What is the future for the Judicial Committee of the Privy Council?

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Executive summary

- The Judicial Committee of the Privy Council gives judgment in about 70 cases a year. These include appeals from a range of legal systems outside the UK; appeals from some decisions of the General Medical Council and similar professional bodies in the UK; very occasionally, challenges to Church of England reorganisation schemes; and under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998 it has become responsible for determining 'devolution issues'. Each board of three or five judges convened to hear a case is drawn mainly from the UK's 12 Lords of Appeal in Ordinary who split their time about evenly between service on the Judicial Committee and the Appellate Committee of the House of Lords. Other senior judges who have been appointed as Privy Councillors are also eligible to sit.

- The overseas jurisdiction has declined since the 1940s as former dominions and colonies decided to create their own top level courts rather than rely on the Judicial Committee. 17 independent states do, however, continue to permit appeals to London. The government of New Zealand (from where 14 or so appeals a year come) is pressing ahead with plans to end Privy Council appeals. 10 independent states in the Caribbean have recently concluded an agreement to set up a Caribbean Court of Justice in place of appeals to the Judicial Committee. The date for implementation of these reforms is uncertain; but once in place they will significantly decrease the Judicial Committee's overseas case load. There will then be no more than about 14 appeals a year from the few remaining independent states which send appeals, the British Overseas Territories, the Bailiwicks of Jersey and Guernsey and the Isle of Man.

- There is little rational basis for permitting aggrieved doctors, dentists and vets to appeal to the Privy Council against their professional bodies' decisions about professional registration. It is a misapplication of scare judicial resources to require the UK's most senior judges to hear these cases. In July 2000, the government announced it was considering reform. The General Medical Council is also engaged on a radical review of its own internal decision-making procedures. In England & Wales, such appeals would be better channelled as judicial review challenges in the Administrative Court. Similar comments apply to the Judicial Committee's jurisdiction over Church of England matters arising under the Pastoral Measure.

- The happy coincidence between a potentially sharp decline in the Judicial Committee's work in relation to overseas and medical appeals and its increasing new role and case load as the court for the UK's 'devolution issues' should not be used as a reason to avoid considering further reform.

- Little cogent explanation for choosing the Judicial Committee as the UK's devolution court was provided in 1998. So far all devolution issue appeals have arisen from Scottish criminal cases and relate to alleged non-compliance by the Scottish Executive with Convention rights (*i.e.* those European Convention of Human Rights provisions which have been incorporated into UK law). In the future, there may be devolution issue cases arising from the Northern Ireland Act 1998 and the Government of Wales Act 1998.

- Even if the Judicial Committee has the capacity to cope with the growing number of devolution issue cases, there are reasons to think that its 'architecture' may be inadequate. First, courts ought to be transparent in their institutional design: the distribution of work between the Appellate Committee of the House of Lords and the Judicial Committee is both hard for people to understand and not easy to justify on rational grounds. There is an undesirable overlap of responsibility at the highest level in the UK for adjudicating on Convention rights. Secondly, it is open to question whether the formal attachment of the Judicial Committee to a department of the UK government (the Privy Council) remains desirable. Thirdly, under current arrangements there is the possibility a conflict of authority between the Judicial Committee and the Appellate Committee of the House of Lords. A fourth possible cause of concern is the sheer size of the Judicial Committee: over 60 judges are eligible to be called upon to sit in cases. These, and other, disquiets need further analysis.

Introduction

Nobody starting with afresh would design a court that looks like the Judicial Committee of the Privy Council. The 70 cases or so a year it decides come from a wide variety of sources. Most of its work still arises from its role as the final court of appeal for many legal systems outside the UK:

- seventeen independent states (the UK's former colonies and dominions) including New Zealand, Jamaica and the Republic of Trinidad and Tobago;
- the British Overseas Territories (formerly called Dependent Overseas Territories) including Bermuda, the Cayman Islands and Gibraltar; and
- the Bailiwicks of Jersey and Guernsey, and the Isle of Man.

It also spends about 10 per cent of its time each year hearing appeals from statutory bodies regulating doctors, dentists and vets. During 2000, there were 16 appeals to the Judicial Committee against General Medical Council decisions. The Judicial Committee also occasionally hears appeals against Schemes of the Church Commissioners under the Pastoral Measure 1983.

Of increasing importance is the role of the Judicial Committee in determining 'devolution issues' arising under the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998. These come to the Judicial Committee as appeals or 'references' from lower courts in the UK's three legal systems (England & Wales; Northern Ireland and Scotland). The Law Officers may also refer a Bill of the Scottish Parliament or the Northern Ireland Assembly directly to the Judicial Committee for a determination as to whether it is within the competence of the devolved institution.[1] Devolution issues include disputes about:

- whether legislation made by the Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales (NAW) is within the powers conferred on that institution; and

[1] The Law Officers in Scotland are the Lord Advocate and Solicitor General for Scotland (political appointees and members of the Scottish Executive, though not necessarily MSPs) and the Advocate General for Scotland (a newly created post; the office holder is a member of the UK government and either an MP or a peer. His or her role is to advise the UK government on Scots law). The Law Officers for England and Wales are the Attorney General and the Solicitor General, both political appointees and members of the UK government and either MPs or peers. They also currently act as Law Officers for Northern Ireland, though the Northern Ireland Act 1998 establishes a separate post of Attorney General for Northern Ireland (who will also be a member of the UK government).

- whether decisions of the members of the Scottish Executive, Northern Ireland Executive and NAW are compatible with European Community law and 'Convention rights' (*i.e.* those rights of the European Convention on Human Rights which have been incorporated into domestic law). This type of devolution issue is significant because it means that while legal challenges alleging breach of Convention Rights by the UK government and other public bodies arise under the Human Rights Act 1998, they are 'devolution issues' when they concern the institutions and office holders established by the three devolution Acts. The consequence, as we shall see below, is that Convention rights under the Human Rights Act have the Appellate Committee of the House of Lords as the final court of appeal (or, in some Scottish criminal matter, the High Court of Justiciary) whereas Convention rights under the devolution Acts go, ultimately, to the Judicial Committee.

The judges who sit on the Judicial Committee are, in the main, the UK's twelve Lords of Appeal in Ordinary (the full-time, salaried 'law lords'). They divide their time about equally between the Judicial Committee and the Appellate Committee of the House of Lords (the final court of appeal in civil and criminal matters for England & Wales and Northern Ireland, and for civil cases only from Scotland). In addition to the law lords, other judges who have been appointed as Privy Councillors are eligible to sit. Such judges include: the Lord Chancellor; retired law lords and Lord Chancellors; the 40 judges of the Court of Appeal in England & Wales; the four most senior judges in Northern Ireland; the senior Scottish judiciary; and senior judges from several Commonwealth countries who have been appointed Privy Councillors.[2] Judges retired from their full time posts can sit but, except for a serving Lord Chancellor, there is a statutory prohibition of judges over the age of 75 taking part in the work of the Judicial Committee.

Unlike membership of the UK's Appellate Committee of the House of Lords, membership of the Judicial Committee is not therefore confined to judges who have peerages. In February 2001, a female judge sat for the first time when Dame Sian Elias, the Chief Justice of New Zealand, heard a tax appeal. Only UK judges are permitted to sit when the Judicial Committee is determining devolution issues.

[2] Over the past 20 years, the following judges from this last category have been actually sat on the Judicial Committee: Sir Gordon Bisson, Sir Maurice Casey, Sir Thomas Eichelbaum, Thomas Gault, Sir Michael Hardie Boys, John Henry and Sir Duncan McMullin; Dame Sian Seerpoohi Elias (all judges of the New Zealand Court of Appeal); Sir Tomas Floissac (East Caribbean Court of Appeal); Telfold Georges (Bahamas Court of Appeal) and Edward Zacca (Supreme Court of Jamaica). Source: H.C. Debs., 15 February 2000, col. 459W, updated.

Panels hearing particular cases are selected by the senior law lord (Lord Bingham of Cornhill) and in most cases are made up of five judges, or three for medical and other professional conduct appeals. Hearings take place in a council chamber in Downing Street; members of the public wishing to visit should simply ask the policeman on the gate to let them through. The location of the Judicial Committee's hearings in London is merely one of practical convenience, not a legal requirement (see *Ibralebbe v The Queen* [1964] A.C. 900 at 922) and so the court could sit in any of the countries from which it receives appeals. The determination of death penalty appeals (see below) by judges in London does not breach the UK's international treaty obligations prohibiting capital punishment because 'in cases where the Judicial Committee … acts as an appeal court for an independent state, including states that impose the death penalty, it does so as an integral part of the judicial structure of that state rather than of the UK' (the Prime Minister, H.C. Debs., 3 February 2000, col. 674W).

Declining overseas jurisdiction

Over the years, the Judicial Committee has lost most of its overseas jurisdiction as former dominions and colonies decided that independence made it desirable for them to establish their own indigenous top level courts—such as Australia (in 1968 and 1977), Bangladesh (1972), Canada (1949), Hong Kong (1997), India (1949), Malaysia (1982), Singapore (1994) and Zimbabwe (1980). Seventeen independent states, however, continue to permit appeals to the Judicial Committee, often a right enshrined in a written constitution. Recent developments indicate that New Zealand and ten Caribbean states are now set to follow the long list of other countries which have ended Judicial Committee appeals.

A long standing debate in New Zealand about the desirability of bringing an end to appeals to the Judicial Committee appears to be coming to a close. In December 2000, Attorney General Margaret Wilson circulated a discussion paper recommending that appeals to London cease and the New Zealand government is reported to have a commitment to 'press ahead with its controversial plans' (*Financial Times*, 20 February 2001). During 1999 there were 14 appeals from New Zealand and on average 18 per cent of the Judicial Committee's case load comes from there. (The UK's law lords thus spend far more time hearing New Zealand cases than they do appeals from Northern Ireland, typically two or three a year, in the Appellate Committee of the House of Lords).

In February 2001 agreement was reached among eleven Caribbean states to establish a Caribbean Court of Justice which may (for ten of the states) replace the Judicial Committee as the final court of appeal in criminal and civil matters. The project to establish a new court remains controversial in the region and it is unlikely to be operational before 2003. The new court will have a compulsory jurisdiction over the interpretation and application of the Treaty of Chaguaramas which establishes the Caribbean Community (Caricom) Single Market and Economy (CSME), the regional free trade association. But the agreement allows them to choose whether or not to use the new court as the final court of appeal (rather than the Judicial Committee) from their ordinary courts. Constitutional amendment will be required in most countries. The potential scale of the impact on the Judicial Committee's case load can be seen from Table 1. For a three year sample period, November 1996 to November 1999, it shows how many appeals reached the Judicial Committee from legal systems that may use the Caribbean Court of Justice as their court of final appeal rather then the Judicial Committee. (Surinam is also a party to the agreement establishing the new court, but obviously this former Dutch colony never used the Judicial Committee as a court of appeal).

Table 1: Appeals from Caricom states to the Judicial Committee 1996-1999

Antigua & Barbuda	5 during 3 year sample period
Barbados	8
Belize	4
Grenada	3
Commonwealth of Dominica	0
Jamaica	29
St Christopher & St Kitts	0
St Lucia	2
St Vincent & the Grenadines	4
Republic of Trinidad & Tobago	35

During the sample period, these legal systems contributed 90 of the total 193 appeals determined by the Judicial Committee (*i.e.*, over 46 per cent). A roughly similar picture emerges from the *Judicial Statistics England and Wales for the year 1999* (London: Lord Chancellor's Department, July 2000, Cm. 4786): appeals from the Caricom states amounted to 23 of the 69 appeals entered during 1999 (exactly a third of the total).

Within the UK, views about the ending of these Judicial Committee appeals are mixed. Most welcome it as the inevitable and desirable fruition of de-colonisation and self-determination by peoples many miles away from London. Some commentators have also expressed distaste at the fact that many Caribbean appeals in recent years have been against conviction or sentence in capital cases (see *e.g.* David Pannick QC, 'End this

nonsense of our hanging judges', *The Times*, 15 June 1999). Amnesty International has, however, expressed concern that the ending of Judicial Committee appeals is 'a development that may be motivated by a desire to increase the number of executions … judicial precedents that protect the rights of death row inmates may be threatened' (AI Index, 15 February 2001).

What's left after Caribbean states and New Zealand go?

If and when appeals from New Zealand cease and the Caribbean Court of Justice is running, the Judicial Committee will continue to hear appeals from the overseas legal systems set out in Table 2. This shows the number of appeals determined during the three year sample period November 1996 to November 1999. (Other British Overseas Territories include British Antarctic Territory; British Indian Ocean Territory; Pitcairn Islands; South Georgia and the South Sandwich Islands. Appeals also lie from Akroteri and Dhekelia (Sovereign Base Areas of Cyprus) and the West Indies Associated States—but no significant case load arises from them).

Table 2: overseas appeals 1996-1999 excluding New Zealand and Caricom states

Appeals from independent states	
Bahamas	8 during 3 year sample period
Brunei (in civil cases only)	2
Gambia	3
Kiribati (in very limited cases)	0
Mauritius	8
Tuvalu	0
Appeals from British Overseas Territories	
Anguilla	0
Bermuda	5
British Virgin Islands	1
Cayman Islands	3
Falkland Islands	0
Gibraltar	3
Montserrat	0
St Helena and dependencies	0
Turks & Caicos Islands	0
Legal systems of the British Isles	
Jersey	1
Guernsey	1
Isle of Man	0

These figures, taken from the November 1996 to November 1999 sample, reveal an average caseload for the Judicial Committee of about 12 appeals each year from these legal systems. The *Judicial Statistics 1999* again reveal a broadly similar picture, with 14 cases pending from these legal systems at the end of 1999.

Doctors, dentists, vets and others

Several Acts of Parliament create a right of appeal from professional bodies directly to the Judicial Committee. These are from the:

- General Medical Council (Medical Act 1983)
- General Dental Council (Dentists Act 1984)
- General Optical Council (Opticians Act 1989)
- Council of the Royal College of Veterinary Surgeons (Veterinary Surgeons Act 1966)
- General Osteopathic Council (Osteopaths Act 1993)
- General Chiropractic Council (Chiropractors Act 1994)
- and under the Professions Supplementary to Medicine Act 1960 and/or, insofar as it is in force, the Health Act 1999 (which provides for a new regime for the statutory regulation of certain professions).

Appeals to the Judicial Committee can be brought on points of law and on the merits of the statutory bodies' decisions affecting the registration of the appellant; in some other circumstances the ground of appeal is limited to points of law. Practitioners wanting to challenge interim suspension from their professional register or most other kinds of decisions must make a claim for judicial review in the High Court (in England and Wales) or the Court of Session (in Scotland). During 2000, the Judicial Committee heard 16 appeals from determinations of the GMC (General Medical Council, *Acting fairly to protect patients*, London, 2001 available on line at www.gmc-uk.org). During 1999, the total number of professional body appeals heard was nine; in 1998, there were eight and in 1997 there were seven (*Judicial Statistics 1999,* p. 8).

Recently the Lord Chancellor announced: 'there are strong arguments for dealing with these cases at a lower judicial level. I am considering the question with the other Ministers concerned. Primary legislation would be required in some cases' (H.L. Debs, 20 July 2000, answering a written question from Lord Lester of Herne Hill).

Proposals for better and further regulation of conventional, complementary and alternative medical practice are currently on the policy agenda—partly as a result of professional bodies reviewing their internal procedures for compliance with the Human

Rights Act 1998, but also in response to declining public confidence in the medical professions in the wake of several recent scandals and the growing use of non-traditional medical practices. The GMC is currently undertaking a radical overhaul of its structures (see its consultation documents *Effective, inclusive and accountable: reform of the GMC's structure, constitutional and governance* and *Acting fairly to protect patients* (London: 2001). The GMC only half heartedly defends the status quo:

> 'Although the present arrangements are complex and rather obscure, they do have the merit of subjecting some GMC findings to rigorous scrutiny by the highest legal authority, and the existence of recourse to the Courts is important. However, if this aspect of the current role of the Privy Council is ended, it will be important for any new arrangement to meet the criteria we have identified, and for some recourse to the Courts to be preserved' (*Acting fairly to protect patients*, para. 80).

Also under discussion is the further regulation of alternative and complementary medicines (see the House of Lords Select Committee on Science and Technology, Sixth Report, 1999-2000 session, HL Paper 123 and the subsequent debate on it in the House of Lords on 29 March 2001).

Amidst this flux of policy-making, one thing shines through: the obvious inappropriateness of the Judicial Committee as an adjunct to professional conduct regulation. It is surely a misuse of the UK's most senior judges' time—and also that of the distinguished Commonwealth judges who travel to London to sit from time to time— for them to hear appeals in this area, many of which are on the merits of the regulatory bodies' determinations and some of which are conducted by appellants in person. Nor is it really feasible for the Judicial Committee to adapt itself and its procedures to take on some proposals for expansion of the forms of appeal, for example permitting complainant patients to have a right of appeal and procedures to enable effective appeals in cases with multiple complainants (see GMC, *Acting fairly to protect patients*, para. 80). Moreover, it is at least open to debate whether the use of the Judicial Committee as the court overseeing the statutory regulatory bodies complies with Article 6 of the ECHR, now part of UK law by virtue of the Human Rights Act 1998. The doubt arises because the Privy Council, as a department of state, has some important responsibilities in approving the rules of the statutory bodies against which doctors and others appeal to another of part of the Privy Council (the Judicial Committee). In *McGonnell v UK* (2000) 30 E.H.R.R. 289 the European Court of Human Rights emphasised the need for courts to have objective independence from other branches of government (see below).

Pastoral Measure 1983

Every few years, an appeal is heard by the Judicial Committee under Pastoral Measures (legislation made by the General Synod applying exclusively to the Church of England) dealing, in essence, with the reorganisation of parishes. These are appeals on the merits and are not confined to points of law (*Hargreaves v Church Commissioners* [1983] 2 A.C. 457). Most recently *Cheeseman v. Church Commissioners* [2000] 1 A.C. 19 was heard over two days and resulted in a split decision. Lord Lloyd of Berwick, dissenting, explained that 'their Lordships gave leave to appeal in order to examine an important and difficult question as to the validity of a proposed scheme under the Pastoral Measure 1983' (p 33F). While not disputing that important points of law relating to the Church of England were raised in that appeal, it is open to question whether it is appropriate for the UK's highest court to be the first court of appeal in such cases. Other disputes about Church of England matters are dealt with by judicial review claims in the Administrative Court and by consistory courts.

A happy coincidence?

If New Zealand does end appeals to the Judicial Committee, if the Caribbean Court of Justice becomes operational, and if professional registration appeals cease, the case load of the Judicial Committee will be greatly reduced — perhaps to no more than a dozen or so overseas appeals a year. Or, rather, that would have been the position had not the Judicial Committee been given an important new jurisdiction over 'devolution issues'. By happy coincidence, just as the Judicial Committee's long-established case load seems set to drop off dramatically, its new responsibility to adjudicate in devolution cases is growing rapidly.

Devolution issues: why the Judicial Committee?

The choice of the Judicial Committee as the court of final appeal in devolution issue cases was accompanied by little cogent explanation from the Labour government. One reason given was that the Judicial Committee had experience as 'the final constitutional court for various commonwealth dependencies and colonies' (*sic*.). In what way this was relevant was not elucidated. As an institution, the Judicial Committee had not adjudicated on 'division of powers' questions between different parts of a federation since Canada stopped sending appeals in 1949. Another reason proffered was that allocating the task to the Appellate Committee of the House of Lords 'would add to the

work load of the Appellate Committee' and the Government 'was not sure that they would lead to prompt decisions on cases' (Mr Win Griffiths, H.C. Debs., col. 927, 3 February 1998). This rather overlooks the fact that it is mainly the same twelve permanent law lords who sit in both the Judicial and Appellate Committees. Further reasons were, perhaps, concerns about the appropriateness of the Appellate Committee of the House of Lords dealing with matters to do with the Scots criminal law (see below) and the impression that the Appellate Committee, as part of the UK's Parliament, lacked the objective independence for dealing with division of powers disputes between Westminster and Belfast, Cardiff and Edinburgh.

During the passage of the three devolution Acts, amendments were moved unsuccessfully proposing that devolution issues be determined by the Appellate Committee (a Conservative motion during the Government of Wales Bill) or by a new constitutional court (two different suggestions by the Scottish Nationalist Party and the Liberal Democrats during the passage of the Scotland Bill).

By April 2001, five judgments in devolution issue cases had been reported.

- *Montgomery and another v H.M. Advocate* [2001] 2 W.L.R. 779, 2001 S.L.T. 37 (held, upholding the Scottish court, the Lord Advocate did not breach of Article 6(1) of the ECHR by continuing a prosecution for murder in the wake of pre-trial publicity). There was some disagreement among the Law Lords as to whether any devolution issue was actually raised in this case. Lord Hope and Lord Clyde (the Scottish Law Lords) held that there was no doubt about this. Lord Hoffmann, however, expressed 'considerable doubt' because he did not believe that anything done by the Lord Advocate (the prosecuting authority) was capable of breaching Article 6—any breach that *might* occur would arise if and when *the court* failed to determine a criminal charge 'at a fair and public hearing'. Courts are not part of the Scottish Executive. If Lord Hoffmann's doubts were correct, it would have followed that the final court of appeal in the case would have been the High Court of Justiciary.
- *Hoekstra and others v H.M. Advocate* [2001] 1 A.C. 216, 2001 S.L.T. 28 (four defendants convicted of importing three tonnes of cannabis sought leave to appeal to the Judicial Committee, but it was held that no 'devolution issues' arose).
- *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 W.L.R. 817, 2001 S.L.T. 59 (held, overturning the Scottish court, the prosecution could rely on an admission by Mrs Brown obtained compulsorily under section 172 of the Road Traffic Act 1988 that she had been the driver of a car when charged with drink driving; there was no breach of the right against self-incrimination protected by Article 6(1) of the ECHR). Lord Hope returned to the important issue whether there was a 'devolution issue', holding that there was because 'while the court had primary responsibility to ensure

that the respondent had a fair trial, the effect of the Scotland Act 1998 was that this was also the responsibility of the prosecutor'.

- *H.M. Advocate v McIntosh* 2001 S.L.T. 304 (held, overturning the Scottish court, there was no breach of Convention rights protecting the presumption of innocence and the right to enjoyment of property by a prosecutor who applied to a court for a confiscation of property order under legislation aimed at drug dealers).
- *Follen v H.M. Advocate*, 8 March 2001 (special leave to appeal refused).

Other devolution issue cases are pending before the Judicial Committee, all of them from Scotland and dealing with the rights of defendants in criminal cases. These are 'devolution issues' because under the Scotland Act 1998 the Lord Advocate, a member of the Scottish Executive and the prosecuting authority, acts outside his powers if he breaches Convention rights.

Far fewer cases are expected to emerge from Wales, not least because the National Assembly for Wales has no criminal justice function and this is the context in which Convention right arguments are most likely to arise.[3] The National Assembly also has no power to make primary legislation. It also seems unlikely that any significant number of devolution issues will arise in Northern Ireland over the next few years. Criminal justice responsibilities have not (yet) been devolved to the Northern Ireland Executive and little legislation has been passed by the Northern Ireland Assembly.

In an interview with *The Times* in 1999, the then senior law lord, Lord Browne-Wilkinson, candidly expressed his anxieties about growing case load:

> 'With the Human Rights Act just around the corner, and devolution appeals … there will be a crisis in judge-power. "We will see a doubling of our workload. And nobody has worked out how we are going to find the judge-power to deal with it"' (19 October 1999, p. 3 Law Section)

The anticipated decline in Judicial Committee's overseas cases (together, perhaps, with doctors and dentists' appeals) may mean that, after all, it is possible for the current institutional arrangements at the top of the UK's legal systems to be maintained. The Judicial Committee will probably be able to cope with devolution issues and the small amount of residual overseas' appellate work without undue strain on itself or having an impact on the law lords' other work load in the Appellate Committee of the House of

[3] Defendants in criminal proceedings in Wales, like those in England, simply use the Human Rights Act 1998 to raise Convention right arguments before, during and after trials in the ordinary courts of England and Wales. The final court of appeal in these cases is the Appellate Committee of the House of Lords, not the Judicial Committee.

Lords. The fact that there may be less case load pressure than was once thought should not, however, preclude reform of the UK's top level courts on other grounds.

Are there reasons for reform?

Even if the Judicial Committee can cope with the number of cases in the years to come, there are reasons why the 'architecture' of the court system may be inadequate.

Transparency of institutional design

First, the distribution of work between the UK's two top level courts is both hard for people to understand and not easy to justify on rational grounds. Courts ought to be transparent in their institutional design. The Appellate Committee of the House of Lords is the general final court of appeal—except that it does not hear Scottish criminal appeals. There is ancient aversion to the idea of a court consisting mostly of English judges (only two of the twelve permanent law lords are from north of the border) dealing with Scots criminal law. As Lord Hope of Craighead recently observed, 'although there is now much common ground between England and Scotland in the field of civil law, their systems of criminal law are as distinct from each other as if they were two foreign countries' (*R. v. Manchester Stipendiary Magistrate, ex parte Granada Television Ltd* [2000] 2 W.L.R. 1, 5). Yet the law lords, sitting as members of the Judicial Committee, are now dealing with the Scottish criminal justice system, insofar as Convention rights are at issue. Convention rights are also within the ambit of the Appellate Committee when they arise under the Human Rights Act 1998—as they will in relation to criminal justice in England & Wales, and in any functions of 'public authorities' in any part of the UK which are not part of the Scottish Executive, Northern Ireland Executive or National Assembly for Wales. The position in relation to criminal cases is therefore as follows:

- if the Convention right is breached in England & Wales or Northern Ireland, appeal is ultimately to the Appellate Committee of the House of Lords
- if the Convention right is breached in Scotland by the prosecutor (or other member of the Scottish Executive, or in legislation made by the Scottish Parliament) acting outside powers permitted by the Scotland Act 1998, appeal on such a 'devolution issue' is ultimately to the Judicial Committee
- if the Convention right is breached by a Scottish criminal court (which, because of separation of powers principles, is not part of the Scottish Executive) then appeal lies to Scotland's final court of appeal in criminal matters, the High Court of Justiciary.

Even if turf wars are avoided between the UK's top level courts, it is unsatisfactory that responsibility for developing the new human rights case law is shared out in the present opaque fashion.

A separation of court and department

Secondly, it can be argued the institutional arrangements of the Judicial Committee prevents it having the kind of independence from other parts of government that is expected today. While critics have often pointed to the unsatisfactory position of the UK's other highest court—the Appellate Committee—being a committee of the UK's legislature, few have pointed to the similar problem that arises in relation to the Judicial Committee being formally attached to a UK department of state (the Privy Council). One response to such concerns is, perhaps, that the Judicial Committee Act 1833 put the Judicial Committee's existence onto a statutory footing and transferred the Privy Council's judicial powers 'from the Council to what was to be in substance an independent court of law and that the connection between the two bodies was in future no more than nominal' (*Ibralebbe v The Queen* [1964] A.C. 900 at 919). No one doubts that the Judicial Committee is in practice anything other than entirely independent of government. What is open to question, however, is whether it is still the best arrangement for a court to share a name with a government department, and for some of its formal procedures to remain linked to the Privy Council in its executive capacity (*e.g.* that some of its judgments take the formal form of being a 'report' 'advising' Her Majesty in Council).

Possibility of conflict of authority between the House of Lords and Privy Council

Thirdly, the current arrangements turn the rules of precedent upside down. Generations of law students who have been taught that the Appellate Committee of the House of Lords was the UK's highest court must learn again. The Scotland Act, section 103 (and similar provisions in the other devolution Acts) now make the Judicial Committee the highest court: 'Any decision of the Judicial Committee in proceedings under this Act … shall be binding in all legal proceedings (other than before the Committee)'. Reference to *Hansard* debates on the Scotland Bill make it abundantly clear that this applies even to the Appellate Committee (Lord Sewel, H.L. Debs., 8 October 1998, col. 619). As already noted, litigation about breach of Convention rights by the devolved institutions ends up in the Judicial Committee whereas allegations of breach of Convention rights by the UK government and all other public authorities ends up in the Appellate Committee of the House of Lords. A recent illustration of the potential for clash are challenges to town and country planning procedures in Scotland and England (they were similar) on the ground that an appeal to a minister, followed by an appeal to a court limited to points of

law, did not satisfy the requirement of Article 6 of the ECHR that everyone is entitled to a fair and public hearing before an independent tribunal. The Scottish case *County Properties Ltd v. Scottish Ministers* 2000 S.L.T. 965 was decided in July 2000 by the Outer House holding that the planning system was not compatible with Convention rights. The English High Court in *R. on the application of Holding & Barnes Plc v. Secretary of State for the Environment, Transport and the Regions* ('the Alconbury case') [2001] *Administrative Court Digest* 65 reached a similar conclusion in December 2000. If the Scottish case had been taken to appeal, it would have gone to the Judicial Committee. As it happened, an appeal in the Alconbury case was heard with impressive promptness by the Appellate Committee of the House of Lords in March 2000, and judgment is awaited. What this episode demonstrates is the possibility of conflict between the top level courts. What *if* the Judicial Committee had heard an appeal and came to a different conclusion to that of the Appellate Committee?

A large and amorphous court

A fourth weakness in the architecture of the Judicial Committee is its size. The judges are held in the highest esteem … but there are a lot of them. The number of judges eligible to sit on the Judicial Committee is currently over 60; the UK judges able to sit in devolution issue cases is over 50. The composition of panels, of three or four, to hear particular cases is determined by the senior Law Lord (Lord Bingham of Cornhill). As yet, no clear conventions have emerged about the territorial balance of panels in devolution issue cases (or even whether this is ought to be an important consideration). Lord Bingham presided in three of the four cases in which judgment was given up to April 2001. He was joined by two Scottish law lords (Lord Hope of Craighead and Lord Clyde) and two English (or the Northern Irish) law lords. Another case, to the surprise of some, had three Scottish judges: the Rt. Hon. Ian Kirkwood (Lord Kirkwood), a senior Scottish judge, joined the two Scottish law lords. In an age when courts, like other public institutions, are expected to operate in a transparent fashion, the lack of criteria for the selection of panels is a source of concern to some critics (see *e.g.* Lord Lester of Herne Hill, H.L. Debs., 28 October 1998, col. 1969).

The need for further analysis and debate

The whole future of the Judicial Committee needs be put on the reform agenda in the UK, as it has been in New Zealand and the Caribbean. So far the devolution settlement has been relatively stable along the Edinburgh-London axis. It is however only a matter of time before a highly controversial 'division of powers' dispute arises in which

important powers of the Scottish Executive or Scottish Parliament are at issue (rather than the less party politically contentious and less nationally divisive issues of human rights in criminal justice). The same is surely true of relations between Cardiff and London. The Belfast-London axis is, of course, already far less stable. Prudence suggests that the time to ensure that there is an effective court, whose legitimacy is unquestioned, is *before* the UK sails off into the unchartered waters of division of powers litigation.

The forms that a new top level court, or courts, for the UK might take is the subject of a Constitution Unit report to be published in June 2001.

Further reference

The Privy Council was one of the last parts of the UK government machine to 'go on line' but since August 2000 a helpful website (www.privy-council.org.uk) has presented useful information about the Judicial Committee's work, including the Judicial Committee's judgments.

About the author and the top courts project

Andrew Le Sueur is Barber Professor of Jurisprudence at The University of Birmingham and an Honorary Senior Research Fellow at UCL Constitution Unit. With *Richard Cornes* he is engaged in a project which is considering whether the UK's two top level courts—the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council—are in need of reform and, if so, when, how and in what form change might occur. The project has been funded by the Economic and Social Research Council (ESRC grant R000222908) and the British Academy (grant APN30026).

Some of the statistics referred to in this briefing were originally compiled by *Roger Masterman*, research assistant at the Constitution Unit; further statistical analysis appears in Le Sueur and Cornes, 'What do the top courts do?' (2000) 53 *Current Legal Problems* p 53, appendix (also available as a Constitution Unit report).

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