

# **A SUPREME COURT FOR THE UNITED KINGDOM**

## **POLICY PAPER, JUSTICE**

### **Summary**

This paper restates JUSTICE's position on a Supreme Court and updates the arguments since the paper produced by a working party in 1999 as evidence to the Royal Commission on the House of Lords. The key features of the argument remain as set out in the earlier paper:

- (i) Senior full-time judges should not be members of the Upper House, because it is inappropriate that they should be able both to act as legislators and to perform judicial functions. Members of the Supreme Court should be full-time judges.
- (ii) Former judges should be eligible to be appointed to the Upper House on ceasing to hold judicial office, (provided that the composition of the Upper House will remain, in part, appointed).
- (iii) The Supreme Court should be housed in its own building with sufficient resources to enable it to maintain the highest standards in carrying out the judicial process.
- (iv) The functions of the Judicial Committee of the Privy Council in determining devolution issues should be transferred to the new Supreme Court, whose composition should ensure that it reflects the legal systems of the United Kingdom as a whole.
- (v) The new Supreme Court building could also house the Judicial Committee of the Privy Council in dealing with Commonwealth appeals etc, in the interests of the efficient use of resources.

### **A UK Supreme Court**

#### **Introduction**

1. In 1999, a senior JUSTICE working party argued that there is a pressing need, in the context of the changes to the British constitution and to the role of the judiciary, to create a Supreme Court of the United Kingdom<sup>1</sup>. Since then, the arguments for and against the creation of such a court, and the precise form it might take, have been studied in depth, in particular, by the Constitution Unit at University College London.

---

<sup>1</sup> Written evidence to the Royal Commission on the Reform of the House of Lords by a JUSTICE Working Party.

Lord Bingham has consistently argued for a Supreme Court, in his address to the 2001 JUSTICE annual general meeting and elsewhere<sup>2</sup>.

2. It may be helpful to summarise the current business of the Appellate Committee of the House of Lords and of the Judicial Committee of the Privy Council. In 2000<sup>3</sup>, there were 236 petitions for leave to appeal to the Appellate Committee of the House of Lords. 229 petitions were disposed of, 58 of which were allowed. 93 remained outstanding at the end of the year. The total number of substantive appeals presented in 2000 was 79. Of these, six were criminal; 14 were appeals from the Scottish Court of Session and two were from the Northern Ireland Court of Appeal. Over 90 per cent of judgements allowed the appeal or allowed it in part or varied the order of the court below. Civil appeals covered a diverse range of issues including conflict of laws, defamation, immigration, judicial review, education, landlord and tenant and planning. The House sat on 138 days to hear petitions for leave and substantive hearings, on 128 days to hear interlocutory petitions in appeals presented during the year; and on two days to hear peerage claims.
3. The Judicial Committee of the Privy Council received a total of 90 appeals and dealt with 64 petitions for special leave to appeal. Over two thirds of the appeals disposed of were from Commonwealth countries, of these 31 were civil and 21 were criminal. The majority of criminal appeals were cases of capital murder. In its domestic jurisdiction, the Judicial Committee dealt with the first cases under the devolution legislation. The ten petitions received in this category were all from Scotland and all arose out of criminal proceedings in which accused persons alleged that the Lord Advocate, as prosecutor, was infringing their human rights. The remaining 21 appeals disposed of after a hearing by the Judicial Committee related to appeals from committees of the General Medical Council and the governing bodies of other health professions. The Judicial Committee sat on a total of 102 days.

### **The separation of powers**

4. There is no question of the skill and integrity of the Law Lords in keeping separate their dual roles as both judges and legislators. However, the argument that the constitutional overlap poses merely a theoretical anomaly of no practical significance

---

<sup>2</sup> Lord Bingham has spoken most recently on this subject at the Constitution Unit Spring Lecture, 1 May 2002.

<sup>3</sup> *Judicial Statistics 2000* Reference (the latest year for which statistics are available)

is being increasingly undermined. Recent jurisprudence on the independence of judicial bodies has emphasised that independence and impartiality must be measured against both subjective and objective standards. In *Findlay v United Kingdom* [1997] 24 EHRR 221, the European Court of Human Rights stated:

First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

5. Although there is no question of subjective partiality, Law Lords can objectively be placed in constitutionally difficult positions. Two practical illustrations of the theoretical problems are provided by the recent account of a leading counsel.<sup>4</sup> First, she argued to the appellate committee of the House of Lords, on *Pepper v Hart* grounds, that it should consider an excerpt from a Parliamentary debate in the Upper House. This submission was rejected. However, one of the presiding judges had been present during the debate in question and was, therefore, required to “forget” what he undoubtedly would have heard. Secondly, during the course of the same case, counsel had been called on to address their Lordships on the subject of legislative provision regulating covert policing. Her arguments were interrupted by lunch, during which one of the presiding judges was lobbied by a pressure group inviting him to intervene in legislation on this subject.
6. Maintenance of objective impartiality is particularly important at a time of rapid growth in the role of judges in deciding highly politicised disputes involving the executive and, in some cases, the devolved legislatures. The European Court of Human Rights has already decided, in *McGonnell v United Kingdom* (2000) 30 EHRR 289, that the Bailiff of Guernsey did not meet the requirement of objective impartiality when he sought to sit as a judge in a case concerning legislation that he had played a role in passing.
7. The increased importance of *demonstrating* the separation of legislative and judicial functions has been recognised, not least, by the Law Lords themselves. Following the recommendations of the Royal Commission on the Reform of the House of Lords, the Senior Law Lord, Lord Bingham, issued a formal statement to the House circumscribing the situations in which serving Law Lords would find themselves constitutionally able to participate in Parliamentary debates. He stated:

---

<sup>4</sup> Vera Baird QC, at a Charter 88 meeting on 15 May 2002

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.<sup>5</sup>

8. This was the first time such a statement has been given. The previous convention, to similar effect, had been subject to interpretations of varying degrees of strictness. The report of the JUSTICE working party cites numerous examples of serving Law Lords actively participating in debate on politically sensitive issues and those on which they might later be called to adjudicate. The fact that this convention has now been translated into a formal statement of principle indicates a growing recognition of the importance, not merely of avoiding constitutional conflict of interest from a subjective point of view, but also of introducing more formal, structural, safeguards to “exclude any legitimate doubt” from an objective stand point. Lord Bingham’s guidance is, in our judgement, correct and an important step within the context of the present system. However, any move towards thorough-going reform of the second chamber must include a proper separation of the legislative and judicial functions.
9. Proponents of the status quo argue that there are distinct practical benefits of the current arrangements: the Law Lords’ knowledge and expertise enables them to make an invaluable contribution to Parliamentary debates, and, in turn, the experience they gain of politics and wider social issues in the course of their legislative roles is of use in deciding politically sensitive cases.
10. The argument that the Law Lords need to participate in Parliamentary debate in order to remain abreast of current political and social issues is surely unconvincing. Their Lordships have wide and diverse interests and have many different avenues at their disposal should they wish to increase their knowledge of current affairs.

---

<sup>5</sup> Hansard, 22 June 2000: column 419

11. The argument that the Law Lords make an invaluable contribution to legislative debate is more complex. We agree that senior lawyers of the calibre and experience of the Lords of Appeal in Ordinary have much to contribute to the functions of a second chamber in terms of scrutiny and analysis of proposed legislation. However, the extent to which serving Law Lords are able to participate in Parliamentary debate is now limited in accordance with the principles articulated by Lord Bingham. Since his statement to the House, only three of the twelve current Lords of Appeal in Ordinary have spoken in the House<sup>6</sup>. It would therefore make more sense to gain these benefits from those who are in a position to participate fully. This could be achieved by allowing retired Law Lords, or other senior lawyers, to sit in the second chamber. As Lord Bingham, amongst others, has pointed out, the premium on fully participative members of the upper house is only likely to increase if the size of the second chamber is reduced in forthcoming reforms. In Lord Bingham's words:

a habit of reticence makes for good judges, it makes for poor legislators and debaters, and serves to weaken the justification for including the Law Lords among the members of the House.<sup>7</sup>
12. There are additional practical benefits of creating a separate Supreme Court. Indeed, for many commentators these benefits provide sufficient reason in themselves for changing present arrangements.
13. The Appellate Committee of the House of Lords currently occupies a cramped corridor in the Palace of Westminster. It is not conducive to public accessibility and there is no room for any form of support staff, such as is usually enjoyed by a court of this level. Creating a Supreme Court, with its own building would enable there to be a dedicated Supreme Court library with appropriate research facilities. It would also afford a valuable opportunity to make the court system more open and transparent to the general public. The Constitution Unit, in its report "*The Future of the United Kingdom's Highest Courts*"<sup>8</sup>, points out that many Supreme Courts around the world have guided tours and public information programmes. This is not merely window dressing, it plays an important role in enhancing public understanding of, and

---

<sup>6</sup> For a full list of the contributions to Parliamentary debate made by those members of the upper chamber who are also eligible to sit on the Appellate Committee of the House of Lords since Lord Bingham's statement to the House on 22 June 2000, see Appendix 1.

<sup>7</sup> Constitution Unit Spring Lecture, 1 May 2002

<sup>8</sup> Andrew Le Sueur and Richard Cornes, 2001

confidence in, the legal system. This is particularly important given recent research findings that two thirds of the public think that:

judges are out of touch with ordinary people's lives ... The questioning overwhelmingly stimulated negative responses relating to perceptions of remoteness based on social distance, inconsistency in sentencing, and examples of insensitive judicial comments reported in the media... The comments tended to cluster around several themes: age, values and bias, inconsistency, and dress.<sup>9</sup>

14. Establishment of a separate Supreme Court of the United Kingdom would also afford an opportunity to look at the composition of what is currently the Appellate Committee of the House of Lords, with a view to merging the functions of the Appellate Committee with the role of the Privy Council in deciding devolution issues. This would enable the establishment of a Supreme Court which serves both as the ultimate court of appeal (for Northern Ireland, England & Wales and Scotland to the extent the Scottish Parliament and Executive decide this is appropriate) and as a court deciding constitutional and devolution issues.

15. JUSTICE considers that Lord Bingham's concerns over the feasibility of such a merger can be met. Speaking in the House of Commons debate on the Government of Wales Bill, Win Griffiths MP explained the Government's reasons for choosing the Judicial Committee of the Privy Council as the arbiter of devolution issues over the Appellate Committee of the House of Lords:

The Judicial Committee acts now as the final constitutional court of appeal for various Commonwealth dependencies and colonies, which were mentioned earlier... As it already has that role, we thought it appropriate to use its experience of handling cases that raise constitutional issues.

We also believe it important that a flexible mechanism should be in place to allow the assembly's powers to be resolved promptly... paragraph 33 of schedule 6 gives greater flexibility about the membership of the Judicial Committee of the Privy Council than exists for the membership of the Appellate Committee of the House of Lords.<sup>10</sup>

16. This encompasses three justifications:

---

<sup>9</sup> Hazel Genn, *Paths to Justice: what do people do and think about going to law* 1999 pp239-247

<sup>10</sup> Hansard 3 February 1998 Column 927.

- (i) the Privy Council has experience of deciding constitutional issues;
- (ii) it has a smaller work load than the Appellate Committee of the House of Lords;
- (iii) it has a broader membership than the Appellate Committee (thus it allows for greater representation amongst the Scottish judiciary)<sup>11</sup>.

Undoubtedly, there were also concerns in Scotland about the close ties between the Appellate Committee and the Westminster Parliament.

17. In our view, there would be no great obstacle to constituting a Supreme Court of the United Kingdom which met these criteria. The significant advantage of merging the devolution jurisdiction of the Judicial Committee with the functions of the Supreme Court, aside from structural elegance, would be that it would avoid the existing problem of duplication. At present, it is possible (and has indeed occurred<sup>12</sup>) that the same human rights point is raised in separate cases that are simultaneously passing through the Scottish and English & Welsh courts. If the functions are kept separate, this could result in the Supreme Court and the Privy Council both being asked to decide on the same issue.
18. We do not see that merging the devolution jurisdiction of the Judicial Committee with the Supreme Court would automatically entail that the Supreme Court would become the ultimate court of appeal on Scottish criminal law. If the Scottish Parliament chooses to retain the High Court of the Justiciary as the ultimate appellate court on Scottish criminal matters, there is no reason why a Supreme Court could not support this asymmetry in the same way that the Appellate Committee of the House of Lords does at present.
19. We agree with Lord Bingham that it is unlikely to be possible to merge the Commonwealth jurisdiction of the Privy Council with that of the proposed Supreme Court. The Privy Council, in its Commonwealth Jurisdiction, is not viewed as a domestic UK court, which a Supreme Court undoubtedly would be. This is likely to make it unattractive to countries which currently retain the Privy Council as their ultimate court of appeal. In any event, this aspect of the Privy Council's jurisdiction is

---

<sup>11</sup> It should be noted in this connection that Commonwealth Members of the Privy Council are expressly excluded from sitting on devolution cases.

<sup>12</sup> See for example, *County Properties Ltd v Scottish Ministers* 2000 S.L.T 965 and *R (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23.

progressively shrinking and is likely to disappear altogether in the future. In the interests of practical efficiency, the Judicial Committee in its Commonwealth jurisdiction could be housed in the Supreme Court Building.

20. We are of the view that the current jurisdiction of the Privy Council to hear appeals against decisions of the General Medical Council and other professional bodies would best be transferred to the High Court. There is no reason for appeals of this nature to be heard at the present level of seniority.

## **Conclusion**

21. Those who advocate maintaining the Appellate and Judicial Committees in their present forms argue that these bodies function well, their judgements are internationally respected and that theoretical arguments about separation of powers should not dictate reform of institutions which operate perfectly well in practice.
22. Our response is that, whilst acknowledging the undoubted strengths of our existing judicial bodies, the present constitutional overlap cannot be dismissed as merely a theoretical concern of no practical importance:
  - It may place us in breach of our international obligations under the European Conventions on Human Rights.
  - The Lords of Appeal in Ordinary are increasingly taking steps to ensure that their legislative role does not encroach on their judicial functions. In practice this means withdrawing from Parliamentary debate. Particularly if the size of the second chamber is greatly reduced, the premium on full participation is likely to increase.
  - The current facilities for the Appellate and Judicial Committees are far from ideal. The creation of a Supreme Court would afford the opportunity to improve public accessibility and to provide appropriate support facilities for a court of this standing.
  - Clarifying the structure of the UK's most senior court would facilitate public understanding of the justice system and could be used as an opportunity to combat public perceptions of the courts and the judiciary as inaccessible and unrepresentative.

We leave the final words to Lord Bingham:

To modern eyes, it was always anomalous that a legislative body should exercise judicial power, save in very restricted circumstances. This anomaly may not have mattered in the past. But if the House of Lords is to be reformed, and even if it is not, the opportunity should be taken to reflect in institutional terms what is undoubtedly true in functional terms, that the law lords are judges not legislators and do not belong in a House to whose business they can make no more than a slight contribution.

Roger Smith/Ruth Brander,  
JUSTICE,  
59 Carter Lane,  
London EC4V 5AQ

November 2002

## APPENDIX A

### Contributions to Parliamentary debates by the Lords of Appeal in Ordinary and other Lords who are eligible to hear appeals as part of the Appellate Committee of the House of Lords (except the Lord Chancellor) from 22/06/2000 – 23/05/2002

#### Lords of Appeal in Ordinary

Lord Bingham of Cornhill	none
Lord Slynn of Hadley	none
Lord Nicholls of Birkenhead	none
Lord Steyn	none
Lord Hoffmann	none
Lord Hope of Craighead	31 October 2000 – Criminal Justice and Court Services Bill 23 July 2001 – Minimum Standards in Asylum Procedures: EU committee report 13 May 2002 – Proceeds of Crime Bill
Lord Hutton	3 May 2002 – Justice (Northern Ireland) Bill
Lord Saville of Newdigate	none
Lord Hobhouse of Woodborough	none
Lord Millett	none
Lords Scott of Foscote	18 January 2001 – Culture and Recreation Bill 12 March 2001 – Hunting Bill 19 November 2001 – EU Committee report on Counter Terrorism: The European arrest Warrant 8 January 2002 – Export Control Bill 23 April 2002 – European Arrest Warrant
Lord Rodger of Earlsferry	none

#### Other Lords of Appeal

Lord Brown-Wilkinson	none
Lord Cameron of Lochbroom	none
Lord Clyde	none
Lord Hardie	none
Lord Lloyd of Berwick	24 July 2000 – Football (Disorder) Bill 15 January 2001 – International Criminal Court Bill 19 January 2001 – Psychotherapy Bill 4 October 2001 – International Terrorism

	25 March 2002 – Proceeds of Crime Bill
	30 April 2002 – Liaison Select Committee Report on crash of Chinook helicopter on Mull of Kintyre
	13 May 2002 – Proceeds of Crime Bill
Lord McCluskey	12 February 2001 – International Criminal Court Bill
	9 May 2001 – asked about Turkey’s compliance with judgments of the European Court of Human Rights
Lord Mackay of Clashfern	17 October 2000 – Freedom of Information Bill
	29 January 2001 – Prescription Only Medicines (Human Use) Amendment (No.3) Order 2000
	29 January 2001 – Commonhold and Leasehold Reform Bill
	27 February 2001 – Social Security Fraud Bill
	15 October 2001 – Tribute to Lord Hailsham
	10 December 2001 – Anti-terrorism Crime and Security Bill
	3 April 2002 – Tribute to the Queen Mother
	10 May 2002 – Divorce (Religious Marriages) Bill
Lord Mackay of Drumadoon	none
Lord Mustill	20 March 2001 – Borough Freedom (Family Succession) Bill
	10 April 2002 - Borough Freedom (Family Succession) Bill
	24 April 2002 - Borough Freedom (Family Succession) Bill
Lord Nolan	28 June 2000 – Regulation of Investigatory Powers Bill
	19 July 2000 – Regulation of Investigatory Powers Bill
	2 July 2001 – Parliamentary Code of Conduct
Lord Phillips of Worth Matravers	none
Lord Woolf	4 October 2000 – Criminal Justice and Court Services Bill