

The Future of the United Kingdom's Highest Courts

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Preface

The UK top courts project

This report is one of several publications from an on-going study of the future of the UK's two top level national courts. The research has been funded by the Economic and Social Research Council (grant R000222908) in which the authors of this report (Richard Cornes and Andrew Le Sueur) were joint award holders with Professor Robert Hazell, director of UCL Constitution Unit. In 2000, Le Sueur was the recipient of an award from the British Academy (grant APN30026) for travel in connection with the project.

The project was conceived within the Constitution Unit at UCL and this report is published under its auspices but the opinions expressed in it are those of the authors, and are not necessarily shared by the Constitution Unit or its staff. Le Sueur had primary responsibility for Parts 1-3 and 5-11; Cornes for Parts 12-17. Part 4 is based on Le Sueur and Cornes, 'What do the top courts do?' (2000) 53 *Current Legal Problems* 53.

For the avoidance of doubt, it should be made clear that this report is the product of academic research: it has not been commissioned by any government body, though it is hoped that it will be of interest and use to policy makers.

The research included visits to Australia, Canada, Germany, Spain and the USA to compile case studies of top level courts in those legal systems. Semi-structured interviews were carried out with members of the judiciary, court administrators, practising lawyers, academics working in various disciplines, journalists, politicians and others in order to assess the strengths and weakness of the courts in those jurisdictions. The intention was to explore the scope for drawing lessons from the experiences of other legal systems.¹ Detailed consideration of the comparative aspect of the project falls outside scope of the present report, though some references are made to arrangements in other court systems. Issues of cross-national policy transfer are being pursued in seminars organised under the auspices of the ESRC Future Governance Programme in London and Edinburgh in July 2001..

Other publications from the project

Earlier publications have dealt with the functions carried out by the UK's top level courts², the implications of the European Court of Human Rights' judgment in *McGonnell v UK*³ and the future case load trends of the Judicial Committee.⁴ A book, dealing with some of the issues covered in this report, and also broader and deeper ones not dealt with here, is

¹ Our purpose was therefore different from that of Alan Paterson in his classic book *The Law Lords* (London: Macmillan, 1982).

² Le Sueur and Cornes, 'What do the top courts do?' (2000) 53 *Current Legal Problems* 53 (a version is also available as a research paper from the UCL Constitution Unit).

³ Cornes, '*McGonnell v United Kingdom*, the Lord Chancellor and the Law Lords' [2000] *Public Law* 166.

⁴ Le Sueur, *What is the future for the Judicial Committee of the Privy Council?* (London: UCL Constitution Unit, 2001).

planned for the future. Among the issues to be considered include: why legal systems adopt the models of top courts that they do; the role of courts in adapting to, and promoting, constitutional change; and relationships between courts at the apexes of national legal systems and supranational courts, especially the European Court of Justice and the European Court of Human Rights.

Acknowledgements

This project would not have been feasible without the generous co-operation and support of many judges, policy-makers, court administrators, practitioners, journalists and academics in the UK and in Australia, Canada, Germany, Spain and the USA. We express our sincere gratitude to them all. Work on some aspects of the project was greatly helped by Roger Masterman (research assistant) and David Butler (research volunteer) at UCL Constitution Unit and Tomas Vial (graduate student in UCL Faculty of Laws). Several colleagues made numerous comments on an earlier draft: Professor Anthony Arnall (on Part 10); Professor John Baldwin (Parts 1-12); Professor Robert Hazell (the whole report); Sir Thomas Legg QC (Parts 12-17); and Alan Trench (the whole report). Their suggestions and questions helped greatly to improve this report, though naturally they do not necessarily share the views of the authors and nor are they responsible for any remaining errors and infelicities.

A note on terminology

In this report, the term 'Appellate Committee' is used to refer generally to the judicial functions of the House of Lords; and 'Judicial Committee' to the Judicial Committee of the Privy Council. The expression 'Law Lords' means the twelve Lords of Appeal in Ordinary. To make it clear that the legal system of England and Wales is one system, not two, an ampersand is used ('England & Wales').

Responses are welcomed

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1 Introduction

1.1 Scope and purpose of the report

The purpose of this report is to consider:

- whether the UK's two top level national 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, why, when, how and in what form change might occur.

The report aims 'to provide policy-makers with information and perhaps advice'.⁵ The advice, given from the perspective of academic lawyers interested in constitutional law,⁶ takes the form of identifying options which might be pursued in the future, including maintaining the status quo, and it also begins the task of evaluating them. The report maps out legal and political arguments for and against change, draws attention to evidence, and brings to light some lessons which might be learnt from some other legal systems. This report is not intended to be a polemical statement of our own reform agenda.⁷ To borrow words used in the consultation papers of the Law Commission for England and Wales, this report 'is circulated for comment and criticism only and does not represent [our] final views'.

Given the enormity of the enterprise, it is wise to listen and learn more before committing oneself to any particular set of reforms. Before decisions on the future of the UK's highest courts are made, the problems of the existing arrangements and the relative benefits of rival reform proposals need to be considered with care.

1.2 Why consider the issue now?

A range of different events, concerns and policies makes a detailed consideration of the future development of the UK's top level courts timely.

- During 1998 and 1999, anxieties were expressed by senior judges about the capacity of the Appellate and Judicial Committees to cope with increased case load pressures from litigation involving Convention rights and devolution issues.
- Several senior members of the judiciary have indicated their willingness, even enthusiasm, to consider radical reform.

⁵ It is within the genre of 'information for policy': see I. Gordon, J. Lewis and K. Young, 'Perspectives on policy analysis' (1977) 25 *Public Admin Bulletin* 26.

⁶ Cf. the approach of management consultants: Cap Gemini Ernst & Young UK Ltd, *Commercial Court Feasibility Study* (February 2001) available on line at www.lcd.gov.uk.

⁷ For examples of recent suggestions, see Rodney Brazier, *Constitutional Reform*, 2nd ed. (Oxford: OUP, 1998), pp. 178-182 and Conor Gearty, 'What are judges for?' *London Review of Books*, 25 January 2001. See also IPPR, *A Written Constitution for the United Kingdom* (London: Mansell, 1991) for a more systematic, but now rather dated, set of proposals.

- Paradoxically, as institutions, the Appellate and Judicial Committees have themselves been largely bypassed by the Labour Government's constitutional reform programme while they have simultaneously been given important new roles in 'bringing rights home' and regulating the devolution settlements. The initiatives following on from the Royal Commission on the Reform of the House of Lords are still not complete.⁸
- Unlike the civil and criminal procedures in almost all other courts in England & Wales and Northern Ireland, the Appellate and Judicial Committees have escaped systematic review of their effectiveness, managerial efficiency and institutional cultures.
- The 'institutional architecture' of the UK's top level courts has been questioned. During the passage of the Scotland Bill and the Government of Wales Bill, doubts were raised about whether the Judicial Committee was the ideal forum for adjudicating on devolution issues, but no fully worked out alternative was presented in its place.
- As with some other courts in recent months, concerns have been expressed as to whether the composition and structure of the Appellate and Judicial Committees comply with the requirements of Article 6 of the European Convention on Human Rights (the right to an independent and impartial tribunal).
- During late 2000 and early 2001, significant changes to the Judicial Committee's overseas jurisdiction were on the horizon as the governments of New Zealand and several Caribbean states took steps to end their use of that body as their final court of appeal. These initiatives, and plans to remove appeals from medical and other professional registration bodies, are likely drastically to reduce the case load of the Judicial Committee (apart from devolution issues).
- In contrast to the mid 1990s, the relationship between the UK government and the senior judiciary is currently relatively cordial.
- The work of the Law Lords is subject to increasing scrutiny by the news media.⁹

1.3 Top courts' outputs

Most academic and practitioner writing in the UK dealing with the work of the Appellate and Judicial Committees concentrates, in one way or the other, on the quality and wisdom of their judgments. Dissatisfaction with the quality of output might possibly be a motive for reform, but (on our analysis) this is not currently a major concern. At times in the past, however, disquiet about the quality of the Law Lords' work has surfaced, including the following.

⁸ See *A House for the Future* (Cm. 4534, London: HMSO, 2000), esp. ch. 9 ('The Law Lords and the judicial function of the second chamber'), discussed at 7.6.3 below.

⁹ Prompted by interest in the enactment of the Human Rights Act and later the *Pinochet* case (on which see e.g. Kate Harrison, 'What *Pinochet* has done for the Law Lords' (1999) vol. 149 *New Law Journal* 477).

- The Appellate Committee's alleged lack of competence in some fields of law, for instance English criminal law.¹⁰
- Accusations that the Law Lords have used judgments to further the interests of some sectional interests at the expense of others. J.A.G. Griffith broke new ground by arguing, of the higher judiciary in general not just the Appellate Committee, that the judges have a 'view of the public interest which is shown in judicial attitudes such as tenderness towards private property and dislike of trade unions, strong adherence to the maintenance of order, distaste for minority opinions, demonstrations and protests, support of government secrecy, concern for the preservation of the moral and social behaviour to which it is accustomed, and the rest'.¹¹ More recently, the Oxford political sociologist David Robertson has argued that the Law Lords, who 'are in many ways, just another branch of the British administrative class', work on '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!'¹²
- Politicians have suggested from time to time that the senior judiciary have been too activist and insufficiently restrained in their approach to sensitive political cases. During 1996, for instance, ministers in the Conservative government made a sustained, sometimes highly personal, string of criticisms of courts which found against central government in applications for judicial review.¹³

Questions of the quality of the Law Lords' judgments are not a focus in this report. For present purposes, the assessment of the Law Lords' work given by Lord Goff of Chieveley in evidence to the Royal Commission on the Reform of the House of Lords is accepted as accurate. He wrote of the high esteem and prestige of the Appellate Committee's judgments:

'Our judgments are read by lawyers all over the world. I have been informed by distinguished European lawyers, on more than one occasion, that the House of Lords is the only court in Europe whose judgments are cited all over Europe — despite the fact that the United Kingdom is (apart from the Irish Republic) the only common law country in Europe.'

¹⁰ See e.g. A.T.H. Smith, 'Criminal Appeals in the House of Lords' (1984) 47 *Modern Law Review* 133.

¹¹ *The Politics of the Judiciary*, 5th ed. (London: Fontana, 1997), p. 336.

¹² *Judicial Discretion in the House of Lords* (Oxford: OUP, 1998), pp. 400, 401.

¹³ See Le Sueur, 'The Judicial Review Debate: from Partnership to Friction' (1996) 31 *Government and Opposition* 8.

1.4 Constitutional 'fit'

In many other countries, reformation of the apexes of national court systems has been an element of profound change in a broader political system (*e.g.* post-Second World War reconstruction in Germany, the end of the Franco era in Spain, the democratisation of many states in Eastern Europe, the end of apartheid in South Africa). The current circumstances in the UK are different. Top level court reform in the UK, if and when it occurs, is following on from, not coinciding with, the 'big bang' programme of constitutional reform implemented by the Labour government of 1997-2001. An important focus in discussion about the future for the Appellate and Judicial Committees (or their successor bodies) therefore needs to be on 'fit': in what ways do they fit adequately with the underlying values and hard-edged legislative frameworks of the new constitution?

1.4.1 Assumptions about constitutional continuity

The constitutional reforms for 1997-2001 are better seen as part of a continuing process, not a once-and-for-all settlement of a new constitutional order. Nevertheless, for the task of discussing the future to be manageable, this report must make basic *assumptions* about the continuity of some features of the UK.

- The UK will continue to exist as a sovereign state with devolved government in Northern Ireland, Wales and Scotland.¹⁴ The Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998 will all remain in force for some time to come without major amendment.
- The fact that 'devolution issues' arise requires adjudication by some kind of top level court in addition to the Court of Appeal in England & Wales, the Northern Ireland Court of Appeal and (in Scotland) the High Court of Justiciary and the Court of Session.
- The UK will continue to have three legal systems: (i) England & Wales; (ii) Northern Ireland and (iii) Scotland. These will carry on being recognised both by the UK's internal constitutional arrangements and internationally for the purposes of private international law litigation. This assumption does not preclude acknowledging that a Welsh 'legal order' may now be differentiating itself; nor the emergence, in a more fully formed sense, of a 'UK legal system' distinct from the other three systems of law and courts.
- There is an overwhelming consensus that an appeal court above the Court of Appeal of England & Wales and the Court of Appeal in Northern Ireland is desirable. In Scotland, the desirability of a further tier of appeal for civil claims above the Court of Session is more contested. There is probably even less support for the idea that in Scottish criminal matters there should be a further appeal from rulings of the High Court of Justiciary — but the Scotland Act 1998 makes it inevitable that where a 'devolution issues' is the ground of appeal, there be some recourse to a higher court.

¹⁴ In making this assumption, we intend no disrespect to the views of those who have different political aspirations. See *e.g.* Neil MacCormick, 'An Idea for a Scottish Constitution' in W. Finnie *et al* (eds), *Edinburgh Essays in Public Law* (Edinburgh: Edinburgh University Press, 1991), *esp.*, on courts, p. 163.

- The Human Rights Act 1998 will continue to be in force, largely in its present form. Its application in Northern Ireland may, however, be modified in the medium term when a Northern Ireland Bill of Rights is adopted. The scheme of the Human Rights Act, which requires application by all UK courts and tribunals, makes it impossible to devise a top level court that has exclusive jurisdiction over Convention right issues.
- The current relationships between the UK's courts and the European Court of Justice and the European Court of Human Rights will continue.
- Some legal systems beyond the UK will continue to want to use the Judicial Committee as their final court of appeal. Changes within the UK ought to accommodate those wishes.

1.5 National perspectives

A recurring theme in this report is that there are two competing sets of expectations, often unarticulated or half formed, about the constitutional status of the UK's top level courts.

On one hand, there is a desire for a court which serves each of the three legal systems *as a court of that particular legal system* — not a court of the 'whole UK'. Thus, the Appellate Committee, when it sits to hear a Scottish civil appeal, is said to sit as a Scottish court, applying Scots law, and creating precedent that formally is binding only in Scotland. The same is true of Northern Ireland and of England & Wales.¹⁵ It is for those responsible for each legal system to decide whether, and if so how, to use the Appellate Committee as its final court of appeal. The Scottish legal system chooses not to permit criminal appeals to the Appellate Committee; and civil appeals are made on a different basis (*e.g.* without the restriction of a general leave requirement) than from courts in the other two legal systems. The existence of three separate legal systems in the UK long predates the 1998 devolution Acts, but the Acts confirm the aspiration for legal system autonomy within the UK. Should the Scottish Parliament choose to do so, it could enact legislation ending the right of litigants in civil claims to take their case on appeal to the Appellate Committee.¹⁶ If and when devolution of administration of justice functions occurs in Northern Ireland, the same may apply. This set of expectations implies acceptance of plurality within the UK, comfort with asymmetrical arrangements and a permissive attitude towards territorial diversity.

There is a second and different set of expectations about the status of the UK's top level courts. The desire here is for them to be *national institutions of and for the whole UK*, exercising unifying (and possibly also centralising) functions. The nature of adjudication on devolution issues illustrates the point. Once a top level court (currently the Judicial Committee) has the task of hearing appeals from Scottish courts on whether the Scottish Executive or Scottish Parliament has complied with the terms of the Scotland Act 1998, it is not to be regarded as a Scottish court. This is even more plainly so when a UK Law Officer refers a bill of the Scottish Parliament or Northern Ireland Assembly directly to the Judicial Committee. The

¹⁵ See further 2.2 and 7.3 below.

¹⁶ See 6.3.2 below.

'whole UK' status of the Judicial Committee was made plain in an answer to a Parliamentary Question soon after the Scotland Act was passed:¹⁷

Mrs. Ewing: To ask the Secretary of State for Scotland if the Judicial Committee of the Privy Council must use Scots law practice and precedent in deliberating on disputes relating to the powers of the Scottish Parliament.

Mr. McLeish: The rules of procedure for the Judicial Committee of the Privy Council will be made by an Order in Council under Section 103 of the Scotland Act 1998. They will extend throughout the United Kingdom, as does the Scotland Act 1998 itself. Similarly, the Judicial Committee will not be restricted to applying Scots law in determining cases under the Scotland Act.

The Appellate Committee also has 'whole UK' attributes. Many of its judgments have the function of ensuring consistent interpretation of UK Acts of Parliament in all three legal systems. Appointments to it are in the hands of the UK government, with no formal role in the selection process for the devolved institutions established in 1998, or the judiciary of the three legal systems it serves. Moreover, it is a committee of the UK Parliament. What is missing is a clear demarcation of a body of law that is for the whole UK. David Walker in his *Oxford Companion to English Law* explains that there are:¹⁸

'... in many and important respects quite distinct systems and bodies of law, civil, administrative and criminal, substantive and adjective, in England and Wales, in Scotland and in Northern Ireland. There is, accordingly, no such thing as United Kingdom or British law, though there are some rules common to all parts of the UK and these terms may be used loosely for the law generally or particular branches of law as contrasted with, say, French or American law. In respects in which the law varies as between England, Scotland and Northern Ireland, e.g. land law, the terms "United Kingdom law" or "British law" are meaningless. But in respect of taxation or social security where the same or substantially the same rules apply in each part of the UK, such terms are meaningful'.

Convention rights (as incorporated by the Human Rights Act 1998) and the 1998 devolution Acts can now be added to the list of areas of law which can 'meaningfully' be called UK law.¹⁹ There is, however, no clear sense (yet) of anything analogous to 'federal' law — law of the whole state — of the kind that exists in most other countries with plural legal systems within their borders. The absence of 'federal' law and a unified common law throughout the whole of the UK makes it more difficult than it otherwise would be to define the jurisdiction of any future top level courts which may be created.

¹⁷ H.C. Debs., col. 33 (7 December 1998).

¹⁸ David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), p. 1251.

¹⁹ Clearly, the issue whether, and if so how, there is 'British law' is a complex one, detailed consideration of which falls outside the scope of this report. Reference ought to be made to Article 18 of the Treaty and Act of Union 1707.

There is, then, an ambivalence in the status of the UK's top level courts. If, as many reform proposals require, there is an amalgamation of jurisdictions of the Appellate and Judicial Committee into some form of new court, the following question must be addressed: how best can a new top level court for the UK be, simultaneously, a court of each of the three legal systems and a court for the whole UK?

1.6 Are there lessons from other legal systems?

One method used in this report for identifying and evaluating options for change is to consider what lessons (if any) may be learnt from the institutional and procedural arrangements in some other legal systems — based on case studies of courts in Australia, Canada, Germany, Spain and the USA. It is *not*, however, an aim of this report to discuss the methodological problems of comparative study (or even to explain why these jurisdictions were chosen). Nor can the report deal in detail with the arrangements in these other legal systems or their political contexts. This aspect of the project is pursued elsewhere²⁰ For the purposes of this report it is taken for granted the possibility of transferring policy ideas for the operation and reform of top level courts overseas to the UK.²¹

1.7 Structure of the report

As a starting point for discussion, *Part 2* provides an overview of the main features of the Appellate Committee and the Judicial Committee's status, composition and work. *Parts 3 to 7* move on to consider several broad questions:

- What are the core institutional characteristics of top level courts? (*Part 3*)
- What are the functions performed by top level courts? (*Part 4*)
- What political factors and dynamics exist in the UK to explain why (unlike many other courts and public institutions) the Appellate and Judicial Committees have not yet become subjects of government modernisation policies? (*Part 5*)
- Assuming change is desirable, by what mechanisms could policy makers make decisions about reform to the UK's top level courts, and put their chosen options into practice? (*Part 6*).

Parts 7 to 11 survey some of the main options for structural change to the UK's top level courts — including keeping the current arrangements (*Part 7*), analysis of the advantages and disadvantages of merging of the Appellate and Judicial Committees to form a new supreme court for the UK (*Part 8*), the creation of a new constitutional court (*Part 9*) and a

²⁰ E.g. in a two day colloquium to be held in London and Edinburgh in July 2001 organised under the auspices of the ESRC Future Governance Programme.

²¹ See e.g. Richard Rose, 'Introduction' (2000) 53 *Parliamentary Affairs* 623-627 and Edward C. Page, 'Future Governance and the Literature on Policy Transfer and Lesson Drawing' (January 2000) available on line at www.futuregovernance.ac.uk

'UK Court of Justice' (Part 10). The future of the Judicial Committee if structural reforms take place is considered in Part 11.

The remainder of the report, *Part 12* onwards, considers a series of questions which, though shaped by structural options, can be considered independently of them. These include the criteria for appointing judges to the UK's top level courts (*Part 12*), the appointments process (*Part 13*), the role of the Senior Law Lord (*Part 14*), the selection of panels to hear cases (*Part 15*), the extra-judicial roles of the Law Lords, including their place as members of the UK Parliament (*Part 16*) and finally issues relating to caseload of the courts (*Part 17*).

2 Portraits of the UK's top level courts

2.1 Introduction

Nobody designing a court for the apex of a national legal system would dream of *planning* courts like the House of Lords and the Judicial Committee of the Privy Council. What exists today is the product of the accretion of historical circumstance and ad hoc adaptation to changing needs over several centuries. The constitutional status, legal powers and methods of work of the UK's top level courts (like many of its political and legal institutions) are understood in any detail by relatively few people.²² To lay the basis for further discussion and analysis, this report begins with an overview of the House of Lords and the Judicial Committee of the Privy Council.²³ Most of the features described in outline here are considered in more detail in later parts of the report.

2.2 House of Lords

The House of Lords exercises judicial functions through three kinds of committee.

- Appeal Committees, comprised of three Law Lords,²⁴ which decide whether or not to grant leave to appeal and interlocutory matters.
- Appellate Committees, consisting of five or seven Law Lords, which hear and decide cases. Two Appellate Committees may sit simultaneously.
- The Committee for Privileges which hears claims relating to hereditary peerages and questions relating to the orders, customs and privileges of the House of Lords.²⁵ Its members are elected by the House each session and must include at least three Law Lords. The Committee for Privileges will not be considered in detail in this report, but clearly if some major structural changes take place (those disentangling the work of the Law Lords from that of the UK Parliament), this will affect the Committee for Privileges.

The composition, powers and working practices of the Appeal and Appellate Committees are established by Acts of the UK Parliament²⁶ and in more detail by practice directions and standing orders of the House of Lords.²⁷

²² Public understanding has perhaps been assisted since the setting up of websites by both courts. The Appellate Committee's is www.publications.parliament.uk. The Judicial Committee's (launched in August 2000) is www.privacy-council.org.uk/judicial-committee/.

²³ As to why there is a need to consider both these courts together, see 6.2 below.

²⁴ See below for a definition.

²⁵ Recent cases include *Re Lord Gray's Motion* [2000] 2 W.L.R. 664 and *Re Lord Mayhew of Twysden's Motion* [2000] 2 W.L.R. 719.

²⁶ Principally: the Appellate Jurisdiction Act 1876; Administration of Justice (Appeals) Act 1934; Administration of Justice Act 1960; Criminal Appeal (Northern Ireland) Act 1960; Courts-Martial (Appeals) Act 1968; Criminal Appeal Act 1968; Administration of Justice Act 1969; Judicature (Northern Ireland) Act 1978; Court of Session Act 1980; Judicial Pensions and Retirements Act 1993.

The jurisdiction of the Appellate Committee reflects the fact that the UK is a union state rather than a unitary one. The UK has three distinct legal systems, recognised as such for the purposes of private international law as well as internal constitutional law: England & Wales (one system); Northern Ireland; and Scotland. Each system has its own court structure, to varying degrees different common law and (to increasing degrees) different legislative provisions. The Appellate Committee is the final court of appeal for each legal system (except that there are no criminal appeals from Scotland).²⁸ Thus the Appellate Committee 'when sitting as the final court of civil appeal from Scotland, sits as a Scottish court'.²⁹ Similarly, with appeals from Northern Ireland,³⁰ and England & Wales. The work of the Appellate Committee is, however, overwhelmingly focused on appeals from England & Wales. During 1999, of the total of 76 judgments only three were from Northern Ireland and five from Scotland.³¹

Strictly speaking, there is not a 'common law of the whole UK' which the Appellate Committee is responsible for applying and developing. Nevertheless, in its role as a final court for each of the three legal systems, the Appellate Committee can be regarded as performing a 'whole UK' role in the following respects.

- It interprets and applies Acts of the UK Parliament which extend to more than one, or to all, the legal systems of the UK.
- It annunciates 'principles of general jurisprudence' which apply in all three legal systems.
- As a final court of appeal, it adjudicates on questions relating to the UK's international obligations, *e.g.* in the application of the European Convention on Human Rights and norms of European Community law.
- Equal rights of audience are enjoyed by counsel from England & Wales, Scotland and Northern Ireland in any appeal.
- The Appellate Committee is also the final court of appeal from some UK courts such as the Courts Martial Appeal Court and is the ultimate court of appeal from decisions of the Employment Appeal Tribunal (which is an institution of England & Wales and Scotland).

²⁷ These are made under the provisions of the Appellate Jurisdiction Act 1876, s 11; the latest editions of November 2000 are available on line at www.publications.parliament.uk. The Practice Directions and Standing Orders relating to Civil Appeals is known as the 'Blue Book'. The Practice Directions and Standing Orders relating to Criminal Appeals as the 'Red Book'.

²⁸ The High Court of Justiciary is therefore the highest criminal court in the Scottish legal system. Appeals now do lie, however, to the Judicial Committee where a devolution issue arises in a criminal case: see below.

²⁹ David M. Walker, *The Scottish Legal System: an Introduction to the Study of Scots Law*, 7th ed. (Edinburgh: W. Green/Sweet & Maxwell, 1997), p. 424.

³⁰ Brice Dickson, *The Legal System of Northern Ireland*, 3rd ed. (Belfast: SLS, 1993), p. 66.

³¹ Lord Chancellor's Department, *Judicial Statistics for England and Wales for the year 1999* (London: LCD, 2000), Cm. 4786, p. 10.

2.2.1 *Civil appeals*

In civil claims, the jurisdiction of the Appellate Committee varies according to which of the UK's legal systems the appellant's case was commenced in. From the Court of Appeal (Civil Division) in England and Wales, and from the Court of Appeal of Northern Ireland, an appeal to the Appellate Committee requires 'leave'³² from the appeal court in question (which is only rarely given) or by petition for leave from an 'appeal committee' of three Law Lords. Most such applications are determined without the committee hearing oral submissions, but they may do so.³³ In 1969, provision was made for a 'leapfrog' appeal from the High Court of England and Wales, and from the High Court of Northern Ireland, directly to the Appellate Committee, bypassing intermediate courts of appeal, but this procedural route is very rarely used.³⁴

In most circumstances, litigants in Scotland do not need leave to appeal to the House of Lords from final judgments of the Inner House of the Court of Session which dispose of an action; nor is leave required to appeal against interlocutory judgments which dispose of some part of the action if the judges are not unanimous or where the interlocutory judgment sustained a dilatory defence and dismissed the action. An appeal must, however, be certified by two counsel in the case as raising points fit for appeal. Where leave is required, it must be obtained from the Inner House of the Court of Session, not by petitioning the House of Lords.³⁵

2.2.2 *Appeals in criminal causes and matters*

The Appellate Committee receives appeals from defendants and prosecutors in criminal matters from divisional courts of the Queen's Bench Division of the High Court of England and Wales,³⁶ the Court of Appeal (Civil Division) of England and Wales, and from the Court of Appeal of Northern Ireland, and from the Courts-Martial Appeals Court. The relevant court of appeal must certify that a 'point of general public importance' is involved before considering whether to grant permission to appeal. If, as is usually the case, permission is refused by the court of appeal, a further petition for leave to appeal may be made to the

³² The Civil Procedure Rules 2000 replaced the terminology of 'leave' to appeal with the expression 'permission' in relation to England & Wales for the Court of Appeal; it is, however, still correct to speak of 'leave' to appeal to the Appellate Committee.

³³ Of the 236 civil and criminal petitions for leave to appeal received in the calendar year 2000, only 29 were referred for hearing. Respondents written objections were invited in 53 cases.

³⁴ Administration of Justice Act 1969. One recent example is the appeal in *R. on the application of Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions (and other appeals)* [2000] *Administrative Court Digest* 350. This raised important questions about the compatibility of the planning appeals in England & Wales with ECHR, Article 6.

³⁵ Blue Book, para. 1.3.

³⁶ Such a divisional court will have exercised the High Court's supervisory power of judicial review, or determined an appeal 'by way of case stated', from a magistrates' court. A divisional court in this context is in effect an intermediate court of appeal. Divisional courts of the Queens' Bench Division of the High Court also hear judicial review claims in civil matters (e.g. against local authorities and minister); in that situation, the appeal route is to the Court of Appeal (Civil Division) and then on to the Appellate Committee. The question whether an issue is a 'criminal' or 'civil' one can be controversial.

Appellate Committee. The Appellate Committee has no jurisdiction to hear appeals from the High Court of Justiciary, Scotland's highest criminal court.³⁷

2.2.3 *Membership*

The judges eligible to sit on the Appellate Committee of the House of Lords are principally the twelve salaried, full-time Lords of Appeal in Ordinary (referred to as the 'Law Lords' in this report)³⁸ who are appointed as life peers under section 6 of the Appellate Jurisdiction Act 1876, until a statutory retirement age of 70 years by the Queen on the recommendation of the Prime Minister. The formal criteria for appointment as a Law Lord are that a person has held high judicial office for at least two years or has held rights of audience in the higher courts for 15 years.³⁹ There has not yet been a female Law Lord. As the Appellate Committee hears appeals of some kind from each of the UK's three separate legal systems, by convention two Law Lords at any given time have a professional background in the Scottish legal system; in recent years there has been a practice of one Law Lord being appointed from Northern Ireland; the others are from England & Wales. In recent years, all Law Lords have been appointed from among the ranks of judges serving in first-tier appellate courts in the UK or the European Court of Justice. Since 1984, one of the Law Lords is appointed as the Senior Law Lord and another as a deputy.⁴⁰ Except on the rare occasions when the Lord Chancellor sits, the Senior Law Lord presides over the particular Committee hearing a case. Under powers delegated to him by the Lord Chancellor, he also has responsibility for determining which Law Lords (or others eligible to sit) form panels to hear each case.⁴¹

In addition to the full-time Law Lords, other peers who hold or have held 'high judicial office' are eligible to sit on an Appellate Committee.⁴² It has been usual for Scotland's senior judges to be conferred with life peerages under the Life Peerage Act 1958. The Lord Chancellor is also eligible to sit on the Appellate Committee and occasionally does so.⁴³ The post of Lord Chancellor is a party political one; the post-holder has the roles of: presiding

³⁷ But the Judicial Committee does now hear appeals in Scottish criminal matters insofar as they raise a 'devolution issue': see below.

³⁸ In order of seniority: Lord Bingham of Cornhill; Lord Slynn of Hadley; Lord Nicholls of Birkenhead; Lord Steyn; Lord Hoffmann; Lord Hope of Craighead; Lord Clyde; Lord Hutton; Lord Saville of Newdigate; Lord Hobhouse of Woodborough; Lord Millett; and Lord Scott of Foscote.

³⁹ See Part 12.

⁴⁰ Lord Bingham was appointed directly to the post of Senior Law Lord in 2000 (from that of Lord Chief Justice) not having previously served as a Law Lord; his predecessor was Lord Browne-Wilkinson. The Deputy Senior Law Lord is Lord Slynn.

⁴¹ See Part 15.

⁴² Such judges include Lord Cooke of Thorndon (a former President of the New Zealand Court of Appeal), Lord Woolf (a former Law Lord and now the Lord Chief Justice of England and Wales), Lord Phillips of Matravars (a former Law Lord and now the Master of the Rolls) and retired Law Lords under the age of 75 years (including Lord Browne-Wilkinson; Lord Goff of Chieveley; Lord Lloyd of Berwick; Lord Mustill and Lord Nolan). Several senior members of the Scottish judiciary have peerages and are eligible to sit on the Appellate Committee: Lord Cameron of Lochbroom; Lord Hardie; Lord McCluskey; Lord McKay of Drumadoon; Lord Rodger of Erlesferry. Former Lord Chancellors are eligible to sit until they reach 75 years.

⁴³ Lord Mackay of Clashfern was a Lord of Appeal in Ordinary for two years before serving as Lord Chancellor between 1987 and 1997.

2.3.1 *Overseas jurisdictions*

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 (mostly the UK's former colonies and dominions) including New Zealand, Jamaica and the Republic of Trinidad & Tobago. Here the Judicial Committee sits as an integral part of the judicial structure of that state rather than of the UK.⁵¹ A significant reduction in the Judicial Committee's case load will occur if New Zealand implements proposals to end appeals and if a Caribbean Court of Justice becomes operational.
- The British Overseas Territories (formerly called Dependant Overseas Territories) including Bermuda, the Cayman Islands and Gibraltar; and
- The Bailiwicks of Jersey and Guernsey, and the Isle of Man.
- Appeals may either be (a) as of right or (b) brought only with 'special leave' from the Judicial Committee itself. Some appeals take the form of an appeal to the Judicial Committee as a court; others are, formally, appeals to Her Majesty in Council (in which case, the judgment is in the form of a report of advice to the sovereign).

2.3.2 *UK cases*

The Judicial Committee's UK jurisdiction was until recently confined mainly to hearing appeals from statutory bodies regulating doctors, dentists and vets. During 2000, there were 16 appeals against General Medical Council decisions relating to professional registration; the Judicial Committee spends about 10 per cent of its time on such appeals. The re-allocation of these appeals to lower courts is under consideration. The Judicial Committee also occasionally hears appeals brought under the Church of England Pastoral Measure.

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 1998.⁵² These come to the Judicial Committee as appeals or references from lower courts in the UK's three legal systems.⁵³ The Law Officers may also refer a Bill of the Scottish Parliament, the Northern Ireland Assembly and draft legislation of the National Assembly for Wales directly to the Judicial Committee for a determination as to whether it is within the legislative competence of the devolved institution. Other devolution issues include whether decisions of the members of the Scottish Executive, Northern Ireland Executive and National Assembly for Wales are compatible with European Community law and Convention rights. The latter issue is significant, because it means that while questions about Convention rights arise from the Human Rights Act 1998 in relation to the UK government and other public bodies, they are 'devolution issues' when they concern the

⁵¹ Therefore the Judicial Committee does not breach the UK's international obligation to prohibit capital punishment when it determines death row appeals from Caribbean states (Prime Minister, H.C. Debs., 3 February 2000, col. 674W).

⁵² See below.

institutions and office holders established by the Devolution Acts. By late May 2001, six judgments in devolution issue cases have

- *Montgomery and another v H.M. Advocate*
- *Hoekstra and others v H.M. Advocate*
- *Brown v Stott (Procurator Fiscal, District)*
- *H.M. Advocate v McIntosh*⁵⁷
- *Follen v H.M. Advocate*⁵⁸
- *McLean v H.M. Advocate General*.⁵⁹

Other devolution issue cases are pending before the Judicial Committee, all of them from Scotland and dealing with the rights of individuals 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, has powers if he breaches Convention rights.

Far fewer cases are expected to emerge from Wales at least because the National Assembly for Wales has no criminal justice function in the context in which Convention rights arguments are most likely to arise.⁶⁰ Nor does the National Assembly have power to make

⁵³ SI 1999/1320 Judicial Committee (Powers in Criminal Cases) Order.

⁵⁴ [2001] 2 W.L.R. 779, 2001 S.L.T. 37. Held, upon appeal to the Scottish court, the Lord Advocate did not breach Article 6(1) of the ECHR by continuing prosecution for murder in the wake of pre-trial publicity. There was some disagreement among the Lords as to whether any 'devolution issue' was actually raised in this case. Lord Hope (the Scottish Law Lord) 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 if and when the court failed to determine a criminal charge 'at a fair and public hearing'. He was not part of the Scottish Executive. If Lord Hoffmann's doubts were correct, it would have meant that the final court of appeal in the case would have been the High Court of Justiciary.

⁵⁵ [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 as held that no 'devolution issues' arose.

⁵⁶ [2001] 2 W.L.R. 817, 2001 S.L.T. 59. Held, on appeal to 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 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'.

⁵⁷ 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 under order-making legislation aimed at drug dealers.

⁵⁸ [2001] U.K.P.C. D2, 8 March 2001 (special leave to appeal refused).

⁵⁹ [2001] U.K.P.C. D3, 24 May 2001. Appeals dismissed. The main issue was whether the effect of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (SI 1999/491) breached the appellants' right to a fair trial under ECHR, Article 6.

⁶⁰ Defendants in criminal proceedings in Wales, like those in England, simply use the Human Rights Act 1998 to raise Convention rights arguments before the court during and after trials in the ordinary courts of England & Wales. The final appeal in these cases goes to the Appellate Committee of the House of Lords, not the Judicial Committee.

primary legislation.⁶¹ It 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.

One other little used jurisdiction of the Judicial Committee is conferred by section 4 of the Judicial Committee Act 1833, by which Her Majesty may refer any matter to the Judicial Committee for 'consideration and report'.

2.3.3 *Membership*

A large number of judges are eligible to be called upon to sit on a panel (or 'board') of the Judicial Committee to hear a particular case. The judges who sit are, in the main, the twelve Law Lords. In addition to them, other judges who have been appointed as Privy Councillors may sit.⁶² These include: the Lord Chancellor; Law Lords retired from full-time office and former Lord Chancellors until they reach 75 years of age; the 40 judges of the Court of Appeal in England & Wales and retired judges of that court up to the statutory age limit; the four most senior judges in Northern Ireland; senior members of Scottish judiciary and those who have retired from office (until the age of 75); and senior judges from several Commonwealth countries.⁶³ Unlike membership of the Appellate Committee, membership of the Judicial Committee is not therefore restricted to judges who hold 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.⁶⁴

2.3.4 *Decisions and judgments*

Boards hearing particular cases are selected by the Senior Law Lord and in most cases are made up of five judges, or three for medical and other professional registration appeals. Hearings take place in the Council Chamber at 1, Downing Street. In relation to its overseas jurisdiction there is no reason in law why the Judicial Committee has to sit in London (where

⁶¹ The secondary legislation is made in both the English and Welsh languages. This fact, and the right of litigants and their lawyers to use Welsh in courts sitting in Wales (Welsh Language Act 1993, Part III) raises the question of what, if any, rights Welsh-speakers should enjoy to have appeals heard in Welsh by the Appellate Committee and the Judicial Committee sitting in London. On whether there ought to be a Welsh Law Lord, see Part 12 below.

⁶² See H.C. Debs., col. WA223, 28 January 1998 for a now dated list. The answer to this parliamentary question is misleading insofar as it suggests that the serving and former Lords President of the Council (*i.e.* the ministerial head of the Privy Council) are eligible to sit as members of the Judicial Committee. While formally this may be so, it is surely a well-established convention that only judicially qualified Privy Councillors may sit.

⁶³ The latter category includes, over the past 20 years, the following judges who have actually been called to sit on cases: Sir Gordon Bisson, Sir Maurice Casey, Sir Thomas Eichelbaum, Thomas Gault, Sir Michael Hardie Boys, John Henry; Sir Duncan McMullin; Peter Blanchard, Sir Robin Cooke (as he then was); Dame Sian Seerpoohi Elias (all judges of the New Zealand Court of Appeal); Sir Thomas Floissac (East Caribbean Court of Appeal); Telford Georges (Bahamas Court of Appeal) and Edward Zacca (Supreme Court of Jamaica). Source: H.C. Debs., 15 February 2000, col. 459W, updated.

⁶⁴ Scotland Act 1998, s. 103(2) and similar provisions in the other devolution Acts.

invariably it has done so, for convenience) rather than in the country, overseas territory or Bailiwick from whose court the appeal has arisen.⁶⁵ Often a single judgment is given by the board. Dissenting judgments are now permitted, though given less often than in the Appellate Committee. The first tranche of devolution appeals indicate, however, that in these cases it will be the practice for separate concurring judgments to be given, in much the same way as they are in the Appellate Committee.

2.4 Relationship between Appellate and Judicial Committees

Formally, the Appellate Committee and Judicial Committees are entirely separate institutions with distinct jurisdictions. Each is served by a separate secretariat.⁶⁶ In practice, however, their work overlaps and is carefully coordinated. The overlapping membership of the Law Lords as the core members of both Committees requires close liaison about case management, especially listing of appeals.⁶⁷ It is normal for five Law Lords to be sitting on an Appellate Committee while, concurrently, others are sitting on a board of the Judicial Committee. The judicial assistants appointed to assist the Law Lords in 2000 are the sole responsibility of the House of Lords Judicial Office, but they also work on Judicial Committee cases as well as House of Lords judicial business. The Law Lords have their personal offices in the Palace of Westminster and use the House of Lords' library facilities when preparing judgments for the Judicial Committee as well as the Appellate Committee.

The relationship between the two Committees has had to be expressed in formal legal rules of precedent in the UK's legal systems. Judicial Committee judgments given in its overseas jurisdictions are only of persuasive, not binding, authority in the courts of England & Wales, Northern Ireland and Scotland. Indeed, in several areas of law there are significant differences between the approach taken by the Law Lords sitting in the Judicial Committee as an overseas court and in the Appellate Committee.⁶⁸ The devolution Acts contain a significant new rule of precedent. The Scotland Act 1998, section 103(1) provides, like the others,⁶⁹ that 'Any decision of the Judicial Committee in proceedings under this Act ... shall be binding in all legal proceedings (other than proceedings before the [Judicial] Committee).' This applies to proceedings in the Appellate Committee like all other courts. In relation to devolution issues, which include questions of Convention rights, the Judicial Committee is therefore now the UK's highest court. Lord Bingham has recently acknowledged that 'there is certainly scope for conflict' between judgments on Convention rights given by the Judicial

⁶⁵ See *Ibralebbe v R* [1964] A.C. 900.

⁶⁶ See Part 17 below.

⁶⁷ At the end of each Legal Term, the Clerk of Privy Council (Mr John Watherston) and the Registrar of the House of Lords (Mr James Vallance White) draw up a joint programme to cover the cases listed in the Privy Council and the Lords for the forthcoming term and submit this for approval to the Senior Law Lords.

⁶⁸ *e.g.* whether local authorities owe a duty of care in negligence for economic loss caused by failures to inspect building work.

⁶⁹ Northern Ireland Act 1998, s. 82(1); Government of Wales Act 1998, Sched. 8, para. 32(b).

and Appellate Committees.⁷⁰ It should also be noted that there is an overlap — or at least, the potential for one — between the two committees in relation to all ‘devolution issues’ (not just Convention rights). The Scotland Act 1998 provides:⁷¹

‘32. Any devolution issue which arises in judicial proceedings in the House of Lords shall be referred to the Judicial Committee unless the House considers it more appropriate, having regard to all the circumstances, that it should determine the issue.’

It is also important to recognise that not all legal disputes arising from the activities of the devolved institutions are ‘devolution issues’. Devolution issues are only those which fall within the definitions set out in the devolution Acts.⁷² For example *Whaley v Lord Watson of Invergowrie* did not involve a devolution issue and, if there had been a further appeal, the case would therefore have been heard ultimately by the Appellate Committee.⁷³ Another example of a case in this category is the judgment of Kerr J. in *In the Matter of an application by Bairbre de Brun and Martin McGuinness for Judicial Review*.⁷⁴

2.5 The character of the Committees

Several formal features of the ‘courts’ at the apex of the UK’s legal systems are worth highlighting.

- Strictly speaking, neither the Appellate nor the Judicial Committees are ‘courts’ in relation to their UK jurisdictions. The former is a committee of the House of Lords; the latter a committee of the Privy Council.⁷⁵
- Nor are the twelve Law Lords formally part of the UK’s judiciary:⁷⁶

‘This is manifested by the fact that unlike the members of the circuit (or equivalent) and higher judiciary, they do not wear robes when hearing cases.

⁷⁰ Joint Committee on Human Rights: Minutes of Evidence, 26 March 2001, Q. 111.

⁷¹ Sched. 6, para. 32. Similar provisions exist in the other two devolution Acts.

⁷² Scotland Act 1998, Sched. 6, para. 1; Northern Ireland Act 1998, Sched. 10, para. 1; Government of Wales Act 1998, Sched. 8, para. 1.

⁷³ 2000 S.C. 125 (Outer House); 2000 S.C. 340 (Inner House). The case concerned an alleged breach by a MSP of advocacy rules in relation to members’ interests during the introduction of a private members’ Bill on hunting by accepting legal, administrative and other assistance from the Scottish Campaign Against Hunting with Dogs.

⁷⁴ High Court of Northern Ireland, 30 January 2001 (unrep.). Two Sinn Fein Ministers of the Executive Committee of the Northern Ireland Assembly successfully challenged the legality of a decision by First Minister David Trimble not to nominate them for meetings of the North-South Ministerial Council. The case turned mainly on the proper interpretation of s. 52(1) of the Northern Ireland Act 1998 under which the First Minister and Deputy First Minister are required to make nominations.

⁷⁵ Other standing committees of the Privy Council are: the Universities Committee; the Scottish Universities Committee; the Committee for the purposes of the Crown Office Act 1877; the Committee for the Affairs of Jersey and Guernsey; the Baronetage Committee; and the Political Honours Scrutiny Committee (H.C. Debs., 13 January 1998, col. 000W).

⁷⁶ Written evidence to the Royal Commission on the Reform of the House of Lords by Lord Donaldson of Lynton.

Again, unlike the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and a number of the Lords Justices and High Court Judges, they do not attend the State Opening of Parliament in any judicial capacity and they play no part in the judicial procession from Westminster Abbey at the beginning of the legal year. More significantly, the Senior Lord of Appeal in Ordinary is not one of the “designated judges” for the purposes of the Courts and Legal Services Act 1990’.

- The UK shares its top level courts, and its most senior judges, with other legal systems. The Law Lords give more judgments when sitting as the highest court of Jamaica, New Zealand, or Trinidad & Tobago than they do for the legal systems of Scotland and Northern Ireland.⁷⁷
- The Appellate and Judicial Committees form a court for the ‘whole UK’ only in a complicated sense. Formally, the Appellate Committee sits as the highest court for each of the UK’s three legal systems not as a UK court — though one of its functions is clearly to coordinate legal developments and consistent interpretation of legislation throughout the UK. The three legal systems stand in asymmetrical relationships with the Appellate Committee. The Judicial Committee is more easily described as a UK court (in its domestic jurisdiction). When hearing devolution issues, the Judicial Committee is a UK court both in the sense of being unrestricted in the laws of which legal system it applies and being the body which must adjudicate on disputes between institutions representing different parts of the UK and the whole UK.
- The panels convened to hear particular appeals are not fixed, but are drawn from a larger pool of judges by the Senior Law Lord exercising powers delegated to him by the Lord Chancellor.⁷⁸
- Since 1998, the UK’s legal systems have had a ‘dual apex’ . The two top courts have, however, overlapping jurisdictions on the subject matter of Convention rights.

⁷⁷ During 1999 the number of appeals disposed of were: Scotland (5); Northern Ireland (3); New Zealand (10); Jamaica (7); Trinidad and Tobago (15). Source: *Judicial Statistics for the year 1999*. See further Part 11 below.

⁷⁸ See Part 15 below.

3 Core institutional qualities of top level courts

3.1 Introduction

Before assessment of the strengths and weakness of the UK's top level courts can take place, it is necessary to identify a template of guiding principles for good institutional design.⁷⁹ These desirable characteristics can also form a basis for evaluating the rival suggestions for reform. Our tentative contention is that four clusters of core qualities are widely accepted to be important for top level courts in liberal democracies. These are that top level courts should:

- have institutional autonomy
- be transparent
- be accountable
- and despatch their business efficiently.⁸⁰

Stated at a high level of generality like this, these core qualities are relatively uncontested (who wants a court that is controlled by government, secretive, unaccountable and inefficient?) and could be, and are, applied to courts at any level of a legal system (not just those at the apex), and also to a broad range of other public institutions. There are, though, differences in what is desirable in top level courts compared to other courts. For example, access to justice should be a principle central to the institutional design of trial courts and is of some importance to first tier appeal courts; it is far less important in top courts hearing second appeals if the capacity of that court to select its cases is regarded as important.⁸¹ Another difference between top level national courts and lower courts is the mechanism of accountability: the absence of a further right of appeal to constrain top level courts requires emphasis to be placed on other forms of accountability.

The criteria of autonomy, transparency, accountability and efficiency together provide the basic institutional means for a top level court to establish, maintain or improve its legitimacy. The Hon. Murray Gleeson, Chief Justice of Australia, has recently written:⁸²

'Like parliamentarians, judges make decisions which, in the interests of civil order have to be accepted, even if they are not popular. Since court cases usually have at least one losing party, almost all judicial decisions adversely

⁷⁹ This is not to suggest that court reform is an apolitical, technical exercise: see Part 5 below.

⁸⁰ In some court systems importance is attached to inclusion among the judges of people from different regions of a country. Gender balance may also be regarded as important. Both of these factors are dealt with in Part 12 below.

⁸¹ This is reflected in the ECHR right of access to a court which, while it protects access at first instance, does not protect a right of appeal — and certainly not two appeals. See Le Sueur and Cornes, 'What do the top courts do?' (2000) 53 *Current Legal Problems* p. 55.

⁸² 'Judicial Legitimacy', speech to the Australian Bar Association Conference, New York, 2 July 2000.

affect somebody. Some offend large sections of the community, or powerful and vocal interest groups. What ultimately secures their acceptance is not their wisdom, as to which there may be strong disagreement, but their legitimacy.'

It is common place for academic critics and politicians — of the Right as well as the Left — to criticise superior courts.⁸³ Without the core institutional characteristics of autonomy, transparency, accountability and efficiency, there is little hope of a court being regarded as legitimate.

3.2 Institutional autonomy

This ideal is for the court to have an appropriate degree of self-governance over its jurisdiction, methods of judicial work, case load, administrative practices and, of course, the judicial decisions it reaches in particular cases. Autonomy requires the adaptation to local circumstances of the generally accepted notions of 'independence of the judiciary' and 'separation of powers'. Those concepts cannot mean, in practice, the complete isolation of top level courts from other parts of the machinery of governance. Courts at the apexes of national legal systems operate within networks of inter-dependent public institutions and constitutional processes. Like other courts, they rely on other branches of government to fund their day-to-day work, to provide and participate in procedures whereby judges are selected and appointed, and to enforce judgments. Institutional autonomy requires, as well as independence, the existence of mechanisms by which the court can communicate with other major institutions (principally the legislature and government) and with civil society. A 1997 report by the UK government to the United Nations Human Right Commission captures some of these contradictory aspirations.

46. It is a cardinal principle that, in the exercise of their judicial function, all judges are completely independent. This means that the political and judicial worlds must be kept at arm's length from each other. It is inevitable and proper that the law, and the operation of the law in the courts, should be scrutinized by Parliament and the executive. However, it is a generally accepted convention that members of Parliament and politicians should not criticize particular judicial decisions, albeit that Parliament has the power to reverse their general effects by legislation. When the Lord Chancellor receives letters from members of Parliament, complaining about judicial decisions on behalf of members of the public, he always makes it clear in reply that his constitutional position prohibits him, like any other minister, from intervening in such matters. If Parliament and the executive are not to interfere in the judicial sphere, so conversely the judges are expected to distance themselves from politics. Full-

⁸³ e.g. in Canada, critics on the political Right argue that 'the Court party' (social movements engaged in advocacy for civil liberties, equality for gay people and women's rights, among others) have 'captured' the Canadian Supreme Court: F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: Broadview Press, 2000). Some in Quebec jest, in seriousness, of that court as a 'leaning tower of Pisa' on federal questions (*i.e.* consistently preferring the interests of federal government to that of the province).

time judges are disqualified from being members of the House of Commons, and Lords of Appeal in Ordinary and other senior judges who are members of the House of Lords do not usually take part in its proceedings except when they relate to legal matters.

There are a range of practical ways in which the ideal of institutional autonomy can be pursued.

3.2.1 *Constitutional entrenchment of the court's jurisdiction, composition and remedial powers*

In many legal systems, the top level court's institutional arrangements, powers and status have the protection of a codified constitution and its amendment procedures. This helps provide a degree of insulation for such courts against the kinds of routine, government-led reform that may characterise the rest of the civil and criminal administration of justice apparatus. This mechanism is not, of course, currently available in the UK. Many parts of the overseas jurisdiction of the Judicial Committee, on the other hand, *are* constitutionally entrenched in the countries which send appeals and indeed this is one of the factors which makes reform in that context difficult,⁸⁴ but rightly so from the perspective of institutional autonomy. Proponents of structural change need, in their reforming zeal, to consider the question: if the present Appellate and Judicial Committees are altered now, what will protect them from further change in the future? In the absence of entrenchment as a protection for the UK's top level courts, the other mechanisms for enhancing institutional autonomy take on added importance.

3.2.2 *Fixed, non-renewable terms of office for judges*

Another common protection for institutional autonomy is prohibition against the dismissal or non re-appointment of judges. This is aimed specifically at removing the opportunity for government to place illegitimate pressure on a judge. This mechanism may also operate to curb the influence of interest groups in civil society campaigning for the removal of judges or against their reappointment. Later in this report an (alleged) practical problem with achieving this ideal in the UK is surveyed: in both the Appellate and Judicial Committees, many more judges are eligible to hear any given case than are actually needed. Given the overabundance of judges, a choice has to be made by someone, using some criteria, as to which judges are to form the particular panel. In the Appellate Committee, the selection is, in theory, of five from a possible 27. In the Judicial Committee, the ratio is approximately five from 40 (for devolution issues) or 60 in other cases where non-British judges are entitled to sit. Arguably, these flexible arrangements undermine the protections offered by fixed, non-renewable terms of office for judges.⁸⁵ There are, however, counter-arguments (principally to do with efficiency and the ability it gives to fine-tune territorial representation on particular panels); and, of course, there is nothing to indicate that the discretion to select panels is currently improperly exercised.

⁸⁴ See Part 11 below.

3.2.3 *Self-control over which cases to hear.*

In some legal systems, importance is attached to the court at the very apex of a legal system having capacity to choose which cases to decide.⁸⁶ In Australia, Canada and the USA, top level courts have over several decades sought to reduce their mandatory jurisdiction and increase their discretion to select cases. The picture in the UK in relation to these things is mixed. There is a leave requirement for the vast bulk of cases presented to the Appellate Committee (*i.e.* all appeals from England & Wales and Northern Ireland). In theory, the capacity of the Appellate Committee to select its cases is limited because the intermediate courts of appeal also have power to grant leave; in practice, however, they rarely do. A more significant departure from the right of the Appellate Committee to choose its cases is that most civil appeals from Scotland do not need leave, and where leave is required this is granted or refused by the Court of Session.⁸⁷ The number of appeals from Scotland is, however, small and this is therefore not a major practical issue. There are greater problems in the Judicial Committee. A significant part of its jurisdiction is to hear appeals brought as of right from many overseas legal systems and professional registration bodies such as the General Medical Council. It also has a new mandatory jurisdiction to determine devolution issues referred to it by lower courts, the Appellate Committee and the Law Officers.

3.2.4 *Absence of direct government involvement in the methods of work and administration of the court*

Top level courts can insulate themselves from the influence of the Executive branch of government in a variety of practical ways. A court may have a secretariat that is entirely separate from that of the rest of the court system in terms of conditions of employment, career structures and salaries (a feature in the US Supreme Court). Top courts may regard themselves as separate from the policy making process for courts generally (In the USA, for example, the US Supreme Court falls outside the ambit of the Administrative Office of the US Courts and the Federal Judicial Center). Such arrangements prevent the top court falling victim to fads and fancies of government policy on administration of justice and also enable a distinct professional culture to develop among its staff.

In both these respects, the Appellate and Judicial Committees have a high degree of separation from government — the Lord Chancellor's Department, responsible for administration of justice in England & Wales and also through the Northern Ireland Court Service, has no responsibility for administrative matters in the UK's highest courts. But there are other features about which concerns have been expressed. The position of the Lord Chancellor (a government minister) presents unique challenges for the achievement of formal institutional autonomy in the UK. In short the Lord Chancellor:

⁸⁵ See Part 15 below.

⁸⁶ Where a top level court takes the form of a constitutional court with a function of dealing with individual petitions for constitutional protection (*e.g.* through the writ of *amparo*), the position may be different—as it is also where a court has jurisdiction to hear 'references' from other courts (see Part 10) or public officials.

⁸⁷ See 2.2 above.

- is able to, and does occasionally, sit as a judge on both the Appellate and Judicial Committees (and when he does so, he presides);
- formally has the power to select which judges hear which cases. In practice, this task has been delegated to the Senior Law Lord but 'he can override the Senior Law Lord as his delegate'.⁸⁸

A second feature is that while in some courts the president of the court is chosen by the judges themselves from among their number, in the UK the Senior Law Lord is appointed by the Queen on the advice of the Prime Minister.⁸⁹

3.2.5 *Court sets its own budget and spending priorities*

A court that is subject to budgets determined by other branches of governance — the legislature and the Executive — is at risk of having its institutional autonomy compromised. This said, a court has no means of raising sufficient revenues independent of general taxation; and as a public institution its overall expenditure ought to be subject to parliamentary approval and the possibility of some external audit. There are a variety of ways of achieving a balance between these competing goals.⁹⁰

3.2.6 *Funding of litigation*

The autonomy of top level courts may be jeopardized if other public authorities control the use of public funds to support appellants wishing to appeal to the court. In the UK, it has been asked from time to time 'should it be possible, under carefully regulated conditions, for an appellate court to make an order that the resolving of certain questions should take place at the public expense?'⁹¹

3.2.7 *Engagement in international 'judicial diplomacy'*

An increasingly important method for promoting a sense of institutional autonomy is through the creation of a sense of common purpose with other top level courts and fellow judges in other legal systems.⁹² The Law Lords participate in a variety of exchange programmes. It is also noteworthy that both the Appellate and Judicial Committee also permit judges from other overseas jurisdictions to sit on both courts.⁹³ In relation to the Appellate Committee, this is due more to underdeveloped concepts of citizenship in the UK than conscious design.

⁸⁸ JUSTICE, 'The Judicial Function of the House of Lords' (London: JUSTICE, May 1999), para. 33. This report was submitted as the organisation's written evidence to the Royal Commission on the Reform of the House of Lords.

⁸⁹ See Part 13 below.

⁹⁰ See Part 17 below.

⁹¹ Lord Morris of Borth-y-Gest, 'The Changing Face of English Law' (1976) 7 *Cambrian Law Review* 55 at 63.

⁹² See Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *Oxford Journal of Legal Studies* 499.

⁹³ Recently, especially in the form of New Zealand judges (Lord Cooke of Thorndon on the Appellate Committee; Sir Ivor Richardson and Dame Sian Elias on the Judicial Committee).

3.3 Transparency

While it has long been recognised that ‘justice must not only be done, but must manifestly be seen to be done’⁹⁴ — and more recently that there is a ‘perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon “transparency,” in the making of administrative decisions’⁹⁵ — the vocabulary of ‘transparency’ is less often applied to the administration of justice, except in the limited (but important) senses of requiring courts normally to sit in public and judges to give reasons for their decisions. Our contention is that because the courts at the apex of legal systems have to perform functions of public importance beyond the resolution of particular disputes between parties and they are public institutions of national importance, they, like other public authorities, should work in ways that are open — except where there are well-founded grounds not to do so (such as the need to preserve as confidential the discussions the Law Lords have among themselves about particular cases. There are a variety of practical ways in which top level courts seek to acquire the characteristics of being transparent.

3.3.1 *Relatively simple and comprehensible institutional arrangements*

The quest for transparency starts with basic institutional design. Perhaps the most straightforwardly understandable form of top level national court is one that does everything — adjudicates on constitutional issues and is the final court of appeal in all ordinary civil and criminal cases. The High Court of Australia and the Canadian Supreme Court come close. The US Supreme Court does not because it has jurisdiction only over federal matters, not in the main the laws of the 50 states. Spain and Germany, in variants on the classic European model, have separate constitutional courts accompanied by either a single supreme court (Spain) or a range of specialist high level courts (Germany). What is abundantly clear is that the UK’s arrangements are complex. There may of course be good reasons for complexity. If major structural reform does not take place, codification of the existing array of Acts of Parliament regulating the Appellate and Judicial Committee would promote greater transparency.

3.3.2 *Public or parliamentary confirmation process for judicial appointments*

Some legal systems have included in the process of appointment to the top level courts some form of confirmation process which is open to public (or at least parliamentary) scrutiny. There is no such public phase in the process in the UK and in this respect transparency is not achieved. In December 1999, a report by Sir Leonard Peach to the Lord Chancellor recommended a Commissioner for Judicial Appointments, stating: ‘confidence will be increased amongst both candidates and the general public ... All appointments will be considered to be within the Commission’s remit *with the exception of the Lord Chief Justice and the Lords of Appeal in Ordinary*’ (emphasis added).⁹⁶ Arguably, it is appointment of the Law

⁹⁴ *R v Sussex Justices, ex p. McCarthy* [1924] 1 K.B. 256, 259, per Lord Hewart C.J.

⁹⁵ *R. v. Secretary of State for the Home Department, ex p. Doody* [1994] 1 A.C. 531, per Lord Mustill.

⁹⁶ *Independent Scrutiny of the Appointment Process of Judges and QCs*. See further Part 12 below.

Lords that is most in need of improvement given the public importance of the work they carry out.

3.3.3 *Particular judges who are to hear a case are fixed in advance*

Knowing in advance which judges will hear a case is a facet of transparency. Courts may implement this in various ways, *e.g.* by always sitting en banc (as in the US Supreme Court) or by having a single court carrying out most of its work through fixed-membership chambers (the German Constitutional Court). The current arrangements in the Appellate and Judicial Committees, with panels selected by the Senior Law Lord and his deputy in consultation with senior court officials, are said by critics to be wrong in principle, although they clearly bring efficiency gains.⁹⁷

3.3.4 *Criteria for choosing cases is clear, reasons are given for refusing leave and all judges take part in selection process.*

Given the importance in many top courts of selecting which cases to consider in detail, the ideal of transparency might be thought to apply to this process as much as to other aspects of the court's work. Reasons are only very rarely given for the grant of cert by the US Supreme Court (the process by which most of its cases are chosen), but the criteria have been spelt out and discussed in some detail in the practitioner and academic literature. The same is true of the Canadian Supreme Court.⁹⁸

In the UK, the criteria of leave are defined only in the most general terms: that a case raises an issue of general public importance. In the past it has been argued that 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 rigid rules should be drawn up. The fetish of "certainty" is not the ultimate virtue here'.⁹⁹ The increased emphasis on transparency reopens the question of what is desirable. In the Judicial Committee recently, the court in refusing special leave in a devolution issue case gave substantial reasons.¹⁰⁰

3.3.5 *Encouraging visits by the public*

Some top level courts actively encourage organised group and individual visits to the court, seeing this as an important way of improving public understanding of the court's role. The US Supreme Court is a world leader in this respect. Its souvenir shop is renowned. Exhibitions are held explaining the role of the court (and courts more widely). Good organisation permits visitors to go into the court room briefly during hearings, or for longer conducted tours when the court is not sitting. There are excellent restaurant facilities. In the modern buildings of the High Court of Australia in Canberra, visitors are also well catered

⁹⁷ See Part 15 below.

⁹⁸ See *e.g.* Brian A. Crane and Henry S. Brown, *Supreme Court of Canada Practice 2000* (Scarborough: Carswell, 2000), pp. 23-37. This is a biennial publication.

⁹⁹ L. Blom-Cooper and G. Drewry, *Final Appeal* (Oxford: OUP, 1972), pp. 146-149.

¹⁰⁰ In *Hoekstra v H.M. Advocate* [2001] 1 A.C. 216.

for. Everyone entering the court room is given a pamphlet with a basic explanation of who is who, and the role of the court. This is accompanied by a page or two of information about the background to the particular case being heard that day.

In the UK, the Appellate and Judicial Committees do not compare well in this respect. Obviously there is no separate building for the public to visit in either case. No explanatory material either generally about the Committee or the case in hand is available to visitors. Organised visits are not encouraged.

3.4 Accountability

For some commentators and judges, the notion of an independent court being held to account is an oxymoron. But if accountability 'involves the idea that a person or body should give an account or explanation and justification for its acts and should put things right ... when mistakes are made',¹⁰¹ then most courts are well used to engaging in this activity. The normal forms it takes are the giving of reasons for determinations and being subject to correction on appeal by a higher court. In relation to the latter, top level national courts are obviously in a different position to lower courts, insofar as their decisions, within that legal system, are not amenable to a further appeal. Many top level courts (and this includes both the Appellate and Judicial Committees) do, however, have the capacity to overturn their own previous decisions in later cases when persuaded that it is right to do so.

The absence of further appeal to another national court puts top level courts in a special position. First, it requires that special care be taken to ensure that the reasons given for judgments are clear and cogent. Secondly, because of the aspiration to have institutional autonomy (discussed above), courts as institutions are held to account by requirements that they explain, often to the legislature, the conduct of their affairs.

3.4.1 Explanatory accountability through effective communication

In the past, it was sufficient for top level courts, like other courts, to communicate their judgments to the lawyers who appeared in each case, who would in turn explain the outcome to their clients. In a leisurely fashion, the judgments would be published in series of law reports accompanied by a head note summarising the legal principles of the decision. Some top level courts now appreciate that it is desirable to communicate their decisions to a wider audience beyond the legal profession. This can be achieved in a variety of ways:

- internet websites providing for rapid publication of judgments and information about the judges and work of the court
- permitting the broadcast of hearings and the giving of judgments
- the appointment of a press liaison/public information officer to assist journalists

¹⁰¹ Gavin Drewry and Dawn Oliver, 'Parliamentary accountability for the administration of justice', ch. III in Drewry and Oliver (eds), *The Law and Parliament* (London: Butterworths, 1998).

- annual 'off the record' lunch meetings between one or more of the judges and specialist journalists
- providing accommodation for the news media in the court building where judgments can be read and reports written
- the use of a single judgment of the court, or co-ordinated concurring and dissenting judgments, rather than court's decision consisting merely of individual judgments issued by each judge one by one in succession
- issuing a 'statement upon publishing reasons' to accompany judgments, essentially a brief explanation of the case and the court's holding. (An analogy might be the explanatory statements that since 1999 have been written to accompany Acts of the UK Parliament).

But even in courts which have adopted one or more of these strategies, two factors are commonly regarded as important: (i) the court's judgments must be the central means of formal communication; and (ii) the court as an institution should not respond to criticisms in the press (though sometimes individual judges who have been the subject of criticism may answer back in the form of lectures or published papers).

In some respects, the Appellate and Judicial Committee have made progress. Both now have websites (though the Privy Council was one of the last institutions of central government to launch one), albeit not very enticing ones. The announcement of judgments of the Appellate Committee take place in the chamber of the House of Lords and so may be broadcast (as occurred in the Pinochet appeal). Broadcast of hearings, in common with all other courts in the UK, is prohibited. But there is no press liaison officer. Decisions in many Appellate Committee cases and some Judicial Committee cases take the form of five individual judgments; sometimes they are repetitious of the facts and law.¹⁰² Single judgments of the court are relatively unusual in the Appellate Committee (though more common in the Judicial Committee).¹⁰³

3.4.2 *Explanatory accountability to the legislature*

As a counter-balance to autonomy, in some systems the top level court is required to explain the conduct of its affairs to the legislature. This may be by:

- the attendance by judges of the court at a parliamentary committee hearing (*e.g.* in the US Congress to present the Supreme Court's budget)

¹⁰² See David Robertson, 'The House of Lords as a political and Constitutional Court: Lessons from the Pinochet Case', ch. 2 in D. Woodhouse (ed.), *The Pinochet Case: a Legal and Constitutional Analysis* (Oxford: Hart, 2000); A.T.H. Smith (1984) 47 *Modern Law Review* 133 at 40; A. Patterson, *The Law Lords*, p. 98.

¹⁰³ There is an inconsistency in policy in criminal appeals: in England & Wales, the Court of Appeal (Criminal Division) has an invariable practice of giving a single judgment of the court, and not allowing dissents; no such collective discipline applies to cases which go on further appeal to the Appellate Committee.

- the attendance by senior officials of the court at a parliamentary committee hearing (e.g. the occasional appearances by the Registrar of the Supreme Court of Canada before the House of Commons)
- the publication of reports of their work. In Spain, for example, the *Tribunal Constitucional* has, at irregular intervals and of its own initiative, published two reports. In the US, the Chief Justice publishes a 'year ender' each January, though this is as much a report on the federal judiciary generally (of which the Chief Justice is head) as the US Supreme Court's work. The High Court of Australia is under a statutory obligation to prepare an annual report which gives an account of its activities, budget and a detailed statistical analysis of case trends. In Canada, since 1997 every department and agency, including the Supreme Court, is required periodically to publish two reports. A *Report on Plans and Priorities* contains information on the 'objectives, initiatives and planned results'. A *Departmental Performance Report* 'provides a focus on results-based accountability by reporting the accomplishments achieved against the performance expectations and results commitments'; these are tabled in Parliament.

Although (perhaps conveniently for this purpose) the Law Lords are also members of the UK Parliament, there are relatively few mechanisms whereby the Appellate and Judicial Committees are called upon to justify their work in the ways just described. On the contrary, there is suspicion of its constitutional propriety — even though, as Drewry and Oliver have argued, 'the continuing reforms of the administration of justice, combined with increasing political impact of judicial decisions and the higher political profile of the judiciary, have combined to challenge the continued sustainability of practices and conventions that have traditionally shielded the courts from parliamentary scrutiny'.¹⁰⁴ This applies to the work of the highest courts as much, if not more, than to other courts.

There is no reporting mechanism for either the Judicial or Appellate Committee, save the statistics and the very brief description of the case load which appear in the *Judicial Statistics for England and Wales (sic)* published annually by the Lord Chancellor's Department and three or so paragraphs and a brief statistical annex within the general *House of Lords Annual Report and Accounts*.¹⁰⁵ Recently, the Lord Chancellor, the Senior Law Lord and other judges accepted an invitation to appear before the Joint Committee on Human Rights to give evidence about the impact of the Human Rights Act on the courts,¹⁰⁶ but there is no indication that this will become a regular event.¹⁰⁷ Participation by the Law Lords in debates in Parliament is, at present, the main mechanism outside their written judgments by which

¹⁰⁴ Op. cit. at p. 35.

¹⁰⁵ e.g. *House of Lords Annual Report and Accounts 1999-2000*, paras 45-47 and statistics in Part II.

¹⁰⁶ 26 March 2001.

¹⁰⁷ Lord Woolf MR and Sir Richard Scott V-C (as they then were) appeared before a House of Commons select committee to give evidence on the draft Freedom of Information Bill: see Select Committee on Public Administration, *Minutes of Evidence*, 14 July 1999, H.C. 570-ix, pp. 168-175.

we get to know their views on a range of issues such as constitutional reform¹⁰⁸ and penal policy. If major structural reform leads to the Law Lords leaving Parliament, careful consideration will need to be given to what, if any, alternative channels of communication are created. None of this is to suggest, of course, that judges should ever be required to disclose to Parliament their positions on issues likely to come up for judicial interpretation.

3.5 Efficiency

A court which fails on a day to day operational level to determine cases before it with appropriate speed and competence is brought into discredit and opens its legitimacy to question. Except for the Appellate and Judicial Committees, courts systems throughout the UK have in recent years been subject to rigorous reviews of their efficiency and effectiveness; often radical reforms have been recommended, many of them have been implemented.¹⁰⁹ The next section of this report considers the political reasons why the UK's two highest courts have thus far escaped such scrutiny. Concerns to achieve efficiency and effectiveness in court systems is a pre-occupation in most liberal democracies.¹¹⁰ Clearly, the practical problems facing top level courts will be somewhat different: in absolute numbers, the case load is likely to be much smaller in top level courts than in trial courts or (where they exist) intermediate courts of appeal.

The scope of this report does not permit any detailed account of the relative efficiency of the Appellate and Judicial Committees compared to their overseas counterparts. What can usefully be noted here is the very modest cost of the courts. Excluding judicial salaries (a Law Lord's salary is £152,072, paid from the Consolidated fund), the annual cost of running the Appellate and Appeal Committees is little more than £600,000, which with receipts from fees etc of almost £500,000, resulted in a net expenditure of only £122,610 in 1999-2000. The allocated budget was underspent by 17.8 per cent.¹¹¹ The annual costs of the Judicial Committee are approximately £400,000.¹¹²

¹⁰⁸ See e.g. the views expressed on the prospect of a constitutional court in the UK summarised in Part 9, below.

¹⁰⁹ Reviews include: Lord Woolf, *Access to Justice: final report to the Lord Chancellor* (London: HMSO, 1996); Sir Jeffery Bowman, *Report to the Lord Chancellor by the review of the Court of Appeal (Civil Division)* (London: LCD, 1997) and *Review of the Crown Office List: a Report to the Lord Chancellor* (London: LCD, 2000); the White Paper, *Modernising Justice: the Government's Plans for reforming legal services and the courts*, Cm. 4155; Court Service consultation paper, *Modernising the Civil Courts* (2001); the LDC review of the criminal courts in England and Wales chaired by Sir Robin Auld (see www.criminal-courts-review.org.uk); in Northern Ireland, see the Review of the Criminal Justice System in Northern Ireland (available on line at www.nio.gov.uk/cjr) and *Review of the Civil Justice System in Northern Ireland: final report* (Belfast: Civil Justice Reform Group, 2000).

¹¹⁰ See e.g. in relation to the USA, the work of the Federal Judicial Center (www.fjc.gov) and its reports such as *Conference on Assessing the Effects of Legislation on the Workload of the Courts* (1995) and *Case Management Procedures in the Federal Courts of Appeals* (2000). It is noteworthy that the FJC's remit includes all federal courts except the US Supreme Court.

¹¹¹ *House of Lords Annual Report and Accounts 1999-2000*.

¹¹² See Part 17 below.

4 Functions of the UK's top courts

4.1 Introduction

It is now widely accepted that the top courts play an important, and distinct, public role which extends far beyond achieving individual justice for litigants in particular cases. This part of the report considers the functions performed by the Appellate and Judicial Committees with a view to identifying what is essential and what is not. Structural reform of the top courts will either have to accommodate current tasks, or justify why a function would be better carried out by another court or institution or not at all. Any reformed court must be able to perform the functions *at least* as well as the Appellate and Judicial Committees currently do (otherwise why go through with the disruption of reform?). Analysis of the 359 judgments delivered by the Appellate and Judicial Committees between November 1996 and November 1999 suggests that the top courts currently carry out the following tasks:¹¹³

- Provision of 'better quality' adjudication than is possible in first level appeal courts
- Determination of 'important' cases
- Correction of errors of law made by first level appeal courts
- Management of the judicial administration of the UK's three legal systems
- Provision of constitutional protection
- Modification of case law and interpretation of legislation to ensure that it resonates with contemporary social values

The Judicial Committee, in addition, has these tasks:

- Appellate adjudication services to overseas jurisdictions
- Appeals about registration by medical professional bodies
- Settlement of one particular kind of dispute within the Church of England.

These are considered in turn.

4.2 Better quality adjudication

This function includes, 'clarifying and refining issues, expounding principle, interpreting and applying precedent in a way ultimately better than the courts below.'¹¹⁴ This aspect of what the top courts do is important to all the other functions of the top court. As Lord Bingham notes, without making plainly better decisions (rather than simply *different* ones)

¹¹³ This draws on Le Sueur and Cornes, 'What do the top courts do?' (2000) 53 *Current Legal Problems* 53, to which reference should be made for a more detailed account.

¹¹⁴ Lord Bingham of Cornhill, 'The Highest Court in the Land' Millennium Lecture, delivered at Lincoln's Inn on 24 September 2000.

the 'delay inherent in a second appeal [would be] hard to justify'. It is possible to specify some factors which might constitute the better quality of the top courts' work:

- Refinement: though there are exceptions, the path to the top courts through at least two prior hearings provides the opportunity for the issues in a case to be 'narrowed and refined.'¹¹⁵
- Mode of deliberation: anecdotal evidence of the way the top courts hear cases suggests a challenging atmosphere in which counsel are exposed to rigorous testing by the judges. As they also deal with a smaller number of cases than the courts below, the top courts simply have more time both in the court room and in discussion afterwards.
- Textual quality of judgments.
- Composition of the court: almost all cases receive the attention of a greater number of judges in the top courts than in the court immediately below. If appointments to the top courts are on the basis of professional merit, then one should assume that the judges are — to put it bluntly — 'better' than those in the courts below.¹¹⁶

4.3 Determining important cases

The top courts ought not to exist to deal with trivia: 'if the House of Lords is to perform what I regard as its true function, it is essential that its attention should be concentrated on the relatively few cases which merit, and in practice (short of a revolution in working methods), receive its mature scrutiny'.¹¹⁷ As already noted, in the UK the ideal is not met because of absence of a leave requirement in some circumstances.¹¹⁸

4.4 Error correction

The top courts' function 'is not *ordinarily*, to correct alleged errors in the application of settled law'¹¹⁹ — that role belonging to first level appellate courts in their supervision of trial courts. Nevertheless it is some element of the top courts' functions. As cases go up through the judicial hierarchy, being dealt with by judges with more time and greater experience, a different outcome will more likely arise from a different approach to the law, rather than simply legal error.¹²⁰ The balance tips from an interest in seeing that individual litigants get justice to a wider public interest in the development of the law.

¹¹⁵ See Lord Clyde in *Bank of Scotland v Brunswick Developments (1987) Ltd* No 2 1999 S.C. (H.L.) 53. Lord Clyde went on to note that the case was an exception.

¹¹⁶ The meaning of 'merit' is considered in Part 12.

¹¹⁷ Lord Bingham, above.

¹¹⁸ See 2.2 and 2.3 above.

¹¹⁹ Lord Bingham, above.

¹²⁰ A good example is one of the Judicial Committee's first devolution issue cases, *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 W.L.R. 817, 2001 S.L.T. 59.

4.5 Constitutional protection

Generally, top level courts in legal systems have functions of protecting constitutional rights and structures (whether they be specialist courts or not). The Appellate and Judicial Committees, as final courts of appeal, have been given new functions in this area by the Human Rights Act 1998 and devolution Acts. As already noted, the Judicial Committee has also acquired a new original jurisdiction to consider Bills of the Scottish Parliament and the Northern Ireland Assembly referred to it directly by the Law Officers. The more particular tasks can be outlined as follows.

4.5.1 *Control of the exercise of public power through judicial review*

The Appellate Committee has, in conjunction with the lower courts, developed judicial review as a procedure, determined its scope of application, and developed the grounds of judicial review.

4.5.2 *Civil liberties and human rights*

While there may be dispute over how well the top courts have in fact protected civil liberties and human rights, they have plainly always had a role in doing so. From October 2000 all courts have a statutory duty to act, unless there is clear statutory language to the contrary, in conformity with the Convention rights as set out in Schedule 1 to the Human Rights Act 1998. There are two distinct additions to the top courts' role arising from the Act. The first concerns the section 3 interpretative obligation. It is clear from the words of the section itself, parliamentary debates during passage of the Human Rights Bill and other public statements by the Lord Chancellor and Home Secretary, that the courts are to adopt an entirely different mode of statutory interpretation — even reading words into statutes in order to make them Convention compliant. This, combined with the top courts' traditional roles in respect of managing precedent and innovation (see below), means the top courts must in every case review, and where necessary alter, case law or the interpretation given to statutory provisions (unless clearly impossible) in order to give effect to Convention rights. Second, in those cases where the legislative provision cannot be read consistently with the Convention rights, then, unless the provision is an Act of the UK Parliament, or a provision of subordinate legislation required by such a statute, the courts, ultimately the top courts may quash the legislative provision. In respect of Acts of the UK Parliament, all the higher courts may grant the new remedy of declaration of incompatibility — a finding by the court that the provision in question breaches a Convention right.

4.5.3 *Relationships between legal orders*

National legal systems, whether monist or dualist, do not exist in a legal vacuum. They are intersected and influenced by the legal orders of other countries, supra-national and international legal orders. Top courts play a role along with the state's other key actors (the executive and legislature) in deciding how those legal orders and their norms will relate to the domestic legal systems. As courts of a European state, the UK top courts work with the European Court of Justice and the European Court of Human Rights to develop both the law

of the European Union and ECHR law. One interesting issue for the future will be how ECHR case law will develop now that the UK top courts can enter into dialogue with the European Court of Human Rights. Lord Bingham clearly expects a relationship between equal partners:¹²¹

'I do myself think that one of the great advantages of having incorporated the Convention is that it makes it possible to have a dialogue with the Court in Strasbourg. Of course, we have a lot to learn from them but I venture to suggest they have a great deal to learn from us, not least in areas which are unfamiliar to most Continental jurists, of which jury trial is the most pre-eminent example. ... They [the Strasbourg Court] are now, for better or worse, getting our views on these questions and one would hope that they would treat those with the same serious respect with which we treat their judgments, when though of course we have a duty ultimately to take account of their jurisprudence, whereas they have no duty to take account of ours.'

4.5.4 *Devolution matters and issues*

The Appellate and Judicial Committees both have new functions arising from the Scotland Act, Government of Wales Act and Northern Ireland Act. The Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly are not sovereign in the sense that the UK Parliament is. Lord Rodger, speaking of the Scottish Parliament in *Whaley v Lord Watson of Invergowrie*, but his characterisation applies equally well to the Assemblies in Northern Ireland and Wales, said:¹²²

The fundamental character of the Parliament [is]... a body which — however important its role — has been created by statute and derives its powers from statute. As such it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so then in an appropriate case the court may be asked to intervene.

The introduction of devolution in the UK has been followed with interest by judges from top courts in federal systems, one noting that:¹²³

Federalism plays a vital role in an appellate judge's interpretative work for a reason which affects more than a few statutes lying on the borders traced by federal lines of authority. It is a reason that affects the interpretation of many statutes. That reason grows out of the intangible interpretative factor called 'statutory background' or 'judicial attitude'. Judges in a federal system interpret all statutes in the light of the history, traditions, basic purposes and objectives of that federal system. And that circumstance makes a difference.

¹²¹ Oral evidence to Joint Committee on Human Rights, 26 March 2001, Q. 130.

¹²² 2000 S.C. 340.

¹²³ Stephen Breyer, 'Does Federalism Make a Difference?' [1999] *Public Law* 651, 658.

4.6 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' 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 the 1996-99 sample, include: deciding whether challenges should be channelled into the supervisory jurisdiction of the High Court or dealt with by criminal courts;¹²⁴ whether a trial should be allocated to a court martial or the civilian criminal courts;¹²⁵ 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;¹²⁶ the powers of county courts to grant adjournments;¹²⁷ when it is proper to strike out cause of action on because of a claimant's delay;¹²⁸ 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 — or whether such an issue should be determined at trial;¹²⁹ whether the House of Lords 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;¹³⁰ whether a non-pecuniary interest in litigation was sufficient automatically to disqualify a person from sitting as a judge in the cause;¹³¹ 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.¹³²

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

¹²⁴ *Boddington v British Transport Police* [1999] 2 A.C. 143; *R. v Wicks* [1998] A.C. 92.

¹²⁵ *R. v Martin (Alan)* [1998] A.C. 917.

¹²⁶ *Girvan v Inverness Farmers Dairy (No.2)* 1998 S.C. (H.L.) 1.

¹²⁷ *Bristol City Council v Lovell* [1998] 1 W.L.R. 446.

¹²⁸ *Grovit v Doctor* [1997] 1 W.L.R. 640.

¹²⁹ *Barrett v Enfield LBC* [1999] 3 W.L.R. 79.

¹³⁰ *R. v Secretary of State for the Home Department, ex p. Salem* [1999] 1 A.C. 450.

¹³¹ *R. v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No.2)* 1999] 1 W.L.R. 272.

¹³² *R. v DPP, ex p. Kebilene* [2000] 2 A.C. 326.

designed for the protection of public authorities rather than of the citizen'.¹³³ Another concern is whether such litigation in the top courts is an appropriate use of scarce and finite judicial resources;¹³⁴ time spent on this activity is time unavailable for other purposes (such as enunciating constitutional values).

A new field in which 'system management' functions are being deployed is the demarcation of 'devolution issues'. The first three devolution cases heard by the Judicial Committee required strategic decisions to be made. It has been decided that the Judicial Committee's appellate devolution jurisdiction is engaged only when there has been a 'determination of a devolution issue':¹³⁵

It is plain the Judicial Committee can only act within the limits which have been set out for it by the statute [Scotland Act 1998]. ... Some of the issue which fall within the description of devolution issues in paragraph 1 of the Schedule may well raise constitutional issues. But it does not follow that all issues which are of a constitutional nature are devolution issues within the meaning which is given to the expression by that paragraph.

The system management function also entails the oversight and management of precedent. The ability of the Appellate Committee to undertake this function (and that of innovation) was significantly augmented by the announcement in 1966 that it could depart from its own previous decisions.¹³⁶ The Appellate Committee's ability to change the law by expressly departing from precedent sets it apart from lower courts within the legal systems of the UK. The Judicial Committee has a similar ability in relation to devolution issues arising from section 103 of the Scotland Act 1998 and the other devolution Acts.

4.7 Innovation

Judges on the top court have the prestige and authority to move the law on, by ensuring that the meaning given to statutory provisions, or the rules of the common law, 'broadly reflect the changing values and needs of society'.¹³⁷ Whether and how far judges should engage in innovation is debated — but the *fact* that they do is not.¹³⁸ The US Supreme Court has held both that segregation is constitutional and unconstitutional; in Australia, courts have accepted (even while expressing their disbelief) that Australia was uninhabited (*terra nullius*) prior to European settlement, and then held that not only was Australia inhabited, but its indigenous inhabitants' land rights survived European settlement. The Appellate Committee in *Fitzpatrick v Sterling Housing Association Ltd* (though by a 3–2 majority) has accepted that in the society of 1999 'family' in an Act, the wording of which dated from 1920, includes a same

¹³³ H.W.R. Wade and C. Forsyth, *Administrative Law*, 7th ed., (Oxford, 1994), p. 682.

¹³⁴ e.g. *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48.

¹³⁵ Lord Hope in *Hoekstra*, above.

¹³⁶ Practice Direction (Judicial Precedent) [1966] 1 W.L.R. 1234.

¹³⁷ Lord Bingham, above.

¹³⁸ Antonin Scalia, *A Matter of Interpretation* (1997).

sex partner.¹³⁹ This is likely to be an important facet of the top courts work in the UK as section 3 of the Human Rights Act 1998 mandates *all* courts to consider whether it is possible to read statutes so as to comply with Convention Rights.

4.8 Other functions

Three functions performed by the Judicial Committee will be considered separately in Part 11, below. These are:

- provision appellate adjudication services to overseas jurisdictions
- adjudication on matters of professional registration
- settlement of one particular kind of dispute within the Church of England.

It is difficult to justify on any rational grounds the allocation of the latter two functions to the UK's most senior judges. The overseas function is also likely to change significantly in the medium term.

¹³⁹ [2001] 1 A.C. 27.

5 Political context of reform

5.1 Introduction

The practical process of reforming the UK's top level courts cannot proceed solely (or perhaps even mainly) by means of politically neutral, rational analysis of policy options designed to find some objectively identifiable optimal assortment of features. Choices about the future necessarily arise from, and would need to be implemented in, a political context.¹⁴⁰ Substantial reform is likely to come about only when political incentive and political opportunity coincide. The conjecture put forward here is that:

- over the past several years there have been a number of opportunities when reform *could* have been considered, but was not;
- that, so far, there have been insufficient political incentives for change — indeed, there are formidable disincentives;
- that, in the medium term, the political 'fuel' for reform¹⁴¹ is likely to increase; and
- ultimately a choice will need to be made between two styles of change — either incremental, pragmatic and reactive reform or greater structural, principled and strategic reform.

This part of the report considers each of these propositions in turn.

5.2 Missed opportunities for reform

It is curious that the UK's top level courts have not yet been the subjects of reform, given the existence of two major transformation policies — the Labour Government's constitutional renewal programme and the radical reforms to the administration of civil and criminal justice. Had there been political inclination to do so, it would have been possible for consideration of the future of the Appellate and Judicial Committees to have been part of these initiatives.

5.2.1 *Third Way constitutional renewal*

Consideration of the future of the Appellate and Judicial Committees could have formed part of the Labour Government's constitutional reform programme in which many major public institutions were created anew or had working methods altered or their constitutional status changed. The Royal Commission on Reform of the House of Lords did deal with the judicial function of the upper chamber of Parliament in its 2000 report, albeit fairly briefly. The Commission recommended no significant structural changes in relation to the Law

¹⁴⁰ Anyone doubting this should consider the failed attempt at abolition of the House of Lords' judicial function in the nineteenth century: Judicature Act 1873 and Appellate Jurisdiction Act 1876.

¹⁴¹ To borrow terminology from Michael Foley, *The Politics of the British Constitution* (Manchester: Manchester University Press, 1999), ch. 3.

Lords' work.¹⁴² It was however widely acknowledged that detailed consideration of reform of the judicial function fell outside the scope of the commission's enquiry — as did the position of the Judicial Committee. It is something of a paradox that while being given important roles in the schemes to incorporate the ECHR into domestic law and in the devolution settlement, the Appellate Committee and the Judicial Committee have, as institutions, been so little affected by the forces of modernisation. They are instruments, but not subjects, of change: new wine has been put into old bottles. This has not gone unnoticed.¹⁴³

'... we are seriously proposing a major series of constitutional reforms at the tail end of the 21st century and yet overlaying them with a system of appeal established well before the end of the last century. That seems a strange way to proceed. So, I have no doubt that this House and other organisations will return to this issue.'

5.2.2 *Reform of administration of justice programme*

A second modernisation project which might have provided an opportunity to pursue reform of the Appellate and Judicial Committees is the drive to improve the administration of civil and criminal justice in the UK's legal systems. In England & Wales, the Access to Justice programme has resulted in significant alterations to civil litigation practices implemented by the Civil Procedure Rules (CPR) in 1999 which created for the first time a uniform body of practice rules for the county court, the High Court and the Court of Appeal (Civil Division).¹⁴⁴ In Northern Ireland, the Civil Justice Reform Group reported in 2000 on the appropriateness of the application and adaptation of the new CPR to that part of the UK.¹⁴⁵ The flagship White Paper *Modernising Justice* of December 1998, while purporting to describe the Government's 'comprehensive programme for modernising the justice system in England and Wales' and claiming to 'have looked across the board, at the justice system as a whole, to see where change is needed'¹⁴⁶ makes no reference at all to the work of the Law Lords. Systematic studies were undertaken of the Court of Appeal (Civil Division)¹⁴⁷ and the Crown Office¹⁴⁸ by committees chaired by Sir Jeffery Bowman, a distinguished accountant. A review of the Court of Appeal (Criminal Division) is under way, conducted by Sir Robin Auld. This strategic planning for courts reveals a range of concerns and prescriptions.

¹⁴² Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm. 4534 (London: HMSO, 2000), ch. 9. See further 7.7 below.

¹⁴³ Lord Steel of Aikwood, H.L. Debs. 28 October 1998, col. 1985 (report stage of Scotland Bill).

¹⁴⁴ Lord Woolf, *Access to Justice: interim report to the Lord Chancellor* (London: HMSO, 1995) and *Access to Justice: final report to the Lord Chancellor* (London: HMSO, 1996).

¹⁴⁵ Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland: final report* (Belfast: Civil Justice Reform Group, June 2000).

¹⁴⁶ Cm. 4155, para. 1.1.

¹⁴⁷ *Report to the Lord Chancellor by the Review of the Court of Appeal (Civil Division)* (London, LCD, 1997).

¹⁴⁸ *Review of the Crown Office List: a Report to the Lord Chancellor* (London: LCD, 2000).

- Policy-making about courts should be responsive¹⁴⁹ and ‘joined up’.¹⁵⁰
- There should be clear lines of judicial and administrative responsibility for court systems and courts should have clear objectives.¹⁵¹
- It is desirable for there to be integrated procedural codes for litigation in different levels of court.¹⁵²
- Judges should be encouraged to specialise in particular fields of law.¹⁵³
- Increasing demand for services is a major pressure for change — in this context, the need to cope with growing case loads while reducing delays.
- Appeals should generally go to the lowest appropriate level of judge; in usual circumstances there should only be one level of appeal; and subject to a requirement of first obtaining permission.¹⁵⁴
- Dealing with cases justly requires courts to consider litigant’s financial means and the court’s own resources.¹⁵⁵
- Courts need to be properly resourced and to use information technology.¹⁵⁶

So far in the debates about the future of the UK’s top level courts, there has been little or no engagement with these policy goals and principles. One justification for this may be that it is constitutionally important for top level courts to have a degree of insulation from administration of justice policy reforms implemented by the Executive in lower courts.¹⁵⁷ The lack of engagement may, however, be due less to such high-mindedness and more to the problems of achieving joined up government described below.

5.2.3 *British Overseas Territories*

One other modernisation project should be mentioned here. In 1999, the UK Foreign and Commonwealth Office conducted a major strategic review of the future relationships between the UK and its Overseas Territories.¹⁵⁸ Nothing was said of the role of the Judicial Committee,¹⁵⁹ despite references to the importance of the rule of law and human rights standards.

¹⁴⁹ Woolf, *Access to Justice: Interim Report*, ch. 17; Bowman, *Report to the Lord Chancellor by the Review of the Court of Appeal (Civil Division)*, ch. 11.

¹⁵⁰ *Modernising Justice: The Government’s plans for reforming legal services and the courts*, Cm. 4155 (London, 1999), para. 1.1.

¹⁵¹ Woolf, *Access to Justice: Final Report*, ch. 8; Bowman, *Review of the Crown Office List: a Report to the Lord Chancellor*, recommendation 75.

¹⁵² Woolf, *Access to Justice: Final Report*, ch.14, 20.

¹⁵³ Woolf, *Access to Justice: Final Report*, ch. 8, 15-16; Bowman, *Review Of The Crown Office List*, paras. 21-23.

¹⁵⁴ Bowman, *Report to the Lord Chancellor by the Review of the Court of Appeal (Civil Division)*; *Access to Justice Act 1999*, Part IV (and see Explanatory Note accompanying the Access to Justice Bill).

¹⁵⁵ *Civil Procedure Rules*, Part I.

¹⁵⁶ Woolf, *Access to Justice: Final Report*, ch. 8; *Modernising the Civil Courts*.

¹⁵⁷ See 3.2 above.

¹⁵⁸ *Partnership for Progress and Prosperity*, Cm. 4264.

¹⁵⁹ See Part 11 below.

5.3 Political disincentives to reform

Clearly, then, reform of the top level courts in the UK has not had any significant place on the government's policy agenda. The reasons for this are the existence of a number of disincentives.

5.3.1 *The views of Lord Irvine: a force for conservatism?*

First, the personal views of the Lord Irvine, the Lord Chancellor throughout the Labour government's 1997-2001 term of office and into its second, are opposed to any significant change to the status and composition of the Appellate Committee and Judicial Committee. He has been a defender of the status quo, including the role of Lord Chancellor as both judge and minister.¹⁶⁰ Importance must be attached to his stance not only because he has ministerial responsibility for the administration of justice in England & Wales and Northern Ireland and is a judge of the top courts in question, but also because he has had ministerial responsibility for coordinating the whole constitutional reform programme. The substance of Lord Irvine's argument against radical change (the need for other constitutional changes to 'bed down' first) are considered in more detail later. Here it suffices to note that a future Lord Chancellor may take a different view.

5.3.2 *The difficulty of joined-up policy making*

A second disincentive to reform is the difficulty of achieving 'joined up' policy-making about the future of the Appellate Committee and Judicial Committee. As we have written elsewhere,¹⁶¹ while most other aspects of the UK'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':¹⁶²

'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 UK's top courts. The Law Lords' judicial function is split between the Appellate Committee (a committee of the UK Parliament) and the Judicial Committee of the Privy Council (a committee formally

¹⁶⁰ See Frances Gibb, 'Irvine defends his role in law and politics', *The Times*, 30 March 2001.

¹⁶¹ Le Sueur and Cornes, 'What do the top courts do?' (2000) 53 *Current Legal Problems* 53 at 57-58.

¹⁶² *Modernising Government*, Cm. 4310 (London, 1999), paras. 2.4-2.5.

connected to a department of state). Neither top court falls within the departmental responsibility of Lord Chancellor's Department. As already noted, the Scottish Executive (and in time, the Northern Ireland Executive) have devolved policy-making responsibilities for some aspects appellate routes to the Appellate Committee from the intermediate courts of appeal in those parts of the UK.

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 Department of Health,¹⁶³ the Welsh, Scottish and Northern Ireland Offices, and the Scottish Executive, Northern Ireland Executive and the National Assembly for Wales have interests in the devolution aspects of the Judicial Committee's work.

5.3.3 Political sensitivity about 'tampering' with the senior judiciary

There may be political sensitivity about 'tampering' with the highest courts, for fear of accusations that the government is interfering with the independence of the judiciary. Even minor reforms run the risk of escalating into heated debates about constitutional proprieties.¹⁶⁴

5.3.4 National concerns within the UK

Top court reform has not become a political issue in either Scotland or Northern Ireland. It may well do, however. In Northern Ireland, any question of institutional reform has capacity to inflame community relations in a divided society. The Northern Ireland Human Rights Commission is currently considering methods of enforcing the proposed Bill of Rights for Northern Ireland and it may be that sensitive decisions about the forum of appeals in relation to that legislation will need to be made.¹⁶⁵ In Scotland, it has not gone unnoticed that (on one view) some aspects of reform of civil appeals to the Appellate Committee are within the competence of the Scottish Parliament, not the UK Parliament.¹⁶⁶ There may well be a wish on the part of the UK government to avoid engagement with these issues.

5.3.5 The ripeness of time

A major disincentive to change is acceptance of the widely held view that now is not the right time to consider, let alone implement, any reform to the UK's top level courts. This was an opinion held by Lord Irvine LC, who suggested that the other constitutional reforms should be allowed to 'bed down' before changes to the top level courts are contemplated.¹⁶⁷

¹⁶³ In relation to appeals of certain health care professionals suspended from, or struck off, their respective register. See 11.3 below.

¹⁶⁴ e.g. in the parliamentary debates that preceded the introduction of the 'leapfrog' procedure by the Administration of Justice Act 1969.

¹⁶⁵ See below.

¹⁶⁶ See below.

¹⁶⁷ 'It may be that ... longer-term thought should be given to the appropriateness of a specialist constitutional court. ... I can be encouraging to that limited extent': Lord Irvine, H.L. Debs., col. 1983

Certainly, it is easy to draw up a list of factors that make planning for the future of the Appellate and Judicial Committees difficult.

- Uncertainty about the quantity and quality of 'devolution issue' litigation.
- Continuing uncertainty about the scale of Human Rights Act litigation that is likely to reach the UK's highest courts.¹⁶⁸
- 'Stage 2' of the Government's reform of the House of Lords in its legislative capacity.
- The Northern Ireland Bill of Rights is now under consideration and it is as yet unclear what form it will take in either contents or methods of implementation. One model under discussion within the statutory Northern Ireland Human Rights Commission is for the repeal of the Human Rights Act in Northern Ireland, the enactment of new human rights legislation with a special constitutional court.¹⁶⁹
- The overseas jurisdiction of the Judicial Committee is likely to change in the short to medium term as New Zealand and Caribbean states end appeals.¹⁷⁰

The bedding down argument, then, clearly has merit insofar as it is possible to identify a range of important uncertainties, the resolution of which would make planning for the future of the UK's top level courts easier. There are, however, counter-arguments. First, the argument is essentially one about timing rather than the need for change (or not). Even if time is not quite right to implement change, there ought at the least to be some planning for the future. Secondly, waiting for a time free of future uncertainty about the context in which the UK's top courts will operate is like waiting for Godot: it will never arrive. New uncertainties are likely to replace old ones. Thirdly, and most importantly, the bedding down argument wrongly views the UK's top courts as passive reactors to change rather than being part of the process of change. The Law Lords in their rulings on devolution issues and Convention rights are going to have significant impacts on the conduct of government and people's rights. This is particularly so in the early (current) phase of human rights and devolution issues when the courts are called upon to define for the first time a range of new concepts and establish approaches.¹⁷¹

5.4 Future political 'fuels' for change

Although up to now, due to the disincentives outlined above, there have been missed opportunities to consider the role and status of the UK's top level courts, our hypothesis is that in the future drivers for change will emerge.

(28 October 1998) rejecting a Liberal Democrat amendment to the Scotland Bill for such a court instead of giving the Judicial Committee jurisdiction over 'devolution issues'.

¹⁶⁸ On caseload issues, see Part 17 below.

¹⁶⁹ See below.

¹⁷⁰ See 11.2 below.

¹⁷¹ See Stephen Tierney, 'Constitutionalising the Role of the Judge: Scotland and the New Order' (2001) 5 *Edinburgh Law Review* 49.

5.4.1 *'Bedding down' may reveal structural or constitutional problems*

It is possible to implement new or controversial constitutional arrangements without altering the methods of appointment or the constitutional status of the top level judiciary, as the example of Canada shows where the Charter of Rights and federalism have been adjudicated upon by a Supreme Court whose methods of appointment have been unaltered for years. It is, however, also possible that the 'bedding down' of the constitutional reform programme in the UK will give rise to generalised dissatisfactions with the top courts' status and role. Among the generalised dissatisfactions that might emerge are: the lack of women appointees;¹⁷² concerns about the selection of panels;¹⁷³ and problems with the dual apex of the Judicial and Appellate Committee both having overlapping jurisdiction over Convention rights.¹⁷⁴

The current generally cordial relationships between UK government (and now, the devolved institutions) and the UK's senior judiciary also cannot be taken for granted. Only a few years ago, serious tensions arose in relations between the Conservative government and judges.¹⁷⁵

5.4.2 *Managerial difficulties will emerge*

Even if the difficulties just described are avoided, it seems inevitable that the Appellate and Judicial Committees will be faced with smaller scale (but important) difficulties in the management of their functions. The cases coming before the Law Lords are going to change, both quantitatively and qualitatively, as a result of the Human Rights Act 1998 and the devolution settlement and litigation practices more generally. The managerial challenges facing the court will include the growth in the number of appeals (and references) and increased demand by third party interveners or more frequent use of amici curiae.

5.4.3 *A new sense of constitutionalism in the UK*

In the past, the infrastructure of adjudication was taken more or less as given; today a new sense of constitutionalism has developed, prompted by incorporation of the Convention rights, which questions court procedures and institutional arrangements. Many of the early Convention rights cases have been challenges to the composition, structures and procedures of the courts themselves.¹⁷⁶ It can be predicted that in the coming years there will be heightened interest in the constitutional propriety of the work and organisation of the Law Lords. The case will be made, with increasing force, that the UK's top courts fail at a basic level to comply with fundamental principles of constitutional propriety or basic human rights — in particular, Article 6(1) of the Convention which guarantees that in a determination of civil rights and obligations or a criminal charge, 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal'. While there has not yet been a direct Article 6(1) challenge to either the Appellate or Judicial

¹⁷² See 12.3 below.

¹⁷³ See Part 15.

¹⁷⁴ See 2.4 above.

¹⁷⁵ See Le Sueur (1996) 31 *Government and Opposition* 8.

¹⁷⁶ See Tierney, above.

Committees,¹⁷⁷ the footsteps of Article 6(1) are getting ever closer, as similar judicial arrangements both within and without the UK are found to fail its requirements.¹⁷⁸ Evaluating a tribunal's *independence* may include consideration of:¹⁷⁹

- the manner of appointment of its members
- their term of office, including security of tenure
- the existence of guarantees against outside pressures, and
- whether the body presents an *appearance* of independence.

In relation to the linked requirement of *impartiality* the European Court of Human Rights has set out two tests:

- the tribunal must be subjectively free of personal bias, *i.e.* there must be no *actual* bias; and
- it must be impartial from an objective viewpoint, or, as Sir John Laws expressed it in *McGonnell v UK*: 'Where there is no question of actual bias, our task under Article 6(1) must be to determine whether the reasonable bystander — a fully informed layman who has no axe to grind — would on objective grounds fear that the [court in question] lacks independence and impartiality'.¹⁸⁰

In *McGonnell v UK* the European Court of Human Rights (and especially Sir John Laws, who was sitting as *ad hoc* judge, delivering a separate concurring opinion) was at pains to make clear that Article 6(1) required each case to be examined on its own merits. Finding there to be a breach of Article 6(1) in a particular case did not also amount to finding that the entire

¹⁷⁷ The Fawcett Society has come closest: see 12.3 below.

¹⁷⁸ In the European Court of Human Rights: *Procola v Luxembourg* (1995) 22 E.H.R.R. 193 (judicial committee of the Conseil d'Etat); *McGonnell v UK* (2000) 30 E.H.R.R. 289 (Royal Court of Guernsey in which the judge was the Bailiff, who also had a role as presiding officer of the Guernsey legislature). In the UK: *Starrs v Ruxton* 2000 J.C. 208 (temporary sheriffs, appointed on an annual basis by the Secretary of State for Scotland, with the Lord Advocate—the prosecuting authority—playing an important role in deciding what appointments were required), *cf.* *Gibbs v Ruxton* 2000 J.C. 258; *Hoekstra and others v HM Advocate* [2001] 1 A.C. 216, 2001 S.L.T. 28 (a newspaper article by a member of the first appeal court commented on the ECHR, leading the appellant to argue that it could not have been impartial in relation to the human rights issues which had been raised); *Locabail Ltd v Bayfield Properties Ltd* [2000] Q.B. 45 (joined cases examining a range of issues to do with non-pecuniary and pecuniary interests of judges); *Director General of Fair Trading v Proprietary Association of Great Britain* (2001) 98 L.S.G. 40 (a member of the Restrictive Practices Court had applied unsuccessfully for a position in a company in which a principal expert witness was a director). See further Cornes 'McGonnell v UK, the Lord Chancellor and the Law Lords' [2000] *Public Law* 166 and Tierney 'Convention rights and the Scotland Act: redefining judicial roles' [2001] *Public Law* 38. The Convention, and a possible appeal by General Pinochet to the Strasbourg Court must also have been in their Lordships' minds in *R. v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No.2)* [2000] 1 A.C. 119 (directing that an appeal to the Appellate Committee be reheard by a differently constituted committee because in the first appeal Lord Hoffmann had an undeclared association with a third party intervener).

¹⁷⁹ There are numerous cases. These factors, and those relating to impartiality, are drawn from *Findlay v UK* (1997) 24 E.H.R.R. 221, para 73.

¹⁸⁰ *McGonnell v UK*, above.

judicial structure in Guernsey was unacceptable. The impact of finding that there is a breach of Article 6(1) can, however, have the practical consequence that significant structural change is required to remedy the situation. This was so in *Starrs v Ruxton* in which the High Court of Justiciary found the system of temporary sheriffs to be in breach Article 6(1).¹⁸¹ Moreover, the Divisional Court in the recent *Alconbury* decision on compatibility of the planning systems in England & Wales rejected submissions made on behalf of the Secretary of State that Article 6 was primarily concerned to see whether *individuals* were impartial rather than the body as a whole of which they were part.¹⁸² The cases relied upon by the Secretary of State,¹⁸³ it was held, contained no support in them for the general proposition which the Secretary of State advanced. They did show, as one would expect, that the court will look for lack of objective impartiality on the part of individuals who form part of the tribunal in question, but they gave no support for the proposition that the court was not also concerned with institutional or structural impartiality. Indeed, there were a number of cases which suggested that the European Court was troubled about this.¹⁸⁴ This particular facet of the case was not dealt with in the subsequent appeal to the Appellate Committee.¹⁸⁵

Among the points relating to Article 6(1) which may arise are the following:

- awareness of the constitutional status of the UK's top courts and the need for them to have formally guaranteed independence;
- matters to do with the appointment of the Law Lords and the fact that no women have been appointed;¹⁸⁶
- the roles of the Lord Chancellor;¹⁸⁷
- the top courts' lack of a fixed and certain membership, including the related issue of whether they should sit *en banc*;¹⁸⁸
- the Law Lords' position as members of a legislative body, and more broadly the what limits there should be on their extra-judicial functions.¹⁸⁹

The potential impact of Article 6 arguments is well captured in an exchange between Sir Patrick Cormack MP, Lord Bingham and Lord Phillips MR at a session of the Joint Committee on Human Rights.¹⁹⁰

¹⁸¹ On the notion of a *structural* lack of independence, Lord Rodger L.J.G. in *Gibbs v Ruxton* 2000 J.C. 258 cited with approval the Canadian case of *Attorney General of Quebec v Lippé* [1991] 2 S.C.R. 114, in which Lamer C.J. states: 'Notwithstanding judicial independence, there may also exist a reasonable apprehension of bias on an institutional or structural level. Although the concept of institutional impartiality has never before been recognised by this court, the constitutional guarantee of an independent and impartial tribunal has to be broad enough to encompass this.' (Emphasis added)

¹⁸² [2001] *Administrative Court Digest* 350.

¹⁸³ *Piersack v. Belgium* (1983) 5 E.H.R.R. 169; *De Cubber v. Belgium* (1984) 7 E.H.R.R. 236; *Procola v. Luxembourg* (above); *McGonnell v. UK* (above).

¹⁸⁴ *Sramek v. Austria* (1985) 7 E.H.R.R. 351; *Findlay v. UK* (1997) 24 E.H.R.R. 221; *Belilos v. Switzerland* (1988) 10 E.H.R.R. 466.

¹⁸⁵ [2001] U.K.H.L. 23.

¹⁸⁶ See Part 12 below.

¹⁸⁷ See Part 14 below.

¹⁸⁸ See Part 15 below.

¹⁸⁹ See Part 16 below.

'Sir Patrick Cormack: ... There is much talk about Article 6 and the right to appear before an independent tribunal and some people assert that this really makes it difficult to see the survival of the dual roles of the Law Lords as judges in the courts of last resort and also members of the legislature. What are your views on that?

(Lord Bingham of Cornhill) I am afraid I see this as a question that will become litigious at some point and therefore I would not like to give any answer to the question here and now.

104. I think you have given a very interesting answer, if I may so. Would any of your colleagues like to comment on that?

(Lord Phillips of Worth Matravers) No, thank you.

Chairman: That is short and sweet.'

5.4.4 *Pressure group and party political interest in the matter*

Another kind of fuel change which might emerge is party political, encouraged (perhaps) by pressure group activity and advocacy scholarship. Parliamentary interest in reforming the Appellate and Judicial Committee has been almost kept alive by the activities of the Liberal Democrat Lord Lester of Herne Hill QC.¹⁹¹ It is plausible to imagine any of the UK-wide political parties developing a policy interest in this — the Labour party, as unfinished business of the constitutional reform package; the Conservatives, anxious either to curb liberal judges or because they see a new court as an institution restraining the centrifugal forces of devolution; and the Liberal Democrats, building on the track record of Lords Lester and Goodhart.

Top court reform also has attractions to the nationalist parties. For the Scottish Nationalists, the question of 'keeping appeals in Scotland' may arise, as may concerns about which judges are hearing Scottish devolution issues. For Plaid Cymru, the use of the Welsh language in the UK's highest courts and eagerness to foster the development of a distinctly Welsh legal order may come to the fore.

As with other aspects of the constitution, the influence of pressure groups may be of importance in placing top courts reform on the political agenda. The Institute for Public Policy Research in its *Written Constitution for the United Kingdom*¹⁹² considered the matter, but the analysis has now been rather superseded by events. JUSTICE, in its written evidence to the Royal Commission on the Future of the House of Lords, argued in favour of a new supreme court.

¹⁹⁰ Minutes of Evidence, 26 March 2001.

¹⁹¹ Lords Lester and Goodhart were members of the JUSTICE working party that in May 1999 recommended the establishment of a supreme court for the UK to the Royal Commission on Reform of the House of Lords; but less than a year earlier they proposed a constitutional court for the UK during the passage of the Scotland Bill.

¹⁹² London: Mansell, 1991, pp. 14-18, 101-115 and ch. 9.

5.4.5 *Changes overseas*

Constitutional change in British Overseas Territories and those Commonwealth states which retain appeals to the Judicial Committee are out of the direct control of UK government and the Law Lords, yet could have a significant impact on the character of the Judicial Committee's work.¹⁹³

5.4.6 *Initiatives from the judiciary*

The Law Lords themselves might become catalysts for change. There are some reforms which can be carried into effect by the courts themselves without any need for alteration to primary legislation or any significant change to the courts' budgets.¹⁹⁴ Experience overseas suggests that the personality and willingness to set a reform agenda of the presiding judge of a court may effect change, *e.g.* the Canadian Supreme Court's move to a new court building was the result of lobbying by the then chief justice. Two factors may, however, militate against judge-led reform in the UK. First, the Law Lords have not hitherto spoken with a collective voice about their future.¹⁹⁵ Unless and until there a collective outlook, the scope for the Law Lords acting as catalysts is limited. A second factor is that the Law Lords are not, formally, members of the judiciary and so are not members of the Judges Council (the body that represents the views of the senior judiciary of England & Wales to the UK government). Even if they were, however, Lord Woolf has recently written:¹⁹⁶

'As a judiciary, we have so far neglected to develop a voice which can authoritatively speak for us all. The Judges Council could play this role but it has yet to develop as it should. This is hardly its fault. It has no resources, no dedicated staff or any terms of reference. Equivalent bodies in other jurisdictions have proper public status and issue annual reports. They have a programme of work.'

5.5 What style of change?

The final element of our conjecture is that some kind of change to the existing arrangements for the UK's top courts will be seen as necessary, and that this involve a choice between two basic styles, or modes, of reform:¹⁹⁷

- pragmatic, reactive change that is relatively uncoordinated; and

¹⁹³ See Part 11 and Le Sueur *What is the future of the Judicial Committee of the Privy Council?* (London: Constitution Unit, 2001).

¹⁹⁴ See 6.4 below.

¹⁹⁵ In their evidence to the Royal Commission on the Future of the House of Lords, it was carefully explained that they did not all share the same views of the future and in debates in the chamber. In parliamentary debates on the Scotland Bill, divergent views were expressed about the desirability of a constitutional court for the UK (see 9.2 below).

¹⁹⁶ 'The Needs of a 21st Century Judge: address to the Judicial Studies Board', 22 March 2001 (available on line at www.lcd.gov.uk).

¹⁹⁷ These modes of change have common features, *e.g.* it is desirable for both kinds of change to be based on evidence.

- strategic, principled reform with a clear guiding vision.

Perhaps in reality these ideal types are more points on a spectrum than clearly separate categories. A case may be made for the appropriateness of each type of change.

5.5.1 *Pragmatic change*

Writing in 1990, Brazier noted that 'constitutional change in the United Kingdom has been pragmatic and piecemeal'.¹⁹⁸ The experience of the Labour Government's programme of constitutional reform of 1997 has done little to falsify this statement. Certainly top level court reform has been characterised by this mode of change in the past (with *e.g.* the establishment of the Appellate Committee in 1948; the abolition of the Attorney-General's fiat and introduction of the reference procedure for criminal matters in 1960; leapfrog appeals in 1969; the introduction of judicial assistants in 2000). Such change will be advocated by those who view the Appellate and Judicial Committees as institutions still fit in all the essentials to carry out their tasks for the foreseeable future: do not fix what is not broken. If there are no basic problems with the structure of the courts and their capacity to produce well-regarded judgments within acceptable time, then there is simply no reason to consider large-scale root and branch reform.

Incremental change, in response to managerial concerns, may be the most likely mode of change in relation to the UK's top level courts. It has three main advantages. First, it is likely to be easier to reach agreement about and implement than more major strategic reform.¹⁹⁹ Secondly, it helps preserve the legitimacy of a court. Continuity with the past is of especial importance to a top level court as a foundation for its respect: to call into question existing arrangements, and to seek to reinvent the UK's top level courts anew, is undesirable. (it may be argued) Thirdly, smaller scale reforms are more suited to pilot projects to test their feasibility than are major structural changes.²⁰⁰ Disadvantages include that it is more difficult to hold government and the court accountable for a series of apparently uncoordinated smaller-scale changes than it is for a coherent package of strategic reforms. The absence of co-ordination may also lead to unexpected and undesirable outcomes.²⁰¹

5.5.2 *Strategic reform*

The case for a more structural, principled and strategic mode of reform is to say, first, that there are indeed basic problems with the current arrangements, for example: the position of the Lord Chancellor,²⁰² the role of the Law Lords as members of the UK legislature,²⁰³ the

¹⁹⁸ R. Brazier, 'The Machinery of British Constitutional Reform' (1990) 41 *Northern Ireland Law Quarterly* 227.

¹⁹⁹ See 6.3 below.

²⁰⁰ The introduction of judicial assistants was done on an explicitly experimental basis. In 1969 when 'leapfrog' appeals were set up, it was said that they would be subject to evaluation after two years.

²⁰¹ It is not clear, for instance, that anyone anticipated that most Scottish devolution issues in the Judicial Committee would be appeals from the Scottish criminal courts.

²⁰² Part 14 below.

²⁰³ Part 16 below.

absence of external checks on appointments,²⁰⁴ the lack of fixed membership panels to hear particular cases,²⁰⁵ the potentially difficult and certainly confusing relationship between the Appellate and Judicial Committees,²⁰⁶ and inadequate resources to cope with an increasing case load.²⁰⁷

Secondly, whereas in the past concerns were often more to do with managerial problems of delay and coping with increasing cases, now it is widely accepted that courts and their procedures must adhere to principles, some based on Convention rights, others to do with more broadly desirable characteristics of political institutions (such as transparency and accountability).²⁰⁸

Moreover, the recent reforms to the civil justice systems in England & Wales, and also in Northern Ireland, demonstrate that there is no inherent reason why large-scale, strategic change is inappropriate for courts. Confidence in the courts of England & Wales has not been undermined by the fact of reform; on the contrary, it has been enhanced. The Appellate Committee and UK jurisdiction of the Judicial Committee are not appreciably different in kind from that of other superior courts in the UK's legal systems. A final benefit of strategic reform is that it is more transparent and amenable to accountability than a series of ad hoc changes.

²⁰⁴ Part 13 below.

²⁰⁵ Part 15 below.

²⁰⁶ See 2.4 above.

²⁰⁷ Part 17 below.

²⁰⁸ Part 3 above.

6 The machinery of change

6.1 Introduction

This part of the report considers the ways in which policy makers may :

- take decisions about what, if any, changes should be made to the institutional structure, jurisdiction, composition and methods of work of the UK's highest courts; and
- put the chosen options into practice.

The hypothesis put forward here may be a little obvious: it is easier to find ways of deciding to make smaller scale alterations to the working practices of the top courts, especially those which do not require amendment of primary legislation, than it is to envisage how strategic structural change might occur. The main reason for this is that no one has clear 'ownership' of policy making about the Appellate and Judicial Committees; there is a multiplicity of 'stakeholders' (to use contemporary jargon).²⁰⁹

6.2 The ambitions of reform

The mechanics of decision-making and implementation will depend, in part, on the scale and scope of the reform project. Two basic questions arise.

6.2.1 *Reform of the Appellate and Judicial Committees in tandem?*

First, is it possible (and, if so, desirable) to consider reform of the Appellate Committee and Judicial Committee in tandem? There are several reasons for arguing that the answer to this question should be yes. First, the overlapping membership of the two courts means that change in one inevitably has an impact on the other. Secondly, now that the Judicial Committee has jurisdiction over devolution issues (which include adjudicating on Convention rights), both the courts are of constitutional importance to the UK. Thirdly, both courts have been brought into formal relationship with each other for the purposes of the rules of precedent in the legal systems of the UK.²¹⁰ In short, the courts are so interlocked that it is impossible to proceed with reform except in tandem.

There are counterarguments. One is that including both courts would complicate an already difficult task of developing policy (not least because the Judicial Committee is still essentially a court serving legal systems overseas). It is also arguable that the courts are different in character and function and therefore different considerations apply to their reform. Despite the advent of Convention rights litigation, the Appellate Committee is and will remain essentially a court hearing ordinary civil and criminal appeals while (for the purposes of the

²⁰⁹ See also Woolf, *Access to Justice*: 'there should be clear lines of judicial and administrative responsibility for court systems ...' (discussed in Part 5 above).

²¹⁰ See 2.4 above.

UK) the Judicial Committee has more the character of a constitutional court and is essentially a court for legal systems outside the UK.

6.2.2 Reform of the Judicial Committee's overseas and domestic jurisdictions in tandem?

A second question is whether it is possible (and, if so, desirable) for consideration of future reforms to the overseas jurisdiction of the Judicial Committee to be considered at the same time as its domestic jurisdiction over devolution issues and appeals from the medical and other professions? Again, there are arguments both ways. In favour of looking at all aspects of the court's jurisdiction is that to do otherwise is highly artificial: the key characteristic of the Judicial Committee is that it is a court which engages in both overseas and domestic adjudication. Further, the changes to the overseas case load which are on the horizon (as New Zealand debates ending appeals and the Caribbean Court of Appeal is established) now make the task of considering overseas and domestic work manageable.²¹¹

Against this approach is the problem that co-ordinating such an all-encompassing review would be fraught with difficulty as it would require co-operation from overseas governments (at a time when, for some, the continued existence of appeals to the Judicial Committee is under active political deliberation). In any event, implementation of reform for the Judicial Committee would require the co-operation of overseas governments, in some cases in the form of formal constitutional amendment. This could stifle any change within the UK for the foreseeable future.

6.3 Machinery for developing policy

The absence in the UK of both a written codified constitution and clear and detailed constitutional conventions about the procedures for developing and implementing policy gives reformers of the UK's top courts something of a blank canvass on which to work. These facts probably hinder the development of policy (because it is unclear who will take the initiative and how they will operate to make decisions about the future of the courts), but they may facilitate the implementation of the decisions because there is flexibility as to how reforms will be given legal effect. Given the lack of any one obvious mechanism for developing policy, it is necessary to consider the range of possible methods and assess their fitness for the task.

6.3.1 Policy making within a single UK department of state

The typical method of developing policy in relation to courts has been for a UK department to establish a committee of inquiry and use the recommendations of that inquiry as the basis for its thinking. This was the technique adopted by the Lord Chancellor's Department in relation to civil justice in England & Wales and by the Northern Ireland Court Service.²¹² This

²¹¹ Part 11 above

²¹² See Part 5 below.

method of policy development under the auspices of a single government department is not possible in relation to either the Appellate Committee or the Judicial Committee.

The most basic reason is because there is no single UK government department with responsibility for the operation of the Appellate Committee, which is a committee of the UK Parliament.

Moreover, while the Judicial Committee is, formally, attached to a department of state (*i.e.*, the Privy Council), it is doubtful whether ministers in that department could properly be seen to initiate policy in relation to judicial functions. In any event, the Judicial Committee's work affects several other UK government departments: the Department of Health has an interest in the operation of its appellate functions in relation to the medical professions; the Scotland Office, the Northern Ireland Office and the Wales Office are stakeholders in its adjudicatory functions over devolution issues; the Foreign and Commonwealth Office has an interest in its functions as final court of appeal from British Overseas Territories and some Commonwealth countries; the Lord Chancellor's Department has responsibilities for the relationships between Bailiwicks of Jersey and Guernsey and the Isle of Man with the UK, as well as its obvious interests in the court system and judicial appointments in England & Wales and Northern Ireland. The National Assembly for Wales, the Northern Ireland Assembly and Executive and the Scottish Parliament and Executive also have interests in the work of the Judicial Committee in relation to devolution issues.

6.3.2 *Inter-departmental/Inter-governmental taskforce*

The *Modernising Government* White Paper has put 'joined up government' at the centre of policymaking. It has already been noted that the difficulty of achieving cross-cutting approaches to the UK's top level courts may be one disincentive to change. A taskforce or working group consisting of officials could be convened, but its membership would need to be of a size that would make decision-taking unwieldy.

One basic issue in need of clarification, and agreement, is the allocation of responsibility as between the Scottish Executive and the Lord Chancellor's Department for policy-making about the UK's top level courts.²¹³ A concordat between the LCD and the Scottish Executive sets out in Annex A those 'matters for which the LCD is responsible in the England & Wales and the Executive in Scotland' including 'questions of procedure, jurisdiction and enforcement in civil cases' and 'the handling of devolution issues: the courts'. Annex B lists the 'reserved matters for which the LCD is responsible within the UK which are of interest to the Scottish Executive', and these include 'the structure and composition of the House of Lords Appellate Committee (the final court of appeal for Scottish civil law)'. On this basis, it would appear that a proposal to introduce a leave requirement for all Scottish appeals would be a matter for the Scottish Executive and Scottish Parliament to decide upon. The rationale for this is that the Appellate Committee, when hearing Scottish cases is a Scottish court. It is also probably the case that the Scotland Act empowers the Scottish Parliament to enact

²¹³ On the 'Scottish questions', see 7.3 below.

legislation ending the right of appeal from the Court of Session to the Appellate Committee.²¹⁴ If, however, any of the options for major structural change discussed below²¹⁵ are pursued, this split of policy-making responsibility between London and Edinburgh makes less sense; a new top level court may, explicitly, be an institution of the whole UK requiring legislation of the UK Parliament to establish it.

6.3.3 *The judges*

The absence of a formal institution representing all UK judges, with resources to conduct research and formulate policy,²¹⁶ means that the judiciary in general and the Law Lords in particular can have only a limited role in initiating proposals for change to the UK's top level courts. Their role is likely to be confined to identifying practical needs (e.g. better accommodation and support staff) and perhaps lobbying for those *via* the Clerk to the Parliaments, Lord Chancellor and, occasionally, in the press. Lord Bingham has recently indicated that the Law Lords were not even consulted about the far-reaching allocation of responsibility to the Judicial Committee for devolution issues.²¹⁷

6.3.4 *A privately convened committee*

The JUSTICE-All Souls' Committee on Reform of Administrative Justice, convened during the 1980s, could provide a model for a privately organised initiative to gather evidence and consider the future of the UK's top courts.²¹⁸ In the absence of any government proposal, it is possible that an organisation such as JUSTICE might sponsor an inquiry into the reform of the top courts.

6.3.5 *Parliamentary committees*

Given that the UK Parliament includes members of the government and members of the Appellate Committee (who are also entitled to sit on the Judicial Committee), it might be appropriate for a parliamentary committee — such as the newly established House of Lords Committee on the Constitution — to take the initiative and begin consideration of the future of the UK's top level courts. Insofar as issues of compliance with Convention and other human rights are raised, some questions could conceivably fall within the remit of the Joint Committee on Human Rights.

²¹⁴ A view endorsed by Lord Hope of Craighead, 'Taking the Case to London: Is it all over?' [1998] *Juridical Review* 143. Lord Hope argues that there are good reasons why the Scottish Parliament would wish to retain Scottish appeals to the Appellate Committee. Tierney notes: 'Lord Hope's view that this matter is devolved is unlikely to be universally shared, and if the Scottish Parliament were to attempt to remove the right of final appeal to the House of Lords such a move could well be challenged before the Judicial Committee ...' ('Scotland and the New Legal Order' (2001) 5 *Edinburgh Law Review* 49, 59.

²¹⁵ Parts 8-10 below.

²¹⁶ Part 5 above.

²¹⁷ Evidence to the Joint Committee on Human Rights, 26 March 2001.

²¹⁸ The end product was *Administrative Justice: Some Necessary Reforms* (Oxford: OUP, 1998).

6.3.6 *Royal Commission*

Perhaps the most obvious method for investigating whether reform of the UK's top courts is desirable and, if so, for outlining a model for the future, is a Royal Commission. These have been used to consider constitutional and administration of justice issues where a degree of party political neutrality and of gravitas was thought to be desirable.²¹⁹ A Royal Commission on the Reform of the Appellate Committee of the House of Lords and Judicial Committee of the Privy Council could receive evidence from a wide range of stakeholders and, adopting the methods of the 1999 Royal Commission on the Future of the House of Lords could ensure an appropriate public participation in meetings. Transparency would be assured by the publication of the written evidence received. The Commissioners themselves could be appointed to reflect the many interests concerned — including the judiciary, the legal profession, UK Government, the devolved institutions of Northern Ireland, Scotland and Wales, the legal systems outside the UK which use the Judicial Committee as a final court of appeal, as well as constitutional experts.

6.4 **Machinery for implementing change**

If decisions are taken to make changes to the UK's top courts — whether that be reactive, pragmatic and incremental or strategic and principled — appropriate methods will have to be selected to implement those decisions. Three broad types can be identified:

- enactment of new legislation or amendment of existing primary legislation;
- exercise by the courts themselves of their inherent jurisdiction with legal effect;
- internal administrative change requiring no change in the law.

6.4.1 *Enactment and amendment of primary legislation*

Any major structural change will require the enactment of new legislation by the UK Parliament and repeal of existing statutory provisions governing the Appellate Committee and/or the Judicial Committee. There is, in any event, a case to be made for the consolidation of existing provisions relating to the courts as an aid to transparency.²²⁰ Changes to the overseas jurisdiction of the Judicial Committee would have to be brought about by amendment to a variety of constitutional provisions, legislation or orders in council in the various independent states, British Overseas Territories and in Jersey, Guernsey and the Isle of Man.²²¹ Some matters of procedure (*e.g.* leave requirements) relating to the Appellate Committee's jurisdiction over Scottish civil claims are, under the Scotland Act, allocated to the Scottish Parliament to legislate upon. Any large scale structural reform will

²¹⁹ Examples include the Royal Commission on the Future of the House of Lords (which reported in January 2000) and the Royal Commission on Criminal Justice (in 1993 under the chairmanship of Lord Runciman).

²²⁰ See Part 3 above.

²²¹ See Part 11 below.

require primary legislation, but this is also true of implementation of some smaller scale change (such as removing professional registration appeals from the Judicial Committee).

6.4.2 *The courts' rule-making and decisional powers*

Implementation of some reform is in the hands of the Law Lords. In relation to the House of Lords, changes have been given effect to by Practice Statements (e.g. the decision of the Appellate Committee no longer to be bound by its own previous decisions),²²² Practice Directions and the periodic issue of new editions of the *Form of Appeal and Directions as to Procedure Applicable to Criminal Appeals* ('the Red Book') and the *Form of Appeal and Directions as to Procedure Applicable to Civil Appeals* ('the Blue Book'). Procedure Directions are issued by the Clerk to the Parliaments (e.g. on fees and security for costs). Changes to the courts' powers can also be effected by judicial decisions in the course of judgment, e.g. in *R. v Secretary of State for the Home Department, ex p. Salem*, it was decided that 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.²²³ In short, a range of reforms have been, and could in the future be, brought about by judicial rule-making and decision without the need for parliamentary legislation.

6.4.3 *Internal administrative action*

Informal changes to the courts' work methods may be achieved by 'intra-mural' administrative action taken by the Law Lords in conjunction with the officers of the Judicial and Appellate Committee, e.g. the appointment of judicial assistants, setting up websites for the dissemination of information and uses of information technology.

²²² A statement was read out by the then Lord Chancellor, Lord Gardiner, on behalf of himself and the Lords of Appeal in Ordinary before judgments were delivered on 26 July 1966.

²²³ [1999] 1 A.C. 450.

7 Options for major structural change and the status quo

7.1 Overview

This part of report identifies and outlines the main options for the structure of the UK's top level courts.²²⁴ The report will then go on to provide an initial evaluation of each option. As explained in Part 1, the aim is not to advance a polemical argument in favour of any particular package of reforms but rather to contribute to the on-going debate by providing a sober and relatively neutral assessment of the options for the future.

- The status quo, keeping the Appellate Committee and Judicial Committee as distinct institutions with broadly the same jurisdiction to hear cases as at present. (This option does not preclude smaller-scale changes).²²⁵
- A 'supreme court' for the UK, amalgamating into a single court the current jurisdiction of the Appellate Committee and those aspects of the Judicial Committee's jurisdiction that relate to the UK (including devolution issues).²²⁶
- The creation of two new courts for the UK: a 'constitutional court', which would hear devolution issues, and be the specialist final court of appeal for civil litigation, judicial review and criminal cases which raise significant issues of Convention rights or other constitutional matters; and a 'companion court' — a supreme court which would take over the ordinary civil and criminal jurisdiction of the Appellate Committee. These two bodies could either be two separate and freestanding courts, or two divisions, of fixed membership, within an overarching court.²²⁷
- A 'court of justice' for the UK. The appeal courts in each of the three legal systems of the UK (i.e., England & Wales, Northern Ireland and Scotland) would become the final court of appeal in individual cases. Where a UK-wide approach to a legal issue is needed, the appeal courts would refer requests for a preliminary ruling to the UK court of justice. The UK court of justice having answered the question, the matter would be remitted back to the referring court for it to continue its determination. The court of justice would also have powers to hear direct actions for the annulment of primary legislation and in actions to enforce the compliance of public authorities with duties imposed by UK statutes where there is an inter-governmental dimension.²²⁸
- In relation to the options for change, it is assumed for the purposes of this report that the Judicial Committee would remain in existence as a court of final appeal for the Bailiwicks of Jersey and Guernsey, the Isle of Man, the British Overseas Territories and those

²²⁴ The expression 'structure' is used to mean the major institutional arrangements (one court or two; if more than one, what relationship exists between them) and the general scope of the court's jurisdiction (essentially, what kinds of cases the court determines).

²²⁵ See below.

²²⁶ See Part 8.

²²⁷ See Part 9.

²²⁸ See Part 10.

independent States of the Commonwealth which choose to retain it as their ultimate court of appeal. The judges of any new top level UK court(s) would not necessarily, however, be the same as those who sit on the Judicial Committee.²²⁹

Although the terminology of 'supreme courts' and 'constitutional courts' is familiar from other legal systems, it is clearly not possible to transplant any already existing model into the UK. Too much ought not therefore to be read into the label fixed to each model.

7.2 Why these models?

This report is the product of academic study and not overly concerned with questions of political feasibility. The models are put forward in order to provoke debate. The three main models for major structural change (supreme court; constitutional court plus companion court; and court of justice) described in detail in the following parts of the report are just variations on themes. A 'supreme court' for the UK could, for example, take one of several forms. In devising each one, regard has been had to factors already examined in this report.

- The question: how can a new top level court for the UK be, simultaneously, (a) a court for each of the three legal systems and (b) a court for the whole UK?
- The core institutional qualities of top level courts to: (a) have institutional autonomy; and to be (b) transparent; (c) accountable; and (c) efficient.
- The need for top level courts in the UK to carry out most of the functions described in Part 4.

7.3 The Scottish questions and structural change

In describing models for a new UK top level court (or courts), the general question arises whether it is desirable for there to be greater symmetry in the relationships between the three legal systems and the new top court than currently exists. Of the UK's three legal systems, the most distinctive is Scotland's. Three 'Scottish questions' arise when considering major structural change.²³⁰

- Should the Court of Session become the final court of appeal for civil claims in Scotland, i.e. an end of appeals to the Appellate Committee?
- If the possibility of civil appeals beyond the Court of Session is retained, should they all be subject to a leave requirement so that they are made on the same basis as appeals from intermediate courts of appeal in England & Wales and Northern Ireland?
- Most controversially, should any new UK top level court hear appeals in criminal matters from the High Court of Justiciary?

²²⁹ See Part 10.

²³⁰ None of this, or course, is to suggest that there are no 'Northern Irish' or 'English & Welsh' or (which is different) 'English' and 'Welsh' questions.

For the reasons discussed in Part 6, decisions on these matters would be for the Scottish Parliament and Executive. Sensitivity to the Scottish questions has had a profound effect on debates about the UK's top level courts — arguably an impact disproportionate given the small number of Scottish appeals currently heard by the Appellate Committee. As we shall see, some people argue that the main reason why the UK acquired a dual apex for its court systems in 1998 was because of the unacceptability of the Appellate Committee to Scottish opinion of the Appellate Committee.²³¹

7.3.1 *The Scottish civil question*

The Appellate Committee receives appeals from the Court of Session on a different basis than it does from the appeal courts in England & Wales and Northern Ireland: in most Scottish civil appeals, leave is not required and where it is, this is a matter for the Court of Session, not the Appellate Committee. There are arguments for and against introducing a leave requirement on the same terms as the other UK legal systems, but detailed consideration of this point falls outside the scope of this report. The main reason Scottish appeals were not brought within the scheme for obtaining leave introduced for England & Wales and Northern Ireland by the Administration of Justice (Appeals) Act 1934 was lack of parliamentary time rather than any objection of principle; indeed during the passage of the Bill there was a plea by one Scottish MP for the Court of Session to be brought within the ambit of the new scheme.²³²

A more fundamental question is whether a new top level court for the UK should hear *any* Scottish civil appeals. The issue whether the Appellate Committee has had an unfortunate role in the 'Anglicisation' of Scots private law has been the subject of debate for many years.²³³ Arguably one way of making the Scots legal system, already recognised as separate for the purposes of private international law, more cohesive in its own right would be to end the possibility of such appeals — or at least to further restrict the circumstances in which they might be brought (*e.g.* only when a question of interpretation of a UK Act of Parliament is in issue). At present there are few civil appeals: in 1999, only five judgments.²³⁴ One benefit of retaining appeals is that this gives a relatively small legal system access to a wider range of ideas tested in the courts in London. For the purposes of this report, it is assumed that there is a continued wish of the Scottish Parliament for there to be some connection between the Scottish legal system and the UK's highest court.

7.3.2 *Scottish criminal appeals*

The current position in relation to criminal appeals is now as follows:

²³¹ See Part 9.

²³² See further Le Sueur, 'Panning for Gold: choosing cases for the House of Lords and the Judicial Committee of the Privy Council', a forthcoming paper.

²³³ *e.g.* Claire McDiarmid, 'Scots Law: the Turning of the Tide' [1999] *Juridical Review* 156.

²³⁴ The future of Scottish representation on the top level court if civil appeals ended is considered in Part 12, below.

- if a 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 a 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 only to Scotland's final court of appeal in criminal matters, the High Court of Justiciary.

Clearly, if it is decided that major structural change to the UK's top level courts is desirable, thought must be given to the court in which Scottish criminal appeals ought ultimately to be disposed of. There are two possible approaches.

First, reformers could strive to preserve the High Court of Justiciary as the final court of appeal at all costs. Because of the structure of the Scotland Act 1998, this can only be partially achieved (for the reasons set out above). There are, however, some cogent reasons for such an approach. It may be doubted whether a reformed top court for the whole UK would have sufficient expertise to deal competently with questions of 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'.²³⁵ Further, the Act and Treaty of Union 1707, whether or not it has a special status of 'fundamental law' within the UK, attaches constitutional importance to the preservation of the Scottish judicial system and the separateness of its system of public law. Moreover, there is a long tradition of the UK being comfortable with legal pluralism and there is no pressing reason why this should change — on the contrary the devolution schemes of 1998 embrace the notion of asymmetry. To substitute tidiness of the court system for pluralism is a poor bargain. Lord Bingham, who is not given to hyperbole, recently told a parliamentary committee that the reason why the Privy Council is hearing devolution issues arising in Scottish criminal trials²³⁶

... is because, as I understand, it was politically unacceptable in Scotland for the Appellate Committee of the House of Lords to be doing that. To say would it not be better to have one court without paying very, very close attention to the sensitivities of the Scots in this matter would be a recipe for disaster in my opinion.

A different approach is to open up to debate whether Scottish criminal appeals could and should be dealt with by a new UK top court. For the purposes of discussion, the possibility of (say) a new UK supreme court having jurisdiction to deal with all appeals on all Scottish criminal matters should not be ruled out. Several tentative arguments can be sketched out.

²³⁵ *R. v. Manchester Stipendiary Magistrate, ex parte Granada Television Ltd* [2000] 2 W.L.R. 1, 5.

²³⁶ Joint Committee on Human Rights, Minutes of Evidence, 26 March 2001, para. 110.

- The argument about lack of expertise in Scots criminal law is not of a special kind. Inevitably, a final court of appeal consisting of twelve, or fewer, judges will lack detailed knowledge of *many* fields of law — none of the current Law Lords were, for instance, specialists in English family law or UK immigration law before appointment. It is an exaggeration simply to assume, without argument, that the Scots criminal law falls into a class of its own. As with other important fields of law, judges appointed to the UK's highest court could be expected to acquire a deep understanding of this area of law. (Though of little comfort north of the border, it might also be pointed out that the Law Lords have at times in the past lacked any effective grasp of *English* criminal law!)²³⁷ It is also noteworthy that the Scottish Law Lords sit on *English* criminal appeals, having mastered the principles of that branch of law without having prior professional experience of it.
- If there is a genuine problem with lack of expertise which cannot be solved by a willingness of intellectually brilliant (English, Welsh and Northern Irish) judges to master an unfamiliar area of law, then it ought not to be supposed that excluding jurisdiction is the only solution. Other possibilities exist, for instance permitting the top court to call upon additional members, drawn from the senior Scottish judiciary, to sit in Scottish criminal appeals.²³⁸
- The objections to Scottish criminal appeals 'to London' are curiously elitist ones, put forward only by Scottish lawyers and politicians. Viewed from the perspective of the ordinary citizen, people in Scotland are denied an opportunity which criminal defendants in other parts of the UK enjoy — the ability to take a case to the UK's highest court.
- Permitting Scottish criminal appeals to a (reformed) top level court for the whole UK would assist the Scottish criminal justice system where, currently, there are enormous case load pressures on its highest courts. Moreover, just as Scots civil law can benefit from access to the larger pool of ideas created by the London courts, so too with Scots criminal law.
- In any event, the current arrangements are an odd and unsatisfactory bifurcation: the Law Lords sitting in the Appellate Committee cannot hear Scottish criminal appeal, but when they cross the road and sit as the Judicial Committee they may do so (insofar as Convention rights or other devolution issues are raised). As Lord Bingham recently told a parliamentary committee:²³⁹

'... what is important is that the Scots criminal system has always been self-contained and has no English input at all. One of the anomalous, and to me surprising and unexpected, results of devolution is that for the first time one does have judges, Scots prominently among them but nonetheless judges, sitting in London ruling on questions relating to Scots criminal trials.'

²³⁷ See A.T.H. Smith, 'Criminal Appeals in the House of Lords' (1984) 47 *Modern Law Review* 133.

²³⁸ See Part 15 below.

²³⁹ Joint Committee on Human Rights, *Minutes of Evidence*, 26 March 2001, para. 110.

7.4 The court's premises and location

New premises would be needed, at considerable public expense. The relocation of the Appellate Committee would be following a pattern in Ottawa and Washington DC where supreme courts moved out of inadequate accommodation in the legislative building to purpose built premises of their own. The location of premises would need careful thought. London, as the capital of the UK, is perhaps the obvious place. There may, however, be symbolic and other benefits in it being located elsewhere, such as Birmingham (the UK's second largest city). Although the supreme court secretariat would need fixed premises, an alternative for the court itself would be to go on circuit and hold its hearings in Cardiff, Belfast and Edinburgh as well as in London.²⁴⁰

7.5 Are we predisposed to structural change?

This report stems from an academic study that is predisposed to change insofar as effort has been channelled into understanding when, why and how and in what form change may take place. We do, however, believe that the option of keeping maintaining the status quo needs to be considered carefully. Advocates of the status quo ought, though, to accept two facts.

First, the status quo exists only in a fluid form. Both the Appellate and the Judicial Committees have been subject to numerous reform initiatives. The Appellate Committee in the sense understood today dates back only to 1948 (when post-War building work forced the law lords out of the chamber in the Palace of Westminster). Procedures have been altered: in 1934, a leave requirement in civil appeals from courts in England & Wales and Northern Ireland (but not Scotland) was introduced;²⁴¹ in 1960, the Attorney-General's fiat as a precondition to bringing criminal appeals was replaced with a requirement of leave and certification of a point of general public importance; a 'leapfrog' appeal procedure was introduced in 1969; and in 1984 the formal office of Senior Law Lord was created. The status of the Judicial Committee has, in the post-War period, altered out of all recognition as the forces of decolonisation has changed its case load and prestige; since 1998, it has also become a proto-constitutional court for the UK's devolution issues. Those of a conservative turn of mind cannot, therefore, simply call in aid tradition or invoke the venerable ages of institutions as the basis for preserving the current arrangements at the apex of the UK's court system. Like the campaigners for change, the advocates of keeping what there is need to adopt a rational, evidence-based approach.

Secondly, a survey of attempts at past reforms quickly reveals that what in one generation are regarded as questions of momentous constitutional importance can seem, a few decades later, to be anything but that. The creation of the Appellate Committee in 1948 was

²⁴⁰ It is already anticipated that the Judicial Committee will sit in Cardiff when hearing devolution issues from Wales: Frances Gibb, 'Wales is given its own higher court hearings', *The Times*, 1 July 1999.

²⁴¹ Administration of Justice (Appeals) Act 1934.

controversial. The creation of the leapfrog appeal procedure by the Administration of Justice Act 1969 was similarly the subject of heated debate but in the end, it was a damp squib and it hardly used. Thirty years on, the controversy surrounding its introduction seems out of all proportion to the issues at stake.

7.6 Is the status quo a viable structural option?

Although this research project pre-supposes that there is, at the very least, a case to be made for reforming the UK's existing arrangements for its top level courts, this report attempts to be neutral on the question whether major structural change (as defined above) is desirable. Several arguments in favour of maintaining the status quo can be stated.

7.6.1 Qualities of the present courts must be preserved

Put simply, the courts as presently constituted are working extremely well. There is a positive case to be made for the effectiveness and qualities of the existing arrangements. The work of the Law Lords, sitting as both the Appellate Committee and Judicial Committee, is held in high regard both in the UK and overseas. The prestige of the courts is enhanced by its place within the UK Parliament. To make major structural change to these highly-regarded courts would risk damaging confidence.

As to the efficiency and effectiveness of the courts as they exist today, the onus is on those demanding change to show a business case for change. There is no evidence to suggest that there would be any costs savings or increase in effectiveness by, for instance, merging the administrative staff of the Appellate and Judicial Committees into a new support staff for a new court, or having common case managements for all the cases heard by the Law Lords. The establishment of a new court would require substantial capital expenditure and increased running costs.

7.6.2 The timing of structural reform

Even people who accept that at some point in the future major structural reform may be needed can argue that now is not the right time to consider such radical options. The 'bedding down' argument has already been considered;²⁴² it is essentially the view that the time is not ripe to make major change while other aspects of the constitutional reform programme, and also the new approach to civil litigation in England & Wales, are settling in. Institutional stability and continuity at the highest levels of the UK's legal systems are desirable during times of far-reaching change to the substantive law of the UK. Any step towards major structural reform would open up bigger questions which are best left unasked. For instance, discussion about the creation of a constitutional court for the UK, or a change in the territorial balance of the Law Lords, or the role of party politics in nominations to a new court, 'would fuel a perception that those appointed might not decide these cases

²⁴² See Part 5 above.

strictly according to law because each [judge] had to pass some test of suitability on political grounds'.²⁴³

Radical reform of top level courts *has* recently been considered — and rejected. It was explicitly addressed by the Royal Commission on Reform of the House of Lords in its January 2000 report,²⁴⁴ though no major structural changes were recommended. The Commission concluded that there was no reason why the second chamber should not continue to exercise the judicial functions of the present House of Lords and that the Law Lords should continue to be *ex officio* members of the reformed second chamber and carry out its judicial functions. Rather oddly, the Commission suggested that the terms for which Law Lords can be appointed to the second chamber under the Appellate Jurisdiction Act 1876 should be amended to bring them into line with those of other members of the second chamber, subject to automatic reappointment as long as they are entitled to sit on the Appellate or Appeal Committees. It was also recommended that the Law Lords should set out in writing and publish a statement of the principles they intend to observe when participating in debates and votes in the second chamber and when considering their eligibility to sit on related cases.²⁴⁵

The future of the UK's top level courts was also considered, briefly, in the White Paper leading up to the Human Rights Bill²⁴⁶ and during the passage of the Scotland Bill and Government of Wales Bill.²⁴⁷ Nothing has changed since then (it can be argued) and it is therefore inappropriate to revisit the issue for reform.

7.6.3 *There is no reason of principle for reform*

There is no principle of constitutional law or human rights norm which requires the UK to make changes to the institutional arrangements for its top level courts. The Royal Commission on the Reform of the House of Lords accepted the desirability of the Law Lords remaining part of the upper House of Parliament, as has Lord Irvine LC. The European Court of Human Rights judgment in *McGonnell v UK*, holding that there was a violation of Article 6 when the Bailiff of Guernsey sat as a judge in a case concerning legislation passed by an assembly of which he was the presiding officer, has no application to the circumstances of the Appellate and Judicial Committees (it can be argued). Even if, as some suggest, litigation on these points is inevitable this is no need to pre-empt decisions on those issues.

Furthermore, the criteria identified in Part 3 of this report — institutional autonomy, transparency, accountability and efficiency — are largely met by the Appellate and Judicial Committees as they currently exist. Insofar as these are indeed core institutional qualities of

²⁴³ Lord Irvine, H.L. Debs., col. 1983, 28 October 1998 (during report stage of the Scotland bill).

²⁴⁴ *A House for the Future*, Cm 4534 (London: HMSO, 2000), ch. 9. Given the pressures of time under which the Royal Commission had to work, too much ought not to be read into the report's admittedly brief consideration of the judicial function of the House of Lords.

²⁴⁵ See Part 16.

²⁴⁶ *Rights Brought Home*, para. 2.4.

top level courts, and the Appellate and Judicial Committees fail to match up to them, then smaller scale change rather than major structural reform can remedy the deficiencies.

7.6.4 *There are no pressing managerial problems*

A further set of arguments are to the effect that there is no pressing practical necessity for major change to institutions or jurisdictions. Some anxieties were expressed about the inability of the Appellate and Judicial Committee to cope with an increased caseload due to devolution issues and appeals about Convention rights.²⁴⁸ With hindsight, these fears seem likely to have been misplaced and the quantity of litigation on Convention rights and devolution issues seems set to be far less than some had predicted.²⁴⁹ Insofar as the concern is that Convention right cases will crowd out other types of appeals from the Appellate Committee's caseload, a relaxed attitude to this should be taken. The court's caseload has been subject to changes in the past — during the 1960s it was, for instance, dominated by tax appeals — and this should be viewed as a normal trend. It is also possible that the decline in the volume of commercial litigation in England & Wales²⁵⁰ may result in fewer appeals to the Appellate Committee in this field. In any event, it seems likely that quite soon New Zealand and several Caribbean states will stop sending appeals to the Judicial Committee and this will make available to their Lordships more time to hear UK appeals.

The rejection of major structural and jurisdictional change does not preclude some sensible, pragmatic smaller-scale managerial alterations to the work of the Appellate and Judicial Committees. The recourse to the Judicial Committee by doctors, dentists and others is one aspect of its jurisdiction which is hard to justify; removing this would free up 10 per cent more time for that court to spend on other matters.²⁵¹ Efficiency savings might also be made by introducing a requirement that civil appeals to the Appellate Committee from Scotland are made subject to a leave requirement (which would bring them into line with appeals from England & Wales and Northern Ireland). Ad hoc reforms such as these should be considered if and when there becomes a pressing need to do so — but there is no need for major structural alteration.

²⁴⁷ See below.

²⁴⁸ See Part 17 below.

²⁴⁹ See Part 16, below.

²⁵⁰ See Cap Gemini Ernst & Young Ltd, *Commercial Court Feasibility Study* (February 2001), a report commissioned by the LCD.

²⁵¹ See Part 11 below.

8 Structural change — a UK supreme court

8.1 Introduction

The major structural model discussed in this part of the report is the creation of a supreme court for the whole of the UK.²⁵² In recent years, support for a new top level court in the form of a supreme court has come from JUSTICE, Lord Donaldson of Lynton (a former Master of the Rolls), Lord Bingham (on behalf of the Judges Council in 1999),²⁵³ Lord Phillips of Worth Matravers MR,²⁵⁴ the Institute for Public Policy Research (IPPR),²⁵⁵ Professors Conor Gearty²⁵⁶ and Rodney Brazier.²⁵⁷

The model sketched out below borrows from the High Court of Australia and the Supreme Court of Canada in seeking to establish a single apex for the UK's legal systems in the form of a top court 'for all purposes'.²⁵⁸ It puts the UK's three legal systems into a symmetrical relationship with the top level court (in distinction to the current arrangement where Scottish civil appeals to the Appellate Committee do not require leave and no appeal at all lies from the High Court of Justiciary in criminal matters). The supreme court would be the final court of appeal for all criminal, civil and judicial review matters throughout the UK, and would also deal with 'devolution issues'. As with the other models for structural change outlined in this report, this is only one of a number of possible variations on a theme.

8.2 The UK supreme court's jurisdiction

The model amalgamates, with modifications, the Judicial Committee and House of Lords' work. The Appellate Committee and the Appeal Committee of the House of Lords would be abolished.²⁵⁹ The Judicial Committee would continue to exist, but exclusively as a court for overseas legal systems.²⁶⁰ The judges serving on the Judicial Committee would not necessarily be the same as those serving on the new supreme court. For the purposes of this

²⁵² In England & Wales there already exists an institution known as the Supreme Court of Judicature, *i.e.* the Crown Court, the High Court and the Court of Appeal. Some change in nomenclature would be desirable.

²⁵³ See their respective written evidence to the Royal Commission on the Reform of the House of Lords.

²⁵⁴ Interview in *The Times*, 22 May 2001.

²⁵⁵ *A Written Constitution for the UK* (London: Mansell, 1991). The IPPR styles itself a 'centre left' think tank.

²⁵⁶ 'What are Judges For?', *London Review of Books*, 25 January 2001.

²⁵⁷ *Constitutional Reform*, 2nd ed. (Oxford: OUP, 1998), pp. 178-182.

²⁵⁸ The US Supreme Court is different in that it has jurisdiction only over questions of federal law; supreme courts in the 50 states are the final courts of appeal for state law.

²⁵⁹ The House of Lords may, however, retain a judicial function insofar as the Committee for Privileges exists to hear peerage and other claims: see Part 2, above.

²⁶⁰ See Part 11, below.

report and for discussion, the model described below includes jurisdiction over all Scottish criminal matters.²⁶¹ The following matters would fall within the court's jurisdiction.

- Appeals, with the leave of the court, in civil cases from the Court of Appeal (Civil Division) in England & Wales, the Northern Irish Court of Appeal and the Court of Session. This includes judicial review.²⁶² Thought ought to be given to requiring the intermediate court of appeal to certify that the appeal raises a question of general public importance (as already happens in criminal appeals to the Appellate Committee) as a precondition for seeking leave.
- Appeals, with the leave of the court, in criminal cases from the Court of Appeal (Criminal Division) in England & Wales, the Northern Ireland Court of Appeal, the Courts Martial Appeal Court and the High Court of Justiciary (sitting in its appellate capacity). The inclusion of this last court is a major innovation as until now no criminal appeals have come from Scotland to the Appellate Committee (for the reasons explained above). However, Scottish criminal matters in which Convention right points are raised do now come to the Judicial Committee on appeal. Questions of compliance with Convention rights, whether arising under the devolution Acts or the Human Rights Act, could be grounds for appeal in any criminal appeal. The Attorney-General of England & Wales (and Northern Ireland) would retain the right to refer questions of criminal law to the supreme court, as he currently has to the Appellate Committee. Consideration should be given to empowering the Lord Advocate (the Law Officer of the Scottish Executive responsible for prosecutions) to have similar access to the supreme court.
- The UK's Law Officers would have power to refer Bills of the Scottish Parliament and of the Northern Ireland Assembly to the court, before or after royal assent, to determine whether that legislation was within the competence of the devolved assembly. (This would reproduce the existing powers of the Judicial Committee).
- It may also be desirable for the supreme court to have a residual category of jurisdiction (based on section 4 of the Judicial Committee Act 1833) enabling it to consider and report on 'any matter' referred to it by Her Majesty.

'Leapfrog' appeals, under which appeals may in some tightly defined circumstances be taken directly from the High Court in England & Wales and the High Court of Northern Ireland to the Appellate Committee, have fallen into almost complete disuse; no provision is made for them to be retained.²⁶³ The jurisdiction of the Judicial Committee over medical registration appeals and Church of England matters arising under the Pastoral Measure are not

²⁶¹ See Part 7 above ('The Scottish questions').

²⁶² In England & Wales, some judicial review applications are 'criminal', but we gloss over that as nothing turns on it for present purposes.

²⁶³ The reasons for the failure of this reform need to be investigated further. If leapfrog appeal is to be retained, ways of re-invigorating its use should be considered.

transferred to the supreme court: in both cases, legal action would in the first instance be commenced in the Administrative Court in England & Wales.²⁶⁴

8.3 The status of the supreme court

At present, the Appellate Committee sits as a court of the legal system from whence the appeal comes, for instance as a Scottish court when hearing a Scottish appeal. In the model described here, the supreme court would be a court of the whole UK and its decisions would be formally binding in all three legal systems. In this respect, all decisions of the supreme court would have a legal and constitutional status similar to that currently possessed by the Judicial Committee when hearing devolution issues.²⁶⁵

8.4 Judges of the supreme court

The membership of the supreme court, and whether the court would sit in panels or en banc, are considered in Parts 12-15. It has sometimes been suggested that a defining characteristic of a 'supreme court' is that all judges participate in all decisions, but we do not take that view. Questions of how panels are constituted can usefully be considered separately from questions of structural reform.²⁶⁶

8.5 Structural advantages of a new supreme court

The main structural benefits of the model proposed flow from the creation of a symmetrical, single apex to the UK's legal systems.

8.5.1 Transparency

Courts ought to be transparent in their institutional design.²⁶⁷ The single supreme court has the advantage of simplicity of institutional design — in contrast to the UK's current arrangements (and the other models for structural change surveyed in this report). The distribution of work between the UK's existing top level courts is both hard for people to understand and not easy to justify on rational grounds. 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. 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

²⁶⁴ See Part 15.

²⁶⁵ See Part 1.

²⁶⁶ See Part 15.

²⁶⁷ See Part 2.

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.

8.5.2 *A single apex*

Turf wars are not, however, out of the question. The arrangements introduced in 1998 change the rules of precedent. 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.²⁶⁸ 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 end 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 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*²⁶⁹ 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')²⁷⁰ reached a similar conclusion in December 2000. If the Scottish case had been taken to appeal, it could ultimately have

²⁶⁸ Lord Sewel, H.L. Debs., 8 October 1998, col. 619.

²⁶⁹ 2000 S.L.T. 965,

gone to the Judicial Committee. As it happened, an appeal in the Alconbury case was heard with impressive promptness by the Appellate Committee on 9 May 2001. 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 from that of the Appellate Committee? There are dangers of 'races to the top', with lawyers in devolution issue cases seeking to obtain rulings of the Judicial Committee before lawyers in Human Rights Act cases get to the Appellate Committee.

The creation of a supreme court avoids the problem of a dual apex to the court system such as currently exists in the UK — and which would also exist with the adoption of a constitutional court plus its companion court.²⁷¹

8.6 Conclusions

A supreme court would help improve the autonomy of the UK's highest courts,²⁷² by breaking the links between the top court and the UK Parliament (in the case of the Appellate Committee) and a department of state (the Judicial Committee's connection with the Privy Council). Separation would require budgetary independence and new premises, both of which could have practical and symbolic importance in enhancing the independence of the court. Careful planning would be needed, however, to ensure that there were adequate formal channels of communication between the supreme court and other institutions of government. The relatively simple and symmetrical structure of the supreme court enhances its transparency. As to the efficiency of the court, clearly the establishment of a supreme court would require considerable capital expenditure for new premises and running costs would be increased compared to that of the current judicial functions of House of Lords as the court would no longer benefit from the provision of staff and library services within the Palace of Westminster.

There are, however, several potential weaknesses with the model. First, it assumes that a single court is fit to determine both ordinary civil and criminal appeals and also constitutional questions. Secondly, a supreme court would arguably be a 'centralising' institution at a time when the process of devolution in the UK suggests a different approach is desirable. There is also no need for symmetrical treatment of the three legal systems (asymmetry is a feature of the 1998 devolution settlement).

²⁷⁰ [2001] *Administrative Court Digest* 65.

²⁷¹ The model examined in Part 9, below.

²⁷² See Part 2.

9 Structural change – a constitutional court ‘plus’

9.1 Introduction

The structural option of a constitutional court for the UK cannot be considered in isolation. A model for the apex of a legal system that includes a top level court specialising in, among other things, devolution issues and Convention right adjudication implies the existence of another top level court (which we call the ‘companion court’) for dealing with ‘non-constitutional’ matters. The constitutional court model examined in this part of the report therefore includes with it another court (a ‘thin’ supreme court) for ordinary civil and criminal appellate litigation. The two courts could either be entirely distinct with a different secretariat and premises, or they could take the form of two ‘divisions’, ‘boards’ or ‘chambers’ — different terminology for the same concept — within an overarching UK court of final instance (called *e.g.* the United Kingdom Courts of Appeal).

Support for some kind of constitutional court in the UK has come from, among others: Lord Steel of Aikwood,²⁷³ Lord Cook of Thorndon (the former President of the New Zealand Court of Appeal who has sat on the Appellate Committee),²⁷⁴ Lord Lester of Herne Hill,²⁷⁵ Richard Gordon QC,²⁷⁶ and Aiden O’Neill QC.²⁷⁷ A working group commissioned to provide expert guidance to the Northern Ireland Human Rights Commission has also considered the possibility.

Examination of proposals for a constitutional court proceeds in four stages. First, the recent political background to proposals for a UK constitutional court are set out. Secondly, an attempt is made to define the possible extent of such a court’s formal jurisdiction. What is proposed is far removed from that of the ‘European model’ of constitutional courts which began with the Austrian Constitutional Court designed by Hans Kelsen in 1920, building on an institution first established in 1868, and which has been replicated, with adaptations, in many other civilian legal systems. The proposal is for what is essentially a specialist appellate court for public law cases. Thirdly, the main arguments for and against this model are considered. Fourthly, comments are made about the ‘other’ court which must necessarily form part of a package including a constitutional court.

9.2 Recent political background

What little debate there has been about the possibility of a UK constitutional court is curiously polarised. On the one hand constitutional courts are very fashionable; they have

²⁷³ See below.

²⁷⁴ See below.

²⁷⁵ As a member of the JUSTICE working party drafting evidence for the Royal Commission on the Future of the House of Lords, he also supported the idea of a supreme court.

²⁷⁶ R. Gordon and R. Wilmot-Smith (eds), *Human Rights in the United Kingdom* (Oxford: OUP, 1996).

²⁷⁷ ‘Judicial Politics in the Judicial Committee’, *Journal of the Law Society of Scotland*, 1 January 2001.

proliferated throughout Europe as well in Latin America and have increasingly become the subject of both academic study and political cooperation. Even political scientists in the USA are beginning to compare what some see as their lacklustre Supreme Court and with benefits of constitutional courts.²⁷⁸ Against this there is in the UK a strong body of opinion that views constitutional courts as obviously unsuitable. Constitutional courts are, from that point of view, regarded as appropriate in four main situations:²⁷⁹

- when a new legal order is being fashioned within a nation that is in transition from an anti-democratic form of government into democratic ones (as in, at different times, South Africa, Spain, Germany and Eastern European states)
- if a nation has a written, codified constitutional document
- in civilian legal systems which have a clear demarcation between public and private law
- where a legal system recognises 'constitutional review', *i.e.* the power of a court to strike down legislation as unconstitutional.

Clearly none of these conditions apply in the UK, it is argued, and a constitutional court therefore is not desirable.

9.2.1 *Constitutional court proposals and devolution*

Others have taken the possibility more seriously, especially in relation to devolution issues. During the passage of the Scotland Bill and the Government of Wales Bill in 1998, amendments were moved (unsuccessfully) to establish a constitutional court with jurisdiction to determine 'devolution issues' instead of the Judicial Committee. It is not clear from the proposals put forward what if anything else the envisaged court would do. But even Lord Irvine LC did not rule out the possibility of a constitutional court: 'It may be that ... longer-term thought should be given to the appropriateness of a specialist constitutional court. ... I can be encouraging to that limited extent'.²⁸⁰

The choice of the Judicial Committee as the court of final appeal (and of some originating jurisdiction) in devolution 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 1949.²⁸¹ Another reason proffered was

²⁷⁸ *e.g.* Washington University School of Law's Institute for Global Legal Studies is holding a three day conference on 1-3 November 2001.

²⁷⁹ On 8 December 1999, the Administrative Law Bar Association convened a meeting on the subject: all three speakers (Professor Paul Craig, Sir Sydney Kentridge QC and Sir John Laws) were unanimous in their conclusions that a constitutional court was undesirable in the UK. No one from the floor spoke in favour.

²⁸⁰ H.L. Debs., col. 1983 (28 October 1998) rejecting a Liberal Democrat amendment to the Scotland Bill for such a court instead of giving the Judicial Committee jurisdiction over 'devolution issues'.

²⁸¹ For analysis of the Judicial Committee's record on rights adjudication, see K.D Ewing, 'A Bill of Rights: Lessons from the Privy Council' in W. Finnie *et al* (eds), *Edinburgh Essays in Public Law*, p. 231.

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 [sc. the Law Lords sitting in the House of Lords] would lead to prompt decisions on cases'.²⁸² This 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 law²⁸³ 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. Maybe the real reason for allocating devolution issues to the Judicial Committee was because this had been done before — in relation to Northern Ireland under s. 51 of the Government of Ireland Act 1920.²⁸⁴

The choice of the Judicial Committee certainly caused eyebrows to be raised outside the UK. The Solicitor-General of South Australia reports:²⁸⁵

'It is obvious that the Scotland Act 1998 involves very great political and organisational changes to government institutions. Some of these changes seem, to an outsider, to be quite surprising. For example, it having taken nearly 100 years for we Australians to "repatriate" our legal system from appeals to the Judicial Privy Council [sic.], it is surprising to many of us to see that body given a new lease of life as a constitutional court, particularly seeing as it was so inadequate in that role when hearing appeals from Australia. ... this new role also risks creating a dual apex with the House of Lords in devolution cases which again seems to me to be a surprising development.'

During the passage of the Scotland Bill in the House of Commons, the SNP moved an amendment to replace the Judicial Committee with a 'constitutional court' — 'a model based on the German constitutional court, which has been exported recently to Spain and Mexico'.²⁸⁶ The idea emerged again in the Lords where Liberal Democrats proposed an amendment for devolution issues to be determined by a constitutional court. Lord Steel of Aikwood stated:²⁸⁷

We propose that this rather large, amorphous body [*i.e.* the Judicial Committee] should be slimmed down and made more precise and that a constitutional court should be drawn from nine members of the Judicial Committee of the Privy Council. We propose that no fewer than four of these should be people

²⁸² Mr Win Griffiths, H.C. Debs., col. 927, 3 February 1998.

²⁸³ See Part 7 above on the 'Scottish questions'. In the model set out below, the constitutional court (like the Judicial Committee at present) would hear appeals from the Scottish criminal courts insofar as they raise 'devolution issues', including points relating to Convention rights.

²⁸⁴ The Judicial Committee only ever heard one reference: *Educational Levy case* [1936] A.C. 352.

²⁸⁵ B.M. Selway Q.C., 'The Constitution of the UK: a Long Distance Perspective' (2001) 30 *Common Law World* 3 at 22.

²⁸⁶ H.C. Debs., col. 204, 12 May 1998.

²⁸⁷ H.L. Debs., col. 1963, 28 October 1998.

who hold, or have held, high judicial office in England; that no fewer than two of them should hold, or have held, high judicial office in Scotland; and that at least one member of that nine should be someone who holds, or has held high, judicial office in Northern Ireland. We propose that on any one particular case:

'No fewer than five members of the Court (including at least one member who has held high judicial office in Scotland) shall sit to hear any proceedings under this Act.'

... We then propose that there should be a nominating committee of persons set out in our draft new schedule who should recommend duly qualified persons to Her Majesty for appointment as the president or members of the court. We suggest that that nominating committee should consist of the Lord Chief Justice of England, the Master of the Rolls, the President of the Family Division, the Vice-Chancellor, the Lord President, the Lord Justice Clerk, the Lord Chief Justice of Northern Ireland, two persons appointed by the Speaker of the House of Commons, at least one of whom should be resident in Wales, one person appointed by the presiding officer of the Scottish parliament, and one person appointed by the presiding officer of the Northern Ireland Assembly. We have set out other self-explanatory provisions which relate to age limits and the qualifications of the court. This is a serious attempt to stimulate a general debate on how we deal with constitutional disputes in the new era when we will have these three devolved assemblies or parliaments operating within the United Kingdom. I hope that we shall at least have a fruitful discussion on them. I beg to move.'

Lord Wilberforce, a former Law Lord, commenting that the Government had given 'no reasoned explanation why' the Judicial Committee was chosen for the role of adjudicating on devolution issues, gave 'general support to the concept proposed' in the Liberal Democrat amendment.²⁸⁸ Lord Cooke of Thorndon (the former President of the New Zealand Court of Appeal who sat from time to time on panels of the Appellate and Judicial Committees), supporting the tenor of Lord Wilberforce's remarks, said:²⁸⁹

'In principle there are valid reasons for preferring a Constitutional Court to the Judicial Committee of the Privy Council for the purpose of these devolved questions. The reasons pertain to experience, expertise, specialisation and temperament. Lord X may be admirably equipped to decide issues of domestic law, but by experience, interest and temperament may not be so well qualified to deal with human rights questions. They are a field of their own, in which there is a large body of international jurisprudence — a jurisprudence which requires a sympathetic appreciation of the aims of human rights combined with a certain amount of pragmatism and practicality, a combination of idealism and feet on the ground. It tends to be a field of its own and there is much to be said for a court of its own, a court which will have the opportunity of building up a body of jurisprudence not only within the United Kingdom but also attracting international respect. It would be a somewhat specialised, dedicated court, a limited corps of specialised judges.'

²⁸⁸ H.L. Debs., col. 1966.

²⁸⁹ H.L. Debs., col. 1967.

Other judicial figures spoke against the amendment. Lord Hutton (making his maiden speech) was concerned that one member of the nominating committee would be a person appointed by the presiding officer of the Northern Ireland Assembly. He believed 'that considerable harm could be done to public confidence in the judiciary — and this is an important factor — if there were public debate and discussion about the political views of judges, as I believe there would be if a nominating committee were established'.²⁹⁰ Lord Mackay of Drumadoon, a senior Scottish judge, said he was 'not yet convinced that the constitutional court is the correct approach. But I am convinced ... that it is a matter which merits serious consideration. I very much hope that this may be the start of examining the whole issue'.²⁹¹ Lord Hope of Craighead expressed similar views.²⁹² Lord Clyde explained why the Judicial Committee was an effective and efficient tribunal for adjudicating on devolution issues, adding 'I am attracted by the idea of a constitutional court, but I believe it is too early'.²⁹³

9.2.2 *Constitutional court proposals and human rights*

The question of a constitutional court for the UK has also arisen in the context of debates about human rights. The White Paper on the Human Rights Bill, *Rights Brought Home*, dealt curtly with the question of which courts ought to enforce Convention rights in the UK, commenting simply that allowing people to argue that their Convention rights have been infringed 'in our courts at any level' was 'preferable to allowing cases to run their ordinary course but then referring them to some kind of separate constitutional court which, like the European Court of Human Rights, would simply review cases which had already passed through the regular legal machinery'.²⁹⁴ Little was said about this during the passage of the Bill through Parliament.

More recently, the question of a constitutional (or human rights) court has emerged in Northern Ireland. The Criminal Justice Review, carried out pursuant to the 1998 Belfast Agreement, suggested that the establishment of a constitutional court be explored. The Northern Ireland Human Rights Commission (NIHRC) has, in its preparatory work for a Bill of Rights for that part of the UK, considered the possibilities both of a constitutional court in Northern Ireland and also a UK-wide one. The NIHRC is a statutory body set up pursuant to the Belfast Agreement 1998.²⁹⁵ One of its specific tasks is to make recommendations to the Secretary of State for Northern Ireland on what should be contained in a Bill of Rights for

²⁹⁰ H.L. Debs., col. 1976.

²⁹¹ H.L. Debs., col. 1977.

²⁹² H.L. Debs., col. 1979.

²⁹³ H.L. Debs., col. 1981.

²⁹⁴ para. 2.4.

²⁹⁵ See Northern Ireland Act 1998, ss 68-72. Strand Three of the Belfast Agreement provided that the NIHRC 'will be invited to consult and advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos

Northern Ireland. In March 2001, the NIHRC published a collection of preparatory reports commissioned from specialist working groups on various aspects of the proposed Bill of Rights.²⁹⁶ The working group on the ways in which the Bill of Rights (whatever its contents) might best be implemented considered how in legislative terms a Bill of Rights could 'supplement' the rights already guaranteed in the ECHR. It suggested three models.

- Repeal of the Human Rights Act 1998 in Northern Ireland and a new Bill of Rights adopted in its place.
- Legislation could be passed to add new rights designed for the particular circumstances of Northern Ireland to those already incorporated under the Human Rights Act 1998.
- The enactment of a single statute providing for supplementary rights without amending the Human Rights Act 1998.

The report went on to consider the closely related question of how rights would be enforced and suggested several models. One is enforcement by a special Human Rights Court (with a 'constitutional court' type role) for Northern Ireland.²⁹⁷ The report notes that 'the relationship between the Human Rights Court and the House of Lords and Privy Council would need to be worked out'²⁹⁸ and suggests that one way would be:

'By providing for a Human Rights or "Constitutional" Court not just for Northern Ireland, but for the whole of the UK. This would have the benefit of eliminating the current potential overlap between the House of Lords and the Privy Council in the Human Rights Act and devolution Acts. It would also build on the East-West dimension of the Belfast Agreement. It might also be possible to think of a further mechanism for North/South (of Ireland) participation in such a court, or participation by the Council of Europe or Commonwealth judges.'²⁹⁹

The NIHRC is currently (*i.e.* May 2001) formulating its recommendations and a report is expected to be published later in the year.

9.2.3 *Key features in the political debates so far*

Two main points emerge from the periodic discussions about a constitutional court for the UK over the past few years.

- Among parliamentarians in the House of Lords and the senior judiciary there is a fair degree of support for the idea that of a constitutional court ought to be investigated

of both communities and parity of esteem, and — taken together with the ECHR — to constitute a Bill of Rights for Northern Ireland ...' (para. 4).

²⁹⁶ NIHRC, *Bill of Rights for Northern Ireland: Reports of the Independent Working Groups to the NIHRC* (Belfast: NIHRC, 2001); also available on line at www.nihrc.org.

²⁹⁷ See Colin Harvey, 'The Politics of Rights and Deliberative Democracy: the process of drafting a Northern Ireland Bill of Rights' [2001] *European Human Rights Law Review* 48.

²⁹⁸ *Op. cit.*, para. 5.4.

²⁹⁹ *Op. cit.*, para. 5.5.1.

further. As yet, there has been little or no serious study of the scope of a constitutional court's jurisdiction — for understandable reasons discussion so far has focused either on devolution or on human rights matters.

- The proposal for a constitutional court also has a strong regional dimension. The Law Society of Scotland was a supporter of the idea and in Northern Ireland the special circumstances of a local Bill of Rights has prompted thinking about the possibility of a constitutional court either for the province or for the UK as a whole.

Against that background, we now turn to consider the possible jurisdiction for such a court.

9.3 The constitutional court's formal jurisdiction

Given the important formal differences in legal systems,³⁰⁰ the constitutional courts found in many other European legal systems cannot be firm models for any UK version. The initial challenge in envisaging a constitutional court for the UK is therefore coherently to define its jurisdiction without the aid of any template. Stating the formal jurisdiction for a UK constitutional involves a redistribution and amalgamation of jurisdiction currently shared between the Appellate and Judicial Committee. The constitutional court might:

- determine devolution issues referred to it by courts or Law Officers, or on appeal, under the Government of Wales Act, the Northern Ireland Act and the Scotland Act;
- be the final court of appeal from the UK's legal systems in any civil claim or criminal prosecution where the question at issue was whether to grant a 'declaration of incompatibility' of an Act of the UK Parliament (Human Rights Act 1998, section 4);
- be the final court of appeal from the UK's legal systems in civil claims and criminal appeals turning on section 6(1) of the Human Rights Act 1998;³⁰¹
- in relation to England and Wales, be the final court of appeal for judicial review claims, applications for habeas corpus and other statutory applications commenced in the Administrative Court³⁰² and analogous procedures in Scotland and Northern Ireland;
- in relation to Northern Ireland, be a final court of appeal on cases arising from the (proposed) Northern Ireland Bill of Rights;³⁰³
- have a residual power 'to consider and report' on 'any matter' referred to it by Her Majesty.³⁰⁴

It is not suggested that the constitutional court would have any *original* jurisdiction to decide individual complaints about breaches of Convention rights. In some legal systems such as

³⁰⁰ *i.e.* civil law; the sharp distinction between public and private law; codified written constitutions; the centralisation of constitutional adjudication into a single court; constitutional review (discussed above).

³⁰¹ 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' Public authority includes a court or tribunal (s. 6(3)(a)).

³⁰² Formerly the Crown Office List in the Queen's Bench Division of the High Court.

³⁰³ See above.

Spain, it is a task of the constitutional court to determine such issues through a procedure for claiming direct individual protection for protection of constitutional right (through the writ of *amparo* or similar). In contrast, the scheme of the Human Rights Act 1998 is to permit Convention rights to be raised in any court. Nor is it suggested that the constitutional court would have any special jurisdiction over European Community law rights: these are required to be given immediate and effective protection in all courts and tribunals.

The jurisdiction outlined above is, essentially, that of a specialist public law appellate court with some original jurisdiction (similar to that currently conferred on the Judicial Committee) to consider whether Bills referred to it by the Law Officers are within the powers conferred by the Scotland Act 1998 and the Northern Ireland Act 1998. The constitutional court would not have *exclusive* jurisdiction to deal with constitutional issues. An important feature of this model is that the judges appointed to the court would be specialists.³⁰⁵

9.4 The benefits of this model

One of the main justifications for this model is the benefit of specialisation of the judicial function. In England & Wales, these have been recognised in relation to civil litigation and in particular for public law litigation. If specialism is so clearly accepted as important for first instance courts in larger legal systems, then there is at least as strong a case for approaching appeals on the same basis. Benefits from specialism accrue in several different forms. Judges who are specialist in a field of law are likely to be more efficient and effective in their decision-making simply by virtue of their deeper knowledge. Moreover, as Lord Cooke of Thorndon suggested,³⁰⁶ effective judicial leadership in the field of human rights law requires 'experience, interest and temperament' that is different from that needed in other fields. The same is true of the division of powers problems likely to arise as devolution issues. Appointments to a constitutional court could draw on a different pool of talent and be made using a different selection process from that traditionally used for higher courts in the UK. Among others, it would enable more women and academics to serve. The territorial balance between appointees from different parts of the UK could also be more finely tuned. Moreover, it needs to be recognised that the most senior judges determining human rights and devolution issues will no longer be anonymous and apolitical, but will be subject to media scrutiny and public criticism. Appointments to a new constitutional court can take this into account.

A specialist court could also adapt its procedures and approaches better to deal with public law litigation. Third party interventions and the use of *amici curiae* are likely to be more frequent in this field than others. A court making public law decisions may also be expected to explain its often politically sensitive judgments to the press, the public and to Parliament.

³⁰⁴ Based on (the little used) Judicial Committee Act 1833, s. 4.

³⁰⁵ See Part 13 below.

³⁰⁶ See above.

This is better done through a specialist court which could, for example, appoint a press liaison officer, conduct public education and have regular meetings with parliamentary committees.³⁰⁷

Whereas in the past there was probably insufficient specialist appellate work to sustain a separate court, this is no longer so. Litigation over 'devolution issues' is set to grow, as are claims that Convention rights have been breached — though the extent of that growth remains uncertain.³⁰⁸ In England & Wales, the growth in the case load of the Administrative Court (formerly the Crown Office List in the Queen's Bench Division) has been well documented.

The case for a specialist constitutional court does not just rest on the advantages for such a court for public law matters. The allocation of work to a constitutional court will help preserve judicial capacity at the apex of the legal systems to deal with ordinary civil and criminal appeals. It would prevent the Appellate Committee (or its modified successor) having the character of its case load swamped with public law cases at the expense of commercial law, tort law and other fields in which it currently adjudicates. It will also prevent delays in Appellate Committee (or its successor's) work caused by the need for devolution issues in the Judicial Committee to 'have priority over the ordinary work of the House of Lords ...'.³⁰⁹ There are also political advantages for the 'companion' court. It is inevitable that from time to time tensions will arise between government (or others) and those judges responsible for adjudicating on constitutional and human rights questions. It would be better to have such criticism directed at, and dealt with, by a specialist court rather than having the *whole* apex of the court system embroiled in the controversy.

The creation of a constitutional court would enable the current confusing division of work between the Appellate and Judicial Committees to be unravelled and put together again in a more rational way. The Human Rights Act 'is woven into the fabric of the devolution settlements',³¹⁰ but the present arrangements create a strange bifurcation. A constitutional court would consolidate the ultimate jurisdiction to determine whether (a) Acts of the Scottish Parliament, (b) Scottish subordinate legislation, (c) Northern Ireland subordinate legislation (d) Welsh subordinate legislation, (e) Acts of the Northern Ireland Assembly, (f) Acts of the UK Parliament and (g) UK subordinate legislation are compatible with Convention rights. At present the ultimate court in relation to (a) to (e) is the Judicial Committee and (f) and (g) is the Appellate Committee.

A distinct constitutional court for the UK may also promote more effective relations with the continental European courts which exist in the major states of the EU and Council of Europe.

³⁰⁷ On transparency, see Part 3 below.

³⁰⁸ See Part 17 below.

³⁰⁹ Lord Goodhart, H.L. Debs., col. 1974, 28 October 1998.

³¹⁰ Lord Lester of Herne Hill, H.L. Debs., col. 1968, 28 October 1998.

9.5 Disadvantages of a constitutional court

The creation of a constitutional court presumes that it is possible to make demarcations between 'constitutional' and 'non-constitutional' litigation. In the absence of a codified constitution, this is difficult. The attempt to make distinctions between public and private law for the purposes of claims for judicial review in England & Wales shows the pitfalls: it is inevitable that the court's resources would be diverted into copious litigation about 'boundary disputes' between the specialist and non-specialist jurisdiction.³¹¹ Any attempt to devise a schema for allocating constitutional cases to a constitutional court is also undermined by the inability of a national legal system to do this for a field of law in which many of the most important constitutional and rights issues arise — European Community law. A specific example illustrates the general point. *Barrett v Enfield LBC*³¹² was a claim in negligence against a local authority alleging failures in its duties to care for children. An important issue was whether it was open to a court of first instance to strike out the claim as disclosing no reasonable cause of action in the light of the European Court of Human Rights' judgment in *Osman v UK*³¹³ where there was held to be a breach of Article 6(1) in the striking out of a negligence claim against a police force. It is far from clear whether such a case should fall within the jurisdiction of an ordinary court or the specialist constitutional court.

A second objection to a specialist constitutional court for the UK goes to the heart of one of the main functions of top level courts — to be managers of the court and legal systems as a whole. Top courts exist to facilitate 'joined up justice', giving guidance through case law about which courts, using what kinds of legal procedures ought to deal with different kinds of legal dispute.³¹⁴ For such system management to be effective, the court(s) at the apex of the legal system should speak with one voice and give expression to a common set of values and principles. *Barrett v Enfield LBC* again supplies a useful illustration: there the Appellate Committee was able to give definitive guidance (expressing a degree of incomprehension and scepticism of the ruling in *Osman v UK*, but suggesting a pragmatic way forward for courts in the UK). A constitutional court, imbued with a mission to give priority to the values of human rights, might have made more of *Osman* and given a judgment that would have caused difficulties to the ordinary courts which had to adapt their practices to it.

A further, related, risk is of tension between the constitutional court and the other court at the apex of the UK's legal systems as they compete for prestige and influence. This is avoided as between the Appellate and Judicial Committees because those courts are largely

³¹¹ In relation to judicial review see *O'Reilly v. Mackman* [1983] 2 A.C. 237. Professor Sir William Wade says this 'was a brilliant judicial exploit, but it turned the law in the wrong direction, away from flexibility of procedure and towards a rigidity reminiscent of the bad old days of the forms of action a century and a half ago' (H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 8th ed. (Oxford: OUP, 2000), p. 664).

³¹² [1999] 3 W.L.R. 79.

³¹³ (2000) 29 E.H.R.R. 245.

³¹⁴ See Part 4 above and Le Sueur and Cornes, 'What do the top courts do?' (2000) 53 *Current Legal Problems* 53, 79.

composed of the same judges. The risk would also be forestalled by the creation of a single supreme court for the UK.³¹⁵

It is also open to question whether there would really be sufficient specialist public law appellate work for a constitutional court. Such cases have not, in fact, been a large proportion of the Appellate Committee's case load. Of course, the advent of the Human Rights Act and devolution has changed the proportion of time spent on rights issues, but many estimates of likely increase in litigation have been wildly exaggerated.³¹⁶

On a more abstract level, a constitutional court is antithetical to traditional, and valued, approaches to law in the UK. The idea of a separate constitutional court stems from work commissioned by the Austrian government from the academic lawyer Hans Kelsen (1881-1973). Kelsen drafted the 1920 Austrian Constitution, an important feature of which was a constitutional court (to which he was appointed a judge in 1921).³¹⁷ The civilian legal systems and the political contexts in which this model have been propagated around Europe and many other regions of the world are completely alien to the UK. It is poor comparative law and politics to imagine that there can be any transplant of this institution, or a variant on it, into the UK. The Kelsen model requires centralisation of judicial power to consider constitutional questions. This is the opposite of the diffuse system of 'constitutional adjudication' (insofar as that term is appropriate) in the UK, where all courts and tribunals have duties under the Human Rights Act and European Community law, as well as the common law, to consider questions. The Diceyan tradition continues to provide a firmer guide for us. It still is, and ought to be, an important meaning of the rule of law in the UK that 'every man, whatever be his rank or condition, is subject to the ordinary law or the realm and amenable to the jurisdiction of the ordinary tribunals [*i.e.* courts]' and that 'the constitution is the result of the ordinary law of the land'.³¹⁸

Furthermore, the proponents of a constitutional court misunderstand recent developments. Neither the Human Rights Act nor the devolution Acts have conferred on the UK courts any new types of power or require judges in the UK to perform new types of function. Adjudication on Convention rights involve legal issues, not political ones. Division of powers issues, as between say the Scottish Executive and the UK government are not of a new kind either: the ordinary courts have for decades had to adjudicate on the respective powers of central government and local authorities, often against a highly charged political background.³¹⁹ In such circumstances there are benefits in having what is clearly an impartial *court* (as opposed to a political institution that a constitutional court would inevitably be or become) decide legal questions. A constitutional court would encourage the 'judicialization

³¹⁵ See Part 8 above.

³¹⁶ See Part 16 below.

³¹⁷ Kelsen was removed from the court in 1930 for political reasons after the constitutional court overturned rulings of lower courts which had held administrative authorities acted invalidly in recognising remarriage of Catholics. His classic work on constitutional courts is 'La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)' *Revue de Droit Public* 197.

³¹⁸ *Introduction to the Law of the Constitution*, 10th ed. (London: Macmillan, 1959).

of politics' — the expansion of judicial power — at a time when what is needed is the reinvigoration of parliamentary politics. A constitutional court would inevitably become a 'court with a mission' and would equally inevitably lack proper constraints on its powers.

9.6 The companion court

To consider the creation of a constitutional court for the UK necessarily implies considering *another* court at the apex of the UK's legal systems to deal in some way with appeals arising in non-constitutional cases (ordinary civil litigation and criminal appeals). There are two main options here:

- To maintain the Appellate Committee broadly in the form it exists today, with the Law Lords hearing appeals in all cases except those which fall within the jurisdiction of a new constitutional court. See Part 7.
- To create a new supreme court for the UK along similar lines to the model considered in Part 8, though minus the jurisdiction conferred on the constitutional court.

If the later option is preferred, a further important choice arises about the structural relationship between the constitutional court and the companion. This relation could be one at arms' length, with each court being an entirely separate institution. Given the fundamental nature of the matters with the constitutional court's jurisdiction, it would probably be appropriate to expect its judgments to be binding in the Appellate Committee/new supreme court, as well as in all lower courts and tribunals in the UK. A provision in the UK Act of Parliament establishing a constitutional court could state: 'Any decision of the Constitutional Court shall be binding in all legal proceedings (other than proceedings before the Constitutional Court)'.³²⁰

A different kind of relationship could be created if both the constitutional court and the companion court were constituted as a single court (called perhaps the 'United Kingdom Courts of Appeal'). Within this overarching court, the constitutional court and supreme court would be separate panels of fixed membership,³²¹ though served by a joint secretariat.³²² Each court (or chamber) could be free to develop its own rules of procedure, methods of work and might well have different appointments mechanisms. Using techniques of case management now being developed in the High Court in England & Wales, appeals entering a common gateway would be allocated to (a) the constitutional court; (b) the supreme court; or occasionally (c) a plenary sitting of the UK Court of Appeal as a whole. Plenary sittings of the whole court might take place either in specified types of case or in cases of exceptional

³¹⁹ *e.g.* on rate capping and the subsidy of public transport.

³²⁰ Cf. Scotland Act 1998, s. 103(1).

³²¹ See Part 15 below.

³²² Other terminology may be better than 'court' to describe the two entities, *e.g.* 'division' or 'chamber'. It is however common in England & Wales to have 'courts' as constituent parts of larger 'courts' (*e.g.* the Administrative Court and the Commercial Court — both parts of the High Court).

importance with the court in its discretion decides ought to be so heard. An example of such a case might be where an appellant argues that some feature of the ordinary court system breaches a Convention right (*e.g. Barrett v Enfield LBC*).³²³

³²³ See above.

10 Structural change — UK court of justice

10.1 Introduction

The options for major structural change surveyed so far — a supreme court and a constitutional court (plus its companion court) — are ideas familiar from the occasional debates in the UK over the past few years. It is important, however, to avoid regarding those two options, or modifications of them, as the *only* options for major structural change. This part of the report therefore considers a third main option: a UK ‘court of justice’. As with the other options, the particular model sketched out here is just one variation on a theme.

The inspiration for the idea of a UK court of justice will be obvious: the European Court of Justice (ECJ), particularly in its jurisdiction to make preliminary rulings on questions referred to it by courts and tribunals of the 15 member states and its jurisdiction to determine some direct actions. Commentators have suggested that the preliminary ruling mechanism is capable of transfer, with necessary adjustments, for use in other international courts.³²⁴ The proposal made here is that the reference procedure, and some other features of the ECJ, are appropriate not only for supra-national tribunals but might usefully be adapted and adopted to form a new kind of top level court *within the UK* for dealing with questions of *national* law. The Appellate Committee would cease to exist and the Judicial Committee would cease to have any jurisdiction over UK matters.

10.2 The jurisdiction of a UK Court of Justice

The UK court of justice would not be an appellate court. Matters would reach it in two ways: either by courts in the UK’s three legal systems referring questions for preliminary ruling or, in some clearly defined circumstances, by actions brought by public authorities directly before the court.

10.2.1 Requests for preliminary rulings

Requests for preliminary rulings would be made by the Court of Appeal of England & Wales, the Northern Ireland Court of Appeal, and in Scotland the Court of Session and the High Court of Justiciary sitting in their appellate capacities, and other specified courts or

³²⁴ To the European Court of Human Rights (see M. Schwebel, (1988) 28 *Virginia Journal of International Law* 495) and the International Court of Justice (see S. Rosenne, (1989) 29 *Virginia Journal of International Law* 401). The reference procedure will also be a feature of the Caribbean Court of Justice (on which see Part 11 below): ‘Where a superior court of a Contracting Party or a tribunal is seized of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court [of Justice] for determination before delivering judgment’ (Article IX(c)).

tribunals.³²⁵ The limited range of courts with power to refer questions to the UK court of justice is a departure from the arrangements for access to the ECJ where *any* national court or tribunal may make a reference.³²⁶ Confining the right of reference to a small number of appeal courts will keep the number of cases arriving at the UK court of justice in check, though it might make the procedure less effective.

A request for a preliminary ruling would be an interlude in the case before the appellate court: having received a ruling from the UK court of justice, the court in England & Wales, Scotland or Northern Ireland would continue with its determination. 'Preliminary' is used in the sense of the ruling being preliminary to the final disposal of the case. The time taken up by this device need not be great. Unlike an appeal, preliminary references could be 'characterised by a single, simultaneous exchange of written pleadings which must be drafted in ignorance of the detailed arguments of the other participants in the proceedings and which cannot then be supplemented until the brief oral hearing'.³²⁷ There would, however, be benefits in allowing the sequential exchange of observations by the parties.

The questions capable of being referred to the UK court of justice would be ones of law relating to the whole of the UK.³²⁸ Where legal issues are peculiar to one of the UK's legal systems (*e.g.* Northern Ireland law of real property, Scots criminal law unaffected by Convention rights, and the interpretation of legislation which applies only in England) the appellate court of that part of the UK would be the final court of appeal. Questions of law relating to the whole of the UK include the interpretation of the Human Rights Act 1998, Scotland Act 1998, Northern Ireland Act 1998, Government of Wales Act 1998 and any other statute of the UK Parliament which extends to more than one of the UK's legal systems. Issues to do with the development of the common law in any one of the three UK's legal systems might also be the subject of a reference for a preliminary ruling insofar as the point at issue concerns a 'principle of general jurisprudence' common to all or at least more than one of the legal systems. This is the aspect of the reference jurisdiction that is most difficult to define. In some fields of law, such as negligence, it is accepted that common principles apply in the UK's three legal systems. The same is broadly true of the principles of judicial review and many other areas of common law.

The decision whether to refer a question to the UK court of justice would be for the appeal courts, not the parties to the civil litigation or the defendant or prosecutor in a criminal trial. The appeal courts would hear submissions from the parties about the desirability (or not) of making references before they made their decisions. Where a point of law relates to the

³²⁵ It might be appropriate, say, to include the Employment Appeal Tribunal and the Courts Martial Appeal Court in the schema.

³²⁶ Except in relation to matters arising under the 1968 Brussels Convention on the enforcement of judgments on civil and commercial matters where the power to refer to the ECJ is restricted to specified appellate courts. See also Article 68 EC (which will apply to the regulation replacing the Brussels Convention with effect from 2002) and Article 35 TEU.

³²⁷ David W.K. Anderson, *References to the European Court* (London: Sweet & Maxwell, 1995), writing of the ECJ.

³²⁸ On which see Parts 1 and 2 above.

operation of a devolved institution, but is not strictly a 'devolution issue' as defined by the devolution Acts and raises no issue of UK-wide importance, it may be appropriate to refuse to refer a question to the court of justice.³²⁹ Only when the question of law at issue is necessary for the disposal of the case would the courts of appeal be able to refer it to the court of justice.

It is suggested that an appeal court would be *required* to make a reference only in limited circumstances: when it proposed to call into question an Act of the UK Parliament on the ground of its incompatibility with a Convention right;³³⁰ and where the issue before the appeal court was the validity of primary legislation made by the Scottish Parliament or Northern Ireland Assembly. Even the mandatory requirement to refer was extended to a wider range of situations (*e.g.* where the point in issue was as to the scope of a Convention right) the appeal court would be free to decide the case without making a reference if the matter is *acte clair*.³³¹ Other types of situation could be subject to a discretionary power to refer (*e.g.* where, in relation to questions of common law, an appeal court faced with a divergence of approach between its own previous authority and courts in other parts of the UK).³³²

One potential difficulty might arise when an appeal court (or any other court or tribunal) in England & Wales, Scotland or Northern Ireland is faced with a question of EC law. It will be normal for that court to seek a preliminary ruling from the ECJ rather than the UK court of justice. If, however, the UK court of justice while giving a preliminary ruling, or dealing with a direct action (see below), concluded that its determination depended on a point of EC law, then the UK court of justice would itself seek a preliminary ruling from the ECJ.

10.2.2 *Direct actions for annulment of legislation*

Like the ECJ, it is envisaged that a UK court of justice would have jurisdiction to determine actions commenced directly before it by specified categories public authorities. It would also be desirable to permit, in exceptional circumstances, natural and legal persons with a direct interest to bring such actions. Direct actions would include actions for the annulment of legislation passed by the Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales or for a declaration of incompatibility in relation to an Act of the UK Parliament. (The analogy here is with Article 230 EC). The grounds for seeking annulment or seeking an order of incompatibility in respect of primary legislation would be inconsistency with the devolution Acts, the Human Rights Act and European Community law. In relation to subordinate legislation, additional grounds of review would be available

³²⁹ *e.g.* *Whaley v Lord Watson of Invergowrie* 2000 S.C. 340 (see Part 2 above).

³³⁰ Human Rights Act 1998, s. 4.

³³¹ In the EC context, this means that national courts are not required to refer questions of Community law to the ECJ 'where the question raised is materially identical with the question which has already been the subject of a preliminary ruling in a similar case' (*Da Costa v Nederlandse Belasting Administratie*, Joined Cases 28, 29 and 30/62 [1963] E.C.R. 31 at 38).

³³² *e.g.* in the past the courts in Northern Ireland and England & Wales took different views on whether disciplinary adjudications of prison governors were amenable to judicial review.

(essentially procedural impropriety, irrationality and illegality). The institutions capable of initiating such direct actions would be specified, and would include: the UK government, the Scottish Parliament and Executive, the Northern Ireland Assembly and Executive, and the National Assembly for Wales.

10.2.3 *Direct actions for failure to act*

Another type of direct action which the UK court of justice might have jurisdiction to deal with are claims by a public authority in one part of the UK that a public authority in another part of the UK, or an all-UK public authority, has failed to fulfil an obligation imposed on it by an Act of the UK Parliament. (The analogy here is with Article 232 EC). Thus, if the Scottish Executive claimed that the UK government had failed to allocate block grant to it in accordance with the law, the UK court of justice would be the forum for adjudication.

Where disputes arise between public authorities in the same part of the UK, they would be dealt with by the courts in that part of the UK³³³ unless Convention rights or European Community law rights were in issue. In other words, only where there is an inter-governmental dimension would the UK court of justice have jurisdiction.

10.3 The style of judgment

Because, on references, the UK court of justice would have the task of giving authoritative guidance to another court, it is desirable that a single judgment of the court be given — rather than several concurring and dissenting judgments delivered *seriatim*. The judgment would give numbered answers to numbered questions. The need for a single judgment is less pressing in relation to the court's determination of direct actions but may nevertheless be desirable for consistency. The members of the UK court of justice would be expected to exhibit a degree of collective responsibility for their decisions in a way quite different from the current arrangements. The court would be accountable for its decisions as an institution rather than a group of individual jurists.³³⁴

10.4 Membership of the court

Given the explicit focus of the court on UK-wide issues, it may be appropriate for the presidency of the court to rotate between judges from the UK's three legal systems.³³⁵ The UK court of justice would be a court of fixed membership which would always sit *en banc* to hear particular cases.³³⁶

³³³ e.g. between the Greater London Authority and the Secretary of State for the Environment, Transport and the Regions in the Administrative Court.

³³⁴ On accountability as a desirable attribute of top level courts, see Part 3 above.

³³⁵ See Part 14 below. This is an idea, raised in a different context, by Lord Donaldson of Lynton in his written evidence to the Royal Commission on Reform of the House of Lords.

10.5 Funding of references

If, as is proposed, the decision to refer a question to the UK court of justice would be one for the court of appeal, not the parties, there is a strong argument in favour of the legal costs of the reference being borne out of public funds rather than the parties' pockets. The alternative would be (as with references to the ECJ) to make costs of the reference costs in the cause to be decided by the referring court.

10.6 Is this all entirely new?

Much of what is proposed will be familiar to judges in the UK through their experience of making references to the ECJ. Two distinctive features of the UK court of justice — reference procedures and a limited original jurisdiction — arguably have some precursors in the UK, though the analogies are not exact. The existing arrangements for dealing with 'devolution issues' in the Judicial Committee include the possibility of a reference from lower courts and the Appellate Committee. But in those arrangements (which have not yet been invoked) an important difference is that the Judicial Committee takes on the whole conduct of the case and determines the proceedings, rather than giving a preliminary ruling which is then applied by the referring court. The other reference provision is quite different: the right of the Law Officers to refer a Bill of the Scottish Parliament or the Northern Ireland Assembly, before or after it has been granted royal assent, to the Judicial Committee for determination of the issue whether it is within the powers of the respective legislature. Again, this has not yet been invoked. That procedure is more analogous to the direct action for annulment described above.³³⁷ A different form of reference device is also well-established in criminal appeals where the court answers hypothetical questions on the Attorney-General's reference procedure introduced in 1972.³³⁸

The giving of single judgments 'of the court' by a UK court of justice would not be entirely alien to the UK's legal systems. It is the invariable practice of the Court of Appeal (Criminal Division) in England & Wales and a common practice in the Judicial Committee. The giving of answers to questions posed by another court is also not new: this happens when the Administrative Court in England & Wales determines appeals by way of case stated from magistrates' courts.

³³⁶ See Part 15 below.

³³⁷ Though an action under Article 230 EC cannot be brought before the contested act has been adopted; there is no prior review of legality.

³³⁸ On which see J. Jaconelli, 'Attorney-General's References — A Problematic Device' [1981] *Criminal Law Review* 543; A.T.H. Smith, 'Criminal Appeals in the House of Lords' (1984) 47 *Modern Law Review* 133 at 149. Where a person tried on indictment has been acquitted, the Attorney-General may if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer the point to the court and the court shall consider the point and give their opinion on it (Criminal Justice Act 1972, s. 36). There is the possibility of a further reference to the Appellate Committee. The outcome of the trial is not affected.

10.7 Advantages of the court of justice model

Perhaps the main benefit of the court of justice model is that appeals from intermediate courts of appeal cease to be the principal method of access to the UK's top level court. So long as appeals remain the route to the top, the issues coming before the court at the apex of the legal system are determined by individual litigants and the vagaries of litigation — in particular the problems of expense, lack of stamina and delay in reaching a final outcome which deter many good cases raising important points of law receiving consideration at the highest level. Judges sitting in the courts of appeal in the UK's three legal systems are better placed than individual lawyers acting for clients to decide which legal issues ought to be determined by the most senior judiciary. If, as is widely accepted, the UK's top level court ought to have strategic functions for supervising the administration of justice and coordinating the development of law in the UK, rather than being mainly concerned with correcting errors by intermediate courts of appeal, the reference procedure is a more systematic method of enabling the right types of case to reach the apex.

A second advantage of the court of justice model is that it defines effectively the respective status and roles of the UK's top level court and that of the English, Scottish and Northern Irish courts of appeal. In the current arrangements, the Appellate Committee is simultaneously (but uneasily) a court of each of the legal systems.³³⁹ The UK court of justice would, unequivocally, be a court of and for the whole UK and its rulings would be binding on all other courts. That is balanced by the fact that access to the court, on references, would be controlled by the senior courts in each of the legal systems and it is those courts which give final binding judgments in the cases they refer. The respective roles are also defined in terms of function: the UK court of justice would exist to assist the courts of appeal by giving them authoritative guidance when requested to do so. The relationship would be characterised by the idea of mutual dialogue,³⁴⁰ rather than hierarchical authority.

Thirdly, the capacity of the UK court of justice to be a court of originating jurisdiction hearing direct actions on a defined range of challenges solves the problem of deciding on a forum for litigation as between the four units of governance in the UK (the UK & England, Wales, Scotland and Northern Ireland) and three legal systems (England & Wales, Scotland and Northern Ireland). The statute book already recognises the need for this in the right of the Law Officers to refer bills of the Scottish Parliament and the Northern Ireland Assembly to the Judicial Committee. This proposal builds upon that.

Fourthly, the UK court of justice would be a good 'fit' with the existing constitutional structures. Where a court of appeal is faced with a question of European Community law, it

³³⁹ So when, say, hearing a Scottish appeal, the Appellate Committee sits as a 'Scottish court': see Part 2 above.

³⁴⁰ Cf. Anderson, *References to the European Court*, p. 1 ('The preliminary reference procedure is a dialogue, by which courts and tribunals throughout the territory of the European Union may seek guidance from the European Court on matters of law which fall within its competence').

will be able to seek the guidance of the ECJ. On other matters, it might have to seek the guidance of the UK court of justice.

Finally, far from being an attempt to transplant a 'foreign' model into the UK, redesigning the apex of the UK's legal systems in the form of a court of justice would actually be the least 'foreign' of all the options for major structural change. The concept and practice of a court of justice have already been part of the UK's constitutional furniture, in relation to EC law, for a generation.

10.8 Difficulties with the court of justice model

First, the court is premised on the existence of something which simply does not exist: a 'legal system of the UK'; as good law students know it is a solecism to speak of 'UK law'! The UK is a union state, not a federation. There is no 'federal' law alongside the law of England & Wales, of Northern Ireland and of Scotland. An attempt to create a court with jurisdiction over a body of law which is not recognised (or at best, only vaguely emerging) is doomed to failure.

Secondly, an undue burden might be placed on a litigant or defendant in criminal proceedings for an appeal if there is a delay while a request for a preliminary ruling to the UK court of justice is made. It is also likely to increase the average length and costs of litigation (even if the direct costs of the reference is at public expense). A very small proportion of cases currently determined by the courts of appeal are subject to further appeal to the Appellate and Judicial Committees. It is likely that a greater number of references will be made.

Thirdly, this model takes the capacity to select cases away from the court at the apex of the legal system and gives the task of regulating access to lower courts of appeal. This is problematic. A top level court incapable of regulating its own cases through a 'leave' requirement lacks autonomy, which ought to be an important attribute of such courts.³⁴¹ This may well result in overload of the court (there have been chronic delays in the ECJ) and prevent the top court setting its own agenda in terms of the type of legal issues it hears. A requirement of leave could be created.

Moreover, it is undesirable for top level courts to decide questions of law divorced from detailed consideration of the facts of particular cases. This has been recognised in tort litigation where the Appellate Committee now avoids determining negligence claims on the basis of preliminary points of law. A court without detailed knowledge and examination of the facts may well make important mistakes about the context of a case.³⁴²

The court of justice model would also, of all the models for major structural change, demand the greatest alteration to the status and methods of work of what are currently intermediate

³⁴¹ See Part 3 above.

³⁴² See also *e.g. Kuddus v. Chief Constable of Leicestershire Constabulary* [2001] U.K.H.L. 29.

courts of appeal — the Court of Appeal of England & Wales, the Court of Appeal of Northern Ireland, and the Court of Session. These courts would become final courts of appeal and would need to respond in different ways. The largest, the Court of Appeal in England & Wales with its 40 judges, if it lacked a superior appellate court above it, would have to find ways of coordinating its work itself and dealing with the conflicts between judgments which are inevitable in a court of that size sitting simultaneously in several divisions.

The need for the courts of appeal to refer questions to a court of justice, far from creating a dialogue of equals, would undermine their authority to decide, especially on Convention right points. The scheme of the Human Rights Act is to require all courts and tribunals to be conversant with Convention rights law, and to enforce the 1998 Act. The model outlined above would, bizarrely, single out the courts of appeal as the one tier of court that could not confidently proceed to apply the Act. This would diminish the status of those courts.³⁴³

Even if there is some merit in the court of justice model, it represents too significant an innovation. Any structural reform to the Appellate and Judicial Committee should build upon what already exists. A court of justice would be a complete rupture from the past.

10.9 Concluding remark

The court of justice model described above, or variants on it, are worthy of discussion — if only to emphasise that the search for a new institutional design for the apex of the UK's court system (if there is to be one) should include possibilities beyond the notions of 'supreme' and 'constitutional' courts.

³⁴³ But cf. the current position of the Appellate Committee in EC matters where, as the court of last resort, it is required to seek preliminary rulings from the ECJ on questions which lower courts and tribunals may, in their discretion, choose not to do so.

11 The 'rump' Judicial Committee

11.1 Introduction

This part of the report considers the future of the Judicial Committee if major structural change served to allocate devolution issues to another court (*e.g.* a new supreme court or a constitutional court). If that happened, the Judicial Committee's 'rump' jurisdiction would be that which it had prior to the 1998 devolution Acts:

- appeals from legal systems outside the UK
- various appeals against the registration decisions of certain professional bodies, including the General Medical Council
- challenges to decisions taken by the Church of England under the Pastoral Measure.

11.2 Overseas appeals

As previously noted, nobody starting afresh would design a court that looks like the Judicial Committee of the Privy Council.³⁴⁴ 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 & Tobago;
- the British Overseas Territories (formerly called Dependant Overseas Territories) including Bermuda, the Cayman Islands and Gibraltar; and
- the Bailiwicks of Jersey and Guernsey, and the Isle of Man.

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 have 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 many other countries which have ended Judicial Committee appeals.

A longstanding 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

³⁴⁴ See Part 2.

ahead with its controversial plans'.³⁴⁵ During 1999 there were 14 appeals from New Zealand representing 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)³⁴⁶ 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, however, 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 the states 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 the number of appeals that reached the Judicial Committee from legal systems that may use the Caribbean Court of Justice as their court of final appeal rather than the Judicial Committee.

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

Antigua & Barbuda	5
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

³⁴⁵ *Financial Times*, 20 February 2001.

³⁴⁶ 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.

emerges from the *Judicial Statistics: England and Wales for the year 1999*.³⁴⁷ 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. Many people have welcomed 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.³⁴⁸ 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'.³⁴⁹

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

If appeals from New Zealand cease and the Caribbean Court of Justice becomes operational, 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 1999.³⁵⁰

³⁴⁷ London: Lord Chancellor's Department, July 2000, Cm. 4786.

³⁴⁸ e.g. David Pannick QC, 'End this nonsense of our hanging judges', *The Times*, 15 June 1999.

³⁴⁹ AI Index, 15 February 2001.

³⁵⁰ 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
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 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.

11.2.2 *Options for the future*

It is likely that in the medium term the Judicial Committee will receive little more than a dozen appeals a year from overseas legal systems. There are several options.

- To maintain the Judicial Committee as a separate institution serving the needs of these overseas jurisdictions. Consideration might be given to amalgamating the secretariat of the Judicial Committee with that of a new supreme court or constitutional court/companion court.

- To draw upon a different pool of judges to hear overseas appeals. The number of judges eligible to sit on the Judicial Committee is large and there is no constitutional or legal reason why any of its work need be heard by judges who are simultaneously members of the UK's highest court(s).
- To encourage the British Overseas Territories, Jersey, Guernsey, Isle of Man and those independent states who wish to continue using the Judicial Committee to amend their legislation or constitution so that appeal lies to the new UK court.

11.3 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 (as of right, without a leave requirement) 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.³⁵¹ 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'.³⁵²

Proposals for better 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

³⁵¹ General Medical Council, *Acting fairly to protect patients*, London, 2001 available on line at www.gmc-uk.org.

³⁵² H.L. Debs, 20 July 2000, answering a written question from Lord Lester of Herne Hill.

is currently undertaking a radical overhaul of its structures.³⁵³ The GMC only half-heartedly defends the status quo:³⁵⁴

‘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.’

Also under discussion is the further regulation of alternative and complementary medicines.³⁵⁵

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.³⁵⁶ 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* the European Court of Human Rights emphasised the need for courts to have objective independence from other branches of government.³⁵⁷

In short, there is no justification for retaining this area of work in the Judicial Committee or in transferring it to a new UK top court. It should be redirected to a more appropriate level of court.

³⁵³ 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).

³⁵⁴ *Acting fairly to protect patients*, para. 80.

³⁵⁵ 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.

³⁵⁶ GMC, *Acting fairly to protect patients*, para. 80.

³⁵⁷ (2000) 30 E.H.R.R. 289 and see Part 5 above.

11.4 Church of England Pastoral Measure 1983

Every few years, an appeal is heard by the Judicial Committee under Church of England 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.³⁵⁸ Most recently *Cheeseman v. Church Commissioners* was heard over two days and resulted in a split decision.³⁵⁹ 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'. 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. Pastoral Measure litigation could be redirected to the Administrative Court.

³⁵⁸ *Hargreaves v Church Commissioners* [1983] 2 A.C. 47.

³⁵⁹ [2000] 1 A.C. 19.

12 Criteria for judicial appointment

12.1 Introduction

There are different formal criteria for qualification to sit as a member of the House of Lords and the Judicial Committee. These distinctions are glossed over for the purposes of this part of the report and the focus is on the criteria for appointment of the Lords of Appeal in Ordinary (the Law Lords), who form the nucleus of judges serving both courts.³⁶⁰ The question is whether the current criteria for appointment are satisfactory, either in relation to the Appellate and Judicial Committees or any new top level court that may be created following major structural reform.³⁶¹

12.2 The current criteria

There is a statutory requirement that candidates for appointment as a Law Lord must have at least two years prior experience of high judicial office or have held a specified legal professional qualification for at least 15 years.³⁶² A Law Lord's appointment is brought to an end at the age of 70 years, though retired Law Lords may continue to sit on an ad hoc basis until the age of 75 years.³⁶³

In addition to these statutory criteria, a constitutional convention requires that two of the twelve Law Lords have experience of the Scottish legal system. There is a less firmly established practice that one Law Lord is appointed from Northern Ireland.

Also relevant, though designed for appointments to other courts, are *The Lord Chancellor's Policies and Procedures on Judicial Appointments*,³⁶⁴ which include the following 'fundamental principles'.

- (a) Appointment is strictly on merit. The Lord Chancellor appoints those who appear to him to be the best qualified regardless of gender, ethnic origin, marital status, sexual orientation, political affiliation, religion or disability, except where the disability prevents the fulfilment of the physical requirements of the office.

³⁶⁰ For an overview, see Part 2 above.

³⁶¹ See Parts 7-10 above. The form of a new court would have some impact on the design of appointment criteria and procedures. If, for example, the UK established a constitutional court, one of the benefits would be that specialists in the field could be appointed using a different appointments procedure to that for the other top level court (see Part 9).

³⁶² Appellate Jurisdiction Act 1876, s. 6 as amended by the Courts and Legal Services Act 1990, s. 71. The professional qualifications are: a Supreme Court qualification in England & Wales; being an advocate or solicitor entitled to appear in the Court of Session or the High Court of Justiciary in Scotland; or having the status of a practising member of the Bar of Northern Ireland.

³⁶³ See below.

³⁶⁴ Available online at www.lcd.gov.uk.

(b) Part-time judicial service is normally a pre-requisite of appointment to full office. (c) Significant weight is attached to the independent views of members of the professional community (and others) as to the suitability for appointment.

Reform of the current criteria would therefore require either amendment of primary legislation, the establishment of new constitutional conventions, or alteration in government policy — or all of these things.

12.3 The problems

Few would quarrel with the overarching criterion of professional merit as the essential foundation for judicial appointments. In recent times, however, this has been applied in such a way as to restrict the pool of candidates to judges who have served on the UK's intermediate courts of appeal for several years (or, in the case of Lord Slynn, been a member of the ECJ). Commentators have identified several problems which flow from making appointments exclusively from this cohort.

- It has led to a conspicuous absence of any women among the Law Lords. None of the most senior Northern Irish and Scottish judiciary are women and only three of the 36 Court of Appeal judges in England & Wales are female.
 - It may not ensure adequate expertise in some areas of law (e.g. English criminal law).
 - The balance between English, Welsh, Scottish and Northern Irish judges may no longer be appropriate.
 - Given the Law Lords' new role in devolution issues and as the final court for Human Rights Act appeals, the criteria for appointment may place insufficient emphasis on political astuteness.
 - The length of term of office may be problematic.
- Each of these issues will be considered in turn.

12.3.1 *Appointing women*

Everyone supports the principle that equality of opportunity should permeate the judicial appointment criteria and processes. There is, however, less consensus about the priority that should be attached to making appointments of women to the UK's highest courts. Sir Thomas Legg has recently argued that 'I am doubtful about the separate policy of explicitly seeking to compose the judiciary to reflect proportions of gender, ethnicity and any other classification in society at large'.³⁶⁵ Sir Thomas, a former Permanent Secretary in the Lord Chancellor's Department, views any such policy as arbitrary and asks, rhetorically, why other groups should not also benefit from such a (in his view) misguided approach.

Set against this, are arguments that it is highly desirable that the composition of the judiciary should strive to reflect the broad make-up of society. In relation to gender balance, two

³⁶⁵ 'Judges for the New Century' [2000] *Public Law* 62 at 76.

arguments are put forward: that the appointment of a greater number of women would equip courts with beneficial skills and insights that they currently lack; and that the absence of women from the UK top level courts threatens the legitimacy of those institutions.

The concept of merit could be re-conceived to take into account a wider range of considerations, among them the skills and insights a candidate for judicial office possesses as a result, quite simply, of who they are. Writing of the Australian judiciary, Hamilton argues that 'any judge will see the world as a mirror reflecting his/her experiences'³⁶⁶ and this influences how they carry out their judicial role, including what decisions they reach. She concludes:

... if the courts today are to reflect a 21st century understanding of equality before the law, one crucial aspect is the selection of judges. This selection needs to be based on far more than legal and advocacy skills. Today selection based on those skills is not sufficient to ensure courts are staffed with judicial officers able to recognise and meet the imperatives of legal system reform. Nor is it sufficient to ensure the many persons who currently feel disenfranchised from the legal system truly 'have a voice' and 'will be heard'. For until they do, equality before the law exists in theory, not in practice.³⁶⁷

A further argument for seeking to ensure that top level courts better reflect society is based on appearances, as 'public confidence in the courts is dependent upon how the judiciary is perceived by the public'.³⁶⁸ Writing about the judiciary in England & Wales, Malleon argues:

Increasing the representatives of the judiciary can provide the judges with an essential opportunity to demonstrate their accountability and so secure public support. As public scrutiny and criticism of the judiciary increases, this means of regaining and maintaining public confidence will become increasingly critical. Since the judiciary cannot comply with the democratic requirements of electoral accountability, this method of social accountability amounts to an essential form of legitimacy. If this is recognised, then it can be argued that whether or not a more socially reflective judiciary produces a means to reflect consensus or common sense in its decisions, it is important and necessary to change the background of the judges for its own sake.³⁶⁹

A recent case highlighting the potential difficulty caused by the absence of women Law Lords is *R v. A*, which concerned the compatibility between a statutory provision designed to shield a rape complainant from cross examination about her previous sexual history with a

³⁶⁶ Barbara Hamilton, 'Criteria for judicial appointment and "merit"' (1999) 15 *Queensland University of Technology Law Journal* 10, 15.

³⁶⁷ p. 17.

³⁶⁸ Simon Shetreet, 'Who will judge—reflections on the process and standards of judicial selection' (1987) 61 *Australian Law Journal* 766, 777.

³⁶⁹ Kate Malleon, *The New Judiciary – The effects of expansion and activism* (Ashgate: 1999), p.114.

defendant's right to a fair trial.³⁷⁰ The Fawcett Society, a women's rights pressure group, applied to intervene to argue that an all-male Appellate Committee was not an 'impartial tribunal' as required by Article 6 of the ECHR. In its unsuccessful petition for leave to intervene, the Fawcett Society submitted that the subject matter of the appeal was unusual because:

First...it involves a direct conflict between, on the one hand, the right of male defendants to a fair trial in sexual offences cases, and, on the other hand the rights of female complainants to respect for their privacy and dignity, and not to be subjected to inhuman and degrading treatment; Second, how to strike this balance is an issue which is deeply contested on gender lines; in particular, an important aspect of the issue for decision, namely whether the existence of a previous sexual relationship between a female complainant and a male accused is relevant to whether consent was in fact given on a particular occasion, is a question on which there can be shown to be a marked divergence between male and female perspectives; Third, this is a conflict between rights which are now recognised as fundamental in English law (Articles 3, 6(1) and 8 of the ECHR having been given effect by the Human Rights Act 1998 since 2 October 2000), and under the framework of the Human Rights Act its definitive resolution by the UK's highest court therefore has serious democratic implications.

Putting to one side the more difficult argument that a court including women would have reached a different decision,³⁷¹ the Fawcett Society's argument based on *appearances* needs to be taken seriously. At the very least, when a top level court is dealing with matters of such potential controversy, and in a society attuned to issues of gender balance in public institutions, it seems unwise to leave the top court open to criticism on this ground.

In the UK, the approach to changing the gender balance the judiciary has so far been to rely on 'trickle up' — the supposition that the composition of the judiciary will change in line with changes in the make-up of the Bar and the lower courts, from where senior judges are drawn. Lady Justice Hale commented recently that 'Most serious outside observers know that this will not happen.'³⁷²

³⁷⁰ [2001] U.K.H.L. 25. The provision in question was the Youth Justice and Criminal Evidence Act 1999, s. 41.

³⁷¹ Cf. Cooke P., as President of the New Zealand Court of Appeal: 'The six judges who have sat on this case in the two courts are all men, most of us more than middle aged. This is a type of case suggesting a woman's insight would be helpful on a least one of the Benches in assessing the claims, personality and situation of a litigant woman and arriving at justice between man and woman'. We owe this example to a draft paper by Kate Maleson 'Selecting and appointing judges in the era of devolution and human rights' (prepared for an ESRC Future Governance Programme seminar in London on 20 July 2001).

³⁷² Frances Gibb, 'Choice of judges "fails democratic legitimacy"', 4 April 2001.

The experience of legal systems outside the UK may provide lessons for alternative ways forward.³⁷³ It is notable that the first and so far only female judge to sit as a member of the Judicial Committee is the Chief Justice of New Zealand, Dame Sian Elias.³⁷⁴ Other major top level courts all have women members. The Canadian Supreme Court and the *Bundesverfassungsgericht* (the German constitutional court) are both led by women. Overseas experience indicates that a change in gender balance of top courts requires a clear political commitment to change. In the USA, Presidents Carter and Clinton both pursued policies of selecting more women, as well as African Americans and other minorities, to the federal bench — though it was President Reagan who appointed the first woman to the US Supreme Court in fulfilment of an electoral pledge.

12.3.2 *Ensuring sufficient expertise across fields of law*

A top level court with a general jurisdiction cannot have expertise in all areas of law. For many years, however, trenchant criticism has been made of basic gaps in the Law Lords' fields of expertise — most notably English criminal law. Drewry and Blom-Cooper comment that the 'jurisprudential output [in criminal law] continues to give less than satisfaction to practitioners, who complain that too little expertise in criminal law is evident among their Lordships. Lords Mustill and Steyn have proved the exceptions to the rule'.³⁷⁵

Criminal appeals have not in the past formed a large proportion of the Appellate Committee's case load (though criminal cases from legal systems outside the UK are a larger proportion of the Judicial Committee's work). The Human Rights Act may change this as a large proportion of Convention right points will arise in criminal trials. The need for expertise in criminal law is, arguably, now greater than it was in the past.

A different problem in relation to criminal law may be emerging from the Scotland Act 1998. A consequence of the devolution settlement is that questions of compliance with Convention rights by the prosecuting authorities in Scotland are 'devolution issues'. The first six devolution appeals heard by the Judicial Committee all arose in this context.³⁷⁶ Because the Law Lords sitting in the Appellate Committee have never before needed to deal with Scots criminal law, there has not previously been a need for expertise in this field. It is open to question whether the current arrangement of having two Scottish Law Lords is capable of providing sufficient depth and breadth of expertise in this expanding area of work.

Generally, the Human Rights Act will call for breadth and depth of understanding of human rights law and values — 'experience, expertise, specialisation and temperament'³⁷⁷ of a kind

³⁷³ As with other questions of comparative lesson learning, detailed exploration of the methods by which policies and practices may be transferred from one country to another fall outside the present report and are being pursued in other publications: see Preface.

³⁷⁴ Robert Verkaik, 'First all-female appeal court "just a fig leaf" say women lawyers', *The Independent*, 11 February 2001 and 'More women in wigs? We'll be the judge of that', *The Independent*, 7 May 2001.

³⁷⁵ G. Drewry and L. Blom-Cooper, 'The Appellate Function' in B. Dickson and P. Carmichael (eds), *The House of Lords: its Parliamentary and Judicial Roles* (Oxford: Hart, 1999), pp. 113, 117.

³⁷⁶ See Part 2 above.

³⁷⁷ Words of Lord Cooke, H.L. Debs., col. 1967 (28 October 1998), discussed in Part 9 above.

that is not found only, or mainly, among the judges of the UK's intermediate courts from where appointments as Law Lords are habitually made. For this reason, the creation of a specialist constitutional court may be preferable to expecting a top level court to be a Jack-of-all-trades.

If, however, a generalist court is preferred, then it may be desirable for appointment criteria to include an explicit exhortation to appoint judges with a range of complementary fields of expertise.

12.3.3 Inclusion of judges from different legal systems

So long as Appellate and Judicial Committees, or their successor bodies, continue to hear some appeals from each of UK's three distinct legal systems, the appointment of judges from each of those legal systems will be desirable.

One reason for this is to ensure some inside knowledge of each legal system and its substantive laws is on hand. Thinking radically, if this is the main rationale for ensuring that the composition of the top courts reflects the whole the UK, then practices ought now to recognise that inside knowledge and experience of two other legal systems to which the UK is connected — European Community law and the ECHR — is also desirable. The precedent of Lord Slynn's appointment as a Law Lord following service in the ECJ could, possibly, establish a useful practice.

A second reason for seeking to ensure an appropriate national balance is that the top level courts are important national institutions of the whole UK in which territorial representation is needed.³⁷⁸ This rationale recognises a symbolic, nation-binding function of top level courts. Such a court without Scottish judges would hardly constitute a 'whole UK' institution, yet this might be a consequence of any future decision by the Scottish Parliament to end civil appeals to the House of Lords (or its successor body) from the Court of Session. The argument, a variant on the 'West Lothian question' in the UK Parliament, is that if the UK's top court determined no Scottish appeals, there is little justification for including Scottish judges on its bench.

Issues of national balance will take on special legal and political importance in cases where the Judicial Committee (or its successor body) has the task of determining devolution issues about the allocation of power between the UK government and the devolved institutions. One difficulty, however, is that — unlike Scotland and Northern Ireland — Wales does not have a separate legal system and there has never been a suggestion that there should be a Welsh Law Lord. While devolution has not created a separate Welsh legal system, there is an argument that in devolution cases Welsh perspectives should be represented on the court. But how could one define a 'Welsh judge'? This difficult issue might usefully be referred to the National Assembly for Wales to consider what criteria should be devised to decide whether a prospective Law Lord had sufficient connection to Wales. In light of the reality of

³⁷⁸ See Parts 1 and 2 above.

bilingual legislation made by the National Assembly this might include the ability to understand the Welsh language.

There is also a wider issue about the overall balance of the top level court in devolution cases. Despite the differences in the individual devolution settlements, there will be cases where the Judicial Committee hands down rulings which affect the competence of all three devolved governments or assemblies. Given this, it may be desirable to ensure that all three devolved parts of the UK are represented on the panels which hear devolution cases, though what the balance between them should be is unclear.³⁷⁹

12.3.4 Political skills

Judges on top level courts frequently make decisions of extreme political importance and deep controversy. Under the Human Rights Act, the Law Lords must consider arguments and evaluate evidence of what 'is necessary in a democratic society'. Under the devolution Acts they will inevitably deal with hotly contested legal disputes between the UK government and one or more of the devolved administrations. In such cases, the exercise of legal judgment, and the manner in which it is explained, requires political astuteness that is different in character from that needed in adjudication in most ordinary civil and criminal cases. A brilliant career at the commercial Bar or prior judicial service in the Chancery Division will not necessarily ensure that a candidate has the requisite political skills (in this broad, non-partisan sense). The criterion of professional merit may need to be broadened to encompass these attributes.

There is an argument that the process of wringing politics out of the appointments process in the last 20 years or so has left the senior judiciary overly insulated from the political world. Arguably, major structural reform which ends the Law Lords' place within the House of Lords may exacerbate the problem. Lord Wilberforce, in his submission to the Royal Commission on Reform of the House of Lords, justifying the Law Lords' continuing legislative role on the following basis.

... Participation in the general work of the House is of great value to the Law Lords themselves. Before their appointment, they have, as judges in the Higher Courts, been fully occupied in strictly legal work, being bound to apply the law strictly in accordance with precedent and the reasons of (inter alia) the House of Lords. They acquire a professional cast of mind. When they are appointed Law Lord, their work takes on a different dimension: they are not bound by previous decisions, and while not in the strictest sense, free to legislate, they are able to take a broader view of legal policy. If this were not so, they would simply replicate the work of the Court of Appeal and a further tier of appeals would be said to be unnecessary and undesirable. Involvement in the work of the House leads to a greater understanding of the problems of the legislator, of social trends, of the proper limits of judicial innovation.

³⁷⁹ See further Part 13 below.

Ending the Law Lords' parliamentary role would, on this view, deprive them of a necessary link to the political world and the possibilities of learning about a whole range of ideas and attitudes.³⁸⁰

12.3.5 *Term of office*

There is no statutory lower age limit for appointment as a Law Lord, though in practice the use of the overarching professional merit criterion means that most Law Lords are appointed in their early sixties. The term of full-time appointment now ends at the age of 70 years.³⁸¹ Law Lords who retire from full-time office may, however, continue to sit on an ad hoc basis until the age of 75 years in both the Appellate and Judicial Committees.

Doubts may be raised as to whether the current arrangements for retirement are constitutionally proper because of the theoretically large potential pool of non-permanent judges this creates from which panels are selected to hear particular cases.³⁸² That said, the contribution of retired Law Lords to the work of both the Appellate and Judicial Committees is regarded by many as valuable.³⁸³

If a new court is created, consideration will have to be given to the length of judicial appointment. There are three main options: life-long appointment, brought to an end by voluntary retirement or death in office (as in the US Supreme Court); appointment until a specified age; and appointment for a fixed, non-renewable term (as in the Spanish *Tribunal Constitucional*).³⁸⁴ There are advantages and disadvantages to each arrangement, but detailed consideration of these falls outside the scope of this report.

12.4 **Strategies for reform**

Two main options exist for securing reform of the composition of the UK's top level courts which may address some of the problems identified above — the absence of a woman Law Lord, the lack of expertise in some fields of law, and the need to fine tune national representation. These are:

- the wider and more frequent use of ad hoc judges brought in to hear particular cases;
- to broaden the pool from which full-time appointments are made beyond the judges serving in the UK's intermediate courts of appeal.

³⁸⁰ See Part 16.

³⁸¹ For judges appointed after 31 March 1995: see Judicial Pensions and Retirements Act 1993, s. 26 which was brought into effect on 31 March 1995.

³⁸² See Part 15.

³⁸³ See for example the evidence of JUSTICE to the Royal Commission on Reform of the House of Lords, page 17, para 45. JUSTICE argued that retired members of the new supreme court proposed in their submission, should be appointed to the Upper House.

³⁸⁴ Note also that the Royal Commission on Reform of the House of Lords recommended that Law Lords should be appointed to the House of Lords on 15 year terms (like other peers), but subject to automatic reappointment until they reached the judicial retirement age.

12.4.1 *Use of ad hoc judges*

The Senior Law Lord exercises power, delegated to him by the Lord Chancellor, to call upon a range of judges other than the Law Lords to sit on cases in the Appellate and Judicial Committees.³⁸⁵ Assuming that it is an acceptable practise, its wider use would enable other judges and qualified people to join the top court for particular appeals — for example, a specialist criminal judge in criminal appeals, a judge of the Family Division in family cases, and more Scottish judges to join the Judicial Committee when it is considering Scottish devolution issues. This strategy has, however, very limited potential to address the absence of women Law Lords because so few senior judges below the Law Lords (the pool from which ad hoc judges are most likely to be drawn) are female.

12.4.2 *Widening the appointment pool*

The appointment pool could be widened to include a much broader range of appropriately legally qualified candidates, including an:

admixture of lawyers with broader experience, with the aim of enlarging the courts' political understanding and horizons. Candidates would be distinguished academics and other lawyers of experience of public life, including here lawyers from all quarters.³⁸⁶

Breaking free from the straightjacket of only appointing judges from the intermediate courts of appeal would require no compromise of the professional merit principle. Lawyers in academic life, practising barristers and advocates, solicitors in commercial practice, senior members of the Government Legal Service, members of the UK's Law Commissions and first instance judges (to identify only some sources) possess the expertise in the law required for appointment to the top courts. Broadening the pool of candidates need not require amendment of the statutory qualification criteria. The Appellate Jurisdiction Act 1876 allows for the appointment of a person who has a professional qualification for at least 15 years.³⁸⁷ There may, however, need to be a departure from the policy of normally requiring part-time judicial service prior to appointment to a full-time office.

The appointment of academic lawyers directly to top level courts is a normal practice in many constitutional courts in other legal systems (where they often form the majority of the court's members). In any event, the old boundaries in the UK between academic endeavour and judicial service are rapidly breaking down as many of the Law Lords, and other senior judges, have produced scholarly writing in the form of textbooks and journal articles. The suspicion sometimes aired in the UK that, if appointed to appellate courts, academics with a stake in the future development of their specialist subject areas would use their positions to further their agendas regardless of the merits of cases, is wholly groundless.

³⁸⁵ See Part 15.

³⁸⁶ Sir Thomas Legg, 'Judges for the New Century' [2001] *Public Law* 62 at 68.

³⁸⁷ See above. Rights of audience need not have actually been exercised, merely held.

Prior experience as a trial judge, or even at appellate level, is not regarded as an essential pre-requisite in many other courts. Chief Justice Rehnquist had no judicial experience before his appointment to the US Supreme Court. Justice Blanchard of the New Zealand Court of Appeal, who has also sat on the Judicial Committee, was appointed to the High Court of New Zealand from a post as a commercial transaction partner in a large law firm. If some prior judicial experience is desirable before appointment to the highest courts, whether for academics or non-litigious lawyers, a short period of service in a lower court may be sufficient.

13 Judicial appointment processes

13.1 Introduction

The appointment of Law Lords is increasingly attracting media attention.³⁸⁸ As Sir Thomas Legg QC recently observed, 'Who our judges are, and how they are selected, is a public matter and fully justifies public interest and debate.'³⁸⁹ This part of the report reviews how Law Lords are appointed and suggests models for reform.

13.2 The appointment of Law Lords

Law Lords are appointed by the Monarch on the advice of the Prime Minister. The Prime Minister is provided with a list of potential appointees by the Lord Chancellor. The extent to which the Prime Minister is guided by the Lord Chancellor, and the number of names put to the Prime Minister, are unknown and presumably dependent on the characters of the Prime Minister and Lord Chancellor and the relationship between them.³⁹⁰ It at least seems clear that unlike in Australia the decision is one shared (though perhaps in varying ways) between these two Ministers, that the Cabinet does not play a role, and that partisan politics does not usually, if ever now, play a part. In considering the list of candidates to be put to the Prime Minister, the Lord Chancellor will consult with senior members of the judiciary.³⁹¹

13.2.1 Lack of transparency

A criticism made of the appointment process for Law Lords is that it lacks sufficient transparency,³⁹² as both the selection process and decision to appoint Law Lords takes place out of the public eye. In opposition, the Labour Party proposed the introduction of a Judicial Appointments Commission for the judiciary generally in England & Wales, and an independent appointment committee specifically for the Law Lords.³⁹³ In office, Lord Irvine LC appointed Sir Leonard Peach to conduct an overview of the appointment process, though excluding consideration of the question who should exercise powers of appointment. Sir

³⁸⁸ See e.g. Martyn Day and Rabinder Singh, 'Wanted: a judiciary fit for a modern society', *The Times*, 7 July 2000; George Rosie, 'Lets peeble the judges again', *New Statesman*, 17 January 2000; Robert Verkajk, 'Law lord calls for "democratic" system to appoint new judges', *Independent*, 12 July 2000, reporting on a speech given by Lord Steyn; John Griffith, 'How the Government is compromising the judges', *The Daily Telegraph*, 23 April 2001; and, reporting a speech given by Lady Justice Hale, Frances Gibb, 'Choice of judges 'fails democratic legitimacy'', *The Times*, 4 April 2001. In Parliament Lord Lester of Herne Hill has maintained a sustained critique.

³⁸⁹ 'Judges for the New Century' [2001] *Public Law* 62.

³⁹⁰ There were doubts during Margaret Thatcher's premiership as to how readily she accepted the advice of her Lord Chancellor. See Diana Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart, 2001), ch. 6.

³⁹¹ *The Lord Chancellor's Policies and Procedures on Judicial Appointments* (online at www.lcd.gov.uk), discussed in Part 12, above.

³⁹² See Part 3.

Leonard reported in December 1999, recommending a commission with power to scrutinise the judicial appointments process. A Judicial Appointments Commission was established in early 2001 with power to scrutinise the appointments process and the first Commissioner, Sir Colin Campbell, was appointed in March 2001. The Commission has no direct role in the appointment process.³⁹⁴

As judicial appointments to lower level courts in England & Wales are made with increasing degrees of openness, including the advertisement of posts, the contrast with the confidential nature of appointments to the highest courts grows starker. Developments in Scotland will have a similar effect. There the Scottish Executive announced earlier this year that it would establish a Judicial Appointments Board with a central role in the selection of Scottish judges up to the Inner House. The Scottish Justice Minister, making very clear that reform is not required because of any actual partiality, or lack of ability in the judiciary presented the need for change in this way:

The main concern [commentators] have about the current system is that it is too secretive and is not open enough to public scrutiny. Following on from that is the charge that this lack of transparency can lead to charges of cronyism.³⁹⁵

In a written answer in the Scottish Parliament the Justice Minister provided further details of the proposal, stating it would be:

Chaired by a senior non-legal figure, and will have other lay members, who will be appointed following the Nolan appointment procedures. It will also contain representatives of the judiciary and legal professions, so that lay and legal members will be equally balanced. ... Its role will be to advise the First Minister on names of new appointees to the office of Judge of the Court of Session... It will determine its own procedures, but these will be subject to guidance from the Scottish Ministers. All appointments will be advertised and appointments will be made solely on merit. The board's procedures will include a requirement that the legally qualified members are satisfied as to the legal capacity of those recommended. The Board will make its recommendations to the First Minister, who will consult the Lord President of the Court of Session (as he is obliged to do by the Scotland Act 1998). The First Minister will expect to accept the advice of the board unless there is good reason to the contrary. The Lord Advocate will no longer routinely advise on appointments, but will advise the First Minister in any case of uncertainty about the Board's recommendations.³⁹⁶

³⁹³ Richard Norton-Taylor, 'Constitution--Labour's policy review: elected second chamber would replace House of Lords', *The Guardian*, 19 May 1989.

³⁹⁴ See Kate Malleson, 'Scrutiny by appointment', *The Times* 27 March 2001.

³⁹⁵ Speech by Jim Wallace QC, Minister of Justice 'Judicial Appointments, an Inclusive Approach' 14 March 2001.

³⁹⁶ Written answer of Mr Jim Wallace (Minister of Justice and Deputy First Minister), 14 March 2001, Scottish Parliament Official Report.

One of the reasons for the Board was, while keeping merit as a guiding principle, to increase the representativeness of the Scottish judiciary:

Merit will be the criterion on which judges and sheriffs are appointed, but part of the purpose of the board – particularly the lay membership – will be to ensure that the people whom it recommends understand the communities they serve.³⁹⁷

It is too early to assess what effects the Board will have on the make up of the Scottish judiciary. If there is no change to the process of judicial appointment in England & Wales, a consequence will be that in time the Scottish Law Lords will have gone thorough a rather different appointment process to their counterparts in England & Wales and Northern Ireland.³⁹⁸

13.2.2 Overseas comparisons

The UK system is similar to the appointment processes for Justices of the Canadian Supreme Court and the High Court of Australia (see Table 1, below). Both the Canadian and Australian systems have also come under sustained criticism for a lack of transparency and a high degree of executive control, including the fact that the federal governments have the dominant role, leaving the provinces and states respectively with very little say.³⁹⁹

Appointments to the *Bundesverfassungsgericht* and the US Supreme Court provide a contrast. In the USA, the Senate's role in the appointments process, with the now notorious Senate Judiciary Committee hearings at which candidates are questioned, provides both a check on the Executive, as well as providing a public opportunity to learn about Supreme Court justices before appointments are made. The confirmation process, while gruelling, is also valued by at least some members of the Supreme Court. There are, however, drawbacks to such legislative involvement including the potential for judicial appointments to become the object of partisan politics. The reality is that appointments may simply be 'arranged' by senior party officials behind the scenes or, alternatively, the appointment system may become paralysed as political parties refuse to compromise. The requirement of a two-thirds majority for election of *Bundesverfassungsgericht* judges, and the same majority for the 8 members of the Spanish *Tribunal Constitucional* in effect requires the parties to agree between themselves on candidates which all sides can accept. These judges are all highly, and widely, regarded. Although they may be associated with a particular political party there is no suggestion that they vote on the court in order to further the interests of the side of politics

³⁹⁷ Mr Jim Wallace, question 8, 22 March 2001, Scottish Parliament Official Report, (S10-3169).

³⁹⁸ There is a prospect of reform in Northern Ireland: see Criminal Justice Review Group, *Review of Criminal Justice in Northern Ireland* (March 2000).

³⁹⁹ In Australia the Federal Attorney-General is under a statutory obligation to consult the state Attorneys General. There is no equivalent obligation on the Canadian Minister of Justice, although there is evidence of some informal consultation.

which proposed them. However, the special majority also means that judicial appointments in those countries are a far more consensual affair than in the USA.

Table 1: Top courts and their judges

Court (number of judges)	Appointing authority	Comment
<i>High Court of Australia (7)</i>	Federal A-G must consult State A-Gs. Then a matter for the A-G and Cabinet (the balance depending on the political strength of the A-G) who nominate; Governor General appoints.	<ul style="list-style-type: none"> • The states, although enjoying a statutory right of consultation would like more say in the appointment of Justices • The whole Cabinet takes an interest in the appointment process and the barriers to partisan political interests playing a part are low. • The A-G in seeking to answer criticisms of the process as overly secretive has attempted to address the problem by publicising in public lectures at least the <i>way in which he goes about</i> selecting candidates to put to Cabinet. • Former politicians have been appointed to the bench • The Chief Justice is appointed separately by the Executive and may be drawn from outside the Court.
<i>Supreme Court of Canada (9)</i>	Minister of Justice (who is also the Federal A-G) and Cabinet. Strong Prime Ministerial role. No requirement, or practice of consulting the Provinces.	<ul style="list-style-type: none"> • Provincial governments have no formal right of involvement in the appointment process, though they may be informally consulted. There is pressure for greater formal involvement of the Provinces. • The appointment process for Justices is heavily focused on the Minister of Justice/Federal A-G, though the Prime Minister plays a role in selecting Chief Justices. • The position of Chief Justice has traditionally alternated between a francophone Quebec judge and a judge from one of the other Provinces.
<i>US Supreme Court (9)</i>	President, with the 'advice and consent of the Senate'. The Senate Judiciary Committee holds hearings at which the nominees are questioned by Senators	<ul style="list-style-type: none"> • The simple majority required to secure Senate approval means there is no requirement for the political parties to agree between them on candidates which both are content to appoint. While many candidates are appointed with the approval of both sides of politics there are also times when a Justice has been appointed only because one party is able to use its Senate majority to secure appointment(e.g.

		<p>Justice Clarence Thomas).</p> <ul style="list-style-type: none"> • The Chief Justice is appointed separately, requiring Presidential nomination and Senate approval. • The need to have a bench which at least to some extent reflects the diversity of US society is acknowledged: the Court has one black member, two women and one justice of Italian decent.
<i>Bundesverfassung sgericht (16)</i>	8 each selected by the Judicial Selection Committee of the <i>Bundestag</i> (the Parliament) and 8 by the <i>Bundesrat</i> (in which state governments are represented). A 2/3 vote is required in each institution.	<ul style="list-style-type: none"> • The super-majority required for appointment means that only Justices which both sides of politics can agree to are appointed. • There is a practice that each side of politics may effectively control eight seats each. • Where there is a coalition government the practice has developed that the majority coalition partner will give one of its nominations to the junior coalition partner. • Justices nominated by political party do not however necessarily have any formal, or even significant informal links to the nominating party. Parties may nominate on the basis of perceived 'ideological fit' so far as it can be discerned from e.g. academic writings.
<i>Spanish Constitutional Court (12)</i>	2 by the Spanish central government; 2 by the Council of the Judiciary; 4 each elected by the lower and upper houses of Parliament. Consideration being given to holding hearings in relation to the Parliamentary appointments. All 12 appointed by the King.	<ul style="list-style-type: none"> • As in Germany, the political parties, in relation to the Justices nominated by the Parliament, divide the appointments up between them. • Surprisingly (given the presence of strongly nationalist areas, such as Catalonia), there is no formal requirement, or informal pressure for the Court's judges to be territorially balanced (as there is in Canada). While there is a Catalan judge at present this only reflects the fact that for a period the central Popular Party government depended on the Catalan nationalist party for its majority in the Madrid national Parliament. The Basque country simply refuses to take part in the Court. • An early case of note concerned attempts by the national government of alter the appointment of those on the Judicial Council (which nominates 2 of the judges); the issue being that control of the Council allowed for potential control of 2 of the Courts appointments. • The President and Vice-President of the Court are elected by the other judges every 2 years.

13.2.3 *Executive control over the appointment process*

Another criticism made of the appointment process for Law Lords is that, while the Executive's involvement does provide for democratic legitimacy, its level of control is incompatible with the autonomy of the top courts.⁴⁰⁰ Given the political importance of the senior judges' roles, it is clear that elected politicians should play *some* role in the appointment of the most senior judges. Some sort of a role is also consistent with the institutional quality of accountability.⁴⁰¹ The issue is as to the nature and extent of that role. Currently, the power of appointment is shared between the Lord Chancellor and the Prime Ministers; there is no check on these two office holders beyond their own integrity. In modern times this has been, almost without exception, sufficient, with Lord Nolan able to comment:

In some countries less happy than ours, it may need great courage for a judge to decide a case against the government. In this marvellous country, all that happens if you decide a case against the government is that you get rather good press and very possibly promoted.⁴⁰²

However, there was some doubt about Mrs Thatcher's role in appointments to the top courts while she was Prime Minister. A former Lord Chancellor, Lord Mackay of Clashfern, in evidence to the Home Affairs Select Committee noted:

Chairman: I think you answered, just to confirm to Peter Butler, that all your recommendations [to the Prime Minister] had been accepted?
Lord Mackay: I was careful not to say that. What I did say was that I make these recommendations in confidence to the Prime Minister. I have never been disappointed by any recommendations that the Prime Minister has made to Her Majesty during my time – neither surprised nor disappointed.⁴⁰³

The Committee subsequently reported it had 'some qualms' about the role of the Prime Minister in judicial appointments and questioned whether Prime Ministers should continue to have a role in the appointments process.⁴⁰⁴

The Australian, UK and Canadian problem of a lack of a check on the Executive power of appointment is answered in the USA by the involvement of the Senate. While the President nominates the Chief Justice and Associate Justices, their confirmation requires a simple majority vote in the Senate. The Senate votes after its judiciary committee has carried out hearings, at which the nominee appears. The process is now infamous for the experiences of

⁴⁰⁰ See Part 3.

⁴⁰¹ See Part 3.

⁴⁰² This example and the one following are drawn from a draft paper by Kate Malleon, 'Selecting and appointing judges in the era of devolution and human rights' (written for an ESRC Future Governance Programme seminar on 20 July 2001).

⁴⁰³ Home Affairs Select Committee, Report on Judicial Appointments Procedures, 1996, vol. II, para. 459.

Robert Bork (who did not get confirmed) and Clarence Thomas (who did). It should be noted though that these two examples are the exception.

Two factors are important in making for contentious confirmation battles in the USA. First, the qualities of the candidate appointed. Well qualified, moderate candidates such as Associate Justices Souter (a nominee of President Bush, Snr.), Breyer and Ginsburg (both President Clinton's nominees) were all easily confirmed. Secondly, the simple majority required to confirm candidates means that there is no institutional requirement for consensus. This suggests that if the UK were to consider some form of legislative confirmation procedure, that the process by which candidates are initially selected remains crucial. It would make sense to retain the skills of the Lord Chancellor's Department's Judicial Appointments Division in some way. Secondly, requiring a super-majority to confirm appointments as in Germany, and in respect of eight of the Spanish *Constitucional Tribunal* judges, tends to temper partisan politics, as the parties are forced to put forward candidates both can agree to.

13.3 Options for reform

Whether or not there is a change in the structures of the Appellate and Judicial Committees, the way in which the Law Lords are appointed could be reformed.⁴⁰⁵ Three options, drawing upon both the UK and overseas examples discussed in the previous section, will now be set out. Variations and additional issues relevant to all four models are set out immediately after the models. As with the models for major structural change to the UK's top courts,⁴⁰⁶ the options presented here are 'ideal types' and would have to be fine tuned to fit with whatever structural model might be chosen.

13.3.1 Option 1: ministerial nomination followed by parliamentary confirmation

Under this model the Executive, in the form of the Prime Minister and the Lord Chancellor (or a future Minister of Justice), would retain the right to select the top court judges. While the current selection process may lack transparency, Sir Leonard Peach noted that he was:

impressed by the quality of the work... being done by the Judicial Group [of the Lord Chancellor's Department] and by the professionalism and depth of experience of the civil servants involved in the various processes.⁴⁰⁷

The process could be supervised by the recently appointed Judicial Appointments Commissioner (whose jurisdiction would have to be extended beyond his current ambit of

⁴⁰⁴ Home Affairs Select Committee, Report on Judicial Appointments Procedures, 1996, vol. I, para. 128.

⁴⁰⁵ We suggest that the judges of the top courts should continue to be titled 'Lords of Appeal', or colloquially, 'Law Lords'.

⁴⁰⁶ See Parts 7-10 above.

⁴⁰⁷ Sir Leonard Peach *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales* (London: LCD, 1999), p. 3.

appointments within for England & Wales only). Once a candidate was selected, he or she would be required to appear before a parliamentary select committee. Confirmation or rejection would be by vote in one or both Houses of Parliament.

This option has the advantage of maintaining a reasonably strong degree of Executive input in the process, including the highly skilled Lord Chancellor's Department Judicial Appointments Division, while also introducing a parliamentary check on the Executive. It would increase the openness of the process, and by involving Parliament, the Law Lords' democratic legitimacy.

One possible danger with this model is that parliamentary committee hearings may provide an irresistible opportunity for adversarial politics of a damaging kind. The respect shown by MPs and peers towards the senior judiciary on the rare occasions in which they have appeared before parliamentary committees may, however, suggest this is unlikely and that hearings could be conducted with tact and decorum.⁴⁰⁸ Partisan politics could also be discouraged if confirmatory votes in Parliament were by a super-majority, of say two thirds, to ensure that the Executive only nominated candidates who were likely to command cross-party support.

13.3.2 Option 2 – a Judicial Appointments Commission

A different option would be to establish a new Judicial Appointments Commission with the specific task of selecting candidates for appointment as Law Lords. In its most expansive form, it could make the final choice as to who to appoint and perhaps even make the appointment. There are, however, other options: the commission could forward names of its nominees to the Parliament for confirmation; or it could present a confidential, unranked shortlist to an appropriate Minister, who would then choose from that shortlist who to recommend to the Monarch for appointment.

The procedures and membership of such a commission would clearly be central to its success. As to procedures, the commission might be empowered to work in private, or to hold public hearings. Such hearings might, arguably, have advantages over parliamentary hearings of the kind suggested in Model 1 as even less likely to be overtly partly political.

Membership of the commission would need to inspire confidence in its competence, independence and impartiality. Important choices in the commission's institutional design would be: the qualifications required for appointment to the commission;⁴⁰⁹ the status and length of the commissioners' office; and how members of the commission should themselves be appointed.⁴¹⁰

⁴⁰⁸ See *e.g.* the appearance of senior members of the judiciary before the Joint Committee of Human Rights on 28 March 2001.

⁴⁰⁹ In Scotland, the new Judicial Appointments Commission is to have more lay members than legally qualified members.

⁴¹⁰ *e.g.* the devolved Executive bodies might nominate some members to the commission.

There are foundations upon which to build such a commission since the appointment of Sir Colin Campbell as Judicial Appointments Commissioner in England & Wales. The other UK experience upon which to build comes from the Scottish Judicial Appointments Commission (through which, in time, future Scottish Law Lords may be familiar with, having gone through its processes to be appointed to courts in Scotland). The experience in many legal systems overseas is that well organised commissions can both improve the standing of the judiciary and lead to a broadening the types of candidates appointed.⁴¹¹

There are, however, some potential disadvantages with this model. Judicial appointments commissions may themselves become the object of partisan political interest; a number of commissions in the USA are faulted on this basis⁴¹² and problems have arisen in Spain.⁴¹³ A second objection to judicial appointments commissions is that they may appear elitist and even anti-democratic, as they remove the control of judicial appointments from both the Executive and the legislature.

13.3.3 Option 3: nomination by all governments within the UK

In this model, each of the governments with the UK — the UK government (and de facto government for England), the Scottish Executive, the Northern Ireland Executive and the National Assembly for Wales — would be allocated responsibility for making appointments to a specified number of seats on the court. For instance, if the top level court comprised twelve judges, the UK government might be responsible for eight posts, the Scottish Executive two, and the Northern Ireland Executive and the National Assembly for Wales, one each. The criteria and methods by which each government selects its nominees might either be left as a matter for each government to decide, or be conducted in accordance with a common set of criteria and procedures established by a UK Act of Parliament.

The option has the attraction that it is consonant with the process of devolution. It could also provide a real sense of 'ownership' of the top court by all parts of the UK, thus helping to strengthen the Union. It would be particularly suitable for use in conjunction with the UK court of justice model.⁴¹⁴ An obvious problem with the model is, however, its political feasibility. Moreover, introducing more hands into the appointment process would make it difficult to achieve balance in the court in terms of fields of expertise.⁴¹⁵

⁴¹¹ See Kate Malleson, *The Use of Judicial Appointments Commissions: A Review of the US and Canadian Models*, Lord Chancellor's Department, Research Paper No. 6 (1997).

⁴¹² See Kate Malleson, 'Selecting and appointing judges in the era of devolution and human rights', a draft paper for an ESRC Future Governance seminar on 20 July 2001.

⁴¹³ An early case in the Spanish *Tribunal Constitucional* concerned the makeup of the *Consejo General del Poder Judicial* (Judicial Council of the Judiciary), the representative body for all Spanish judges, which as one of its functions nominates for appointment two of the judges of the *Tribunal Constitucional*; there was concern that proposed reforms would allow greater political control of the *Consejo General*, and accordingly the *Tribunal Constitucional* itself.

⁴¹⁴ See Part 10.

⁴¹⁵ See para. 12.3.2 above.

13.3.4 *Option 4: nomination by the UK Parliament?*

Finally, if only for the purposes of academic discussion and to test the boundaries of the process of lesson learning from other jurisdictions, brief mention ought to be made of a model that would permit the UK's most senior judges — or some of them — to be selected and nominated for appointment by a committee of senior Privy Councillors within the UK Parliament. The inspiration for this suggestion are the arrangements established by some continental European constitutions, such as those of Spain and Germany, where one or both chambers of the legislature has responsibility for nominating for appointment some or all members of a constitutional court.⁴¹⁶ At first sight, such arrangements seem entirely alien to British political and legal traditions (though that is perhaps also true of some other recent constitutional innovations in the UK).

⁴¹⁶ See Table 1 above. In Spain, the upper and lower Houses of the *Cortes* each nominate four judges to the *Tribunal Constitucional*; there are twelve judges in total. In Germany, 8 of the 16 members of the *Bundesverfassungsgericht* are chosen by committees of selection in the *Bundestag* and the *Bundesrat*.

14 The Senior Law Lords

14.1 Introduction

In most top level courts, one of the court's judges is an undisputed first among equals. In the UK, however, the Senior Law Lord (currently Lord Bingham) and his deputy (currently Lord Slynn) are in an odd position because the Lord Chancellor remains — in theory and practice — the most senior judge of both the Appellate and Judicial Committees. Day to day responsibilities for the running of the two courts have been delegated by the Lord Chancellor to the Senior Law Lords. However, it remains open to Lord Chancellors to preside at hearings and, if one so chose, to revoke the administrative tasks currently delegated to the Senior Law Lords.⁴¹⁷

14.2 The office of Senior Law Lord

In 1984, the convention that the office of Senior Law Lord was automatically assumed by the longest serving Law Lord was altered. Lord Hailsham LC characterised the change as bringing the appointment of the Senior Law Lord 'into line with what is now the normal practice in other parts of the judicial system.'⁴¹⁸ The new procedure is for the Senior Law Lord and his deputy to be appointed independently, as a matter of Executive choice, following the appointment process for Law Lords generally: the Lord Chancellor puts a list of names to the Prime Minister who then recommends a candidate to the Queen, who makes the appointment.⁴¹⁹ In response to Lord Hailsham's statement, Lord Diplock expressed his full support for the change to what he termed the 'office of presiding over the Appellate Committee and the Judicial Committee of the Privy Council', adding that his long experience in appellate courts:

[had] taught [him] that the task of presiding over a plurality of judges in such a way as to promote an efficient and expeditious way of dealing with appeals is not the same as producing judgments which clarify and develop the law. The tasks call for different qualities. They may be combined in the same judge, but also they may not. To preside is a more taxing task, and increasing age may well render a judge less fit to undertake it, though still leave unimpaired his ability to produce judgments which clarify and develop the law. ...For efficient administration of justice in the highest court in the United Kingdom seniority ought not to be the sole criterion to preside.

⁴¹⁷ See JUSTICE, 'The Judicial Functions of the House of Lords: written evidence to the Royal Commission on the Reform of the House of Lords' (May 1999), para. 23; H.L. Debs., col. WA 220, 30 July 1999.

⁴¹⁸ H.L. Deb., vol. 453, col. 915-918, 27 June 1984. The reform was effected simply by the Lord Chancellor advising the Queen that this would be the new procedure.

14.3 The roles of the Senior Law Lord and the deputy Senior Law Lord

On a day to day basis, the Senior Law Lord carries out most of the functions assumed by the senior judge in all top level courts. He represents the court on official occasions, as when in March 2001 Lord Bingham appeared to give evidence to the parliamentary Joint Committee on Human Rights, alongside the Lord Chief Justice of England & Wales and the Master of the Rolls.⁴²⁰

In court, the Senior Law Lord presides over the panel on which he is sitting. Cases are normally listed so that the Senior Law Lord presides over one panel while the deputy presides over another panel sitting simultaneously. Presiding at hearings gives the two senior judges the ability to influence, in very general sense, the direction argument takes. Whoever is the presiding judge chairs discussion after the hearing and allocates responsibility for writing judgments.

The Senior Law Lord and the deputy oversee administration within the Appellate and Judicial Committee, working in conjunction with senior court officials. One important task is to approve listing arrangements for each legal term. This is done at a meeting about three weeks before the end of the preceding term attended by the Senior Law Lord, the deputy Senior Law Lord, the senior official responsible for judicial business in the House of Lords (the 'Fourth Clerk of the Table (Judicial)')⁴²¹ and his opposite number in the Judicial Committee (the 'Registrar of the Privy Council').⁴²² Because the UK's top courts do not sit *en banc*, listing arrangements require the exercise of discretion as to which Law Lord or other eligible judges hears each case. This fact has become the subject of comment and criticism.⁴²³

14.4 Reform of the Lord Chancellor's role as a judge of the top courts

The office of Lord Chancellor is renowned for its conflation of legislative, Executive, party political and judicial roles.⁴²⁴ The present Lord Chancellor is equally well-known for his vehement defence of the ancient office. Questions about whether a Minister of Justice would be a preferable constitutional arrangement, and whether the Lord Chancellor should continue to be head of the judiciary in England & Wales, fall outside the scope of this report.⁴²⁵ Instead, the focus is on the Lord Chancellor's role in relation to the judicial business of the House of Lords and the Judicial Committee, in particular whether the office of Lord

⁴¹⁹ See Part 13 above.

⁴²⁰ Minutes of Evidence, 26 March 2001.

⁴²¹ A post currently held by J.A. Vallance White.

⁴²² Currently James Watherston.

⁴²³ See Part 15 below.

⁴²⁴ See Diana Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart, 2001).

⁴²⁵ For a recent argument in favour of a Ministry of Justice see Sarah Spenser, *Time for a Ministry of Justice? The Future of the Home Office and the Lord Chancellor's Department* Paper for the IPPR seminar Remodelling Government, delivered 14 March 2001. See also: Andrew Grice, 'Think Tank with ties to No 10 backs cut in Lord Irvine's powers' *The Independent* 26 March 2001; Andrew Grice 'Blair plans

Chancellor is compatible with Article 6(1) of the ECHR and what consequences would flow from the Lord Chancellor relinquishing his right to sit as a judge.

14.4.1 *Compliance with Article 6(1)*

Although Lord Irvine LC has staunchly defended his right to sit as a judge — amidst growing calls for this practice to end — he actually sits judicially relatively rarely. He sat in the Appellate Committee in November 2000,⁴²⁶ March 1999,⁴²⁷ and April 1998.⁴²⁸ The arguments against the Lord Chancellor sitting as a judge have been well rehearsed, especially after the European Court of Human Rights' adverse ruling in relation to the Bailiff of Guernsey (a post which combines judicial functions with legislative and executive ones) in *McGonnell v UK*.⁴²⁹ In a nutshell, the main objection is that an officer who is a member of the UK Cabinet, a minister responsible of a major government department, the presiding officer of one of the Houses of Parliament, as well as a party political fundraiser, cannot constitute an 'independent and impartial tribunal' for the 'determination of civil rights and obligations' and criminal liability within the requirements of Article 6(1) of the ECHR. Using the tests of 'independence' enumerated by the Strasbourg court in *Findlay v UK* as a starting point,⁴³⁰ several potential difficulties with the role of the Lord Chancellor can be highlighted.

- Manner of appointment: Lord Chancellors are party political appointments and hold office for reasons of their loyalty to the government of the day.
- Term of office: the Lord Chancellor holds office at the pleasure of the Prime Minister.
- The existence of guarantees against outside influence: the only guarantee against outside pressures is a Lord Chancellor's personal integrity.⁴³¹ The test of Article 6(1) is not, however, focused on a subjective understanding of a judge's impartiality, but on that of a reasonable onlooker.

Ministry of Justice in big shake-up of Whitehall' *The Independent* 20 March 2001; David Faulkner 'Why the justice system needs a minister to fight its corner' *The Times*, Law Section, 12 June 2001.

⁴²⁶ *Murray v Foyle Meats Ltd* [2000] 1 A.C. 51.

⁴²⁷ *DPP v Jones* [1999] 2 A.C. 240

⁴²⁸ *Boddington v British Transport Police* [1999] 2 A.C. 143.

⁴²⁹ In his submission to the Royal Commission on Reform of the House of Lords, Lord Donaldson that 'the similarity between the position of the Bailiff and the Lord Chancellor is obvious.'

⁴³⁰ (1997) 24 E.H.R.R. 221. The case concerned the role of the convening/confirming officer in a Court Martial.

⁴³¹ Lord Irvine LC's political fundraising activities led to controversy earlier this year. The Lord Chancellor had suggested to lawyers attending a Labour lawyers dinner that they might contribute £200 each to the Labour Party. As some of these lawyers would in time be seeking to be made QCs, or to be appointed to the bench, there was the unfortunate potential for it to appear that the contribution could assist them in their future careers. See: Tom Baldwin and Frances Gibb 'Irvine risks loss of legal patronage' *The Times*, 20 February 2001; Robert Verkaik 'Lord Irvine faces new attack over judicial appointments', *The Independent*, 13 March 2001. Lord Irvine maintained he had not acted improperly, and that, in any event, he was establishing a new Judicial Appointments Commission which would have the power to scrutinise the appointments process: H.L. Debs., 21 February 2001, col. 814.

- The appearance of independence: Following the High Court of Justiciary's reasoning in *Hoekstra v HM Advocate* the involvement of the Lord Chancellor in individual hearings may taint the entire panel.⁴³²

Article 6(1) also requires impartiality. Arguably, the nature of the Lord Chancellor's office may suggest to a reasonable onlooker that a Lord Chancellor could lack impartiality. Lord Irvine accepts that it would be wrong to sit on cases which give rise to points under the Human Rights Act 1998 provisions on right to a fair hearing, but takes the view that there is a huge amount of litigation which does not involve the interests of the Executive and he can no reason why he should not sit on such cases.⁴³³ Despite this reassurance, the Lord Chancellor's continuing involvement in judicial business is likely to remain controversial.⁴³⁴

14.4.2 *Consequences of the Lord Chancellor ceasing to have a judicial role*

If the Lord Chancellor did cease to have a judicial role, the Senior Law Lords would exercise presiding and administrative powers within the Appellate and Judicial Committees (or their successor bodies) in their own right, rather than as delegated powers. Reform of the Lord Chancellor's judicial role would also have impacts outside the top courts and several constitutional points would need to be addressed.

Lord Chancellors have a role as protectors of judicial independence, it is said, because they may speak in defence of the courts at the heart of the Executive—where necessary, reminding their political colleagues of the boundaries between Executive, legislative and judicial authority. If the Lord Chancellor is not available to protect judicial independence, it may be necessary to consider other mechanisms to secure the courts from political interference. Several reform options canvassed elsewhere in this report could assist in the task:

- major structural change to create new top level courts with a clear institutional separation from both the legislature and the Executive⁴³⁵
- the creation of a more transparent appointment processes⁴³⁶
- reform of the funding and administration arrangements of the top courts.⁴³⁷

⁴³² *Hoekstra v HM Advocate (No 3)* (2000) SCCR. 367. In *Hoekstra*, the High Court of Justiciary held that one of the judges, Lord McCluskey, had made such intemperate statements about the Human Rights Act 1998 that he could not be said, on an objective basis, to be impartial. Lord McCluskey's objective partiality tainted the other two judges' involved and the appeal was ordered to be reheard before a different panel of three judges.

⁴³³ Evidence to Joint Committee on Human Rights, 19 March 2001.

⁴³⁴ Fellow judges have questioned the role: Lord Steyn, 'The Weakest and Least Dangerous Department of Government' [1997] *Public Law* 84, 90-1. Advocates are also increasingly inclined to challenge the Lord Chancellor's decision to sit, as counsel did (successfully) in *Reeves v Commissioner of Police for the Metropolis* [2000] 1 A.C. 360. In that case the plaintiff's counsel objected to the Lord Chancellor sitting when asked by the clerk if the case could go short in order to enable the Lord Chancellor to chair a cabinet committee on one of the hearing days.

⁴³⁵ See Parts 7-10.

⁴³⁶ See Part 14.

It is also claimed by some that the post of Lord Chancellor provides a particularly effective channel of communication between the top level courts and the UK government. If connection between the Lord Chancellor and the top courts was to cease, or loosen, it may therefore be prudent to put in place other formal avenues by which the court could express its views on matters such as resources and case load to the Executive (e.g. by the creation of a more effective Judges Council in which the top court judges take a leading role) and Parliament (e.g. the laying of an annual report before Parliament and periodic attendance at committee hearings).⁴³⁸

14.5 Reform of the office of Senior Law Lord

The same criticisms may be made of the appointment process for Senior Law Lords as are made of that for appointing Law Lords generally.⁴³⁹ In essence, these are that the process lacks sufficient transparency and is subject to an inappropriate degree of Executive control. The manner of, and reasons for, Lord Bingham's appointment as Senior Law Lord in April 2000 was subject to some comment in the press⁴⁴⁰ — not all of it well-informed. What is clear, however, is that as part of any thorough-going reform to the UK's top courts, consideration ought to be given to the office of Senior Law Lord, especially the method of appointment. Three options can be considered.

One is for the appointment process for the senior judge to continue to be the same as that for other judges of court.⁴⁴¹ This is the case in Australia, Canada and the USA. Under this model, a judge not previously a member of the court could be appointed directly to the office of senior judge.

A second model would be for the judges of the top court to elect one of their number to be the presiding judge for a fixed term of several years (a practice used by the Spanish *Tribunal Constitucional*). While it may be essential to have some political input in the selection of the judges to the court, arguably it is more appropriate to leave the decision as to who should lead the court to the court. This would enhance the institution's independence and autonomy,⁴⁴² and also enhance the position of the senior judge as he or she would have the explicit endorsement of their colleagues.

⁴³⁷ See Part 17 below.

⁴³⁸ See Part 3.

⁴³⁹ See Part 13 for suggestions as to how this process might itself be reformed.

⁴⁴⁰ See e.g. John Griffith, 'How the Government is compromising the judges' *The Daily Telegraph*, 23 April 2001 (Professor Griffith appeared to be unaware of the 1984 change of practice discussed in para. 14.2 above). See also Hugo Young, 'Politicised judges may now learn to keep out of politics: Irvine is reshuffling judges at the top and playing kingmaker', *The Guardian*, 20 April 2001.

⁴⁴¹ See Part 13.

⁴⁴² See Part 3.

Thirdly, the post of senior judge could be held in turn by judges appointed from the UK's three legal systems.⁴⁴³ In Canada, the post of Chief Justice has alternated between a Justice from Quebec and one from the rest of Canada. Rotation would, however, be contrary to the rationale elaborated by Lord Diplock in 1984 that the position of senior judge requires special skills, and so should be determined by seeking a candidate with those skills, regardless of for instance, which UK legal system he or she comes from, or how long he or she has been a member of the court.

⁴⁴³ A suggestion made by Lord Donaldson of Lynton in his evidence to the Royal Commission on Reform of the House of Lords.

15 Selecting panels to hear cases

15.1 Introduction

The Appellate Committee deals with most cases in panels of five; in cases of exceptional importance, seven judges will take part. The Judicial Committee sits as three when dealing with professional registration appeals and five for other matters. Determination of petitions for leave to appeal and interlocutory matters are also dealt with by an Appeal Committee of three.⁴⁴⁴

The Clerk of the Appellate Committee and the Registrar of the Privy Council prepare, a term in advance, a draft programme for cases to be heard in both Committees. This draft is submitted to the Senior Law Lord and the deputy Senior Law Lord who, in due course, meet with the Clerk and Registrar to finalise programme for the following term.⁴⁴⁵ The heart of the system is that there is exercise of discretion as to which judges will sit on which cases. In total, 27 judges are qualified to sit as a member of the Appellate Committee⁴⁴⁶ and over 60 are eligible to sit in the Judicial Committee.⁴⁴⁷

The senior judges' discretion results from two features of the UK top courts: they are not courts of fixed membership; and flowing from the lack of a fixed membership, the UK's top courts necessarily sit in panels of less than the total number of judges eligible to sit — *i.e.*, they do not sit *en banc*. These arrangements are in contrast with some other top courts. In the US Supreme Court, for example, the court has a fixed membership of the eight Associate Justices and a Chief Justice and all Justices take part in all cases. No judges are called in from outside the court on an ad hoc basis; within the court, nobody has a discretionary power to select which judges will hear which cases.

Two features of the way panels are selected have been the subject of criticism: the fact that there is a discretion to decide which of the Law Lords hears a particular case; and also that, in a minority of cases, discretion is exercised to bring in ad hoc judges. The pros and cons of the current system will be surveyed before three options for reform are considered, which are:

- a modified version of the existing discretionary system
- a 'twin court', with two chambers of fixed membership
- the court sitting *en banc*.

⁴⁴⁴ See Part 2 above.

⁴⁴⁵ See para. 14.3 above.

⁴⁴⁶ As at 6 June 2000 (when the House of Lords Judicial Business website list was last updated). According to that list, two members of the House, Lord Goff of Chieveley and Lord Cooke of Thorndon, will reach the age of 75 during 2001 and so be disqualified from hearing appeals.

⁴⁴⁷ For an account of the total membership of each court, see para. 2.1.4 (the Appellate Committee) and para. 2.2.3 (the Judicial Committee).

15.2 Justifications for the current system

The present system of selecting panels may be justified on several grounds. First, the process is not, in essence, any different from the listing process in other UK courts. For instance, someone starting a claim in England & Wales in the High Court will have the case allocated for trial to one of 72 puisne judges in the Queen's Bench Division; if there is an appeal to the Court of Appeal, a panel of three of the 36 Lords Justices of Appeal will be selected. The nature of the discretion being exercised in listing appeals for the Appellate and Judicial Committees is not appreciably different in kind or extent than that exercised at other stages of the trial and appeal process.

Secondly, the discretion inherent in the present system enables the Appellate and Judicial Committees to dispatch their caseload with a reasonable degree of efficiency.⁴⁴⁸ Changes to the system which reduce the number of judges, and consequently 'judge hours' available, risks significantly diminishing the capacity of the court. The ability of the Senior Law Lord to call upon ad hoc judges is especially important at times when Law Lords are away from the court conducting major public inquiries.⁴⁴⁹

A third advantage of the current listing arrangements is that they enable the territorial composition and fields of expertise of a panel to be fine-tuned. Thus, in the important devolution case of *Brown v Stott (Procurator Fiscal, Dunfermline)*,⁴⁵⁰ the panel of five forming the Judicial Committee on that occasion included three members knowledgeable about Scots criminal law as the Rt. Hon Ian Kirkwood (Lord Kirkwood), a senior Scottish judge, joined the two Scottish Law Lords.⁴⁵¹

Finally, the fact that senior judges from legal systems outside the UK (in particular New Zealand) sit on the Judicial Committee allows those jurisdictions to contribute in kind to the cost of running what is their court of final appeal. The practice may also facilitate the sharing of legal ideas between judges from different jurisdictions.⁴⁵²

15.3 Criticisms of the current arrangements

Even though, on the grounds listed above, benefits flow from the existing system of listing, critics argue that current arrangements are unacceptable.

⁴⁴⁸ e.g. retired Court of Appeal judges may be called in to form a panel to hear professional registration appeals and senior judges from the overseas jurisdictions may spend time in London sitting on the Judicial Committee. Flexibility of membership in the House of Lords was important when a newly constituted Appellate Committee had to be formed to hear the second Pinochet appeal.

⁴⁴⁹ See para. 16.2 below.

⁴⁵⁰ [2001] 2 W.L.R. 817.

⁴⁵¹ On the problem of ensuring expertise across fields of law, see further para. 12.2.2 above.

⁴⁵² Judges from overseas may sit on any case heard by the Judicial Committee, except 'devolution issues' from which they are barred by the devolution Acts.

15.3.1 *Lack of transparency*

The current arrangements are arguably less than ideal simply because of their opaqueness about who may be called upon to sit, which results in a lack of transparency in the operation of the courts.⁴⁵³

15.3.2 *Impact on outcomes*

Also of concern is the fact that that the exercise of discretion to choose membership of panels to hear particular appeals includes a power intentionally or unintentionally to influence outcomes. The *Pinochet* cases provided a stark example of the latter: had the composition of the first panel been different, neither of the two subsequent cases might ever have arisen.⁴⁵⁴ Those cases, however, only reveal a fact known by all lawyers — who one gets on the bench has an influence on how a case is decided. History reveals that the power has in the past been used intentionally to manipulate the results of cases.⁴⁵⁵

15.3.3 *Ad hoc judges*

The selection of ad hoc judges, paid on a daily basis, to join the Law Lords on particular panels raises a possible argument under Article 6(1) of the ECHR. Arguably, judges from lower courts, retired UK judges and judges from other Commonwealth jurisdictions called to sit in the Appellate and Judicial Committees on a case by case basis lack sufficient formal 'independence' because, while secure in their position in respect of the particular case they are called in to hear, they have no tenure in the Judicial or Appellate Committee, let alone security of tenure, beyond the case in hand.

The temporary nature of these judges' position may be compared to that of temporary sheriffs in Scotland, considered by the High Court of Justiciary in *Starrs v Ruxton*.⁴⁵⁶ The concern with temporary sheriffs was the possibility that an onlooker might think that they would tailor their judgments with an eye to being reappointed by the Lord Advocate. The question in relation to ad hoc judges in the Appellate and Judicial Committees is whether an *appearance* may be given to a bystander that an ad hoc judge from an intermediate court of appeal would give judgment in a way intended to advance his career, or a retired judge in the hope of further ad hoc appointments.

⁴⁵³ See Part 2.

⁴⁵⁴ See David Robertson's plea for 'the need for a full court': 'The House of Lords as a Political and Constitutional Court: Lessons from the Pinochet Case', ch. 6 in D. Woodhouse (ed.), *The Pinochet Case: a Legal and Constitutional Analysis* (Oxford: Hart, 2000), pp. 36-40.

⁴⁵⁵ See Diana Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart, 2001), pp. 120-121, quoting in part Robert Stevens: 'Halsbury (1895-1905) who wanted to see the power of trade unions reduced, sought to manipulate the composition of judicial panels to secure these ends, a strategy which proved effective when the House of Lords held that unions could be sued for losses arising from a strike, while the "careful selection" of panels by Loreburn (1905-12) "helped to return some powers to the dominion government in Canadian appeals and in English appeals ensured that the courts would abandon attempts to interfere directly with policy decisions by the Executive. ... Moreover, evidence suggests that Haldane, Sankey and Hailsham "all chose their Privy Council panels in order to further their own particular concerns about the dominion"'.

⁴⁵⁶ 2000 S.L.T. 42.

15.4 Options for reform

Three main options for the future can be identified. The first may possibly be suitable for use in the Appellate and Judicial Committees as they currently exist; the other two suggestions are intended in the event of major structural reform to the UK's top level courts.

15.4.1 *A modified version of the current system*

One method for addressing the criticisms while keeping the essence of the existing arrangements would be to restrict the scope of discretion at the listing stage by removing the eligibility of ad hoc judges to be chosen. If the selection process was merely to form panels of five from permutations of the twelve Law Lords, the task would be no different from that of any listing exercise in other UK appeal courts. The appeals in which ad hoc judges are most used — overseas appeals and professional registration appeals in the Judicial Committee — are likely to diminish in number.⁴⁵⁷ The main drawbacks with this model are that it would lead to a loss of flexibility in listing arrangements and would make calling in additional expertise in areas such as Scots criminal law impossible.

15.4.2 *A 'twin' court*

A second possible model draws inspiration from the German *Bundesverfassungsgericht* which sits in two distinct chambers. Judges are appointed specifically to one or the other chamber and each chamber has a distinct jurisdiction. The conception is of a 'twin' court, each independent chamber having equal status and being 'the court'. In exceptional cases, a matter may be decided by both chambers sitting together in a plenum.

A twin court model would be particularly suitable in the UK to accommodate appellate specialism in public law, criminal law and devolution issues (the jurisdiction of one chamber) and civil matters (the other chamber).⁴⁵⁸ Each chamber could have, say, seven judges. Plenary sessions could be called to deal with important cases, the subject matter of which cut across the two chambers.⁴⁵⁹ One possible disadvantage flowing from the fact that judges of different chambers would not sit together is that it may diminish the collegiality of the court as a whole and create less sense of a single institutional identity.

15.4.3 *A single court sitting en banc.*

In this model, like the US Supreme Court, all judges of the court would sit and determine all cases. Such an arrangement would have the advantage of a high degree of transparency. It could also be used for each of the structural reform models outlined earlier in the report: a single supreme court;⁴⁶⁰ a constitutional court and a companion court;⁴⁶¹ and a UK court of justice.⁴⁶² However, this option has the potentially significant disadvantage that, unless the

⁴⁵⁷ See Part 11.

⁴⁵⁸ See Part 10.

⁴⁵⁹ See para. 10.5 above.

⁴⁶⁰ Part 8.

⁴⁶¹ Part 9.

⁴⁶² Part 10.

courts radically altered their working methods — for example, by restricting the length of oral argument and employing more judicial assistants — it would be able to hear far fewer cases than the Appellate and Judicial Committees do at present.

16 Extra-judicial functions

16.1 Introduction

Hearing and determining cases is the primary duty of judges.⁴⁶³ In the UK, the Law Lords may also have important roles outside the courtroom: they are members of the House of Lords and may choose to take part in its legislative and scrutiny work;⁴⁶⁴ some have also chaired major public inquiries. The questions arise whether the Law Lords' involvement in these two activities is compatible with the:

- independence required of them as judges of the UK's highest courts, and
- top courts' ability to efficiently dispatch their business.

16.2 The Law Lords in Parliament

Each of the three options for major structural change discussed earlier in this report — a UK supreme court,⁴⁶⁵ a constitutional court and a companion court,⁴⁶⁶ and a UK court of justice⁴⁶⁷ — have as one of their principal justifications the benefits of separating judges of the UK's top level court from the UK Parliament. As with many other features of the current arrangements, however, the benefits of such reform are not universally acknowledged.

Although Law Lords are appointed primarily for the purpose of hearing and determining appeals, they may also take part in the other work of the House in the following ways.

- Speaking in debates, proposing bills (in particular Law Reform bills prepared by the Law Commission) and voting in divisions.
- Chairing committees of the House, *e.g.* sub-committee E of the European Committee and the Consolidation Bills Joint Committee.
- Sitting with lay peers on the Committee for Privileges.⁴⁶⁸

⁴⁶³ Some senior judges also have important administrative functions as president of their court (see Part 14 above) and as head of the judiciary (*e.g.* the Chief Justice of the US).

⁴⁶⁴ Section 6 of the Appellate Jurisdiction Act 1876 reads in part:

'For the purposes of aiding the House in the hearing and determining of appeals, Her Majesty may ... by letters patent appoint ... qualified persons to be Lords of Appeal in Ordinary ... Every Lord of Appeal in Ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall by virtue and according to the date of his appointment be entitled during his life to rank as a Baron ... and shall ... be entitled to a writ of summons to attend, and sit and vote in the House of Lords;...'

⁴⁶⁵ Part 8.

⁴⁶⁶ Part 9.

⁴⁶⁷ Part 10.

⁴⁶⁸ See para. 2.1 above.

Some of the Law Lords have decided not to take part in legislative business.⁴⁶⁹ Recently, the arguments against the Law Lords' involvement in legislative business have become focused on the requirements of Article 6(1).⁴⁷⁰ The potential for the dual role to give rise to such a legal challenge was noted by the Senior Law Lord in oral evidence to the Joint Committee on Human Rights.⁴⁷¹ The emphasis now placed on the requirements of Article 6(1) should not, however, lead us to overlook other broader constitutional principles which make the Law Lords' extra-judicial roles inside and outside the House difficult ones.⁴⁷²

The Law Lords' presence in the legislature was considered by the Royal Commission on Reform of the House of Lords, though from the perspective of what would be best for the House of Lords as a legislature, rather than what would be best for the Appellate Committee as a top court.⁴⁷³ In his evidence to the Royal Commission, Lord Wilberforce argued that the presence in the House as entirely beneficial and that there was not 'the beginning of a case for separating off the Law Lords' from the House of Lords. Contrary arguments were put to the Royal Commission by JUSTICE, which concluded its evidence by stating:

The nature of much of the work of the judiciary increasingly interacts with political and legislative decisions, and has become higher in its public profile. It calls for a wider and clearer separation of the functions and powers of the judiciary from the other branches of government. Where judges have this greatly increased role it is surely wrong in principle that they should continue to serve as legislators.⁴⁷⁴

The Royal Commission did not accept this and recommended that in the new House of Lords the Law Lords should 'continue to be *ex officio* members'.⁴⁷⁵ But focusing on the needs of the House of Lords as a legislature, the Royal Commission did not address the implications of the decision in *McGonnell v UK* for the Law Lords, noting the decision as of relevance only to the position of the Lord Chancellor. It did, however, note the potential for overly partisan interventions by the Law Lords in legislative matters to call into question the appropriateness of a Law Lord sitting in any subsequent case involving the statute in respect of which he had had some legislative involvement. In a recommendation which encourages greater transparency, the Royal Commission suggested that the Law Lords clarify the basis

⁴⁶⁹ Lord Steyn, Lord Saville, and Lord Phillips.

⁴⁷⁰ For more detailed discussion, see Cornes, '*McGonnell v UK*, the Lord Chancellor and the Law Lords' [2000] *Public Law* 166.

⁴⁷¹ See para. 5.3.3 above.

⁴⁷² See Sir David Williams, 'Bias; the Judges and the Separation of Powers' [2000] *Public Law* 45.

⁴⁷³ See Russell and Cornes, 'The Royal Commission on Reform of the House of Lords: a House for the Future?' (2001) 82 *Modern Law Review* 92-95.

⁴⁷⁴ JUSTICE, 'The Judicial Functions of the House of Lords: written evidence to the Royal Commission on the Reform of the House of Lords' (May 1999), para. 21.

⁴⁷⁵ *A House for the Future*, Cm. 4534 (London: HMSO, 2000), ch. 9.

on which they would take part in legislative matters. The Law Lords have now acted on that recommendation.⁴⁷⁶

Lord Bingham of Cornhill: My Lords, with the leave of the House, before the reports from the Appellate Committees are considered, I should like to make a Statement on Recommendation 59 of the Royal Commission on the Reform of the House of Lords. That recommendation is that:

‘The Lords of Appeal should set out in writing and publish a statement of the principles which they intend to observe when participating in debates and votes in the second chamber and when considering their eligibility to sit on related cases.’

I should tell the House that my noble and learned friends have considered this recommendation and have agreed on the terms of a Statement to give effect to it. I will now read the Statement which has been agreed by all the Lords of Appeal in Ordinary:

‘General Principles

As full members of the House of Lords the Lords of Appeal in Ordinary have a right to participate in the business of the House. However, mindful of their judicial role they consider themselves bound by two general principles when deciding whether to participate in a particular matter, or to vote: first, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.

The Lords of Appeal in Ordinary will continue to be guided by these broad principles. They stress that it is impossible to frame rules which cover every eventuality. In the end it must be for the judgment of each individual Lord of Appeal to decide how to conduct himself in any particular situation.

Eligibility

In deciding who is eligible to sit on an appeal, the Lords of Appeal agree to be guided by the same principles as apply to all judges. These principles were restated by the Court of Appeal in the case of *Locabail (UK) Ltd v. Bayfield Properties Ltd and others and four other actions* [2000 1 All E.R. 65 (CA)].’

My Lords, that concludes the Statement. I recognise, of course, that this is a subject on which noble Lords may wish to express a view, but I hope that the House will agree that it would not be appropriate to enter into a debate now, at a judicial sitting. What I have done is to report to the House what the Lords of Appeal in Ordinary have agreed. If any noble Lord wishes to explore the matter further, then I am sure that a debate can be arranged through the usual channels.

It remains true that the only certain way of avoiding any doubt about the independence and impartiality of the top courts, and ensuring that the Law Lords’ time is devoted to their

⁴⁷⁶ HL Deb vol 614 col 419 22 June 2000. The extent to which other Law Lords (e.g. retired Lords of Appeal, or Peers holding high judicial office) who may sit on appeals will observe these principles is not indicated. The Lord Chancellor has indicated he would also observe the statement made by the Lords of Appeal in Ordinary; HL Deb vol. 614, col. WA163, 7 July 2000.

primary task, that of being a judge, is for them to cease their involvement in legislative matters.

If at some future time the Law Lords were no longer members of the House of Lords, the avenues for communication between the top court and Parliament, which their presence currently provides, could be replaced in other ways — such as appearances before an appropriate parliamentary committee or the laying before Parliament of an annual report on the work of the court.⁴⁷⁷ Parliamentary involvement in the appointment of the UK's most senior judges would also foster an institutional link between the court and the legislature.⁴⁷⁸

16.3 Public inquiries

Over the past few years, Law Lords have, at the request of the Government, taken on the onerous task of chairing major public inquiries into controversial, politically sensitive matters. Lord Saville's on-going inquiry into shootings in Northern Ireland in January 1972 ('Bloody Sunday') is predicted to be the most expensive public inquiry ever held in the UK, with costs estimated at £100m; it has gathered statements from more 1,500 witnesses. Lord Phillips was chairman of the BSE Inquiry, and completed a 16 volume report to ministers in October 2000.⁴⁷⁹ Before appointment as a Law Lord, Lord Scott chaired the 'Arms to Iraq' inquiry which reported, in five volumes, in 1996.⁴⁸⁰ Two distinct problems may arise from the use of Law Lords to chair inquiries.

16.3.1 *Interference with the efficiency of the top courts*

A Law Lord chairing an inquiry is not available to sit judicially. While this may not have been a problem in the past, it now is.⁴⁸¹ Simply from the point of view of ensuring that the top courts can fulfil their primary function of hearing and deciding cases, if the government decides to keep making use of the Law Lords for inquiry work then the total number of Law Lords may have to be increased.

16.3.2 *Separation of powers*

Having any judge chair an inquiry into a matter of controversy has the potential to blur boundaries between the Executive and the judiciary. Commentators have argued that 'there is certainly a strong case for holding that judicial inquiries should be used sparingly and selectively'.⁴⁸² The case is even stronger where a proposed chairman is a Law Lord.

⁴⁷⁷ See para. 3.3.2 above.

⁴⁷⁸ See para. 13.2 above.

⁴⁷⁹ Lord Phillips of Worth Matravers, June Bridgeman, Malcolm Ferguson-Smith, *BSE Inquiry*, 1999-2000, H.C. 887.

⁴⁸⁰ Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions, 1995-95, H.C. 115.

⁴⁸¹ See also David Bamber 'Justice delayed by shortage of law lords', *The Sunday Telegraph*, 6 January 2000.

⁴⁸² Gavin Drewry, 'Judicial Inquiries and Public Reassurance' [1996] *Public Law* 368, 371-72 (writing in particular of the Arms to Iraq inquiry).

In Australia, a series of cases have provided guidance as to when federal judges may be used for other than judicial business. The general trend of these cases has been to progressively restrict the ability of judges to undertake functions other than their judicial duties. Justice McHugh in *Grollo v Palmer* states:

The *persona designata* exception to the *Boilermakers'* principle, must... give way when the exercise of non-judicial functions impairs a federal judge's ability to perform judicial functions or when it would give rise to a reasonable doubt as to the independence or impartiality of a federal judge. ... As the Supreme Court of the United States pointed out in *Mistretta v United States* [488 US 361 at 407(1989)], 'The legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.'⁴⁸³

There is also the unfortunate potential for the judge carrying out such inquiries to be judicially reviewed, raising the potential for the public to be presented with the spectacle of a Law Lord being found, in colloquial terms, to have 'made a mistake' or acted unfairly.⁴⁸⁴ The subject matter of an inquiry could also form the basis for subsequent litigation in which the Law Lords may be called upon to hear an appeal. Insofar as judges are best placed to chair complex public inquiries, there is a strong case for avoiding the use of Law Lords. Law Lords are not in any event the only individuals who are considered able to carry out public inquiries: use is also commonly made of lower level appellate judges, retired civil servants and senior academics.⁴⁸⁵

⁴⁸³ *Grollo v Palmer* (1995) 184 *Commonwealth Law Reports* 348, 377. Justice McHugh dissented from the application in that case of the relevant rule. It does remain open for federal judges to be appointed to, for instance, commissions of inquiry, so long as they operate in an appropriately judicial manner. However, our impression in the course of research interviews in Australia was that this would now be a rare occurrence.

⁴⁸⁴ As occurred early in the life of the Saville inquiry: see Brigid Hadfield, 'R v Lord Saville of Newdigate, *ex parte anonymous soldiers*: What is the Purpose of a Tribunal of Inquiry?' [1999] *Public Law* 663.

⁴⁸⁵ See e.g. Lord Cullen's inquiry into the Ladbroke Grove rail crash (see www.hse.gov.uk/index.htm) and Professor Ian Kennedy's inquiry into deaths of children during heart surgery at the Bristol Royal Infirmary.

17 Caseload and resources

17.1 A court under pressure

The final part of the report turns to consider briefly questions relating to caseload. In 2000, the Appellate Committee, was a court under considerable pressure:

The backlog of appeals awaiting determination has grown to 94 (including 19 awaiting judgment). This backlog can only be reduced when both Appellate Committees sit at once, something rarely possible as the ten available Lords of Appeal in Ordinary sit daily in both the Judicial Committee of the Privy Council and the Appellate Committee.⁴⁸⁶

The number of cases awaiting determination at the end of the 1996–1998 years were: 1996 (66), 1997 (53), 1998 (66).

The Human Rights Act and devolution statutes were introduced into these circumstances. Predictions of their likely quantitative impact varied. A year before the coming into force of the Human Rights Act 1998,⁴⁸⁷ the then Senior Law Lord, Lord Browne-Wilkinson, told *The Times*:

With the Human Rights Act just around the corner, and devolution appeals ... there will be a crisis of 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 all'.⁴⁸⁸

At about the same time, in written evidence to the Royal Commission on Reform of the House of Lords, Lord Wilberforce said of the Human Rights Act 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 tentative evidence so far suggests that the quantitative impact of Convention rights on caseload is less than some predicted.

17.2 Impact of Convention rights since October 2000

One of the clearest recent statements from official sources of the actual impact of the Human Rights Act appears in evidence to the parliamentary Joint Committee on Human Rights by the Lord Chancellor and the then Attorney-General in March 2001. In a memorandum, the Lord Chancellor outline the current situation in England & Wales:⁴⁸⁹

⁴⁸⁶ House of Lords Annual Report 1998-1999.

⁴⁸⁷ The main parts of the Act came into force on 2 October 2000.

⁴⁸⁸ Interview with Frances Gibb, *The Times*, Law Section, 19 October 1999.

⁴⁸⁹ Joint Committee on Human Rights, *Minutes of Evidence*, 19 March 2001.

There has been some extra workload, in particular in the higher courts, but there has been no significant impact on the length or complexity of hearings and no significant increase in outstanding cases at any level of the system. I believe that this smooth transition has not been due to chance but the result of the two years of careful preparation by both Government and the courts. ¶ In response to the Committee's specific questions, when new legislation is introduced, there can be a time lag before any significant impact as practitioners assess the early case law and consider how best to use it. This may be the reason why use of the Act has been limited so far, in particular in the courts of first instance. In addition to this, the requirements of section 22(4) of the Act mean that it is only possible to challenge the actions of public authorities in new proceedings where the action that is being challenged took place on or after 2 October 2000. Such claims will therefore inevitably take some time to feed into the system. It may well be therefore that work will increase in the future. What is clear, however, is that the court system is managing the current workload extremely effectively and is well placed to deal with any future increase, if that transpires. ¶ In the county courts and High Court, 76 claims for damages have been issued in the first quarter that have relied alone on a Convention point. In comparison, some 467,000 civil claims have been issued in the same period. The Administrative Court reports that there have been less than a dozen issues in judicial review that could be termed new.

The Lord Chancellor went on to explain in his memorandum that:

I was also particularly concerned to ensure that the higher courts were as prepared as possible for implementation of the Act so that they were able to hear important cases as quickly as possible without undue impact on other workload. For example, Sir Jeffrey Bowman conducted Reviews of the Court of Appeal (Civil Division) and Crown Office List (now the Administrative Court). Recommendations from these Reviews were implemented prior to implementation of the Act to simplify procedures and to enable the Courts to deploy their resources more flexibly. Administrative Court sittings were doubled in the run up to the Summer vacation and as a result the number of outstanding judicial review cases has been considerably reduced.

What is perhaps striking is that while the High Court and Court of Appeal in England & Wales were being prepared in this way, Lord Browne-Wilkinson was, apparently, left to express his anxieties about the capacity of the Appellate and Judicial Committee to a *Times* journalist.

In relation to criminal trials and appeals in England & Wales, the then Attorney-General, Lord Williams of Mostyn QC, told the Joint Committee on Human Rights that:⁴⁹⁰

A number of authoritative judgments have already been handed down by the senior judiciary or are awaited shortly on major ECHR issues. I believe that this has been possible because of a combination of the mechanisms within the higher courts themselves to spot issues needing early resolution, and the work

⁴⁹⁰ Joint Committee on Human Rights, *Minutes of Evidence*, 19 March 2001, 'Memorandum from the Attorney-General'.

of the ECHR Fast Track Group⁴⁹¹]. These judgments will in turn inform the approach of the Magistrates' and Crown Courts to ECHR arguments.

In questioning by members of the Joint Committee, Sir Patrick Cormack MP asked whether the Lord Chancellor and the Attorney-General about the prophesy that the courts would be swamped, which has not happened, and whether they expected the position to remain constant or for there to be a steady increase in cases:

(Lord Irvine of Lairg) I do not really know. I am a little surprised that there has been such a small, extra input so far. I expect that as the Act beds down, as lawyers become more familiar with it, there will be something of an increase above the present level but nothing that the system is not geared up to accommodate.

49. You almost anticipate my next question. You do not think contingency plans as such are necessary?

(Lord Irvine of Lairg) Contingency plans have been made.

Could you elaborate a little?

(Lord Irvine of Lairg) Yes, certainly. Provision has been made in my own budget for extra court sitting time and extra provision of legal aid funds in Human Rights Act related cases. I believe that that provision will prove sufficient for any increase in business that results. The notion of chaos in the courts is absolute nonsense. In fact, the speed of the system is increasing regardless of the Human Rights Act business. Let me elaborate that slightly. There are scarcely any cases, either civil or criminal, which are exclusively attributable to the Human Rights Act. What the Human Rights Act does typically is provide additional points of argument in cases that would in any event be brought forward.

51. We do not have a swamping of cases; we do have contingency plans; and yet you also said that you were somewhat surprised that there had not been more use made. Could you elaborate on that a little?

(Lord Irvine of Lairg) Not really, because I thought that there would be more. It is purely subjective. So far, I have been proved to be wrong.

In what particular areas would you have expected more?

(Lord Irvine of Lairg) The area where typically we might have expected more would have been in the area of the criminal law in relation to Article 6. I am not saying that there has not been increased business. The Attorney would be able to illustrate from his experience new points that are being taken which the Crown Prosecution Service must deal with, but all I am saying — and this is not a science — is that I am pleasantly surprised that the volume of new business is

⁴⁹¹ See Lord William's written evidence, para. 1.6: 'This comprises a small group of prosecutors from the CPS, DTI and HM Customs and Excise together with an observer from the Lord Chancellor's Department, who meet weekly with lawyers at the Legal Secretariat. The Group seeks to identify rulings or issues with wide implications for the administration of criminal justice, and which need to be resolved speedily to clarify the correct approach to the law. Where the ruling is subject to one of the available appeal routes, the Group recommends to the appropriate court authorities that the case should be fast tracked, giving reasons. The ultimate decision as to when to list such cases however remains firmly for the judicial authorities.'

not quite as great as was anticipated, but I enter the precaution: we are a very short time in from implementation and more work may emerge. The notion of chaos in the courts and that the heavens would fall in was ever false and the prophets of doom have already been proved false and will continue to be. [...]

17.3 Comments on future impact of Convention right cases

Clearly, further research work is required on the actual and potential impact on the Appellate and Judicial Committees of appeals raising points of law on Convention rights.⁴⁹² In the mean time, several tentative predictions may be made.

First, the pressure of caseload will continue to be an important 'fuel' for reform of the Appellate and Judicial Committees⁴⁹³ — though not necessarily a decisive one. Other issues, including concerns about constitutional principle and Article 6(1) of the ECHR, are likely to be as significant in forthcoming debates.

Secondly, the balance of subject matter within the Appellate and Judicial Committee's caseload is likely to change as they hear more criminal appeals. In England & Wales and Northern Ireland, Convention rights under the Human Rights Act are most likely to arise in the context of prosecutions. In Scotland, such questions are 'devolution issues', for which the court of final appeal is the Judicial Committee. There will therefore be a growing need for the Appellate and Judicial Committees to have expertise in the field of criminal law — an area in which, in the past, commentators have found them lacking.⁴⁹⁴

Thirdly, it is to be expected that a significant proportion of Convention rights points of law will emerge in the course of public law litigation, especially judicial review, though there is a need for caution here. Sunkin commenting on the effect of the Human Rights Act so far on claims for judicial review in England & Wales notes:

The main point is that during this early period at least, human rights issues appear to have been raised as additional claims in the types of judicial review case that were being brought prior to the Act rather than in a new species of public law litigation. So far as one can discern from these figures, the Human Rights Act appears not yet to have opened up major new areas of judicial review challenge.⁴⁹⁵

Also noting, however, that there has been an ethos of restraint encouraged by the judges in respect of use of Human Rights Act arguments, Sunkin ends with a cautionary 'we shall have to wait and see whether this self-restraint [by counsel] continues'.⁴⁹⁶ The Lord

⁴⁹² A research project at the Human Rights Act Research Unit of King's College London is carrying out a study for the Home Office on the qualitative aspects of reported judgments raising Convention rights.

⁴⁹³ See Part 5 above.

⁴⁹⁴ See Part 13 above.

⁴⁹⁵ Maurice Sunkin, 'Trends in Judicial Review and the Human Rights Act' July-September (2001) *Public Money and Management* 1, 4.

⁴⁹⁶ p. 4.

Chancellor's Department, analysing cases in the Administrative Court between October 2000 and 31 January 2001, say that 'there have been less than a dozen issues that could be termed "new"'.⁴⁹⁷

Contrary to popular belief, public law and constitutional law matters have not, in the recent past, been a significant proportion of the Law Lords' work. Examining over 350 judgments handed down between November 1996 and November 1999,⁴⁹⁸ we found that the Appellate Committee dealt with only a handful of appeals explicitly concerned with fundamental rights — of suspects of crime⁴⁹⁹ and of convicted persons,⁵⁰⁰ freedom of assembly,⁵⁰¹ freedom of expression,⁵⁰² liberty of the person,⁵⁰³ and religious discrimination.⁵⁰⁴ Even adopting a broader 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 is not large in comparison to other subject categories. Nor is the proportion of Judicial Committee appeals on questions arising under codified constitutions in several overseas jurisdictions great.⁵⁰⁵ As with criminal law, there is therefore likely to be an increased need for expertise in public law in the UK's top level courts.

Elsewhere in this report, a number of options for re-aligning expertise have been suggested: a specialist constitutional court;⁵⁰⁶ new criteria for judicial appointments;⁵⁰⁷ and, somewhat problematically, the use of ad hoc judges.⁵⁰⁸ Alongside concerns about coping with caseload, constitutional principle and Article 6(1) of the ECHR, the need for specialism is likely to be an important fuel for reform.

⁴⁹⁷ Lord Chancellor's Department, *Human Rights Act 1998: a statistical update* (available on line at www.lcd.gov.uk).

⁴⁹⁸ On this aspect of the study, see Le Sueur and Cornes, 'What do the top courts do?' (2000) 53 *Current Legal Problems* 53.

⁴⁹⁹ *R. v DPP, ex p. Kebelene* [2000] 2 A.C. 326; *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.

⁵⁰⁰ *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.

⁵⁰¹ *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.

⁵⁰² *Reynolds v Times Newspapers Ltd* [1999] 3 W.L.R. 1010.

⁵⁰³ *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.

⁵⁰⁴ *Kelly v Northern Ireland Housing Executive* [1999] 1 A.C. 428.

⁵⁰⁵ On categorisation of the Appellate and Judicial Committee caseload, see further the statistical annex, prepared by Roger Masterman of UCL Constitution Unit, which appears at (2000) 53 *Current Legal Problems* 53, pp. 94-97.

⁵⁰⁶ See Part 9.

⁵⁰⁷ See Part 13.

⁵⁰⁸ See Part 15.

17.4 A note on premises

No report on reform of the UK's top level courts would not be complete without an observation on a matter that is obvious on a daily basis to the Law Lords, the staff of the Appellate and Judicial Committees and lawyers who appear before them: the physical accommodation of the courts is wholly inadequate and stands in stark contrast to the spacious, well appointed, purpose built court buildings which house many of the major top level courts elsewhere, such as the US Supreme Court, the High Court of Australia, the *Bundesverfassungsgericht* and the Spanish *Tribunal Constitucional*. Counsel and solicitors enjoy better facilities in many lower courts than they do when appearing before the Appellate and Judicial Committees.⁵⁰⁹

Without provision of better premises, the UK's top level courts — whether the subject of major institutional change or not — will be hampered in several of the reforms considered elsewhere in this report, such as the increased use of judicial assistants, the provision of facilities for the news media and better access by members of the public for educational purposes. Separate premises would also have a symbolic importance in marking the independence of the UK's most senior judges from the legislature.⁵¹⁰

17.5 A note on running costs

Detailed analysis of the resources and costs of the Appellate and Judicial Committees, and the implications of the options for reform surveyed elsewhere in this report, has not yet been carried out. For the convenience of readers we reproduce the following extracts from *Hansard*. Along with all researchers in the field, we owe a debt of gratitude to Lord Lester of Herne Hill QC who has, through a sustained series of written questions over the past few years, brought into the public domain much useful information about the UK's top level courts.

17.5.1 *The Appellate Committee*

Lord Lester of Herne Hill asked the Chairman of Committees: Whether he will publish detailed income and expenditure accounts in relation to the performance, by the Law Lords, of the judicial functions of the House of Lords, covering all categories of expenditure other than the salaries of the Law Lords themselves.

The Chairman of Committees (Lord Boston of Faversham): The House of Lords Judicial Office administers the judicial proceedings of the House and provides secretarial and administrative services to the Lords of Appeal. The Office has its own budget and its income and expenditure for the year ending 31 March 1999 was as follows:

⁵⁰⁹ The US Supreme Court and the Supreme Court of Canada both sat in inadequate rooms in a building shared with the legislature before moving to their current purpose-build premises.

⁵¹⁰ Though for as long as the Appellate Committee is a committee of the House of Lords, it is required to meet in the Palace of Westminster.

Income	Judicial Fees	£376,614
	Taxations(1)	£110,481
	Opinions(2)	£7,340
	Total	£494,435
Expenditure	Staff Salaries and Wages	£409,535
	Outside Assistance(3)	£35,696
	Publications	£84,634
	Travel(4)	£33,208
	Office Supplies	£21,445
	Computers	£15,530
	Training (of staff)	£9,146
	Printing	£3,012
	Electronic Publishing	£2,540
	Official Entertainment	£100
	Courier Service	£65
	Total (gross)	£614,911
Less:	VAT refunds on contracted out services	(£7,174)
	Total (net)	£607,737

(1) A fee is received each time the Clerk of the Parliaments certifies the amount of a bill of costs when the parties cannot agree the amount.

(2) Copies of the Law Lords' Opinions are provided free to the parties and to those in the Chamber when judgment is given. Otherwise a charge of £5 is levied. Opinions are published free on the Internet.

(3) Largely attributable to the transcription and amplification of the Pinochet hearings.

(4) The senior and second senior Lords of Appeal in Ordinary are entitled to use the Government Car Service; other Law Lords have limited entitlement.

Certain services, including postage, telecommunications, accommodation and heating, are provided centrally to the House and the costs of these services cannot be broken down between offices. Similarly, the costs incurred by the Parliamentary Works Directorate in respect of the fabric of the Palace of Westminster and its maintenance cannot be broken down by office. Other costs which cannot be identified include the use made by the Law Lords of the services of the House of Lords Library, and the services of Doorkeepers whose costs fall on the budget of Black Rod's Office.⁵¹¹

Since that answer was given, the Appellate Committee's publications budget (£85,000 per year) has been transferred to the House of Lords library budget, and four judicial assistants have been appointed (at a cost of just over £100,000).

⁵¹¹ H.L. Debs., col WA19, 13 July 1999.

17.5.2 *The Judicial Committee*

Lord Lester of Herne Hill asked Her Majesty's Government:

Whether they will publish detailed income and expenditure accounts in relation to the performance by the Law Lords of their judicial functions in the Privy Council, covering all categories of expenditure other than the salaries of the Law Lords themselves.

The Lord Privy Seal (Baroness Jay of Paddington): The income of the Judicial Committee of the Privy Council consists of Council Office fees paid in respect of legal proceedings. In the financial year 1998-99 the fee receipts amounted to £70,209.10.

In the same year the running costs were as follows:

(a) staff costs: £213,590;

(b) overheads and general expenditure: £258,657;

(c) total: £472,247.

The figures at (b) and (c) include daily sitting fees paid to members of the Judicial Committee who are not in receipt of judicial salaries, but do not include any element in respect of the salaries of those who are.⁵¹²

⁵¹² H.L. Debs., col. WA113, 8 July 1999.

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