

# **What Do the Top Courts Do?**

by Andrew Le Sueur and Richard Cornes

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# What do the top courts do?

## Executive Summary

Until recently, proposals to reform the United Kingdom's top courts have treated the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council as distinct entities. The combination of recent legislation in the form of the Human Rights and devolution Acts, increasing case load, and the common membership of both courts has prompted the realisation that reform of either court will necessarily have a bearing on the other. This briefing helps to clear the ground by analysing what the top courts actually do. Ten arguments are advanced as justification for having a second-tier appeal.

**1. Better quality adjudication:**

Issues of law become more refined as they progress to the top courts where they are analysed more exhaustively, leading to higher quality judgements.

**2. Determination of important cases:**

The highest courts deal with 'important' cases, both in terms of money at stake, and also in terms of the public interest. This requires the top courts to display expertise across the spectrum of legal issues.

**3. Correction of errors:**

Lack of reflection, judicial inexperience and other factors may cause errors at lower levels of the judicial system which can only be corrected by a further appeal.

**4. Managing precedent:**

The top courts exercise control over what constitutes correct precedent and supervise the application of precedent by lower courts.

**5. A constitutional court:**

Courts at the apex of legal systems are 'democracy's referees.'

**6. A court for the whole of the United Kingdom:**

The UK has three legal systems in England and Wales, Scotland and Northern Ireland. The top courts can ensure common standards

**7. System Management:**

Second appeals may facilitate strategic case management by closing off lines of argument leading to appeal. However, the top courts may not be the best case managers because they lack direct knowledge of the caseload of the courts below.

**8. Innovation:**

It is the task of the top courts to develop new areas of law, and to modify the law where it no longer accords with contemporary circumstances.

**9. Appellate services for overseas jurisdictions:**

The Judicial Committee of the Privy Council continues to provide a second level appeal for those commonwealth countries which cannot afford to provide one themselves, and for those too small to provide a second level appeal.

**10. Professional regulation and ecclesiastical matters:**

The oddest aspect of the top courts' work, and one that is causing an increasing strain on judicial resources.

# What do the top courts do?

Andrew Le Sueur and Richard Cornes\*

## I. Introduction

With renewed energy, suggestions are being made that the very highest courts that sit in the United Kingdom - the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council - need to be reformed. Because of the apparently different problems faced by each court, a sharp distinction has almost invariably been made between these two 'top courts' in political debate and academic study. For the Appellate Committee, the principal concerns are about the appropriateness of the court being part of the legislature, the role of the Lord Chancellor as a judge of the court, the mechanism of appointment to the court, and how the court will cope with the expected increase and new demands of litigation under the Human Rights Act 1998.<sup>1</sup> In relation to the Judicial Committee, the main contentious issue is whether it is still proper for a court sitting in London to hear appeals from independent or self-governing states overseas, especially where local courts have imposed the death penalty.<sup>2</sup>

For several reasons, however, it is no longer possible to separate discussion of the two courts. First, day to day work of the Lords of Appeal in Ordinary (the permanent, salaried judges who hear almost all appeals in both top courts) is now divided equally between both institutions.<sup>3</sup> Because of the common membership of the two courts, anxiety about the growing case load of one court necessarily prompts questions about the Law Lords' capacity to fulfil their roles in the other; and reform of one court will have an impact on the manpower of the other. Secondly, it is now clearly wrong to characterise the Judicial

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<sup>1</sup> For recent studies, see Brice Dickson and Paul Carmichael (eds), *The House of Lords: its Parliamentary and Judicial Roles* (Oxford, 1999) and David Robertson, *Judicial Discretion in the House of Lords* (Oxford, 1998).

<sup>2</sup> See e.g. David Pannick, 'End this nonsense of our hanging judges', *The Times*, 15 June 1999; Sir Louis Blom-Cooper, 'Caribbean appeal court', *The Times*, 21 June 1999 (letter to the editor); Stephen Vasciannie, 'Revisiting the Privy Council', *The Jamaica Gleaner*, 12 July 1999.

<sup>3</sup> The statistic cited by Lord Hope of Craighead, 'Taking the case to London—is it all over?' [1998] J.R. 135 at 144 and Lord Goff of Chieveley, written evidence to the Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm. 4534 (London, 2000). The Lords of Appeal in Ordinary also carry out other judicial or quasi-judicial functions, e.g. chairing public inquiries, sitting in the Hong Kong Court of Final Appeal and acting as Visitor to some universities in England. On the problems such additional activities create, see David Bamber, 'Justice delayed by a shortage of Law Lords', *Sunday Telegraph*, 9 January 2000.

Committee as principally an 'overseas' court: its jurisdiction has recently been expanded to 'devolution issues', which include points relating to the Human Rights Act 1998 and European Community law;<sup>4</sup> and in some fields (notably appeals from certain professional bodies), it *is* the final court of appeal in the United Kingdom. Thirdly, any reform of top level courts needs to consider combining the functions of the Appellate and Judicial committees into a single court - or the creation of a separate constitutional court which would take on some of the functions of both existing top courts.

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<sup>4</sup> Scotland Act 1998, s. 33 and Sched. 6; Government of Wales Act 1998, s. 109; Northern Ireland Act 1998, ss. 79-83.

## II. Second appeals - constitutional right or effectiveness?

Before any sensible inquiry is possible into the future role, institutional structure, procedures or composition of either or both of the top courts, we need to be clear about what is, or ought to be, valuable about them. This attempt to clarify what is beneficial about the work of the top courts is not, of course, to imply that they are not needed - though, in the past, this has been advocated.<sup>5</sup> The straightforward answer to the question posed in the title of this essay is that the top courts hear appeals from intermediate courts of appeal; in almost every matter they deal with, the top courts are a 'third' court hearing a second appeal.<sup>6</sup>

In *Access to Justice*, Lord Woolf suggested that, generally, appeals serve two main purposes: the private purpose of doing justice in particular cases by correcting wrong decisions; and the public purpose of ensuring public confidence in the administration of justice by making such corrections and clarifying and developing the law and establishing precedents.<sup>7</sup> He was here describing the function of first appeals; in relation to the top courts, the question is more precisely about the worth of *second* appeals.<sup>8</sup> There are two main modes of justification for 'third courts': that constitutional principle requires the possibility of a second appeal; and that three tier arrangements exist because they are conducive to the effectiveness and efficiency of the legal system.<sup>9</sup>

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<sup>5</sup> See Lord Gardiner, 'The Administration of Justice', ch. 2 in Gerald Gardiner and Andrew Martin (eds.), *Law Reform Now* (London, 1963), p. 16; Appellate Jurisdiction Act 1873.

<sup>6</sup> Exceptions to this are that: 'devolution issues' may be determined by the Judicial Committee on 'references' from lower courts and law officers; appeals from statutory bodies responsible for the regulation of certain professions are also 'first' level appeals to that court; a little used provision 'that it shall be lawful for His Majesty to refer to the said Judicial Committee for Hearing and Consideration any such other Matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in the manner aforesaid' (Judicial Committee Act 1833, s. 4); and there is provision for 'leapfrog' appeals to the Appellate Committee from first instance trials (Administration of Justice Act 1969, s. 12).

<sup>7</sup> *Access to Justice — A final report* (London, 1996), ch. 14, para. 2.

<sup>8</sup> In other jurisdictions, courts at or near the apex of the legal system, especially 'constitutional courts', do not necessarily have an appellate function; detailed comparative analysis falls outside the scope of this paper.

<sup>9</sup> Other justifications are possible: a conservative plea that legitimacy rests on traditional authority and 'why fix what ain't broke?'; and in relation to the Judicial Committee, debates about its future role as the court of final appeal for overseas jurisdictions are influenced by pragmatic concerns to maintain the death penalty or to avoid 'tribalism' in the appointment of judges to a successor court (on which see Vasciannie, n. 2 above). It should be noted that jurisdictions which have ceased to send appeals to the Judicial Committee have often created a national third court to replace it.



## Constitutional Principle

Access to a court is a fundamental right - recognised by English law,<sup>10</sup> the European Convention on Human Rights,<sup>11</sup> other international rights instruments,<sup>12</sup> and by the basic laws and codified constitutions of many states. Perhaps, then, second appeals may be justified on the basis that they take such a right of access to a court seriously? Certainly, the right to *one* appeal has been recognised as of constitutional importance. Protocol 7 of the European Convention on Human Rights requires the opportunity for criminal convictions and sentences to be reviewed by a higher court;<sup>13</sup> and a Recommendation of the Council of Europe Committee of Ministers has 'agreed that appeal procedures should also be available for civil and commercial cases and not only for criminal cases'.<sup>14</sup> But the Council of Europe Recommendation is a document urging restraint: it encourages restrictions in the form of leave requirements for civil appeals and, though acknowledging that some legal systems allow second appeals, is not encouraging of their use. It is therefore difficult, if not impossible, to make out a constitutional rights case for second appeals for people in the United Kingdom. Long-established practice also stands against it: those convicted of criminal offences in Scotland have never had a right of second appeal to the Appellate Committee;<sup>15</sup> and recent legislation in England and Wales also seeks to limit the use of second appeals.<sup>16</sup>

The position of people outside the United Kingdom is different. One of the significant functions of the Judicial Committee is to provide adjudication services to several independent states, to the United Kingdom's Overseas Territories and the Crown Dependencies.<sup>17</sup> In most of these jurisdictions, the right to appeal to the Judicial Committee

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<sup>10</sup> *R. v Lord Chancellor, ex p. Witham* [1998] Q.B. 575.

<sup>11</sup> Article 6 and *Golder v United Kingdom* (1975) 1 E.H.R.R. 524.

<sup>12</sup> Universal Declaration of Human Rights, Article 10.

<sup>13</sup> Article 2 (E.T.S. No. 117). This is not yet in force, but the UK government 'has indicated its intention to sign, ratify and incorporate Protocol 7' (Keir Starmer, *European Human Rights Law* [London, 1999]).

<sup>14</sup> Recommendation No. R(95)5 of the Committee of Ministers to Member States concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases (7 February 1995).

<sup>15</sup> See n. 101 below.

<sup>16</sup> Access to Justice Act 1999, s. 55.

<sup>17</sup> The territorial jurisdiction of the Judicial Committee as at April 2000 is from the following independent states: Antigua and Barbuda; Bahamas; Barbados; Belize; Brunei (civil cases only; the Judicial Committee report their opinion directly to the Sultan); Commonwealth of Dominica; Kiribati (limited to constitutional cases affecting a Banaban); Grenada; Jamaica; Mauritius; New Zealand; Republic of Trinidad and Tobago; St Christopher and Nevis; St Lucia; St Vincent and the Grenadines; and Tuvalu. From the following UK Overseas Territories: Anguilla; Bermuda; British Antarctic Territory; British India Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; St Helena; and Turks & Caicos Islands. And from the Crown Dependencies of Jersey, Guernsey and the Isle of Man (which are not parts of the UK).

is either formally part of an entrenched written constitution,<sup>18</sup> or may be regarded as a fundamental law.<sup>19</sup> Decisions as to whether these jurisdictions cease to use the Judicial Committee as their court of final appeal are ultimately conditioned by claims to national self-determination,<sup>20</sup> which the United Kingdom government has, of course, always respected - or even encouraged - in this context.<sup>21</sup>

### Efficiency and effectiveness

Although (to the extent just described) the justification for a second appeal has a constitutional rights-based aspect, its rationale rests more solidly on the perceived utilitarian benefits which a 'third' court confers on the operation of the legal system it serves. The purpose of this paper is to identify what these benefits may be, and to hold them up for critical examination. While most other aspects of the United Kingdom's legal systems have in recent years been subject to thorough-going efficiency reviews, there has as yet been no attempt to achieve 'joined up and strategic' approaches to the top courts themselves or their relationships with the broader legal systems they serve. The *Modernising Government* White Paper puts such approaches at the centre of the government's programme of 'renewal and reform':<sup>22</sup>

'Although there are areas, such as foreign and security policy, where effective co-ordination and collaboration are the norm, in general too little effort has gone into making sure that policies are devised and delivered in a consistent and effective way across institutional boundaries for example between different government Departments, and between central and local government. ... Policies too often take the form of incremental change to existing systems, rather than new ideas that take the long-term view and cut across organisational boundaries to get to the root of a problem.'

Anyone searching for an example of a field of governance in which institutional boundaries encourage an absence of joined up thinking need look no further than the top courts. The Law Lords' judicial function is split between the Appellate Committee of the House of Lords (a committee of the United Kingdom Parliament) and the Judicial Committee of the

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<sup>18</sup> See e.g. Constitution of Jamaica, Part III; Constitution of Barbados, ss. 11, 12, 87 and 88.

<sup>19</sup> E.g. in relation to Jersey, the Order of Council of 13 May 1572, discussed W.J. Heyting, *The Constitutional Relationship between Jersey and the United Kingdom* (St Helier, 1977), ch. 6.

<sup>20</sup> See text at n. 138, below.

<sup>21</sup> Vasciannie, n. 2 above, asks rhetorically 'if, indeed, the Privy Council does not welcome our [sc. Caribbean] appeals, why should we force ourselves on them?' This comment was prompted by reports in the Caribbean news media (see e.g. [Barbados] *Daily Nation*, 22 June 1999, p. 6) that Lord Browne-Wilkinson expressed concern that more than a quarter of the time of the Judicial Committee is taken up with criminal appeals from the Caribbean jurisdictions and that the ultimate court of appeal for a state should be in that state, staffed by citizens of that state and not by outsiders. Lord Browne-Wilkinson repeated his views in *The Times*, 19 October 1999, Law Section, p. 3.

<sup>22</sup> *Modernising Government*, Cm. 4310 (London, 1999), paras. 2.4-2.5.

Privy Council (a committee of a department of state). Neither top court falls within the departmental responsibility of Lord Chancellor's Department (which is responsible for court services in England and Wales). The Foreign and Commonwealth Office and several overseas governments have an interest in work of the Judicial Committee insofar as it is concerned with providing adjudication services to legal systems outside the United Kingdom; but the Home Office,<sup>23</sup> the Department of Health,<sup>24</sup> the Welsh, Scottish and Northern Ireland Offices, and the Scottish Executive<sup>25</sup> have interests in other aspects of the Judicial Committee's work.

At least partly because of institutional boundaries,<sup>26</sup> recent reforms and proposals for reform have by-passed the Law Lords. Lord Woolf's inquiry into civil justice in England and Wales, now implemented in the Civil Procedure Rules 1999, sought to rationalise and integrate rules and practices in the county courts, the High Court and the Court of Appeal (Civil Division)—but left untouched any consideration of the tier of court above these.<sup>27</sup> Nor have the top courts been subject to the efficiency and effectiveness reviews of the type carried out by Sir Jeffery Bowman for the Lord Chancellor into the Court of Appeal and Crown Office in England and Wales<sup>28</sup> or into the criminal courts in England and Wales.<sup>29</sup> The recent Royal Commission on Reform of the House of Lords considered only the role of Law Lords in the second chamber—not their judicial function.<sup>30</sup>

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<sup>23</sup> As the department responsible for relations between the UK and the Channel Islands.

<sup>24</sup> In relation to appeals of certain health care professionals suspended from, or struck off, their respective register: medical practitioners, dentists, opticians, chiropractors, dieticians, medical laboratory technicians, occupational therapists, orthoptists, physiotherapists, radiographers and remedial gymnasts. Veterinary surgeons may also appeal.

<sup>25</sup> There is no appeal from Scottish courts to the Appellate Committee in criminal matters, but there is in civil matters (as of right); the future for such appeals is not a reserved matter under the Scotland Act 1998 and so any lead in policy making will come from the Scottish Executive. See further n. 103, below.

<sup>26</sup> Another reason may be deference to Parliament (of which the Appellate Committee is part) and the Crown (the Judicial Committee of the Privy Council works under the auspices the department of state most intimately connected to dignified notions of the Crown).

<sup>27</sup> *Access to Justice - Final Report* (London, 1996). For a general critique, see A.A.S. Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure: Essays on 'Access to Justice'* (Oxford, 1995).

<sup>28</sup> See Lord Chancellor's Department, *The Court of Appeal (Civil Division) - Proposals for Change to Constitution and Jurisdiction* (London, 1998); the Bowman report on the Crown Office (London, April 2000).

<sup>29</sup> In December 1999, Auld L.J. was appointed to conduct a review of all aspects of the criminal justice system, following a National Audit Office report revealing delays, inefficiency and £85m a year waste in the system.

<sup>30</sup> *A House for the Future* (n. 3, above), ch. 9.

### III. What is valuable about the top courts' work?

Our theme, then, is that the judicial functions of the Privy Council and House of Lords must be considered together; and that justifications for the existence of second appeals (the vast bulk of the top courts' current work) must largely lie in the practical benefits which such appeals provide. In the remainder of this essay, we seek to survey what these benefits may be. Among legal practitioners, judges in the United Kingdom and abroad, and members of the government there appears to be a broad consensus that the Law Lords perform valuable work. Perhaps because of this, thinking about the *point and value* of second appeals in the United Kingdom is still curiously under-developed; people sometimes appear to believe we should have a second appeal *because* second level appeals are valuable.<sup>31</sup> Put in this stark way, however, the proposition is tautologous. The questions which it begs (*why* are second level appeals valuable? What would be lost to the legal system if the second level appeals did not exist? Why only two, not more, opportunities to appeal?) require careful answers. Several desirable attributes or consequences of the top courts' work can be identified.

- They provide 'better quality' adjudication.
- They determine important cases.
- They correct errors made by first level appeal courts in the application of law.
- They manage precedent.
- They are constitutional courts.
- They provide a court of final appeal for all three of the UK's legal systems.
- They manage the operation of the legal system.
- They have authority to innovate to ensure law resonates with contemporary social values.
- They provide adjudication services for overseas jurisdictions.
- (Oddly), they provide first appeals from certain professional discipline tribunals.

Many of these tasks contribute to achieving a broad function of high level appeals - that of facilitating 'joined-up'<sup>32</sup> justice and law through the co-ordination, in various ways, of laws and procedures.

We assess, in turn, the tasks said to be carried out by the top courts. In doing so, we draw on the evidence provided by a sample of cases from the top courts: judgments handed down between November 1996 and November 1999.<sup>33</sup> Our aim is to identify and clarify the

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<sup>31</sup> The seminal work is Louis Blom-Cooper and Gavin Drewry, *Final Appeal* (Oxford, 1972). For more recent studies, see n. 1 above.

<sup>32</sup> On joined-up government, see n. 22 above.

<sup>33</sup> For further analysis of this sample, see Appendix below.

arguments, not to carry out a cost-benefit analysis - though in this regard it should be noted that the financial costs of running the top courts are modest.<sup>34</sup>

### **Better quality adjudication**

Though rarely put so bluntly, many of the desiderata for third courts are connected to ideas that their processes and outputs are, simply, 'better' than those of the courts below. This may come about in several different ways - through the refinement of legal issues, the mode of deliberation; style of the written judgments; or the composition of the court.

#### *Refinement*

As Lord Clyde recently remarked, 'It is often found that during the history of a case through successive appeals the arguments become narrowed and refined' (though he went on to add that 'The present proceedings are an exception to that. The various presentations appear to have lurched from one argument to another so as to give rise to a suspicion about the basic stability of the case').<sup>35</sup> The claim here is that the very process of preparing for a further hearing, and arguing the points again, is useful to the parties' lawyers and the court of final appeal benefits from the reasoned judgments of the courts below it (and, accordingly, questions of law are 'better' determined).

In several respects, the ideal of progressive distillation of argument may not always be completely achieved. Occasionally wholly new arguments, not canvassed in the courts below, are advanced before the Appellate Committee and considered.<sup>36</sup> Moreover, some appeals are from judgments in striking out applications where the court below has *assumed* the facts pleaded by the claimant are true. As the House of Lords itself acknowledges, it is

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<sup>34</sup> Answers to Parliamentary Questions recently asked by Lord Lester of Herne Hill reveal: in the financial year 1998-99 the fee receipts for the Judicial Committee amounted to £70,209.10 and running costs totalled £472,247. These costs include the daily sitting fees paid to members of the Judicial Committee who are not in receipts of judicial salaries, but do not include any element in respect of the salaries of those who are (see H.L. Debs., cols. WA113-114, 8 July 1999). The net cost of the Appellate Committee in the same period was £607,737 (see H.L. Debs., cols. WA 18-19, 13 July 1999).

<sup>35</sup> *Bank of Scotland v Brunswick Developments (1987) Ltd (No.2)* 1999 S.C. (H.L.) 53.

<sup>36</sup> e.g. *Thorn Materials Supply Ltd v Customs and Excise Commissioners* [1998] 1 W.L.R. 1106; *ICI v Colmer (Inspector of Taxes)* [1999] 1 W.L.R. 2035 (the respondents raised for the first time an argument about construction of Income and Corporation Taxes Act 1970, s. 258 with the result that their Lordships felt compelled to refer a question to the ECJ for preliminary ruling). Member States of the EU are required to permit litigants who claim Community law rights to raise new appeal points on Community law (see C-430/93, *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* [1996] All E.R. (EC) 259). Cf. Blom-Cooper and Drewry who state that between 1952 and 1968 only two appeals were allowed by the House of Lords on the basis of an argument that had not previously been used in the lower courts. Of this trend they observe: 'It is an unwritten, but firm rule of the House not to consider arguments that have not been considered in the courts below. In only twelve cases [out of 466] during our period of study was this rule expressly waived' (*Final Appeal*, n. 31 above, p. 247).

desirable for appeals to be determined 'on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.'<sup>37</sup> Further, 'leapfrog' appeals brought under the Administration of Justice Act 1969 directly from first instance judgments turn the Appellate Committee into a court of first appeal; few such appeals are, however, brought.<sup>38</sup> It should also be noted that the Judicial Committee when dealing with a reference from a law officer as to the legislative competence of the Scottish Parliament<sup>39</sup> will not benefit from any prior 'refinement' of the legal issues.

These instances aside, the opportunity for 'refinement' seems present in most of the cases which come before the top courts. But in and of itself this factor cannot provide a compelling justification for second appeals. It is no more than the application of the common place observation that, normally, the more time a group of people devote to completing a task, the better the outcome (or the better the justification for the outcome). Furthermore, the 'refinement' justification does not *itself* explain why some (only a tiny number) of cases should benefit from such careful and costly consideration.

### *Mode of deliberation*

Practitioners as well as judges speak warmly of the rigorous, testing and more reflective nature of hearings before top courts: hearings take place with greater 'leisure', and before more judges, than at first instance trials and first level appeal courts. There is, however, little available empirical data on which to make informed comparisons of the methods of deliberation utilised—for example, how draft judgments are written and discussed—by the Law Lords and (for example) the judges in the Court of Appeal.<sup>40</sup> One sociologist reports an impression of the Law Lords 'coming to decisions in relatively hurried committee meetings'.<sup>41</sup> Justifications for second level appeals based on the notion that there is

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<sup>37</sup> See Lord Browne-Wilkinson in see *Barrett v Enfield LBC* [1999] 3 W.L.R. 79 (referring to a mistaken understanding of the role of educational psychologists, corrected by the Court of Appeal in *Phelps v Hillingdon LBC* [1999] 1 W.L.R. 500).

<sup>38</sup> Our wider study (see n. 161 below) will examine the reasons for the apparent failure of this reform. Council of Europe Recommendation No. R(95)5 (n. 14, above) urges the use of such a device.

<sup>39</sup> Scotland Act 1998, s. 33.

<sup>40</sup> For a description of deliberative methods of the Law Lords in the Appellate Committee, see David Robertson, *Judicial Discretion in the House of Lords* (Oxford, 1998), p 15. Similar methods appear to be used by the Judicial Committee: under an Order in Council of 1627, the junior member of the Board is required to express his conclusions first. In a booklet published by the Privy Council Office, it is said that 'Deliberation usually lasts twenty to thirty minutes, sometimes it will go on for an hour. Unless there is a dissenting judgment, the Board's reasons are contained in a single judgment prepared by the Chairman or at his request by another member of the Board. The deliberation will have given the author the opportunity to discern from his colleagues the strands of argument which need to be covered in the judgment' (*The Judicial Committee of the Privy Council* [London, 1999], pp. 6-7).

<sup>41</sup> *Op. cit.*, p. 33. The description provided by Robertson is contested by (at least) one Lord of Appeal in Ordinary who believes that 'in truth, Robertson misunderstands the position'. Robertson's assertion that the Law Lords only have one perfunctory meeting about a case 'is nonsense. Apart

something appreciably different about the ways in which judgments are made are, at best untested. In any event, this factor in itself cannot explain why some cases should benefit from this while almost all others do not.

### *Textual quality of judgments*

Another possible justification for second appeals is the quality of the written judgments handed down by the top courts. Lord Bingham of Cornhill has written of the Appellate Committee that it 'commands respect at home and abroad for the intellectual quality and erudition of its judgments'.<sup>42</sup> Lord Goff has written of the Law Lords' 'prestige' and drawn attention to the fact that their judgments are cited all over the world.<sup>43</sup> Almost all judgments of the Appellate Committee are reported<sup>44</sup> (though fewer of the Judicial Committee's are) and so there are data on which to assess such claims. Some academics studies have asserted the importance of the quality of the Law Lords' output as an explanation for second level appeals. Blom-Cooper and Drewry say: 'Our view (based on impression and reflection rather than on any systematic research) is that the House of Lords continues to justify its existence by the quality of its review function'. Other views are less sanguine.<sup>45</sup> The New Zealand Solicitor-General in 1995, recommending appeals to the Privy Council from that jurisdiction be abolished, said that 'the proposition that a two appeal system will produce ... a better of articulation of the law than will a single appeal system is unconvincing'.<sup>46</sup> At the conclusion of his recent study of 407 cases between 1986 and 1995, Robertson pulls few punches. He claims that the following are 'some salient characteristics of the Law Lords decisions as revealed in the published cases':<sup>47</sup> they are very consequentialist in that they are deeply concerned about potential future consequences of their decisions; they rely on Parliament as a long stop; their decisions are commercially pragmatic; they are patronising to other rule appliers (e.g. legal tests will be rejected if they

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from formal meetings there is a constant dynamic process of discussion about cases before they are heard, during the hearing of the cases, afterwards, at meetings, with reference to drafts circulated, etc. We never seem to stop talking about our cases!' (source: private communication with the authors).

<sup>42</sup> Written evidence to the Royal Commission (n. 3 above).

<sup>43</sup> Written evidence to the Royal Commission (n. 3 above).

<sup>44</sup> In our sample of cases during 1996-99, 99 per cent of Appellate Committee judgments were reported in *The Times* and 87.6 per cent were reported in the *Weekly Law Reports*; since November 1996, all Appellate Committee judgments are available online at <www.parliament.uk>. A smaller proportion of Judicial Committee judgments are reported; nor does the Judicial Committee have a website from which judgments may be obtained. If one views court judgments as public goods produced at tax payers' expense, the difficulties of obtaining Privy Council judgments in a convenient format are difficult to justify.

<sup>45</sup> The most detailed study by lawyers remains T. Murphy and R. Rawlings, 'After the Ancien Regime: The Writing of Judgments in the House of Lords, 1979-80' (1981) 44 M.L.R. 617 and (1982) 45 M.L.R. 34.

<sup>46</sup> J.J. McGrath Q.C., *Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure* (Wellington, 1995).

<sup>47</sup> *Judicial Discretion in the House of Lords* (n. 40 above); the emphasis is ours.

are too complex for, say, medical examiners in social security cases); they have great respect for the decisions of other common law jurisdictions; the Law Lords are consciously incrementalist; they are consciously 'problem solvers' to ensure the smooth running of public administration; and they trust other administrators. Robertson then argues that:<sup>48</sup>

'In the end these assumptions within which the paradigms are developed are dependent on common, shared, professional expectations which are largely inchoate, and *which are quite unsuited as the basis of creative law making which shapes our lives*. Many have sought a description of judicial ideology, but the truth about their attitudes, in some sense, is that they are not ideological enough! Or at least, they are not ideological in the sense of a developed theory and set of overt assumptions. In the sense of ideology which precisely refers to the largely unconscious expectations of what constitutes normal, rational, decent, responsible behaviour, there is a judicial ideology. It is the ideology of old middle-class men, as the more radical suggestions have it. But they are untypical even of that social category — they have soaked up the ethos of tough minded liberalism of those who run an administrative state.'

In this paper we cannot pursue further the question of the quality of reasoning employed by the Law Lords, save to make the point (again) that there has been no detailed *comparison* of styles of reasoning as between the Law Lords and, say, first level appeal courts.

### *Composition of the court*

Finally, the composition of the top courts may contribute to better quality adjudication. The top courts normally sit as a bench of five (rather than three as in the Court of Appeal in England and Wales). The homely truth that 'five heads are better than three' may not, however, be entirely apt in this context if Robertson is correct in his analysis that 'English judges do not engage with each other intellectually - their positions largely slip past the alternative view with no comment'.<sup>49</sup> A different view is that quality may be said to arise simply from the fact that the top courts are normally composed of Lords of Appeal in Ordinary, judges appointed on criteria which, although not made public, can be assumed to include their abilities to produce judgments of the highest qualities. It should be noted, however, that judges other than the permanent salaried Lords of Appeal in Ordinary<sup>50</sup> participate in the judicial function of both top courts.<sup>51</sup>

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<sup>48</sup> Loc. cit., pp. 400-401.

<sup>49</sup> Robertson, 'The House of Lords as a Political and Constitutional Court: Lessons from the Pinochet case', ch. 2 in Diana Woodhouse (ed.), *The Pinochet Case: a Legal and Constitutional Analysis* (Oxford, 2000), p. 20. See also note 41, above.

<sup>50</sup> Those eligible to sit on the Appellate Committee in addition to the 12 salaried Lords of Appeal in Ordinary are Lords of Appeal below the age of 75 years who have retired or resigned, the Lord Chancellor (a political appointment rather than one made primarily on the basis of merit as a judge) and retired Lord Chancellors under the age of 75, members of the House of Lords hold or have held high judicial office (defined by Appellate Jurisdiction Act 1887, s. 5 and Appellate Jurisdiction Act 1876, s. 25). Those eligible to sit on the Judicial Committee in addition to Lords of Appeal in Ordinary are those Privy Councillors who are: retired Lords of Appeal; judges of the Supreme



## Determining important cases

Nobody envisages that the top courts should deal with trivial matters; on the contrary, of course, a valuable feature often highlighted is that they exist to deal with 'important' cases. The notion of what constitutes importance in this context is, like much else, curiously underdeveloped. Two main strands can be identified.

First, important cases may be defined in terms of the sums of money at stake in civil claims. Several of the overseas jurisdictions provide that appeals as of right (i.e. without leave) lie to the Judicial Committee where the value of the dispute exceeds a prescribed amount.<sup>52</sup> Inflation and the passage of time has, in many jurisdictions, lead to rights of appeal in very modest claims.

Secondly, 'importance' is understood as relating to questions of law that should be considered by a third court. In criminal appeals to the Appellate Committee, leave is conditional on the court below certifying 'that a point of law of general public importance is involved in the decision and it appears ... that the point is one that ought to be considered by [the Appellate Committee]'.<sup>53</sup> The precursor of the modern statutory requirement was even more emphatic that a case had to involve 'a point of law of *exceptional* public importance'.<sup>54</sup> In civil cases, the Appeal Committee's criteria<sup>55</sup> for granting or refusing leave

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Courts of England, Ireland and the Scottish Court of Session, and judges or retired judges of those Commonwealth jurisdictions which may still appeal to Her Majesty in Council — currently this means the judges and former judges of the New Zealand Court of Appeal, the Chief Justice of the Eastern Caribbean Supreme Court (Sir Vincent Floissac) and the Chief Justice of Jamaica (Zacca J.). When the Judicial Committee is hearing 'devolution issues' only judges of the United Kingdom may sit.

<sup>51</sup> Twenty out of 54 appeals heard by the Appellate Committee during 1998-99 included one judge who was not a currently serving Lord of Appeal in Ordinary, four appeals involved two such judges and two appeals involved three. No Appellate Committee of five has ever included more than three judges other than the Lords of Appeal in Ordinary. In the same period, the Judicial Committee heard 52 appeals: 27 of these appeals involved one judge who was not a Lord of Appeal in Ordinary, 13 involved two such judges and three involved three such judges. Source: H.L. Deb., col. WA42, 28 April 1999. In his written evidence to the Royal Commission (n. 3 above), Lord Wilberforce said that 'retired Law Lords are a valuable supplement. Indeed, many would contend that the value of Law Lords increases in retirement'.

<sup>52</sup> e.g. Constitution of Jamaica, Part III (1) creates an appeal as of right 'where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim or question respecting property or a right of the value of one thousand dollars or upwards'. In April 2000, the exchange rate was £1: Jamaica\$66.45

<sup>53</sup> Administration of Justice Act 1960, s. 1(2); Courts-Martial (Appeals) Act 1968, s. 39(2); Criminal Appeals Act 1968, s. 33(2).

<sup>54</sup> Criminal Appeal Act 1907, s. 1(6) (our emphasis); see *R. v. Ball* [1911] A.C.47 in which Lord Alverstone stated that this provision was 'inserted not so much with the object of deciding the particular case before the Court ... but with the object of obtaining the decision of the highest tribunal in the country upon a point of law'.

are not expressly stated,<sup>56</sup> and the appeal committee does not give reasons for its leave decisions, but it seems clear that importance of the question of law raised is a significant factor. The same is true of the determination of leave, where required, to appeal to the Judicial Committee.

### *Choosing 'important' cases*

The top courts are, in relation to most of their jurisdiction, in the enviable position of having a wide discretion to *choose* which cases to hear. Commentators in the past have argued that it would be wrong to constrain that choice by rules or clearly announced criteria.<sup>57</sup> Given (now) the general trend to transparency in decision-making, the fact that the top courts are public authorities rationing a scarce resource and the developing notions of rights of access to a court, it is at least open to question whether such an approach continues to be desirable. But whether or not reasons are disclosed to the parties in particular cases, thought needs to be given to the meaning of 'importance' generally and its implications for the operation of the top courts. While it is obviously true that important questions of law are determined by the top courts, it is equally true that many important questions of law are *not* determined. In almost every field of law, there are issues of law which have troubled the Court of Appeal and generated extensive academic comment, but which have not been decided by the Appellate Committee.<sup>58</sup> *If 'importance' is understood to be a relative rather than an absolute concept, several things follow.* First, it means there is no 'magic' total number of appeals which should be determined by the top courts - there is no compelling reason why the top courts must each year hear 50 to 60 appeals a year (as they have in recent years) rather than 30 or 20. In the vast bulk of the appeals heard each year, no profound difficulties would ensue for the legal system, commercial activity or the processes of good governance if the litigation stops at the intermediate court of appeal. Secondly, understanding 'importance' as a relative concept can also possibly mean that the grant and refusal of leave to appeal may properly be constrained by explicit considerations of the resources available to the top courts.<sup>59</sup>

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<sup>55</sup> Leave applications are considered by a tribunal of three Law Lords: see *Practice Directions and Standing Orders Applicable to Civil Appeals* (March 2000) available at <[www.parliament.uk](http://www.parliament.uk)>

<sup>56</sup> For a discussion, see Blom-Cooper and Drewry, *op. cit.* (n. 31, above), pp. 146-149.

<sup>57</sup> *Loc. cit.*: 'Given a system which stipulates that leave is necessary, it is probably more desirable that the flexible criteria should be applied impressionistically from case to case rather than that right that rigid rules should be drawn up. The fetish of "certainty" is not the ultimate virtue here'.

<sup>58</sup> By way of illustration, consider: in relation to judicial review, what criteria should be used for deciding whether something is a 'public' or 'governmental' function for sports and industry self-regulatory bodies? The doctrine of substantive legitimate expectation in public law, and the question of when (if the doctrine exists) an overriding public interest can relieve the authority of the duty to satisfy the expectation?; in employment law, the existence of the 'band of reasonable responses' in unfair dismissal and the associated issue of the extent to which an employment tribunal can substitute its own judgment. The list could go on.

<sup>59</sup> A similar question, in the context of applications for permission to apply for judicial review, was asked (and answered) by Lord Donaldson M.R. in *R. v. Panel on Take-overs and Mergers, ex p.*

Thirdly, understanding 'importance' as a relative concept permits the subject matter of the top courts' case load to change considerably over time. If (say) a new legislative scheme prompts appeals, the court may deal with these even if it may require refusing leave to bring appeals in other fields of law. During the 1960s, 'appeals in revenue matters bulked large in the case-load, so large in fact that the Law Lords might on occasion almost have been mistaken for an ennobled extension of the Special Commissioners for Income Tax'.<sup>60</sup> Predictions of the number and timing of appeals likely to arise from the Human Rights Act 1998 and the devolution Acts vary greatly.<sup>61</sup> If, though, we are correct to argue that 'importance' is a thoroughly relative concept, why should human rights and devolution issues appreciably increase the overall caseload of the top courts? If these categories of legal issues are indeed (relatively) the most important ones, then top courts have it in their power to refuse leave in other categories of case and so maintain a constant and manageable caseload.

### *The importance of the 'generalist court'*

One objection to the last suggestion may be that a valuable feature of the top courts is that they are generalist tribunals,<sup>62</sup> and that it would be undesirable for public law issues to crowd out commercial or other types of cases, even if only for (say) five to eight years. Scholars have devised schemes for the classification of the subject matter of the appeals.<sup>63</sup> Attempts to justify the role of second appeals on the basis of the case load subject matter is that the taxonomy ends up being more of a description of the court system as a whole rather than the work of the top courts in particular. For instance, Robertson writes that 'Cases before the Lords, in one way or another, are nearly all about power imbalances. Indeed the traditional notion that the duty of the courts is to protect the weak from the mighty is a guiding theme of this book'.<sup>64</sup> He goes on to classify the judgments in his

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*Guinness plc* [1990] Q.B. 146 at 177-178 ('given the constraints imposed by limited judicial resources, this necessarily involved limiting the number of cases in which leave to apply should be given'.)

<sup>60</sup> Drewry and Blom-Copper, 'The Appellate Function' in Dickson and Carmichael (eds.), *op. cit.* (n. 1, above), p. 117.

<sup>61</sup> See e.g. Lord Browne-Wilkinson, *The Times*, 19 October 1999, Law Section, p. 3 ('We will see a doubling of our workload. And no body has worked out how we are going to find the judge power to deal with it all'; cf. Lord Wilberforce's reminder in his written evidence to the Royal Commission (n. 3, above) that 'a reasonable guess is that it may give rise to a large number of challenges in the courts—a logistical problem no doubt (but we may recall that on VAT the prognoses was spectacularly wrong)'. The phenomenon of growing caseloads in appellate courts is not confined to the UK, but is a characteristic of legal systems world-wide. Typically, jurisdictions attempt two means to control numbers: first, by increasing the resources of the appellate courts; secondly, by seeking in a variety of ways to improve efficiency. See further David W. Neubauer, *Judicial Process* (Brooks, Calif., 1991), ch. 13.

<sup>62</sup> See Appendix below.

<sup>63</sup> See e.g. Blom-Cooper and Drewry, *Final Appeal* (n. 31, above), ch. XIII-XV; Robertson, *Judicial Discretion in the House of Lords* (n. 1, above), ch. 1.

<sup>64</sup> *Op. cit.*, pp. 28-29.

sample period as 'sorting out the details of the corporate economy', 'as the "fine tuner" of the government system', 'the definition of crime', 'as the "fine tuner" of the welfare state' and 'finally, there are cases which seem tremendously important, manifestly involve pressing human demands for justice, but which defy categorisation'. The explanatory power of such analysis is limited. The factors which determine the subject matter of litigation in general are diverse and complex: the economic cycle; natural disasters; political crises; availability of financial assistance and expertise to pursue litigation; the introduction of new legislative schemes; particular mistakes or scandals. So long as the top courts' formal functions are essentially that of an appellate court, their case load is likely to some extent to reflect litigation further back down the line.

### **Error correction**

Intermediate courts of appeal correct the errors of civil and criminal trial judges in various ways by holding that: evidence was wrongly admitted or excluded; a rule of law was wrongly applied to the facts of a case; a procedural impropriety occurred; the jury were misdirected; (more rarely) judicial discretion wrongly exercised; and so on. Errors occur at first instance because judgments are often unreserved and so made without the benefit of reflection; the issues presented to the court may have lacked refinement;<sup>65</sup> judges may be inexperienced. The function of such error correcting is as much, or more, for the benefit of particular litigants than for the good of the legal system as a whole.<sup>66</sup>

It may be that error correcting of the types just described is also a valuable function carried out by the top courts. A large proportion of appeals heard by the Appellate Committee and the Judicial Committee do result in the reversal of the intermediate appeal courts' judgment not because the Law Lords formulate the law in a different way to the court below, but because they apply it differently to the facts at issue. This said, salutary reminders about the function of appeal courts' in correcting the 'errors' of lower courts have been given by judges. Lord Justice Atkin, addressing Cambridge law students in 1926, concluded a tedious description of appellate court jurisdiction with an interesting point:<sup>67</sup>

'I will end with a statement of the proportion between successful and unsuccessful appeals, which may be of interest. This proportion seems to be remarkably stable at about 33 per cent. The number of successful appeals from the lower Courts to the Court of Appeal is about 33 per cent of the whole number, and the number of successful appeals from the Court of Appeal to the House of Lords is about 33 per cent. There is no reason for believing that if there was a higher tribunal still the proportion of successful appeals to it would not reach at least that figure'.

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<sup>65</sup> See text at n. 35, above.

<sup>66</sup> See n. 7, above.

<sup>67</sup> Lord Justice Atkin, 'Appeal in English Law' (1927) 3 C.L.J. 1.

Success rates of appeals in the top courts are now greater, typically between 40 and 49 per cent each year,<sup>68</sup> but if Lord Atkin's general hypothesis is correct, the top courts' virtues as error correcting mechanisms are inherently limited. Certainly, there are many occasions when the top court is not unanimous in detecting an error in the determination of the lower court;<sup>69</sup> and it has also been pointed out by several commentators that success or failure before the Appellate Committee, which does not sit *in banc*, may be determined by the choice of membership of the court for a particular appeal.<sup>70</sup> Salutory also is the observation of a justice of the Supreme Court of the USA: 'We are not final because we are infallible, but we are infallible only because we are final'.<sup>71</sup>

## Managing precedent

In legal systems based on the doctrine of *stare decisis*, a valuable function of the top court is to exercise control over what constitutes correct precedent and to supervise the application of precedent by lower courts. The Appellate Committee also has an express power to overrule its own previous decisions.<sup>72</sup> As the role of appellate courts in managing precedent is obvious, relatively uncontroversial and well researched,<sup>73</sup> we will be brief. Much of the work of the top courts during 1996-99 was, unsurprisingly, concerned with overturning precedents.<sup>74</sup> One issue of current difficulty is the role of the Judicial Committee as a court

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<sup>68</sup> See further Appendix below.

<sup>69</sup> Between Easter 1998 and Easter 1999, eight out of the 63 appeals determined by the Appellate Committee were split 3:2; seven were split 4:1; and 46 were unanimous. There was one Appellate Committee of seven, which was split 6:1. In the Judicial Committee, five of the 50 judgments in that period were split 3:2; one was split 2:1; and one was split 3:1. Source: H.L. Debs., cols. WA41-42, 28 April 1999.

<sup>70</sup> On this, see the valuable work of Robertson, *Judicial Discretion in the House of Lords* (n. 1, above), esp. ch. 2 and his speculation on Pinochet in 'The House of Lords as a Political and Constitutional Court: Lessons from the Pinochet Case' (n. 49, above). Presumably similar analysis could be applied to the work of the Judicial Committee.

<sup>71</sup> Justice Robert H. Jackson, *Brown v Allen* 344 US 443 (1953) at 540.

<sup>72</sup> Practice Direction (Judicial Precedent) [1966] 1 W.L.R. 1234.

<sup>73</sup> See further Blom-Cooper and Drewry, *Final Appeal* (n. 31, above), ch. IV.

<sup>74</sup> In relation to the Appellate Committee, see e.g. *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] A.C. 20 (whether contract damages available for injury to reputation); *Boddington v British Transport Police* [1999] 2 A.C. 143 (*Bugg v DPP* overruled; a defendant in criminal proceedings was entitled to contend that subordinate legislation or an administrative act made under it was ultra vires and for those purposes it made no difference whether the error of law alleged was patent or substantive, or latent or procedural); *Girvan v Inverness Farmers Dairy (No.2)* 1998 S.C. (H.L.) 1 (considering awards made by previous juries was a legitimate exercise for the court to undertake, *McCallum v Paterson (No.2)* 1969 S.C. 85 disapproved); *Bristol City Council v Lovell* [1998] 1 W.L.R. 446 (*Dance v Welwyn Hatfield DC* [1990] 1 W.L.R. 1097 overruled); *Norglen Ltd (In Liquidation) v Reeds Rains Prudential Ltd* [1999] 2 A.C. 1 (assignment of the cause of action to R was not void or unenforceable simply because it would enable N to benefit indirectly from legal aid, *Advanced Technology Structures Ltd v Cray Valley Products Ltd* [1993] B.C.L.C. 723 overruled); *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 W.L.R. 1095 (previous rule could not be maintained and should be replaced with a general right to recovery of money paid under mistake of fact or law); *Hunter v Canary Wharf Ltd* [1997] A.C. 655 (the ruling in *Khorasandjian v Bush* [1993] Q.B. 727 had

of final appeal for legal systems outside the United Kingdom, and the manner in which it reviews the precedents of local courts.<sup>75</sup>

### A constitutional court

Courts at the apex of legal systems in most jurisdictions are expected to be 'democracy's referees'<sup>76</sup> - which in essence includes (a) imposing legal constraint on the enactment of legislation by elected parliaments; (b) ensuring that ministers, officials and other public bodies taking executive action do so within the limits of their legal powers; (c) adjudicating on the distribution of powers between national and regional government bodies, and supra-national ones; and (d) protecting fundamental rights of individuals, typically contained in a codified instrument.

Although the Appellate Committee and Judicial Committee are generalist tribunals, one subject category within their case load often regarded as of especial importance is constitutional questions - though in the United Kingdom what counts as 'constitutional' is notoriously fluid. During the 1996-99 sample period, the Appellate Committee dealt with only a handful of appeals explicitly concerned with fundamental rights - of suspects of crime<sup>77</sup> and of convicted persons,<sup>78</sup> freedom of assembly,<sup>79</sup> freedom of expression,<sup>80</sup> liberty of the person,<sup>81</sup> and religious discrimination.<sup>82</sup> Even adopting broader a conception to include rights of asylum seekers, immigration law, sex discrimination and appeals about welfare benefits and public services, the Appellate Committee's case load of constitutional questions does not predominate over other subject categories. Nor is the proportion of Judicial Committee appeals on questions arising under codified constitutions in several overseas jurisdictions great;<sup>83</sup> though this court has an indisputably constitutional role in

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departed from that principle that a mere licensee of land could bring an action in nuisance had was overruled); *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1999] 1 A.C. 266 (overrules *Northern RHA v Derek Crouch Construction Co Ltd* [1984] Q.B. 644); *Shimizu (UK) Ltd v Westminster City Council* [1997] 1 W.L.R. 168 (disapproves *R. v North Hertfordshire DC, ex p. Sullivan* [1981] J.P.L. 752 on meaning of 'listed building').

<sup>75</sup> See text at n. 127, below.

<sup>76</sup> For an overview, see 'The gavel and the robe', *The Economist*, 7 August 1999, p 33.

<sup>77</sup> *R. v DPP, ex p. Kebelene* [1999] 3 W.L.R. 972; *R. v Chief Constable of the Royal Ulster Constabulary, ex p. Begley* [1997] 1 W.L.R. 1475; *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] A.C. 286.

<sup>78</sup> *R. v Secretary of State for the Home Department, ex p. Pierson* [1998] A.C. 539 (to increase a tariff fixed was contrary to the fundamental principle of not retrospectively increasing lawful sentences); *R. v Secretary of State for the Home Department, ex p. Venables* [1998] A.C. 407.

<sup>79</sup> *R. v Chief Constable of Sussex, ex p. International Trader's Ferry Ltd* [1999] 2 A.C. 418; *DPP v Jones (Margaret)* [1999] 2 A.C. 240.

<sup>80</sup> *Reynolds v Times Newspapers Ltd* [1999] 3 W.L.R. 1010.

<sup>81</sup> *R. v Bournemouth Community and Mental Health NHS Trust, ex p. L* [1999] 1 A.C. 458; *K v Craig* 1999 S.C. (H.L.) 1.

<sup>82</sup> *Kelly v Northern Ireland Housing Executive* [1999] 1 A.C. 428.

<sup>83</sup> The constitutional court function of the Judicial Committee is discussed at n. 150, below.

deciding devolution issues under the Scotland Act, Northern Ireland Act and Government of Wales Act 1998.

Our task is to examine what is considered valuable about the top courts' role as 'constitutional court'. The difficulty with making such an assessment is that ideas about the role of Appellate Committee and the Judicial Committee as constitutional courts are clearly in flux. The description in the preceding paragraph - of generalist courts dealing as part of their case load with some cases about constitutional affairs - fits well with the Diceyan version of the rule of law:<sup>84</sup>

'We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right of personal liberty, or the right of public meetings) are ... the result of judicial decisions ... thus the constitution is the result of the ordinary law of the land'.

Expectations of the top courts have now changed. One academic (Robertson) puts it thus: 'a political court is required to give leadership to a nation, to make its legal system something more than a technical solution mechanism'.<sup>85</sup> For him, the *Pinochet* litigation<sup>86</sup> 'demonstrated how inadequately the Law Lords perform when judged against a primary function of a nation's supreme court, if that court is viewed, as political scientists must view it, as a major component of the national political system'.<sup>87</sup> It is clear that politicians also have new expectations of the top courts, envisaging new roles, under the Human Rights Act 1998 and the devolution settlement, in shaping the contemporary polity. Senior members of the judiciary, too, have adopted new, more expansive understandings of the inherent power of the courts (and it would have ultimately to be the top courts), through the common law, to be guardians of democratic principle.<sup>88</sup> The notion of what is useful about the top courts in constitutional matters is no longer just about their capacity to adjudicate on specific legal issues,<sup>89</sup> but emphasises their political role as national institutions able to contribute to debate about what constitutes the good society.

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<sup>84</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., (London, 1959), p. 193

<sup>85</sup> Robertson, 'The House of Lords as a Political and Constitutional Court' (n. 49, above).

<sup>86</sup> See n. 112.

<sup>87</sup> *Op. cit.*, p. 25.

<sup>88</sup> e.g. Lord Woolf, 'Droit Public—English Style' [1995] P.L. 57 at 67 and Sir John Laws, 'Law and Democracy' [1995] P.L. 72; and see the insightful discussion by Robert Stevens, 'Judges, Politics, Politicians and the Confusing Role of the Judiciary', ch. 11 in Keith Hawkins (ed.), *The Human Face of Law* (Oxford, 1997).

<sup>89</sup> We cannot here consider the issue whether litigation under the Human Rights Act 1998 and on devolution issues requires a style of adjudication that is appreciably different from other cases. In his written evidence to the Royal Commission (n. 3, above), Lord Wilberforce argued that such Human Rights Act issues 'as may reach the House of Lords may very well be no different in kind from those it has been used to handle, either when defending the great principles of the Common

Although it is clear that the top courts' constitutional adjudication functions have increased, are increasing and are unlikely to diminish, it should also be clear (but often is not) that these are functions *shared* with other courts, in two senses. First, constitutional norms are generated and applied for the United Kingdom's legal systems by the European Court of Justice (applying the EC Treaties) and the European Court of Human Rights (as a supra-national tribunal applying the European Convention on Human Rights). Supra-national courts may also share a constitutional role with the Judicial Committee in its capacity as court of final appeal for overseas jurisdictions.<sup>90</sup> Secondly, the application of European constitutional norms is a function performed by *all* courts and tribunals in the United Kingdom's legal systems - not one reserved exclusively for the top courts. So far as Community law directly effective rights are concerned, the imperative is for the very first court seized of the matter to determine the issue and protect the right.<sup>91</sup> In relation to Convention rights under the Human Rights Act 1998, the requirement is for *every* court and tribunal to 'take account of' relevant Strasbourg case law.<sup>92</sup> The formal role of the top court is therefore to supervise, on appeal, the development of human rights norms and the interpretation by lower courts of the relationship between Community law and national law.<sup>93</sup>

The one departure from the top courts' *appellate* role in constitutional matters is devolution; here the Judicial Committee may be the first court to consider an issue. Devolution issues may come before the Appellate Committee or the Judicial Committee; where they arise in proceedings in the Appellate Committee, it 'shall ... [refer them] to the Judicial Committee unless the House considers it more appropriate, having regard to all the circumstances, that

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Law or, as regards Black Letter Law, when hearing appeals in the Privy Council based on written constitutions, deriving largely from the Universal Declaration of Human Rights'.

<sup>90</sup> In relation to Caribbean jurisdictions, the Inter-American Commission on Human Rights applying the American Convention on Human Rights 1969, may intervene; see *Briggs v Baptiste*, *The Times*, 3 November 1999.

<sup>91</sup> *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (No.2) (C106/77) [1978] ECR 629. An editorial in *The Times*, 5 March 1994, stated in reaction to the House of Lords' judgment in *R. v Secretary of State for Employment, ex p. Equal Opportunities Commission* [1995] 1 A.C. 1 that 'Britain may now have, for the first time in its history, a constitutional court' (p. 19) and an academic has 'confess[ed] some sympathy' with that view' (Patricia Maxwell, 'The House of Lords as a Constitutional Court—The Implications of ex parte EOC', ch. 10 in Brice Dickson and Paul Carmichael (eds.), *op. cit.* (n. 1, above). Views such as these rather cloud the reality that even an employment tribunal or a bench of lay justices may be called upon to disapply Acts of Parliament on grounds of incompatibility with Community law — e.g. the Cwmbran Magistrates' Court and the Shops Act 1950, s. 47 (discussed in A. Le Sueur and M. Sunkin, *Public Law* (London, 1997), ch. 30).

<sup>92</sup> Human Rights Act 1998, s. 2.

<sup>93</sup> Its ability to do this is not complete: as we have noted, there is no possibility of appeal from Scottish courts in criminal matters.



it should determine the issue.<sup>94</sup> The Judicial Committee is thus intended to be the pre-eminent court in relation to devolution issues. Its judgments bind all other courts, including the Appellate Committee, though not itself. Devolution issues may come before the Judicial Committee in three main ways: references of proposed measures of devolved legislatures prior to passing; references of proposed measures after passage through the devolved legislature, but prior to assent; and on appeal in the course of ordinary adversarial proceedings. The Judicial Committee will be performing tasks similar to those carried out by the French *Conseil Constitutionnelle* (in its pre-legislative advice role), through to the type of constitutional review undertaken by the Spanish Constitutional Court or the United States Supreme Court. Devolution has the potential to present our courts with the sort of federal disputes, which the USA Supreme Court deals with. Justice Breyer notes that British judges may, 'have to answer federalist legal questions approaching from two directions, arising within Great Britain from devolution or arising out of Britain's membership in the European Union.'<sup>95</sup> As judges of the top courts in federal or devolved countries have had to do, the Law Lords will in the future be faced with the task of adjudicating in devolution disputes. Lord Steyn has described the Judicial Committee's role in this regard as one of a 'constitutional court adjudicating, among other things, on demarcation disputes between the Parliament at Westminster and [the devolved assemblies].'<sup>96</sup>

### **A court for the whole of the United Kingdom**

The United Kingdom's three separate territorial legal systems - England & Wales, Scotland and Northern Ireland - each has its own appellate system. What might therefore be regarded as valuable about appeals to the Appellate Committee is that such a further appeal presents an opportunity for a court of the whole of the United Kingdom to consider legal issues, with one or more benefits.

First, as Lord Hope has recently put it, 'there is no doubt that their [*sc.* the Scottish Lords of Appeal in Ordinary] approach to legal problems has made a distinctive contribution to the jurisprudence of the common law'.<sup>97</sup> What is claimed is that a certain 'civilian style' has benefited the laws of England & Wales and Northern Ireland in the past, if not so strongly now. Secondly, it might be said that the two smaller legal systems (i.e. Scotland and Northern Ireland) benefit from second appeals to the Appellate Committee in similar ways

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<sup>94</sup> Scotland Act 1998 Sch. 6, para. 32; Also see Government of Wales Act 1998 and Northern Ireland Act 1998.

<sup>95</sup> Stephen Breyer, 'Does Federalism Make a Difference?' [1999] P.L. 651.

<sup>96</sup> Lord Steyn, 'Incorporation and Devolution—A Few Reflections on the Changing Scene' [1998] E.H.R.L.R. 153; see also Jean McFadden, 'The Scottish Parliament: Provision for Dispute Resolution' [1998] J.R. 221.

<sup>97</sup> Lord Hope, 'Taking the case to London—is it all over?' [1998] J.R. 135 at 145.

to the benefits which accrue to overseas jurisdictions with appeals to the Judicial Committee: judges are more detached, personally and geographically, from pressures of the local scene; relatively small jurisdictions have access to a court with an international reputation for excellence; and it enables the provision of second appeals with relatively little cost to the public purse in those parts of the United Kingdom. However, according to one strand of thinking north of the border, there is a considerable detriment: the current arrangements have resulted in Scots law becoming tainted by alien principles of common law. Thirdly, the fact that some important statutory provisions have common application throughout the whole of the United Kingdom - or almost identical statutory provisions are in force on both sides of the border - means it is essential that, ultimately, a single court is able to interpret such legislation on appeal.<sup>98</sup> Fourthly, the social and economic conditions and attitudes to life are so similar in all parts of the United Kingdom that, unless there is clear reason to the contrary in particular cases, a common approach to legal questions should apply<sup>99</sup> - including in relation to the new human rights requirement that judges in all parts of the United Kingdom 'take account of' the Strasbourg caselaw. Fifthly, there are pragmatic considerations to do with judicial manpower: it is important to have the conventional two Scottish Lords of Appeal in Ordinary so that adequate Scottish judges are available to sit on the Judicial Committee of the Privy Council to hear devolution issues under the Scotland Act 1998.<sup>100</sup> Finally and most broadly, a single top court for the whole country may serve as one of the public institutions which help foster a sense of national unity and the political integration of distinct regions of a nation state.

The ideal of the Appellate Committee as a court for the whole of the United Kingdom is not fully realised at present - most obviously because no appeals in criminal matters from Scotland come to the House of Lords. In 1972, Blom-Cooper and Drewry's seminal study concluded that 'the position is becoming increasingly anachronistic with the increase in the number of statutory offences which apply equally both sides of the Border'.<sup>101</sup> The passage

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<sup>98</sup> e.g. *Glasgow City Council v Zafar* [1997] 1 W.L.R. 1659 (Race Relations Act 1976 s.1(1)(a) interpreted); *Hutchison Reid v Secretary of State for Scotland*, 3 December 1998 (unrep.) ('although the appeal is nominally and in substance an appeal by the Secretary of State for Scotland, it is also in reality an appeal against the decision of the Court of Appeal in the *Cannons Park* case', per Lord Lloyd of Berwick).

<sup>99</sup> e.g. *Smith v Bank of Scotland* 1997 S.L.T. 1061 (since there was no difference between the general principles on caution in Scotland and those governing surety in England, there was no reason why the extension to English law made in *Barclays Bank Plc v O'Brien* could not also be made to Scots law, especially as the rules governing the obligations of a cautioner were the same in both England and Scotland); *Macfarlane v Tayside Health Board*, 25 November 1999 (unrep.) (negligence liability for pregnancy following a failed vasectomy operation).

<sup>100</sup> Lord Hope, *op. cit.* (n. 97, above), p. 148.

<sup>101</sup> *Final Appeal*, (n. 31, above), p. 405. See also the written evidence of Lord Donaldson of Lynton to the Royal Commission (above, n. 3) in which he argues that a new supreme court 'should certainly have jurisdiction to hear appeals from the Court of Session in criminal matters, including in particular any such appeals whose outcome could turn on the provisions of the Human Rights Act'. Lord Bingham of Cornhill's written evidence, expressing views of the Judges Council (the body

of time, and newly emerged ideals of national self-determination, may make the anachronism less perplexing. It seems at least possible that the asymmetry of Scottish civil appeals to the Appellate Committee, but not criminal appeals, could be tidied up in a different direction. On one view, policy on second appeals from Scottish courts to the Appellate Committee is not a 'reserved matter' under the Scotland Act 1998 and is therefore within the purview of the Scottish Executive and Scottish Parliament, which may one day take the view that second appeals in civil matters can better be dealt with by Scottish courts;<sup>102</sup> though an alternative reading is that change to the jurisdiction of the Appellate Committee is a reserved matter as it 'relates to' an aspect of the United Kingdom constitution - namely 'the Parliament of the United Kingdom'.<sup>103</sup>

### **System management**

A benefit of second appeals may lie in the strategic case-management function of the top courts. Within any legal system, decisions need to be made about which courts, using which procedures, deal with different kinds of legal dispute. Guidance on the allocation and despatch of court business may be provided by statutory provisions, court procedure rules, common law rules, practice directions or case law governing the inherent jurisdiction of courts to regulate their own proceedings. 'System management' intended to facilitate 'joined up justice'<sup>104</sup> occurs at all levels of the court structures, but it occupies a considerable proportion of the top courts' work. Examples of the Appellate Committee's function as a manager of the legal system, taken from 1996-99 sample, include: deciding whether challenges should be channelled into the supervisory jurisdiction of the High Court or dealt with by criminal courts;<sup>105</sup> whether a trial should be allocated to a court martial or the civilian criminal courts;<sup>106</sup> giving guidance to lower courts on the proper approach to take when deciding whether to order a new trial on the grounds that an award of damages was excessive;<sup>107</sup> the powers of county courts to grant adjournments;<sup>108</sup> when it is proper to strike out a cause of action because of a claimant's delay;<sup>109</sup> whether a tort claim may be struck out on the ground that it is not fair, just and reasonable to impose a duty of care in negligence -

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which represents the views of the senior judiciary to government and others), was that there was a continuing need for second level appeals to a court which 'should so far as possible encompass the whole of the United Kingdom'.

<sup>102</sup> This is the view of Lord Hope, *op cit.* and in his written evidence to the Royal Commission (n. 3, above). The point is that if no Scottish appeals were heard by the Appellate Committee, there would be no rationale for the appointment of Scottish Lords of Appeal in Ordinary.

<sup>103</sup> Scotland Act 1998, Sched. 5, para. 1. Note also the Treaty of Union 1707, Art. 19 prohibits the courts of Westminster Hall 'or any other court of the like nature' from reviewing Scottish causes (discussed in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh, 1988), vol. 6, para. 821.

<sup>104</sup> See n. 32, above.

<sup>105</sup> *Boddington v British Transport Police* [1999] 2 A.C. 143; *R. v Wicks* [1998] A.C. 92.

<sup>106</sup> *R. v Martin (Alan)* [1998] A.C. 917.

<sup>107</sup> *Girvan v Inverness Farmers Dairy (No.2)* 1998 S.C. (H.L.) 1.

<sup>108</sup> *Bristol City Council v Lovell* [1998] 1 W.L.R. 446.

<sup>109</sup> *Grovit v Doctor* [1997] 1 W.L.R. 640.

or whether such an issue should be determined at trial;<sup>110</sup> whether the Appellate Committee had a discretion to hear an appeal which concerned an issue involving a public authority as to a question of public law, even where there was no longer any live issue which would affect the rights and duties of the parties as between themselves;<sup>111</sup> whether a non-pecuniary interest in litigation was sufficient automatically to disqualify a person from sitting as a judge in the cause;<sup>112</sup> and whether the restriction in section 29(3) of the Supreme Court Act 1981 on the availability of judicial review on a trial on indictment was aimed at preventing delay to the trial process and whether defendants could challenge the legality of the decision to proceed at trial.<sup>113</sup>

Doubts about the capacity and appropriateness of the top courts in system management may be raised. A general concern is that this kind of ad hoc regulation is sometimes unsuccessful. Disputes about the allocation of disputes to ordinary civil proceedings or the specialist Order 53 application for judicial review procedure resulted in several House of Lords decisions. Professor Wade commented that this case law 'has produced great uncertainty, which seems likely to continue, as to the boundary between public law and private law since these terms have not clear and settled meaning ... the House of Lords has expounded the new law as designed for the protection of public authorities rather than of the citizen'.<sup>114</sup> Another concern is whether such litigation in the top courts is an appropriate use of scarce and finite judicial resources;<sup>115</sup> time spent on this activity is time unavailable for other purposes (such as enunciating constitutional values).

## Innovating

Statutory provisions may lose relevance over time. Rules of the common law fall out of date. It is the task of all courts to apply the law as it stands to new circumstances. At the level of the top courts this function may go even further - to that of innovation in the substance of the law - both in the sense of establishing new rules for novel situations and in the sense of modifying the law where it no longer accords with contemporary circumstances.<sup>116</sup> This is a function which goes beyond the application of rules to the facts (the trial court function) or correction of application of the law to the facts (the first level

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<sup>110</sup> *Barrett v Enfield LBC* [1999] 3 W.L.R. 79.

<sup>111</sup> *R. v Secretary of State for the Home Department, ex p. Salem* [1999] 1 A.C. 450.

<sup>112</sup> *R. v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No.2)* [1999] 1 W.L.R. 272.

<sup>113</sup> *R. v DPP, ex p. Kebeline* [1999] 3 W.L.R. 972.

<sup>114</sup> H.W.R. Wade and C. Forsyth, *Administrative Law*, 7th ed., (Oxford, 1994), p. 682.

<sup>115</sup> Consider, e.g. a case such as *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48.

<sup>116</sup> Innovation is not new to the House of Lords, but it may be a function of increasing importance - for a comprehensive discussion of the Law Lords relationship to politics, see Robert Stevens, 'Judges, Politics, Politicians and the Confusing Role of the Judiciary' (n. 88, above) at pp. 267 et seq.

appeal function) - to possibly amending or establishing new rules. This may make it particularly important that the lead in carrying out this task is taken by the 'top' court - which along with the national executive and legislature plays a central role in national policy making.

Innovation also goes beyond the ordering of precedent.<sup>117</sup> It concerns moving the law on - in the way the Appellate Committee did in *Fitzpatrick v Sterling Housing Association*,<sup>118</sup> by updating a statute's definition of 'family' to accord with their new notions of the family. The case raised the question of whether a same sex partner of a protected tenant could be regarded as a member of the family for the purposes of the Rent Act 1977 and thus had the right to succeed to the tenancy on the death of then original tenant. Lord Slynn acknowledged that the original statutory provisions (which dated back to 1920), read in terms of the times of their passing would not have been understood to include a same sex couple within the definition of 'family'. However, such an interpretation would not be, 'in accordance with contemporary notions of social justice.' This case indicates that the innovation function may entail a degree of leading social change - the alteration to the law made in this case may well have been easier for the Appellate Committee to make than for the government, as recent debate over the repeal of section 28 of the Local Government Act indicates.

The danger for top courts in undertaking this task is that it takes them to the edge of the judicial function.<sup>119</sup> As Sir John Laws has commented, the distribution of authority between the judicial and elective branches in the United Kingdom's constitution is, without a binding constitutional document as a guide, 'ultimately a dynamic settlement... between the different arms of government.'<sup>120</sup> The Appellate Committee's decisions may thwart or amend the will of the executive or legislature - or simply be ahead of public opinion. In a case like *Fitzpatrick* however, it may be argued that this is the sort of legal reform the Appellate Committee is right to take up, on the basis that Parliament may have insufficient time, or may not, for political reasons, either be able to move the law forward for fear of public reaction, or simply want to move the law forward. As to when the Appellate Committee should lead like this - that perhaps is an aspect of the 'dynamic settlement' to which Sir John Laws refers: i.e., it involves an argument on a case by case basis on where the balance lies between Parliament and the courts - there is no conveniently clear boundary between judicial innovation and Parliamentary legislative reform.

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<sup>117</sup> See text at n. 72, above.

<sup>118</sup> [1999] 3 W.L.R. 1113; S. M. Cretney and F.M.B. Reynolds, 'Limits of the Judicial Function' (2000) 116 L.Q.R. 181.

<sup>119</sup> On judicial law making in comparison to legislative law making in a comparative perspective see, Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (1989), especially pages 30 -56.

<sup>120</sup> 'Law and Democracy' (n. 88, above), pp. 72, 81.

Another case in this category involving the updating of the interpretation of old statutory language is *R. v Ireland*<sup>121</sup> which concerned the question whether a recognisable psychiatric illness resulting from malicious telephone calls could amount to 'bodily harm' in terms of the Offences Against the Person Act 1861. The Appellate Committee held it could. In contrast to the *Fitzpatrick* case, *R. v Brown* makes it clear that judges engaged in this innovatory activity can just as easily find themselves criticised for imposing conservative ideas of sexual morality.<sup>122</sup> Lord Mustill in a dissenting judgment set out an argument against such judicial innovation, principally that it involves the judges trespassing upon the legislative function. Such controversies may, however, simply be about where Laws' 'dynamic balance' is to be struck. The argument about where the balance is to be struck has more frequently been discussed in debates about judicial activism versus judicial restraint.<sup>123</sup> This debate has had greater prominence in jurisdictions like the United States, in relation to cases like *Roe v Wade*.<sup>124</sup> The question such cases, and this function, raise for the future is whether the top courts are showing, or in the future will show, less deference towards the executive, and even more crucially, towards the legislature. Whatever the balance might have been, it could be about to change dramatically because cases arising under the Human Rights Act 1998 and devolution Acts will require the courts, and ultimately the top courts, to consider the extent to which statutes or acts of public authorities comply with human rights standards. The directions to the courts (for example, section 3 of the Human Rights Act 1998), to always seek to interpret statutes so as to accord with that Act will most likely require the Appellate Committee and Judicial Committee to exhibit more activist behaviour, such as that seen in *Fitzpatrick*. It will become increasingly important to substantiate the justifications for the top courts questioning the actions of the executive and legislature.

Other reasons for the top court to innovate involve the phenomenon of globalisation and the need to develop domestic law to cope with international legal developments and obligations.<sup>125</sup> In *R. v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No. 3)*<sup>126</sup> the House of Lords considered the relationship between developing international law relating to torture and domestic legal rules about whether a former head of state could be immune from prosecution for his actions while head of state. The *Pinochet* cases presented

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<sup>121</sup> [1998] A.C. 147.

<sup>122</sup> [1994] 1 A.C. 212 (homosexual consensual masochistic sex and whether the prosecution in order to succeed had to prove of lack of consent. A majority of 3:2 held it did not, meaning the convictions could stand).

<sup>123</sup> The debate has existed here (e.g. Robert Stevens, n. 88 above) but recently has been framed by discussion of the Human Rights Acts 1998 (e.g. Lord Irvine 'Activism and Restraint: Human Rights and the Interpretative Process' [1999] E.H.R.L.R 350; Rory O'Connell 'Guardians of the Constitution: Unconstitutional Constitutional Norms' [1999] J. Civ. Lib. 48; Lord Steyn, 'Incorporation and devolution – some reflections on the changing scene' [1998] E.H.R.L.R 153).

<sup>124</sup> *Roe v Wade* 410 U.S. 113 (1973).

<sup>125</sup> For e.g., *R v Secretary of State for Transport ex parte Factortame Ltd (No2)* [1991] A.C. 603.

<sup>126</sup> [1999] 2 W.L.R. 827.

issues in relation to which there were no clear answers in statute or case law. The credible development of not only United Kingdom law, but also the relationship of international criminal law to United Kingdom law required an authoritative determination from the highest United Kingdom authority - in this context, the Appellate Committee.

### **Appellate services for overseas jurisdictions**

The Law Lords once confidently exported legal ideas through the binding authority of Judicial Committee advice during the time of the 'imperial appeal'.<sup>127</sup> The days of Empire are passed though. The modern Commonwealth is neither the sort of legal order that the European Union is, nor is the Judicial Committee comparable to the European Court of Justice. The Judicial Committee no longer sits at the heart of a supra-national legal order with the task of maintaining a sense of unity within that order. Comparatively few Commonwealth countries retain the appeal.<sup>128</sup> As the Judicial Committee's overseas jurisdiction has waned it has become much less the court of the empire, or Commonwealth, and far more the individual final level of appeal in right of each jurisdiction which still send it appeals.

There are a range of contemporary justifications put forward for the Judicial Committee's overseas' appellate functions.<sup>129</sup> It provides:

- a second level appeal for legal systems which cannot afford to provide one themselves;
- a valuable second appeal in legal systems too small to provide their own second level appeal;
- specialist adjudication in relation to written constitutions and human rights documents.

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<sup>127</sup> David Swinfen, *Imperial Appeal* (Manchester, 1987).

<sup>128</sup> See n. 17, above.

<sup>129</sup> There is an extensive literature, see e.g. Roger Bryan, 'Toward the development of a Caribbean jurisprudence: the case for establishing a Caribbean Court of Appeal' (1998) 7 *Journal of Transnational Law and Policy* 181; Megan Richardson, 'The Privy Council and New Zealand' (1997) 46 *I.C.L.Q.* 908; Robyn Martin, 'Diverging Common Law: Invercargill goes to the Privy Council' (1997) 60 *M.L.R.* 94; Ronald Pol, 'Privy Council appeals — the principal alternatives' [1996] *N.Z.L.J.* 94; Rose Antoine, 'The Judicial Committee of the Privy Council — an inadequate remedy for death row prisoners' (1992) 41 *I.C.L.Q.* 179; W.S. Clarke, 'The Privy Council, politics and precedent in the Asia-Pacific region' (1990) 39 *I.C.L.Q.* 741; James Harris, 'The Privy Council and the common law' (1990) 106 *L.Q.R.* 574; P.G. McHugh, 'The appeal of "local circumstances" to the Privy Council' [1987] *N.Z.L.J.* 24; Philip Joseph, 'Towards abolition of Privy Council appeals' (1985) 2 *Canterbury L.R.* 273; G.T. Pagone, 'The place of the Privy Council in the Australian court hierarchy: who, what, where?' (1984) 58 *Law Institute Jnl* 959; Peter Burns, 'The Judicial Committee of the Privy Council: constitutional bulwark or colonial remnant?' (1984) 5 *Otago L.Rev.* 503; Sir Clarrie Harders, 'Conventions associated with the Australian constitution: the effect of the events of 1973-75 relating to references and appeals to the Privy Council' (1982) 56 *Australian L.J.* 132.

### *Unable to afford the appeal*

The Privy Council office describes the role in this way, '[w]here once it was a court primarily of the Dominions, now it is a court for the smaller Commonwealth territories who do not have the resources to support a second-tier Court of Appeal of their own.'<sup>130</sup> This assumes that a second appeal is valuable in itself and that this *is* in substance what the Judicial Committee provides (i.e. something more than what the first appeal provides). There are problems with this rationale. First, it cannot apply to jurisdictions like New Zealand, or until recently, Hong Kong: they could afford to run their own second level appeal. New Zealand does not keep the appeal for cost reasons, in fact there is a long-standing desire on the part of New Zealand Governments to end the appeal.<sup>131</sup> Secondly, it ignores the fact that the Judicial Committee's distance from many of the sending jurisdictions means that coming to it is a substantial cost to litigants. Consequently a good number of litigants are likely to be wealthy, taking cases involving significant amounts of money. They may well be able to pay for local appellate services – providing the Judicial Committee to them, effectively free of cost, is like charity to a millionaire.

These cases range across legal disciplines. There are major contractual disputes: e.g. gold mining joint ventures, contracts for the provision of professional services and a number of vendor and purchaser disputes.<sup>132</sup> A subset in this category of cases are those involving interpretation of standard form commercial documents, for example lease documents, *Melanesian Mission Trust Board v Australian Mutual Provident Society*<sup>133</sup> and *Sunflower Services Ltd v Unisys New Zealand Ltd*<sup>134</sup>. Interpretation of these documents is of considerable value to the industries concerned, the prevalence of their use means interpretation by the courts of its terms is of almost statutory significance – i.e. the commercial document, through popular usage is like a voluntarily adhered to statutory scheme.

Property cases also feature prominently. There are three aspects to highlight. First, a number of the cases deal with planning issues – whether under modern planning schemes

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<sup>130</sup> Privy Council Office, *The Judicial Committee of the Privy Council* (London, 1999). While this may be the view from Downing Street reasons for retention of the appeal vary – New Zealand for example has kept it almost by default, because it is too difficult to gain domestic consensus on what (if anything) should replace the Judicial Committee. See J.J. McGrath (n. 46 above) in which it is argued that New Zealand should abolish the appeal and does not need a second level of appeal. See also New Zealand Law Commission, *The Structure of the Courts* (1985).

<sup>131</sup> *Ibid.*

<sup>132</sup> e.g. *Auag Resources Ltd v Waihi Mines Ltd*, case 15 of 1998, 23 March 1998, involving a dispute between the joint venture partners in a gold mine; *R B Anderson-Jones v Society International De Telecommunications Aeronautiquesm (SITA)*, case 33 of 1998, 27 July 1998, a claim for approximately \$1 million in legal fees; and *Wellfit Investments Ltd v Poly Commence Ltd and Anor*, case 32 of 1997, 25 June 1997, and *Chong Kai Tai Ringo and Anor v Lee Gee Kee and Anor*, case 12 of 1997, 17 March 1997, both real estate vendor and purchaser cases from Hong Kong.

<sup>133</sup> (1997) 74 P. & C.R. 297.

<sup>134</sup> (1997) 74 P. & C.R. 112.



or restrictive covenant cases.<sup>135</sup> The second aspect is that a number of the cases deal with interpretation of the Torrens system of land registration.<sup>136</sup> In these cases the Privy Council in a small way is carrying on its vestigial role of a court concerned with unification of the law, the Torrens system being in use in a number of the countries from which it hears appeals.<sup>137</sup> The last type of property case to note are those involving statutory compulsory purchase schemes.<sup>138</sup> Finally under his heading there are a range of other commercial type disputes, all involving significant sums of money: taxation cases; employment law; intellectual property; insolvency; and banking.<sup>139</sup>

There are, of course, cases involving poor litigants – notably those applying *in forma pauperis*. As the split in the Privy Council over the extent to which it should interfere with the workings of local legal systems widens - in death penalty appeals some members are on the side of an uncomfortable deference to jurisdictions with the death penalty, while others show a distinct hostility to the death penalty, regardless of the country from which the appeal comes – the benefit of the Privy Council to these litigants may be less than it could be. This matter is discussed further, in the next section.

### *Insufficient judicial resources*

A second justification offered is that the countries concerned cannot afford (in so far as they do not have enough judges) to set up a replacement court of similar calibre and that this is

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<sup>135</sup> *Attorney General of Hong Kong v Fairfax Ltd* [1997] 1 W.L.R. 149 (covenant in 999 years lease form Crown concerning the type of properties to be built on the land in Hong Kong); *Barber v Minster for the Environment*, case 24 of 1997, 9 June 1997, in which the appellant objected to grant of planning permission to the second respondent because it would block his harbour view in Hamilton, Bermuda.

<sup>136</sup> e.g. *Gardner and Walker v Lewis* case 26 of 1998, 22 June 1998 (from Jamaica); *Liman v Chuan* case 27 of 1998, 22 June 1998 (from Brunei Darussalam); *British American Cattle Co v Caribe Farm Industries Ltd (In Receivership)* [1998] 1 W.L.R. 1529 (Belize). The Torrens land title system, as it exists for example in New Zealand provides for all interests in land to be registered on a certificate of title, one version of which is held at the Land Transfer Office and the other version, by the registered proprietor, or where there is a mortgage, by the first mortgagee.

<sup>137</sup> There are also jurisdictions not using the Privy Council which use the Torrens system, e.g. New South Wales in Australia.

<sup>138</sup> *Lesquende Ltd v Planning and Environment Committee of the States of Jersey* [1998] 1 E.G.L.R. 137; *Fok Lai Ying v Governor in Council and Ors*, case 35 of 1997, 27 June 1997; *Attorney General of New Zealand v Horton* [1999] 1 W.L.R. 1195

<sup>139</sup> e.g. *Inland Revenue Commissioner (New Zealand) v Wattie* [1999] 1 W.L.R. 873; *CFAO (Gambia) Ltd v Taal*, case 6 of 1997, 6 February 1997 (The Gambia, employment); *Canon Kabushiki Kaisha v Green Cartridge Co (Hong Kong) Ltd* [1997] A.C. 728 (Hong Kong, intellectual property, spare parts exception and replacement cartridges for laser printers and photocopiers); *Unilever Plc v Cussons (New Zealand) Pty Ltd* [1998] A.C. 328 (New Zealand, trade mark infringement; the case also involves trans-tasman commercial issues, the appellant and first respondent are Australian registered companies, the second respondent and New Zealand registered company); *Century National Merchant Bank & Trust Co Ltd v Davies* [1998] A.C. 628 (Jamaica, banking); *Village Cay Marina Ltd v Acland* [1998] 2 B.C.L.C. 327.

why they do not do so. Associated with this are issues of whether the local judiciary are sufficiently competent, and arguments that the Law Lords have the advantage of 'Olympian detachment.' This justification does not sit easily with the Privy Council's clear inclination to show deference to the local top courts from which they hear appeals, or the distaste a number of Law Lords are beginning to express about dealing with death penalty appeals.

The theme of deference not only erodes the historical notion that the Judicial Committee has the task of unifying the common law, but also its ability to be a truly authoritative second level of appeal for foreign jurisdictions. As retention of the appeal is seen by some as detracting from a sense of independence and an adverse comment on the quality of the local judiciary the Privy Council is exercising a particularly sensitive jurisdiction.<sup>140</sup> In a recent New Zealand case their Lordships noted that, '[f]or some years their Lordships' Board has recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of *local public policy*.'<sup>141</sup>

In *Lange v Atkinson and Australian Consolidated Press NZ Ltd* the Judicial Committee indicated that it would have not have been inclined to contradict the New Zealand Court of Appeal if it were not for the fact that the Appellate Committee decision in *Reynolds v Times Newspapers Ltd*<sup>142</sup> was decided almost contemporaneously, and that the New Zealand courts had made reference to earlier English decisions. Noting that the New Zealand courts had also referred to Australian case law, where Mr Lange had also brought suit, their Lordships made a number of interesting statements which touch on the modern aspect of their role as a court for the Commonwealth. The statements reveal a court aware that it may lead no longer by the power of precedent, but more by the persuasion of its reasoning:

'Even on issues of local public policy, every jurisdiction can benefit from examinations of an issue undertaken by others. Interaction between jurisdiction can help to clarify and refine the issues and the available options, without prejudicing national autonomy. ... Their Lordships consider that the advent of the decision of the House of Lords in *Reynolds* is a matter the New Zealand Court of Appeal would wish to have the opportunity to take into account when formulating the common law of New Zealand on this issue. ... Their Lordships emphasise that they do not suggest that at the further hearing the New Zealand courts are bound to adopt either the English or Australian solutions. Nor do they seek to influence the New Zealand courts towards either of these solutions.'<sup>143</sup>

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<sup>140</sup> J.J. McGrath, *Appeals to the Privy Council* (n. 46, above).

<sup>141</sup> *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [2000] 1 N.Z.L.R. 257, a defamation action brought by a former New Zealand Prime Minister (emphasis added)

<sup>142</sup> [1999] 3 W.L.R. 1010.

<sup>143</sup> *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, 28 October 1999.

This last comment suggests a court which is attempting to behave in the way second level appeal courts behave in federal systems such as the United States – where the Supreme Court has to deal with conflicts between the federal circuit courts of appeal. Unlike however the United States, the comment also makes clear that the Law Lords would not consider it appropriate, if the New Zealand Court of Appeal wanted to develop New Zealand defamation law along different lines, for them to interfere with that choice. Given that legally Privy Council judgments do still bind New Zealand courts (it is after all the highest court in the New Zealand court hierarchy), the last sentence of the quote is particularly notable - one cannot imagine the Appellate Committee saying the same thing to, for example the English Court of Appeal.

This advantage of being a small group of very senior judges may also be offset by the Judicial Committee's sheer distance from some jurisdictions, especially when dealing with matters involving significant local cultural sensitivities. New Zealand Treaty of Waitangi cases frequently raise this point. *Tainui Maori Trust Board v Treaty of Waitangi Fisheries Commission*<sup>144</sup> arose from the introduction in 1986 of a quota management system for the allocation of resources in New Zealand's fisheries. After Maori had claimed that the system had implications for their proprietary rights under the Treaty of Waitangi there were negotiations with the government which resulted in a deed of settlement (which was associated with other litigation in relation to the scheme). The Deed of Settlement was given effect to in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The consolidated appeals in this case concerned the allocation of fisheries assets to *iwi* and whether *iwi* may include urban Maori – a question involving very specific cultural knowledge. Their Lordships note they were:

'Very conscious of the important role played by the Courts of New Zealand, and by the Court of Appeal in particular, in relation to claims by Maori under the Treaty of Waitangi; and they fully realise the depth of knowledge and experience of the Court of Appeal in this area.'<sup>145</sup>

They nevertheless allowed the appeal.

There are points of more serious tension within the Privy Council itself, especially in relation to death penalty cases, which run against the theme of deference. In death penalty cases some of their Lordships clearly want to take a more 'global' approach and be rather more innovative in their approach to these cases. Lord Steyn's dissent in *Fisher v Minister of*

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<sup>144</sup> *Treaty Tribes Coalition, Te Runanga o Ngati Porou and Tainui Maori Trust Board v Urban Maoris Authorities* [1997] 1 N.Z.L.R. 513; see also, *Peng Aun Lim v McClean and Wiley*, case 10 of 1997, another case arising from the quota management system for New Zealand's fisheries. *Peng Aun Lim* concerned the inter-relation between the operation of the quota system with a commercial transaction – an agreement to share quota allocation in a partnership.

<sup>145</sup> [1997] 1 N.Z.L.R. 513, 522.

*Public Safety and Immigration (No. 1)*<sup>146</sup> is a good example. Lord Steyn's language is certainly that of deference which Ewing has criticised.<sup>147</sup> His Lordship opens

'A dissenting judgment anchored in the circumstances of today sometimes appeals to the judges of tomorrow. In that way a dissenting judgment sometimes contributes to the continuing development of the law. ...[C]onstitutional law governing the unnecessary and avoidable prolongation of the agony of a man sentenced to die by hanging is ... in transition.'

In fact their lordships in a different constitutional context did move towards Lord Steyn's position in the later case of *Thomas v Commissioner of Prisons*<sup>148</sup> (where provisions of the Trinidad and Tobago Constitution were at issue; *Fisher* was a Bahaman case). The tension in these cases on this point was evident at the end of the period examined, see *Higgs and Mitchell v Minister of National Security*<sup>149</sup>, a majority decision with Lord Steyn once again in dissent.

### *Providing specialist adjudication in relation to written constitutions*

A further justification for the Judicial Committee's role is it provides specialist adjudication in relation to written constitutions and acts as a guardian of human rights. During preparation for devolution in the United Kingdom, note was often made of the Judicial Committee's experience in relation to constitutional adjudication when dealing with Commonwealth matters (in relation to countries with written constitutions, especially those which include human rights provisions).<sup>150</sup> In the past the Judicial Committee has exercised very significant influence over development of a number of Commonwealth countries' constitutions. Its decisions in relation to the nature of the Canadian federation are of particular note.<sup>151</sup> In our survey period there are twenty 'constitutional cases',<sup>152</sup> half of which relating to the imposition of the death penalty. They amount to about 10 per cent of the case load. Apart from the death penalty issues there may not be sufficient 'critical mass'

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<sup>146</sup> [1998] A.C. 673.

<sup>147</sup> Keith Ewing, 'A Bill of Rights: Lessons from the Privy Council' in Finnie (ed), *Edinburgh Essays in Public Law* (Edinburgh, 1991), p 231.

<sup>148</sup> Case 13 of 1999, 17 March 1999.

<sup>149</sup> Case 55 of 1999, 14 December 1999.

<sup>150</sup> e.g. Robert Reid, 'Devolution and the Judiciary' in University of Cambridge Centre for Public Law (ed.), *Constitutional Reform in the United Kingdom: Practice and Principles* (1998), p. 25.

<sup>151</sup> Leslie Zines, *Constitutional Change in the Commonwealth*, esp. ch. 3. Drewry and Blom-Cooper note in relation to Canada that, 'Lack of involvement in the local affairs of geographically remote territories and an unawareness by judges of political realities have their pitfalls. The inept handling of a series of cases in the late 1930s concerning the distribution of political power in Canada between the Federal Government in Ottawa and the provincial governments, led directly in 1948 to Canada abolishing all appeals to London.' A constitutional example of the phrase, 'the customer is always right.' *Final Appeal* (n. 31, above), p. 105.

<sup>152</sup> That is cases involving in particular the interpretation of written constitutions, or in the exceptional case of New Zealand, which has a largely uncodified constitution along UK lines, cases of constitutional significance, e.g. involving interpretation of the Treaty of Waitangi.

for the Law Lords to develop overarching or deeper themes in relation to the constitutional development of the jurisdictions they are dealing with; and in relation to death penalty cases, the Committee is increasingly split.

Cases of note include *Thomas v Commissioner of Prisons*<sup>153</sup>, a majority decision on whether there was a constitutional right of a prisoner sentenced to death to have his application to the Inter-American Commission on Human Rights considered and determined before sentence was carried out, and whether the way a prisoner is treated prior to carrying out sentence could render the sentence unconstitutional. The case is also notable because the Board split in three directions, with a majority judgment and two dissents. *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*<sup>154</sup> concerned a civil servant engaging in a public demonstration against the government and his right to freedom of expression. *Matadeen v Pointu*<sup>155</sup> concerned whether educational regulations in Mauritius were discriminatory and upon what grounds they could be reviewed. *Russell v Attorney-General for the State of Saint Vincent and the Grenadines*<sup>156</sup> whether failure to appoint a constituent boundaries commission within a reasonable time of a census was a condition precedent to a valid election. The Judicial Committee held that while a commission had to be established within a reasonable time, and if failure to do so were challenged before an election, relief would be granted, after an election has been held, relief was discretionary. In this case relief was refused.

### **Professional regulation and ecclesiastical matters**

The oddest aspect of top courts' work is that the Judicial Committee hears appeals from a variety of professional disciplinary bodies and in the period examined, one lengthy case about the structure of a parish<sup>157</sup>. This is straight forward appellate work - indeed, the Judicial Committee is the first and only appeal. The cases mostly concern doctors in trouble for psychiatric illness, dishonesty or incompetence. Due to, among other things, changes in the General Medical Council's disciplinary practices, the number of cases coming to the Judicial Committee under this heading is increasing. Although the Committee only sits with three judges for these cases, and for relatively short periods of hearing time (about half to one day) these cases are still a demand on the top courts' key resource - the judges' time. Of all the functions of the top courts discussed in this paper, this one should certainly be moved elsewhere - there is no good reason for a second level appeal court to be carrying out first level appeal work.

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<sup>153</sup> Case 13 of 1999, 17 March 1999 (Trinidad and Tobago).

<sup>154</sup> [1999] 1 A.C. 69 (Antigua and Barbuda).

<sup>155</sup> [1999] A.C. 98.

<sup>156</sup> [1997] 1 W.L.R. 1134.

<sup>157</sup> *Cheesman v Church Commissioners* in which two Lords of Appeal in Ordinary and a retired Court of Appeal judge sat. The decision was split 2:1, and was 31 pages long.

#### IV. Concluding remarks

We have argued that the current work, shared resources and future reform of the Appellate Committee and Judicial Committee are too intertwined to be considered in isolation from one and other. The formal function of the top courts is, and is likely to continue to be, that of hearing second appeals. The value of that basic function and the detail of what that function entails is, as we have shown, far from straightforward or uncontentious. The problems faced by the Appellate Committee and Judicial Committee are not however unique - top level appellate courts around the world are also, coping with: an increasing demands on court time as case loads increase; questions about the legitimacy of the courts' role in restraining executive and legislative action by judicial review; and role of the courts engaging in significant innovation;<sup>158</sup> and new expectations arising from the passage of new legislative or constitutional provisions.<sup>159</sup> While these courts operate in the context of their own legal systems there may be lessons to be learnt from examining both the functions they share with the United Kingdom's top courts (and how they undertake them) and, where there are differences, why other legal systems distribute the functions allocated in the United Kingdom to the top courts, to other bodies within the legal system.<sup>160</sup>

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<sup>158</sup> e.g. *Mabo v Queensland* (1989) 166 C.L.R. 186, in which the High Court found that Australia was not *terra nullius* when European settlers first arrived.

<sup>159</sup> e.g. in Canada, the Canadian Charter of Rights and Freedoms; in New Zealand, the New Zealand Bill of Rights Act 1990; in Spain, the post-Franco Constitution; or generally in Europe, the interaction of Community Law and the European Convention on Human Rights with the legal systems of member states.

<sup>160</sup> We are conducting an conducting a comparative study, funded by the Economic and Social Research Council and British Academy, into the top courts of Australia, Canada, Germany, Spain and the USA with the aim of developing a detailed and costed outline for a new structure for the UK's top courts—including analysis of the choice between a single supreme court, or a supreme court accompanied by a separate constitutional court.

## VI. Appendix

The following statistics have been compiled using each judgment handed down by the Appellate Committee and the Judicial Committee during the period November 1996 to November 1999. As a result the statistics differ from those published by the Lord Chancellor's Department as they do not take into account those appeals that are, for example, disposed of without a judgment (The Lord Chancellor's Department statistics stated that 17 cases were disposed of by the House of Lords without a judgment being given in 1998 alone (*Judicial Statistics* 1998, Cm. 4371).

Table 1: *Appellate Committee of the House of Lords, cases determined November 1996 - November 1999* shows the various outcomes of the 166 appeals determined by the Appellate Committee during the study period, along with statistics as to the court appealed from. The figures show that the Appellate Committee dealt predominantly with matters arising in the Civil Division of the Court of Appeal, and that the Law Lords determined 152 'civil' cases during the study period. Perhaps more surprising however, is the relatively small number of 'criminal' cases dealt with: despite deciding 9 criminal appeals during 1997, the Appellate Committee only determined 14 such appeals during the whole study period. Also surprising perhaps, is the seemingly high success rate throughout the period, however it must be remembered that due to cases which were dismissed without judgment being excluded from this study, this figure may be disproportionately high.

Table 2: *Judicial Committee of the Privy Council, cases determined November 1996 - November 1999* provides a summary of the 193 cases determined by the Judicial Committee during the study period. The table also shows the origins of the appeals (although it must be remembered that the right of appeal from both Hong Kong and the Gambia ended during the study period). The table does display the high proportion of criminal appeals dealt with by the Judicial Committee: roughly one third of the total number during the three year sample. In addition it should be noted that more than half of the appeals determined between 1996 and 1999 came from only four countries: Hong Kong, Jamaica, New Zealand, and Trinidad and Tobago. This is interesting bearing in mind that the appeal from Hong Kong ended mid-way through the study period.

Table 1: Appellate Committee of the House of Lords, cases determined November 1996 - November 1999

Criminal Appeals						
Dates	Allowed:	Allowed in Part:	Dismissed:	Ref to ECJ:	TOTAL:	
Nov 1996 - Dec 1996:	0	0	0	0	0	0
Jan 1997 - Dec 1997:	2	2	5	0	9	
Jan 1998 - Dec 1998:	1	0	2	0	3	
Jan 1999 - Nov 1999:	1	0	1	0	2	
TOTALS:	4	2	8	0	14	

Civil Appeals:						
Dates	Allowed:	Allowed in Part:	Dismissed:	Ref to ECJ:	TOTAL:	
Nov 1996 - Dec 1996:	2	1	4	0	7	
Jan 1997 - Dec 1997:	23	6	20	0	49	
Jan 1998 - Dec 1998:	25	4	17	2	48	
Jan 1999 - Nov 1999:	24	4	20	0	48	
TOTALS:	74	15	61	2	152	

SUCCESS RATES:  
 Criminal: 29%  
 Civil: 49%  
 OVERALL: 47%

Appeals from:	CA (Civil):	CA (Criminal):	Divisional Court:	High Court:	Scotland:	Northern Ireland:	Totals:
Nov 1996 - Dec 1996:	3	0	0	0	3	1	7
Jan 1997 - Dec 1997:	37	9	1	1	9	1	58
Jan 1998 - Dec 1998:	31	2	8	1	7	2	51
Jan 1999 - Nov 1999:	39	0	6	0	3	2	50
TOTALS:	110	11	15	2	22	6	166



**Table 2: Judicial Committee of the Privy Council, cases determined November 1996 - November 1999**

Origin of Appeal:	No. of appeals entered	Dismissed	Allowed	Total
Antigua	5	3	2	5
Bahamas	8	7	1	8
Barbados	2	1	1	2
Belize	4	0	4	4
Bermuda	5	3	2	5
Brunei	2	2	0	2
Cayman Islands	3	2	1	3
Gambia	3	0	3	3
Gibraltar	3	2	1	3
Grenada	3	2	1	3
Guernsey	1	1	0	1
Hong Kong	28	17	11	28
Jamaica	29	14	15	29
Jersey	1	0	1	1
Mauritius	8	7	1	8
New Zealand	25	17	8	25
St. Christopher and Nevis	1	0	1	0
St. Lucia	2	2	0	2
St. Vincent and the Grenadines	4	2	2	4
Trinidad and Tobago	35	17	18	35
Virgin Islands	1	0	1	1
Medical Act 1983	14	13	1	14
Dentists Act 1984	4	2	2	4
Pastoral Measure 1983	1	1	0	1
Medicine Act 1960 (Occupational Therapists Board)	1	1	0	1
<b>TOTAL</b>	<b>193</b>	<b>116</b>	<b>77</b>	<b>193</b>
	Civil	88	43	131
	Criminal	28	34	62

Success Rates:  
 Overall: 40%  
 Civil: 33%  
 Criminal: 55%

**Table 3: Subject Matter of Appeals, 1997 and 1998:**

<u>Subject Matter of Cases Heard 1997:<sup>161</sup></u>		<u>Subject Matter of Cases Heard 1998:</u>	
<p><b>House Of Lords:</b>            Air Transport:1            Armed Forces: 1            Children: 5            Civil Procedure: 3            Conflict of Laws: 4            Criminal Law: 3            Criminal Procedure: 2            Criminal Evidence: 4            Damages: 2            Education: 1            Employment: 5            Extradition: 2            Financial Services: 1            Housing: 2            Income Tax: 2            Insolvency: 2            Landlord and Tenant: 4            Negligence: 1            Nuisance: 1            Planning: 3            Sale of Goods: 1            Sentencing: 3            Shipping: 1            Social Security: 3            Social welfare: 1</p> <p><b>TOTAL: 58</b></p>	<p><b>Privy Council:<sup>162</sup></b>            Administration of Justice: 1            Agriculture: 1            Civil Procedure: 1            Company Law: 1            Constitutional Law: 2            Conveyancing: 1            Copyright: 1            Corporation Tax: 3            Criminal Evidence: 3            Criminal Procedure: 4            Employment: 2            Human Rights: 1            Insolvency: 3            Insurance: 2            Intellectual Property: 1            Landlord and Tenant: 1            Real Property: 1            Shipping: 1            Taxation: 1</p> <p><b>TOTAL: 31</b></p>	<p><b>House Of Lords:</b>            Accountancy: 1            Administration of Justice: 1            Administrative Law: 1            Civil Procedure: 2            Conflict of Laws: 2            Construction: 2            Contract: 1            Criminal Evidence: 1            Criminal Procedure: 2            Damages: 3            Defamation: 1            Detention: 1            Employment: 3            Environment: 1            Equity: 1            European Union: 1            Extradition: 2            Family Law: 1            Finance: 1            Health and Safety: 1            Housing: 2            Immigration: 1            Insurance: 2            Intellectual Property: 1            Landlord and Tenant: 1            Licensing: 1            Local Government: 1            Mental Health: 3            Negligence: 1            Oil and Gas Industry: 1            Penology: 1            Pensions: 1            Police: 1            Sentencing: 1            Shipping: 1            Taxation: 1            VAT: 2</p> <p><b>TOTAL: 51</b></p>	<p><b>Privy Council:<sup>163</sup></b>            Banking: 1            Civil Procedure: 3            Constitutional Law: 1            Criminal Evidence: 3            Criminal Procedure: 4            Evidence: 1            Human Rights: 2            Insolvency: 1            Insurance: 1            Planning: 1            Real Property: 3            Taxation: 2</p> <p><b>TOTAL: 23</b></p>

<sup>161</sup> Categories taken from *Current Legal Information* on CD-ROM (Sweet and Maxwell).

<sup>162</sup> Only 31 of the 68 cases heard by the Privy Council were reported in *Current Legal Information*.

<sup>163</sup> Only 23 of the 52 cases heard by the Privy Council were reported in *Current Legal Information*.