancellor. Sitting gives Lord Chancellors a direct window on the development of the law at the highest level, and as they are by convention already senior barristers, or Law Lords (the previous Lord Chancellor, Lord Mackay, was a Lord of Appeal in Ordinary

⁷ The Judicial Committee in fact has a wide potential advisory role under section 4 of the Judicial Committee Act 1833. The last reference under those provisions was in 1957 concerning the Bill of Rights and freedom of speech in Parliament. Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* 8 ed (1988), page 165.

⁸ The Lord Chancellor, Lord Irvine of Lairg, 17 February 1999, column 733.

⁹ The Lord Chancellor, Lord Irvine of Lairg, 17 February 1999, column 734.

before his appointment) they make their own contribution by delivering speeches in cases. Sitting as a judge also allows the Lord Chancellor to gauge at first hand the qualities of senior barristers who may come up for appointment to the bench themselves.

The Conventions Governing When the Lord Chancellor Sits Have Worked

The conventions as to when a Lord Chancellor may and may not sit have for the most part, worked.¹⁰ The current Lord Chancellor holds the view that there is no category of case where a rule could be laid down that the Lord Chancellor ought not to sit. The closest he has gone is to say he would not sit in 'any appeal where the government might reasonably appear to have a stake in a particular outcome'.¹¹ However, a recent case where the Lord Chancellor was to sit indicates this approach may not avoid controversy. In the case, concerning deaths in custody, Lord Irvine was listed to sit but subsequently withdrew. One of the lawyers involved had written to him prior to the hearing, objecting to the him sitting. The Lord Chancellor in withdrawing did not indicate that the letter in question prompted his action. Further, it may never be appropriate for the Lord Chancellor to sit in a case involving a dispute over the extent of powers devolved from Westminster to Scotland, Wales and Northern Ireland, because the United Kingdom government will rarely be neutral about the outcome.¹²

Factors Against

Breach of Separation of Powers

The fact of participation by a senior member of the cabinet in the work of the Appellate Committee may become a matter of greater adverse comment as more attention is paid to the courts as a result of devolution and the Human Rights Act. At a time when the appearance and reality of the impartiality of the courts is of increasing importance it may no longer be justifiable to include the Lord Chancellor in the Appellate and Judicial Committees. The *Bailiff of Guernsey Case* noted above has particular relevance to the Lord Chancellor. The factors behind the dissenting views in the European Commission of Human Rights are of further concern for the Lord Chancellor. One of the dissenters took the view that in the context of so small a legal system as Guernsey's it was not appropriate to require the degree of separation of powers which might be appropriate in a larger system. Such reasoning could not apply to the United Kingdom.

¹⁰ This is not to say there have not been times when Lord Chancellors have been trenchantly criticised for sitting. Lord Mackay's participation in *Pepper v Hart* was strongly criticised. What might be termed occasional criticisms may not be significant enough to warrant barring the Lord Chancellor from sitting. Or they may indicate that Lord Chancellors should simply choose more carefully the cases they sit on.

¹¹ The Lord Chancellor, Lord Irvine of Lairg, 17 February 1999, column 736.

¹² Dawn Oliver, 'The Lord Chancellor, the Judicial Committee of the Privy Council and devolution', [1999] *Public Law* 1, 4.

Increasing Executive Role

Concerns about the Lord Chancellor sitting do not come solely from the type of cases he faces in his judicial role. The increasing importance of the Lord Chancellor as a member of the executive, and the role of his department, now mean he is far more associated with government. In the last ten years this has resulted in clashes with the judiciary and legal profession over expenditure issues in the legal system, reform of the legal profession and legal aid. The current Lord Chancellor has also been a key minister in the government's constitutional reform programme.¹³ These executive responsibilities by their nature change the character of the Lord Chancellor's office as the Lord Chancellor becomes more intertwined in the business of government. The Lord Chancellor is no longer a detached member of the government. That is particularly evident with the present Lord Chancellor, but it is a trend which has been apparent for some time.

Comments From Other Law Lords

The Lord Chancellor's position may become increasingly uncomfortable if not only academics, but more Law Lords themselves take the view that he ought not to sit as a judge. One Law Lord, Lord Steyn, writing in the UK's main public law periodical in 1997 said this of Lord Chancellors:

On balance it seems to me that little of value would be lost if the Lord Chancellor ceased to be head of the judiciary in England.... A Lord Chancellor gives the appearance to the public of speaking as the head of the judiciary with the neutrality and impartiality so involved. The truth is quite different.... [The] Lord Chancellor is always a spokesman for the government in furtherance of its party political agenda.¹⁴

Should There be a Greater Separation Between the Appellate Committee and the House of Lords? What Sort of Court Should the Appellate Committee be?

Constitutional v Supreme Courts

The term 'supreme court' usually means the highest court in a common law judicial system. They may be called a number of things: e.g., in Canada and the United States they are called Supreme Courts; in the UK, the Appellate Committee; in Australia, the High Court of Australia. The dominant tradition in common law systems is to have a single supreme court at the apex of the judicial system. Their jurisdiction covers all areas of law. They are the final court of appeal in civil, criminal and constitutional cases alike.

¹³ Diana Woodhouse, 'The Office of Lord Chancellor', [1998] *Public Law* 617, 624.

¹⁴ Lord Steyn, 'The Weakest and Least Dangerous Department of Government' [1997] *Public Law* 84, 90-91.

The rules governing how cases reach them vary. In some limited circumstances cases may start in them (in their 'original jurisdiction'). However the bulk of their cases come from courts and other judicial bodies below them in the judicial hierarchy. The degree of control they have over what cases they hear varies according to the rules of each jurisdiction. Appointment to them may be an overtly political exercise, as in the United States, and increasingly Australia. Or, appointment may still be a non-publicly controversial exercise, as in the United Kingdom (though this will change due to devolution and incorporation of the European Convention on Human Rights) or Canada.

In civil law systems, unlike those of the common law, the tradition is for courts of specialist jurisdiction. This includes the courts at the apex of the legal system. Criminal matters are dealt with by a different court from those which deal with administrative and constitutional matters. Examples of specialist constitutional courts are found in Germany, France, and Spain. The only major example in the common law world is the new South African Constitutional Court. That court was set up because of unique political circumstances and the lack of credibility of the Supreme Court which had presided over the legal system of the apartheid era.

Recent high profile cases (e.g., *ex parte EOC*¹⁵) have prompted comments that the Appellate Committee is becoming a constitutional court. These comments result from a mistaken understanding of the nature of the Appellate Committee's role. The United Kingdom has had, in the Appellate Committee, a court which is both supreme, in the sense that it is the final court of appeal for the UK¹⁶, and which is 'constitutional', in the sense that it has concerned itself with issues of constitutional importance. Its constitutional role is mixed in with its responsibilities in other areas of the law but will gain more prominence as the Committee deals with devolution and human rights matters. The key question for the future is whether the Appellate and Judicial Committees are organised appropriately for their increasing constitutional role.

There is one aspect of the current constitutional reform programme which does suggest the possibility of a United Kingdom constitutional court in the civil law or South African sense. This is the use of the Judicial Committee of the Privy Council, which, where devolution disputes are referred to it¹⁷ is the final court of appeal. The mixture of a pre-legislative scrutiny role and specialist 'constitutional' review role in contentious matters are hallmarks of a constitutional court. This is largely foreign to the English legal system. If the Appellate Committee were separated from the House of Lords it could be combined with the Judicial Committee to form a supreme

¹⁵ *Ex parte EOC* [1994] 2 *Weekly Law Reports* 409.

¹⁶ With the exception already noted of Scottish criminal appeals.

¹⁷ Broadly, devolution matters may come to the Judicial Committee either by a bill being referred to it from a devolved legislature prior to enactment, or when a devolution issue arises in the course of litigation and is referred by the judge to the Judicial Committee, or, when the Appellate Committee itself decides to refer a devolution matter arising before it to the Judicial Committee. In the last instance though the Appellate Committee may decide to determine the devolution matter itself. Judgments of the Privy Council on devolution matters are binding on all UK courts, including the Appellate Committee.

court of the sort found in other common law jurisdictions. Or the Appellate Committee could be separated from the House of Lords on its own and formed into a supreme court of general jurisdiction, with the Judicial Committee continuing to develop a specialist constitutional role in relation to devolution matters.

For Separation without Combination with the Judicial Committee

If the Law Lords' right to speak and vote in the House of Lords as legislators were removed then the issue of separating the court itself would be for the most part already answered. There would be no advantage in the Appellate Committee remaining physically in the Palace of Westminster: the way would be clear to remove the Appellate Committee from the House of Lords and establish it as a separate institution. This would have the advantage of enhancing in the public eye the independence of the United Kingdom's supreme court at a time when it may come under increased scrutiny. The current arrangements which allow a number of the Law Lords to sit as members of the Judicial Committee of the Privy Council could continue. At least initially it may be preferable to proceed with reform of the Appellate and Judicial Committees in stages, giving the procedures outlined in the devolution Acts in relation to the Privy Council time to settle. Following this course would keep any disruption the reforms may cause to a minimum, possibly an important consideration when the Judicial Committee may very soon be dealing with the first devolution disputes.

For Separation and Combination with the Judicial Committee

As noted in the overview of supreme and constitutional courts above, the concept of a separate constitutional court is more familiar to civil law jurisdictions. By far the dominant model in the common law systems which the United Kingdom has inspired, is to have a single supreme court with jurisdiction over all matters. Given that the membership of the Appellate and Judicial Committees would be virtually the same, and that the Appellate Committee would no longer be part of the Westminster Parliament there would be no objection in theory to all matters being dealt with conclusively by a new supreme court, combining the Appellate and Judicial Committees, possibly including even Scottish criminal appeals.

Unlike in civil law jurisdictions, where constitutional matters are the preserve of the constitutional court, the putative constitutional court here, the Judicial Committee, would not even have exclusive jurisdiction in devolution matters. Although the likelihood of conflict between the Appellate Committee and Judicial Committee is extremely low, it is not inconceivable. Different panels of Law Lords sitting in the two Committees could come to different conclusions on the interpretation of the devolution Acts. The Judicial Committee's decisions bind the Appellate Committee, but only in relation to devolution matters. Things may be less clear where a case turns on more than a devolution issue, perhaps where a matter of European law is involved. It is undesirable that even the possibility of conflict remains. This point gains further force when the role of a supreme court in settling new constitutional provision is taken into account. Supreme courts are a key national unifying institution, a matter of significance in federal or quasi-federal systems, where their judgments may be central to regulating the ongoing relationships between different parts of the federation, or in the case of the United Kingdom, the Union.

Against Separation

The key argument against separation of the Appellate Committee from the House of Lords at this time is that the current arrangements should be given time to work. The United Kingdom has already undergone a significant amount of constitutional reform and innovation. Reform of the House of Lords, and any consequential reform to the Appellate Committee will only add to this state of affairs. Given that we know the Appellate and Judicial Committees work well at present and are respected, it might be better not to put them through the turmoil of reform at a time when they will be dealing with the first cases under the Human Rights Act and the devolution Acts.

Consequential Issues

What this Briefing has Covered

The issues raised in this briefing were:

- the position of the Law Lords as both judges and legislators?
- the Lord Chancellor's judicial role, and
- the Appellate Committee as a committee of the House of Lords, and it might be split from the House and formed into a separate supreme court, either on its own, or in combination with the Judicial Committee of the Privy Council.

These are significant issues in their own right, dealt with here even so by way of introduction only. Contemplating these questions inevitably suggests others, some of which are listed in the following, and final section.

Appointment and Other Issues Arising

In debates on the relationship between the House of Lords and the Appellate Committee there have been suggestions that Parliament have some role in the appointment of judges to the Appellate Committee, even if this only involved judges being interviewed by Parliamentarians after appointment to the court. Upper houses overseas often have a role in the nomination, election, or appointment of members of the body which is entrusted with constitutional review, be it a constitutional court, a supreme court or a tribunal. In France three of the nine members of the Conseil d'Etat are appointed by the Senate, and in Germany half of the members of the Constitutional Court are elected by the upper house. In Spain 4 of the 12 judges from the Constitutional Court are appointed by the Senate. In each case the lower house has the same powers of nomination, election and/or appointment. The role of the upper house in selection of judges for a constitutional court is appropriate where the system of appointment is left to parliament, and the upper house should have at least the equivalent role in the process as the lower house. However, in other countries an independent procedure for judicial appointment, through a separate body such as a Superior Council of Magistracy provides the basis for maintaining full separation of powers and ensuring independence of the judiciary. The upper house, as the lower house, may have a role in the determining the composition of this council.

How the judges are appointed to any reformulated supreme court is just one of the issues which arise when considering reform of the role of the Law Lords and the Appellate Committee. This briefing has touched on two of the consequential issues, whether the Appellate Committee should remain part of the House of Lords and the role upper houses have in appointment of supreme or constitutional courts. Other issues, which are the subject of a wider research project currently being carried out by the Constitution Unit include:

- How many members should there be of the Appellate and Judicial Committees?
- How many judges would sit in each case? Panels selected by the presiding judges? Or all members of the court?
- Who should the presiding judge or judges be? The Senior Law Lord? Or the Lord Chancellor?
- How will adjudicating Human Rights Act and devolution disputes affect the balance between the courts and the legislatures? between the courts and the executive?
- If the Appellate and Judicial Committees are not combined, how will they relate to each other, in particular in their handling of devolution matters?
- Should Scottish criminal appeals be dealt with by the Appellate Committee? Or a new supreme court for the United Kingdom?
- How will the current constitutional reforms, and any future changes to the jurisdiction of the Appellate and Judicial Committees affect the courts below them, in particular the Courts of Appeal in England and Wales, Northern Ireland, and the High Court of Justiciary and the Inner House of the Court of Session in Scotland?
- What administrative reforms are necessary? e.g., law clerks, IT services, library services?
- Where, physically should the courts sit?
- What procedural reforms should be considered? e.g., increased pre-hearing preparation and written argument and limiting time for oral argument?
- How should the UK's highest courts relate to international courts such as the European Court of Justice?
- To what extent will/should UK courts use overseas and international jurisprudence?

Once conclusions are reached on the three issues introduced by this paper, the government will then need to consider which of the issues listed above arise, and how they should be dealt with. It will be important to ensure that while considering reform of one key branch of government, the House of Lords, there is not a consequential adverse affect on another key branch, the United Kingdom's highest court, the Appellate Committee of the House of Lords.