Reforming the Lords:
the Role of the Law Lords

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Executive Summary

Law Lords in Parliament

- Up to twelve Lords of Appeal in Ordinary (Law Lords) are appointed by the Queen on the recommendation of the Prime Minister.
- The primary task of the Law Lords is to sit as judges on the Appellate Committee of the House of Lords and on the Judicial Committee of the Privy Council.
- The Law Lords do however also have the same rights as other Life Peers, including the right to speak and vote in the House of Lords in legislative matters.
- There is a convention that Law Lords will not speak or vote in controversial

Introduction

Background

Up to twelve Lords of Appeal in Ordinary are appointed by the Queen, on the recommendation of the Prime Minster. By convention two are Scots and in practice one is usually Northern Irish. They are appointed primarily to act as judges in the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council[1]

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

The recent series of decisions in the matter is indicative of the sort of increased publicity the Appellate Committee can expect as it deals with cases under the Human Rights Act 1998 and devolution disputes under the statutes establishing

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

Lastly, in presenting arguments for and against in summary form it is inevitable that some of the propositions for either side suggest their own refutation, and that in some cases arguments used on one side may be turned around for use on the other. In writing this briefing we have followed the Commission's instrta164fnowegpresent the arguments, and have not proceeded to comment on them at length, or to suggest our own conclusions.

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

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

By convention the Law Lords, when speaking in the House of Lords, speak only on non-controversial matters, either introducing law reform bills, or raising technical legal issues in relation to general bills. While there have been instances of Law Lords speaking on controversial matters these might be said not to outweigh the benefit of having their contribu164fnointhe greater number of matters where their involvement is not controversial. Recently the Law Lords made useful contribu164fno during passage of the devolu164f Acts, and the Human Rights Act, all statutes of constitutional significance where the opinions of eminent jurists have self evident merit.

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One of the Law Lords usually chairs subcommittee E of the House of Lords European Committee (concerned with law and institutions) and the Consolidation Bills Joint Committee. In relation to Europe they also maintain contact with the European Court of Justice, providing Westminster with another avenue of communication to European institutions. So long as the Law Lords remain within the area of technicality, and away from broader controversial topics, although in theory breaching the prinnue ofraio' Twls,oJ19j/TT21[(pe thvtsA55 Two.T*ove0.1954 Two mn

The position of the Law Lords in the House of Lords may be said to be largely symbolic. The conventions which govern their activities as judges and legislators have resulted in a relatively clear distinction between their two roles, with their

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

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

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

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

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

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

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

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

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

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

Article 6 of the European Convention on Human Rights provides for the right to determination of one's rights by a fair and impartial tribunal. A recent successful challenge to the Bailiff of Guernsey in the European Commission of Human Rights may have implications for the both the Law Lords generally and perhaps even more so for the Lord Chancellor. The Bailiff of Guernsey presides over the Royal Courts of Guernsey as well as the legislature, and acts

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

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

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

Factors For

The Lord Chancellor provides a key link between the executive, legislature and the judiciary. His position in cabinet, as well as the Appellate and Judicial committees means he may represent the views of the executive to the senior judiciary, and

. Associated with this argument is the concept that the Lord Chancellor has a key role to play as a of the separation of power between the executive and judiciary. The current Lord Chancellor summarises this view of his office:

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

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

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

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

The conventions as to when a Lord Chancellor may and may not sit have for the most part, worked.[10] The current Lord Chancellor holds the view that there is no category of case where a rule could be laid down that the Lord Chancellor ought not to sit. The closest he has gone is to say he would not sit in 'any appeal where the government might reasonably appear to have a stake in a particular outcome'.[11] However, a recent case where the Lord Chan

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

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

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

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

Constitutional v Supreme Courts

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

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

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

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

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

Recent high profile cases (e.g., [15]) have prompted comments that the Appellate Committee is becoming a constitutional court. These comments result from a mistaken understanding of the nature of the Appellate Committee's role. The United Kingdom has had, in the Appellate Committee, a court which is both supreme, in the sense that it is the final court of appeal for the UK[16], and which is 'constitutional', in the sense that it has concerned itself with issues of constitutional importance. Its constitutional role is mixed in with its responsibilities in other areas of the law but will gain more prominence as the Committee deals with devolution and human rights matters. The key question for the future is whether the Appellate and Judicial Committees are organised appropriately for their increasing constitutional role.

There is one aspect of the current constitutional reform programme which does suggest the possibility of a United Kingdom constitutional court in the civil law or South African sense. This is the use of the Judicial Committee of the Privy Council, which, where devolution disputes are referred to it[17] is the final court of appeal. The mixture of a pre-legislative scrutiny role and specialist 'constitutional' review role in contentious matters are hallmarks of a constitutional court. This is largely foreign to the English legal system. If the Appellate Committee were separated from the House of Lords it could be combined with the Judicial Committee to form a supreme

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15 [1994] 2 409.

16 With the exception already noted of Scottish criminal appeals.

17 Broadly, devolution matters may come to the Judi

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

For Separation without Combination with the Judicial Committee

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

For Separation and Combination with the Judicial Committee

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

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

Against Separation

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

Consequential Issues

What this Briefing has Covered

The issues raised in this briefing were:

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

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

Appointment and Other Issues Arising

In debates on the relationship between the House of Lords and the Appellate Committee there have been suggestions that Parliament have some role in the appointment of judges to the Appellate Committee, even if this only involved judges being interviewed by Parliamentarians after appointment to the court. Upper houses overseas often have a role in the nomination, election, or appointment of members of the body which is entrusted with constitutional review, be it a constitutional court, a supreme court or a tribunal. In France three of the nine members of the Conseil d'Etat are appointed by the Senate, and in Germany half of the 4ion, oD-0.0ioD-0 a su in9re appointe d by the ntruseady Upper

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

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

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