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Separating Powers and Constitutionalising the Office of Lord Chancellor*

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(1) Introduction

The decision to scrap the ancient office of Lord Chancellor in the ministerial re-shuffle of June 2003 was a major surprise. The details of the new department and the ministerial role are still in the process of being finally determined as the Department of Constitutional Affairs (DCA) is rising Phoenix like from the ashes of the Lord Chancellor's department. This paper examines some of the implications of this re-structuring. We begin by looking at the governmental role of the new department but the main concern is to reflect upon separation of powers and to assess the proposals for a new system of judicial appointments and for a Supreme Court in terms of the broader constitutional context of the re-balancing of powers between the main organs of the state.

An obvious feature of the former Lord Chancellor was the 'constitutional illogicality of his position'[1] caused by the blatant conflict with separation of powers. At one and the same time the Lord Chancellor wore three hats. He was head of the judiciary with a right to sit on the highest domestic appellate courts. He was not only a member of the House of Lords but performed the function of Speaker, and finally, he was a prominent member of the cabinet and head of the executive department responsible for *inter alia* judicial appointments and the courts service. This apparent anomaly has been explicitly addressed by these changes. Lord Falconer has announced that he will not sit as a judge on the judicial panels of the House of Lords and Privy Council[2] and that future holders of the office i.e. Secretaries of State for Constitutional Affairs will not have the right to preside over the new supreme court when it comes into being. In common with all other ministers the Minister of Constitutional Affairs will continue

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[1] D. Woodehouse 'The Office of Lord Chancellor' [1998] *PL* 617-633 at p.618.

[2] Lord Irvine sat as a judge on a number of occasions early in his Lord Chancellorship but the judgment of the European Court of Human Rights in McGonnell v United Kingdom (2000) 8 BHRC 56 prompted him to state 'The Lord Chancellor would never sit in any case concerning legislation in the passage of which he had been directly involved nor in any case where the interests of the executive were directly engaged. Lord Mackay 1987-1994 sat as a judge 68 times; Lord Hailsham sat 68 times between 1979-1987.

to be a member of the House of Lords, but he will no longer have the role as Speaker in the House although this change was not made in the parliamentary session which ended in 2003 and has yet to be implemented. This could mean that future Ministers for Constitutional Affairs may be from the House of Commons rather than the Lords. We will shortly return to the subject of separation of powers, this will specifically be in the context of the judiciary but first a few observations about the ministerial position.

(2) The Ministerial Role

We have already observed that the Lord Chancellor has an executive role as a member of the Cabinet. It appeared that the previous incumbent, Lord Irvine, was in a particularly powerful position, partly because of the fact that at the beginning of his administration he was a close ally of Tony Blair and was responsible for chairing a number of strategically important cabinet committees[3]. Not all Lord Chancellors have been in such a powerful position but in general they have represented the place of law and the legal profession in the vital affairs of government[4]. A notable aspect of this reform relates to the fact that constitutional issues have been recognised as a matter of central concern for a government department. Indeed, the department's mission statement on its website declares the department is (paraphrased) responsible in government for upholding justice, rights and democracy providing effective and accessible justice for all, ensuring people's rights and responsibilities, enhancing democratic freedoms by modernising the law and the constitution[5]. This raises the question of whether the effect will be to have a much more co-ordinated strategy for constitutional issues. For example, a new Department of Constitutional Affairs might seem the obvious place to handle further reforms relating to devolution and regional government. This would include giving devolved government to the English regions, extending law making powers to the Welsh Assembly and re-allocating devolved competences to Scotland. This could also appear to be the department best placed to address issues to do with European Union law and the constitution. However, at an administrative level the re-shuffle has not addressed the lack of strategic action on the issue of constitutional reform and more specifically in regard to devolution and the plans to introduce English regional government. This is because the departmental command structure in regard to Scotland, Wales and Northern Ireland has not been touched at an administrative level[6]. Officials in the Scottish, Welsh and Northern Ireland offices report to their respective ministers and not through the DCA. The Office of Deputy Prime Minister's department retains responsibility for the introduction of English regional government. As one commentator has noted: 'What was lost was the opportunity to take a more synoptic view of devolution, by bringing together in a single post responsibility for devolution in Scotland and Wales, as the Lords Constitution Committee had recommended' [7].

[3] Woodehouse [1998] at p.618. The Cabinet committees chaired by the Lord Chancellor are discussed below.
[4] Ibid.
[5] http://www.dca.gov.uk/index.htm.
[6] For some preliminary comments see R. Hazell 'Merger, what merger? Scotland, Wales and the Deparment of Constitutional Affairs' [2003] *PL* 650.
[7] Hazell p.653

In regard to the departmental role as co-ordinator of constitutional reform, it is important to note that the informal constitutional mechanism for co-ordinating the arrangements, namely, the concordats with the devolved administrations, are dealt with by the DCA. These agreements which have been drawn up across a range of policy areas with Scottish and Welsh executives are designed to promote constructive co-operation and communication and to resolve potential conflict between central and devolved government. There is considerable debate over the attention paid to concordats and the weight that is given to them in the practical work of government. Also, there have also been suggestions that the general approach to drafting and applying these agreements has tended to reflect the dominance of Whitehall. Nonetheless, these concordats are an illustration of the soft law methods for policy co-ordination that are favoured in preference to providing a detailed statutory framework[8] and they have some potential for future development.

In view of the fact that there has been very little change at an administrative level in these areas the title Department of Constitutional Affairs (DCA) appears at first encounter to be somewhat misleading. However, the ministerial role of the DCA in policy co-ordination for these areas makes more sense if we examine the network of Cabinet committees which are responsible for taking decisions at the heart of government[9]. In general the Minister for Constitutional Affairs has inherited the responsibilities of his predecessor in relation to the Cabinet. He chairs the Ministerial Committee on Constitutional Reform Policy which is responsible for considering "strategic issues relating to the Government's constitutional reform policies" and this committee includes all the most senior members of the Cabinet[10]. In addition, Lord Falconer chairs the Ministerial Committee on Devolution Policy (PD)[11] and the Ministerial Sub-Committee on Reform of the House of Lords (CRP(HL))[12]. In addition to chairing the above committees the Minister for Constitutional Affairs is a permanent member of no less than eight other Cabinet Committees out of a total of twenty three[13]. The point being that these key chairmanships rest with the DCA rather

[8] See P. Leyland 'Devolution, the British Constitution and the Distribution of Power' *NILQ* Vol 53 No 4, Winter 2002, 408-435 at 430. For more detailed discussion see R. Rawlings 'Concordats and the Constitution' [2000] *LQR* 256-286 and J. Poirier 'The Functions of Intergovernmental Agreements: Post Devolution Concordats in Comparative Perspecive' [2001] *PL* 134-157.

[9] Many influential consitutional writers have observed that cabinet committees rather than the full cabinet itself are increasingly the locus for governmental decision making and that the Prime Minister assumes a dominant role in securing the overall objectives of government. See e.g., P. Hennessey *The Prime Minister: The Office and Its Holders Since 1945*, London, Penguin, 2001 at p.522ff.

[10] It is composed of the Deputy Prime Minister and the Chancellor of the Exchequer. Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department, Secretary of State for Transport and Secretary of State for Scotland, Secretary of State for Northern Ireland, Leader of the House of Lords and The Lord President of the Council, Leader of the House of Commons, Lord Privy Seal and Secretary of State for Wales, Parliamentary Secretary, Treasury and Chief Whip, Minister without Portfolio, Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster i.e. the Prime Minister.

[11] Its brief is: "To consider policy and other issues arising from devolution to Scotland, Wales and Northern Ireland."

[12] Its brief is "To consider policy and other issues arising from the Government's plans for reform of the House of Lords and to make recommendations to the Committee on Constitutional Reform Policy".

[13] These are the following: Minister for Constitutional Ministerial Committee on the Criminal Justice System (CJS), Ministerial Committee on Domestic Affairs, Ministerial Committee on English Regional Policy (ERP), Ministerial Committee on European Union Strategy (EUS), Ministerial Committee on Local Government (GL), Ministerial Committee on the Legislative Programme (LP), Ministerial Committee on Organised Crime (OC), Ministerial Committee on Electoral Policy

than other possible ministerial candidates such as the Prime Minister, the Deputy Prime Minister or the Home Secretary. This would tend to confirm the ministerial role in setting the agenda for constitutional reform. Moreover, as part of the current legislative programme announced in the Queen's Speech, the Department of Constitutional Affairs will be responsible for the bills introducing House of Lords reform, the Supreme Court and the new system of judicial appointments.

(3) Separation of Powers and Judicial Independence

The Minister for Constitutional Affairs, Lord Falconer, has stated that he greatly values judicial independence and that he regards it as essential that judicial independence is preserved[14]. But what is meant by judicial independence? There are a number of senses in which judicial independence is relevant. In a macro-constitutional sense this independence would be most apparent if the judicial branch is seen to be separated from and thus independent of the executive branch. Since judicial appointments have been made by the executive in the form of the Lord Chancellor and the Prime Minister this obviously is not straightforward and we will return to the question of appointments more specifically later.

An important degree of independence from Royal interference was recognised by the celebrated decision of *Prohibitions del Roy* of 1607 which confirmed that the King had no right to judge in person and the Act of Settlement of 1701 which gave judges security of tenure. However, some high judicial offices and judicial appointments were made on political grounds and it was only during the Liberal government of the early twentieth century that the current practice of appointment on merit was established[15]. Furthermore, it is clear that new courts and tribunals can only be introduced by statute (rather than Royal decree) and the dismissal of the higher judiciary on grounds of misbehaviour requires confirmation of both Houses of Parliament[16].

However, the degree to which judges are independent from the state still arises in certain categories of case. For example, in cases involving human rights and state security the adjudication process may require the court to decide between the rights of the individual and the wider interests of the state. In this area there are many examples that could be cited which suggest that the judges regard their role in such situations as being an extension of that of the state[17]. The reasoning applied may acknowledge the gravity of the injustice and even the dubious legality of the state's action[18], but the conclusion will often be that the interests of national security prevail

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(MISC24), Ministerial Committee on Public Services and Public Expenditure (PSX). It is interesting that Lord Falconer does not have a seat on the Ministerial Committee on the Governments response to Parliamentary Modernisation (MISC21).

[14] Lord Falconer 'DCA: Justice, Rights, Democracy' Speech to the Institute of Public Policy Research, 3rd December 2003.

[15] R. Stevens 'Government and the Judiciary' in V. Bogdanor (ed.) *The British Constitution in the Twentieth Century, Oxford*, OUP, 2003 p.337 and 341.

[16] Supreme Court Act 1981.

[17] T. Bingham 'Personal Freedom and the Dilemma of Democracies' *ICLQ* Vol 52, October 2003 841-858.

[18] See e.g. Lord Atkin's famous dissenting judgment in *Liversidge v Anderson* [1942] AC 206.

over the rights of the person concerned[19]. The fact remains that in such cases the judges are in effect confirming the decisions of the executive[20].

During the eighteenth century Montesquieu realised that 'power must check power by the arrangement of things' and such thinking has of course contributed greatly to the notion of limited government and constitutionalism. The originators of modern conceptualisations of separation of powers sought to conceive a system of checks which ensures that power vested governors cannot be turned to personal advantage and that the personalised rule by men is replaced by the impersonal rule of rules[21]. It was further recognised that this required '...an independent judiciary in acting as a bulwark against executive power. It is this aspect of the rule of law which is critical in distinguishing between liberal and despotic regimes'. In practical terms this means that the judiciary require firstly 'a set of relatively clear and general rules which can establish an impartial system and, secondly, independence to apply the law without fear or favour'[22].

Modern constitutionalism has tended to generate a particular conception of the relationship between politics and law. On one view, this suggests that law must be conceived as a structure of rules and principles which provides the foundations of political order and that there are certain issues of contention which are removed from the agenda of government[23]. Several previous Lord Chancellors (e.g., Lord Simonds and Lord Jowitt) were keen to ensure that there was no confusion between lawyers and legislators. The policy was that judges, including the highest appellate courts, should apply objective rules and interpret statutes according to their plain meaning resulting, they believed, in a policy neutral bench[24]. Of course, the kind of Diceyan approach which tends to seriously underplay the 'politics of the judiciary' has been challenged. There have been crucial judicial decisions in the political arena which demonstrated strong party political bias. In some cases it was possible to identify undisguised judicial hostility to the collectivist principles of socialism[25]. However, in examining the issue of judicial bias and the independence of the judiciary in the contemporary arena, it is important to recognise that there is no longer a clear ideological divide between the main political parties. They all support market capitalism to various degrees and despite the fact that the higher judiciary still tend to be drawn from an Oxbridge elite, it is by no means clear that their affiliations can still be measured in terms of support for one political party to the detriment of others. Indeed, during the 1980's under the radical Conservative government of Mrs.

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[19] See *Liversidge v Anderson* [1942] AC 206; *Council of Civil Service Unions v Minister of the Civil Service (The GCHQ case)* [1985] AC 374; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696; *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 2 All ER 319. Derogation from Article 5 is permitted in time of war or other public emergency threatening the life of the nation.

[20] Lord Bingham (the senior Law Lord) [2003] at p.857 states that when there are derogations allowing exceptional executive powers Parliament must set out the position in very plain and specific language and the limits of this power should be insisted upon by the courts.

[21] M. Loughlin *Sword and Scales: An Examination of the Relationship Between Law and Politics*, Oxford, Hart Publishing p.183.

[22] ibid. p.185

[23] ibid. p.192.

[24] Stevens 2003, p.348ff.

[25] See e.g., *Robert v Hopwood* [1925] AC 578, *Bromley LBC v Greater London Council* [1982] 1 AC 768. J. Griffith *The Politics of the Judiciary*, 4th ed. London, Fontana, 1997

Thatcher the courts entered the political domain as a counterweight to government. They did so with a number of decisions that in their effect challenged controversial policies and this trend continued into the 1990's[26]. In following this course judges projected themselves as a separate branch of government who were acting as custodians of consensus politics[27]. An equally significant transformation was an increasingly contextual approach to statutory construction and a recognition that judges make and change the law the law as a matter of course[28].

In addition, the Human Rights Act is having an impact on the constitutional balance that previously existed between Parliament, the executive and the courts. It is apparent that a clear policy dimension is emerging from recent judicial decisions. These cases are gradually forming a new set of ground rules and differences in approach between senior judges are already discernible from close analysis of judicial positions[29]. I have argued that the application of rights jurisprudence involves a genuine tension between different philosophical conceptions of the relationship between law and politics[30]. These positions are also represented in the judgments[31]. For example, at the extremes, it might be suggested that the aim of liberal legalism, which represents one strand of this debate, is to secure 'the enclosure of politics within the straightjacket of the law'[32] and such a court centred approach is underpinned by an assumption that answers to all political disputes can ultimately be found in law. On this view, the conferment of increased power on the judges as part of a new constitutional order is justified, not only by the failure of Parliament to protect rights, but by its more general demise as an effective counter-balance to 'elective dictatorship' in a situation where political opposition is weak and also ineffective[33]. This is achieved by a new emphasis on human rights[34].

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[26] R. Cranston 'Reviewing Judicial Review' in G. Richardson and H. Genn *Administrative Law and Government Action*, Oxford, Oxford University Press, 1994 particularly at p.69ff. See e.g., *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement* [1995] 1 WLR 386 which involved a decision to allocate a large chunk of the overseas aid budget the Pergua Dam project in Malaysia; *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385 which involved a challenge to regulations introduced to discourage claims for asylum.

[27] Stevens 2003 p.359.

[28] Stevens 2003 p.364. For example, in *Pepper v Hart* [1993] 1 All ER 42 the House of Lords decided that in exceptional cases where legislation is ambiguous or obscure the courts might rely on ministerial statements in Parliament.

[29] the difference in approach between the Court of Appeal and the House of Lords in *Wilson v First County Trust Ltd* [2001] 3 All ER 229 and [2003] UKHL 40 can be cited as an example.

[30] P. Leyland 'The Human Rights Act and Local Government: Keeping the Courts at Bay' *NILQ* Vol 54, No 2 Summer 2003 136-159 at p.137.

[31] For a recent example see the judgment of Laws LJ in *Thoburn v Sunderland City Council* [2002] 3 WLR 247 which provides a controversial discussion of sovereignty. There are numerous extra judicial contributions to the debate that pre-date the HRA see e.g., Laws J. 'Is the High Court the Guardian of Fundamental Constitutional Rights [1993] *Public Law* 63; Woolf Lord 'Droit Public-English Style' [1995] *PL* 57; Sedley S. 'Human Rights: a Twenty-First Century Agenda' [1995] *PL* 386; Lord Irvine 'Judges and Decision-Makers: The Theory and Practice of Wednesbury Review' [1996] *PL* 59: and have continued since it reached the statute book: see e.g. Lord Hoffman 'Human Rights and the House of Lords' [1999] *MLR* 159; Lord Bingham 'Dicey Revisited' [2002] *PL* 39; Lord Steyn 'Human Rights: The Legacy of Mrs. Roosevelt' [2002] *PL* 473.

[32] A. Tomkins 'In Defence of the Political Constitution' *OJLS*, Vol 22, No.1 (2002) pp.157-175 at p.169ff.

[33] See A Lester 'Human Rights and the British Constitution' in J. Jowell and D. Oliver *The Changing Constitution*, 4th ed., Oxford, Oxford UP, 2000 and A. Lester 'Developing Constitutional Principles of Public Law [2001] *PL* 684-694.

On the other hand, human rights sceptics believing in a form of political constitutionalism might begin with an entirely different premise. Indeed, perhaps the central problem for them is that the theories of rights (e.g. ECHR) to which rights constitutionalists (as adherents of legal liberalism) tend to defer have not reconciled the very questions that lie at the heart of political debate[35]. The point being that political constitutionalists recognise 'the inevitability of sustained disagreement over justice, policy and the content, meaning and priority of rights in circumstances of political pluralism'[36]. From this perspective also, the reinforcement of liberal constitutionalism may turn out to be an impediment to progress based upon a social democratic agenda of progressive reform since many adherents of this view endorse a constitutional order that lacks any commitment to political and economic equality[37]. The key issue comes down to determining who should ultimately decide these contested questions. Should this be achieved by means of a political process or by the courts? Those believing in a form of political constitution will prioritise the political over the legal and call for a theory of authority which demands a high degree of participation or equal participation in decisions over rights. Notwithstanding the problems of 'elective dictatorship', voter apathy etc. politics is regarded as *the* medium of conciliation[38]. For political constitutionalists there should be a recognition of the importance of participation in decision making by ordinary people and this must be given priority over decision making by a supposedly expert minorities such as judges. Of course, these positions are included to broadly characterise opposing viewpoints. There are many stances which could be charted on a continuum between these polarities.

I believe that a form of political constitutionalism much closer to the latter view ought to prevail. Lord Irvine the former Lord Chancellor pointed out that: '[The HRA] was drafted sensitively to balance the forces within our substantially unwritten constitution. And that means the government can accept adverse court decisions, not as defeats, but as steps on the road to better governance'[39]. This acknowledgement that particular powers are given to judges is a recognition that we are governed by the rule of law enforced by the courts. However, Lord Irvine, and now his successor Lord Falconer strongly defend the doctrine of parliamentary sovereignty and reject the view that the stream of recent constitutional reforms are a staging post i.e. intermediate stage on the way to a codified constitution, as has been suggested by Sir

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[34] However, any claim of neutrality here can be challenged. For if this path were to be followed, the Act might become the pretext for the courts to promote the narrow individualistic view of rights that is contained in the ECHR.

[35] Perhaps the most vociferous and sustained scepticism has come from JAG Griffith see 'The Political Constitution' (1979) *MLR* 1 and more recently 'The Brave New World of Sir John Laws' (2000) *MLR* 156.

[36] N. Walker 'Human Rights in a Postnational Order' in T. Campbell, K. Ewing and A. Tomkins (eds.) *Sceptical Essays on Human Rights*, Oxford, Oxford University Press, 2001 at p.123ff. This section of Walker's essay is a discussion of the ideas of J. Waldron *Law and Disagreement*, Oxford, Clarendon Press 1999.

[37] K. Ewing 'The Unbalanced Constitution' in T. Campbell, K. Ewing and A. Tomkins (eds.) *Sceptical Essays on Human Rights*, Oxford, Oxford University Press, 2001 at p.112.

[38] Tomkins, 2002 at p.174.

[39] Lord Irvine 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive', *PL* [2003] 308-326 at p.323.

John Laws[40]. This is because if courts were given a constitutional review function, allowing routine judicial challenges against public bodies performing public duties, it would have far reaching consequences for the community as a whole. The example from other jurisdictions suggests that giving the courts a constitutional review function draws the judges into politics[41]. While it might be desirable in some circumstances to provide citizens with remedies when their convention rights have been compromised, the courts should not be involved in the routine process of administration beyond establishing narrow questions of legality. In other words, the special powers of interpretation that have been given to the courts should be used with circumspection and restraint. This need for judicial deference has been clearly articulated in the House of Lords. For example, Lord Hoffman has recently stated:

'In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which the decision-making powers are allocated are principles of law'[42].

However, as Professor Jowell points out in discussing the judgment this still leaves open the question of the relevant weight to be attached to principle as opposed to policy[43]. The way forward in the public law domain is not to have judges decide matters of resource allocation, but rather to introduce universal statutory systems to deliver benefit and distribute resources on a universal basis. If systemic failings are identified which interfere with rights, a declaration of incompatibility under the Human Rights Act has the advantage of placing the ball firmly back in Parliament's court. It is for Parliament to introduce a remedy of general application[44].

The crop of constitutional reforms have highlighted the importance of keeping the judges, particularly those with a right to sit and vote in the House of Lords, at arms length from political debate. Lord Irvine was criticised for defending the Lord Chancellor's right of audience which was seen as increasingly incompatible with the requirements of the ECHR and his policy making role as a senior minister. As we noted at the outset, Lord Falconer has renounced the right to sit as a member of the court. The same difficulty to some extent confronts the other law lords and other senior judges. 'It has always been a murky constitutional convention about which subjects it was appropriate for law lords to speak on in legislative debates'[45]. Stevens goes on to point out that, among other things, judges in the 1960's opposed capital punishment and reform of the divorce laws by speaking out in the House of Lords and voting against government proposals. However the rules regarding judicial participation in Parliamentary debates have already modified after the introduction of

[40] See Laws 1993 above.
[41] See the discussion below of the political involvement of the US Supreme Court.
[42] *R (on the application of the Pro-Life Alliance) v BBC* [2003] UKHL 23; [2003] 2 WLR 1403 at 75 & 76.
[43] J. Jowell 'Judicial deference: servility, civility or institutional capacity' [2003] PL 592
[44] C. Harlow '"Public" and "Private" Law: Definition without Distinction' (1980) 43 *MLR* 241.
[45] Stevens 2003 p.348.

the Human Rights Act so that judges were considered to be disqualified from participating in debates in highly controversial political matters[46] and the introduction of a Supreme Court will almost certainly mean that in future judges of the highest appellate court will not have a seat in the legislature. Active political involvement will inevitably tend to undermine another role performed by the most senior judiciary, namely, their appointment as chairs of Royal Commissions and other investigations which often have a strong political element to them[47].

After appointment to the bench judges are independent in the sense that they remain in place until retirement. Judicial salaries are paid under the consolidated fund which means that they do not require formal authorisation by Parliament on an annual basis and they receive generous pensions. Judges are not accountable in the same way as other public officials, and, unlike politicians, they do not ultimately have the prospect of the electorate looming over the horizon. The advantage of insulating the judiciary from direct pressure is that it allows them to preside over cases, even when highly controversial and perhaps with political implications, without having to consider the consequences in terms of their career prospects. The downside of this is that although the system of appeals can correct specific errors in the application of the law appeals are not designed to identify the repeated mistakes of individual judges. Furthermore, judges are afforded legal immunity from being sued and there is no formal appraisal mechanism. The lack of standard setting and performance review is unusual under the conditions of new public management which have spread to most public institutions. As judges have assumed a more pro-active and interventionist role in the political arena, it is not altogether surprising that some have faced intense criticism and that there have been increasing demands that they are made clearly accountable for their actions[48]. It has been difficult to see how more accountability might be achieved without compromising judicial independence. However, the introduction of an independent appointments commission and a supreme court might allow these new bodies which will be made independent from the executive take over responsibility for overseeing the performance of judges and for disciplinary issues that arise in regard to judges.

Finally, there is also a distinction that needs to be made between independence and impartiality. Lord Mackay, a former Lord Chancellor, stated that: 'Judicial independence requires that judges can discharge their judicial duties in accordance with the judicial oath and the laws of the land, without interference, improper influence or pressure from any other individual or organisation'[49]. So far independence has been discussed in terms of the way the courts are set up and regard themselves from a constitutional standpoint in terms of their judicial role. However, issues to do with independence, understood more in the sense of impartiality, may also arise on a case by case basis. This can be discussed by reference to what is often

[46] Cm 4534 2000 .

[47] The Hutton Inquiry [2003-4] following the death of David Kelly and the report by Lord Justice Scott into Matrix Churchill are two well known examples.

[48] Home Secretary David Blunkett has been highly critical of certain judicial decisions which undermined immigration policy and the press has concentrated criticism on individual judges.

[49] It has been suggested however by its former President, Mr Justice Wood, that during his term as Lord Chancellor, Lord Mackay, exerted arguably improper pressure to speed up appeals of the Employment Appeals Tribunal. See A. Bradley and K. Ewing *Constitutional and Administrative Law*, 13th ed, Longmans, 2003 p.390.

termed natural justice. Judges, magistrates and adjudicators in any context will be expected to declare any connection to the parties coming before them. For example, if a judge neglects to declare an interest the process will be perceived as being unjust and will be open to challenge[50]. Rules of natural justice and fairness have been developed under the common law which apply to all levels of adjudication[51] and there is a high standard of professionalism and integrity associated with the bench. Given the existing reputation for impartiality among the higher judiciary, this aspect has not been perceived as a major problem. However, in view of the extent to which politicians at both national and local level are now required to declare their personal financial interests it is surprising that there is no compulsory register of judges interests which would help expose potential conflicts of interest and bias.

(4) Judicial Appointments

One of the crucial areas that is being revised concerns the role of the Lord Chancellor/ Minister for Constitutional Affairs in relation to judicial appointments. Judicial appointments have traditionally been left in the hands of politicians. Lord Chancellors and the LCD were responsible for appointing circuit judges, magistrates and panels of many tribunals. In addition, the Lord Chancellor made recommendations for the appointment of High Court judges which were confirmed by the Prime Minister. The traditional method for appointing the most senior judges was based until very recently on informal consultation among the judiciary and professional colleagues[52]. This had considerable merit as a means of assessing the competence of potential candidates but it smacked of the 'old boy' network, as candidates tended to be restricted to those who reached the higher echelons of the bar[53]. There was recognition that Lord Chancellors tended to accept the advice they were given from the legal profession and that High Court judges (and other lesser judges) were elevated to the bench on grounds of their professional ability. It was crucial that the legal profession had confidence in the Lord Chancellor's capacity to protect the independence of the profession and this was part of the balancing act between the executive and judiciary performed by holders of the office[54]. In fact a view held by many judges, including some of the Law Lords opposing a Supreme Court, has been that the failure of separation of powers was more apparent than real. Lord Irvine has explained that the office of Lord Chancellor was in a special position in regard to separation of powers. It meant that the judiciary had a representative in the Cabinet and the Cabinet in the judiciary. In this capacity the Lord Chancellor was a buffer between the judiciary and the executive. It was in fact a high order duty of the Lord Chancellor to protect the judiciary from any political interference[55]. In an environment of cost cutting throughout government the Lord Chancellor's department and therefore the courts system and legal aid have not been exempted from reforms

[50] The House of Lords took the unusual step of setting aside one of its own previous judgments because Lord Hoffmann, one of the members of the original panel of five had failed to declare his connections to Amnesty International, who were one of the parties represented before their Lordships. See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)* [1999] 2 WLR 272.
[51] See P. Craig *Administrative Law*, 5th ed., Sweet & Maxwell, 2003 chapters 13 and 14.
[52] See D. Panick *Judges*, Oxford, Oxford University Press 1987, chapter 3.
[53] Lord Scarman, *The Times*, 8th October 1987.
[54] Woodehouse 1998, p.629
[55] See C. Turpin *British Government and the Constitution*, 5th ed. London, Butterworths at pp.56-57.

aimed at economy and in this regard their ministerial duty to the Treasury has tended to prevail. However, Lord Chancellors are lawyers and the traditional nexus with the legal profession offered some protection to judges who might be faced with criticism because of their judgments[56]. The high profile and widely reported criticisms by the Home Secretary David Blunkett of Collins J over a decision concerning the interpretation of the Nationality Immigration and Asylum Act 2002[57] has once again illustrated the danger to judicial independence presented by over zealous ministers attacking a judge in an 'aggressive and confrontational manner'. The judge has no platform to answer back, and some have emphasised the need for support and protection of the Lord Chancellor or some other equivalent minister at the highest level of government[58].

These changes are designed to have an impact on the way judges will be appointed. Brenda Hale has recently articulated a widely held view noting that: 'Judicial appointments have traditionally been dominated by the assumption that those best fitted for appointment - and thus fitted for the best appointments - are those who have done best in independent practice as barristers. This has excluded large numbers of very able lawyers and limits selection to a small and homogenous group. That group is very largely male, almost all white (there are no black or Asian High Court judges, and I think only one black and one Asian circuit judge, both of them women), and from a comparatively narrow range of social and educational backgrounds. There is now much more diversity lower down the ranks of the Bar but many obstacles to progress remain.'[59] It is interesting that the central objections made by Professor Griffith[60] a generation earlier concerned the domination of the judiciary by a narrow social class. The judges have represented a public school Oxbridge educated elite section of society and experienced a particular legal training and education. The view expressed by Lady Justice Hale above no longer sees the problem mainly in terms of social class, but rather the need to appoint judges that are more representative of society as a whole. Recent Lord Chancellors have recognised the importance of placing increasing emphasis on equality and diversity as well as the accepted qualities of integrity and judicial quality. Moreover, it is now widely accepted that the process for judicial appointments should be much more transparent.

There is a debate currently taking place over the role of a judicial appointments commission. This is a matter of very great constitutional importance. It will already be apparent from the preceding discussion that the heightened prominence of judicial review together with the Human Rights Act and the devolution legislation has placed judges much more regularly in the forefront of political debate. Against this background many commentators, including leading politicians, judges and academics, have expressed concern over the danger of drawing the judiciary into the political arena. An obvious way in which this might occur would be if the new system of

[56] The selection of Lord Mackay by Mrs. Thatcher was because as a Scottish lawyer who was somewhat detached from the legal profession in England he was better placed to introduce reforms affecting the legal profession.
[57] *R (On the application of Q) v Secretary of State for the Home Department* [2003] EWHC 195 Admin.
[58] A. Bradley 'Judicial Independence Under Attack' [2003] PL 397-407 at 406.
[59] The Guardian, October 30, 2003, in a speech deliverd to the Plymouth Law Society. In 2003 Brenda Hale was named as the first female Law Lord.
[60] P. Harris *An Introduction to Law*, 6th ed., London, Butterworths, 2002, p.472.

judicial appointments allowed executive interference over the selection of judges, particularly at the highest level. The formula for making judicial appointments will therefore be crucial.

A body called the Judicial Appointments Commission has already been established but it is not directly responsible for making appointments at present. The system was based on the taking of secret soundings from among members of the legal profession. The persons consulted were asked to assess a candidate's suitability against certain set criteria. This method no longer applies to the majority of judicial appointments which are made by means of competitions and interviews. The Commission for Judicial Appointments for England formed in 2001 reviews the appointment procedures as its primary task to establish whether appointments are made in accordance with the principle of selection on merit and to investigate complaints from unsuccessful applicants who are concerned that their applications were not treated properly and fairly. The Commissioners also contribute to discussions about how the appointment procedures might be improved. In the future this body or a newly constituted one will be directly involved in making judicial appointments.

First, in order to avoid the possibility of political bias it will be crucial to ensure that appointments to this commission (or the one which replaces it as part of the reforms) are not made on political grounds. It has been proposed that a separate recommending body is set up to perform this task[61]. Second, in order to reach the wider objective of a more broad based and diverse judiciary it would seem desirable that the composition of the appointments commission has a majority of lay members. It might be argued that a body dominated by judges and barristers would be inclined to approve candidates with similar backgrounds and qualities to their own. The Commission for Judicial Appointments which was established in March 2001 has Sir Colin Campbell, a non lawyer, as First Commissioner. It has seven additional commissioners to assist in auditing the appointments (but not making the appointments) to the judiciary and of Queen's Counsel. The body also has the task of investigating complaints about the way procedures have been applied in individual cases. At the same time a joint working party on diversity has been set up to encourage equal opportunities[62]. It seems that at least half of the composition of the new Commission may be of lay members. This has not yet been decided but the minister has indicated that he is keen that there should be a strong lay element[63].

The structure and remit of the Commission for Judicial Appointments for England as set out in the consultation paper is included (see footnote). It indicates that the idea is to introduce a body that is broadly similar to that which has been operating in Scotland.[64] The Scottish Judicial Appointments Board comprises 10 members,

[61] See Constutional Reform: A New Way of Appointing Judges, consultation document 2003.
[62] Judicial Appointments Annual Report 2002-2003.
[63] Interview with Lord Falconer, Independent 15th December, 2003.

[64] The Consultation Paper on Judicial Appointments states: 3.4 In our view the best structure for the new Commission to achieve the above aims would be:an independent Commission, constituted as a non-Ministerial Department, with powers, duties and provision for funding set out in the primary legislation; a lay* Chair; a majority of lay Commission members, drawn from a wide range of backgrounds, who can bring together the strong managerial expertise and experience which the Commission will require; members drawn from the judiciary and legal profession to provide the necessary understanding of the nature and role of the judiciary and the special qualities required of

including a Chair. The Commission are all appointed by Scottish Ministers, to whom the Board is responsible for its functions. It has an even balance of lay members and lawyers drawn from both branches of the profession but with a non-layer as chairman. The remit of the Commission is to provide the First Minister with a list of candidates recommended for appointment to the offices of Judge of the Court of Session, Sheriff Principal, Sheriff and Part-time Sheriff. It makes such recommendations on merit. In addition it considers ways of recruiting judges who are as representative as possible of the communities which they serve. Further, it is required to undertake the recruitment and assessment process in an efficient and effective way[65]. In Scotland all the recommendations for judicial appointments of the Board have been accepted by the Scottish First Minister without question. The Scottish Board has not yet been put on a statutory footing but a convention may be in the process of being established, that being that recommendations of the Scottish Board are routinely accepted.

The weight attached to recommendations by the re-constituted commission for England and Wales has yet to be finally resolved, but this will be of central importance in regard to appointments to the higher judiciary and in regard to vacancies for the Supreme Court which is about to replace the House of Lords. In view of the likelihood of wider jurisdictional scope of a new Supreme Court with the recent addition of human rights and the prospect of being the final court for devolution issues, it has been suggested that consideration could be given to whether membership of the Supreme Court should be confined to practising lawyers or extended to include senior legally qualified academics[66].

The consultation paper suggests that three models for appointment to the Supreme Court are being considered:

(i) The Commission would take over the Lord Chancellor's role in directly making appointments up to the level of Circuit Judge and in advising The Queen on appointments at that level and above;

(ii) The Commission would make recommendations to a Minister as to whom he or she should appoint (or recommend that The Queen appoint);

(iii) The Commission would combine the functions above by directly making more junior appointments (for example, part-time judicial and tribunal appointments) and by recommending more senior appointments.

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judges; some of the judicial members might be appointed *ex officio* (These might include the Lord Chief Justice as head of the judiciary, the Master of the Rolls and the Senior Presiding Judge. It might also be sensible to include an appropriate member of the Supreme Court of the United Kingdom); the Chair and the remaining Commission members should themselves be appointed by open competition in accordance with Nolan principles (these principles were set out by Lord Nolan following his report into Standards in Public Life, 1995).
3.5 The Commissioners should be part-time in order to attract a high calibre of applicant, but will need to be supported by a strong Chief Executive, and staff which should include people with appropriate management and human resource skills and experience From Consultation Paper on Judicial Appointments, 2003.

[65] The Judicial Appointments Board for Scotland: Annual Report 2002-2003 which was laid before Parliament in August 2003. SE 2003 202.

[66] The Hon. Michael Beloff QC, *Observer*, 15th June 2003.

The government favours the second option for the Supreme Court, with the Commission putting forward a limited number of names (one or two) from which the PM will make the appointment. This would solve an added complication that arises because the Supreme Court will have a jurisdiction which extends over the entire United Kingdom. This being the need for the Prime Minister to consult with the Scottish First Minister and the First Minister and Deputy First Minister for Northern Ireland before making the final choice from the candidates submitted by the Commission[67].

It is quite common under codified constitutions for the executive to propose and the legislature to approve appointments to the higher judiciary[68]. There are very good reasons for not imitating the procedure in the United States and involving Parliament actively in the appointment process. The constitution of the USA was drafted to incorporate separation of powers as a core doctrine. In regard to the appointment of the most senior judges who sit on the Supreme Court the power to nominate candidates is given to the executive in the form of the President. On the other hand, the Senate, as part of the legislature, has the duty of confirming presidential nominations[69]. However, even though justices of the Supreme Court once confirmed remain in place for their lifetime, this procedure has not been a guarantee of independence and political neutrality. The position has been exactly the reverse. The Supreme Court exercises a constitutional review function and unlike the UK courts it has the power to police the constitution and to declare legislation invalid. This has projected the court into the forefront of political controversy on many occasions[70]. Most obviously in recent times it was the US Supreme Court that had to finally decided the validity of the contested Presidential election result in the year 2000 in the case of *Bush v Gore* [2002][71]. The political dimension of the Supreme Court's role has resulted in deliberate attempts by US Presidents to select judicial candidates with views that appear to correspond to their own[72].

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[67] The means of judicial appointment favoured by the Law Lords was explained to the Constitutional Affairs Seclect Committee by Lord Bingham 'the principles we adopted are first of all that there should be representatives of all three jurisdictions, since the appointment may be made from England and Wales or from Scotland or from Northern Ireland as matters now stand. We have also suggested there should be a lay element ... it should be largely composed of people with a very close knowledge of the judicial quality of the candidates. We have also tried to devise a scheme which would not run the risk that anybody who would ordinarily sit on the appointments commission would be a candidate, which is a risk which could exist.'

[68] In the first place in Italy becoming a judges is a career choice for legally qualified candidates who are appointed on the basis of competitive examination. Under the Italian Constitution which under Article 104 states that there shall be an independent judiciary there is a body called the Superior Council of the judiciary which has the right to appoint, assign and promote judges. This body is comprised of members who are elected by judges (two thirds) and elected by Parliament (one third). It also includes the President of the Republic and *ex officio* the first president and general public prosecutor of the court of Cassation.

[69] Article II, Section 2. The Senate will hold hearings to examine the suitability of candidates but presidential nominations are ratified unless there are blemishes to personal reputation. S. Finer *Five Constitutions*, London, Penguin, 1979.

[70] M. Vile *Politics in the USA*, *Hutchinson*, 1976 p.242. R Denenberg *Understanding American Politics*, 3rd ed., London, Fontana, 1992. See Chapter 6.

[71] December 12, 2000 00-949.

[72] C. Turpin *British Government and the Constitution: Text, Cases and Materials*, 5th ed., Butterworths, 2002 at p.663.

It has been suggested that recommendations by the board might be submitted to Parliament or to the Minister for Constitutional Affairs for final approval. The introduction of a genuinely independent judicial appointments commission in the UK has the potential to avoid the main pitfall of the American system which, as we have just observed, is the political nature of presidential nominations. In the UK the degree of independence will very much depend on the force of the recommendations made by the appointments commission. The Scottish model suggests that there is confidence in the appointment process because the First Minister formally ratifies choices that have already been made. This is not to deny that in exceptional circumstances there could be valid grounds for the First Minister rejecting a candidate. For example, if an objection was raised on the basis of former personal misconduct or because of a conflict of interest, but otherwise it is desirable that either a convention will develop that recommendations are accepted or the limits of the First Ministers veto are set out in legislation. However, if Parliament, or the Minister for Constitutional Affairs and/or the Prime Minister, were in a position to routinely reject candidates after a rigorous selection process and perhaps also substitute their own preferences, this would open up the system to political interference and undermine its credibility. Above all, an independent judicial appointments commission must satisfy the judges that appointments will not be subject to political influence. Not only will the framework for the Judicial Appointment Commission be set out by Parliament, but, according to Lord Falconer, judicial independence is so important that it needs to be enshrined in law too, so that the legislation will place the minister under a statutory duty to guarantee judicial independence. It is likely that the newly constituted body will also be under a statutory duty to carry out its functions in a manor that reflects its independence. This presumably means that failure to perform these functions in a way that complies with the statute would open up the prospect of judicial review of its decisions.

Lady Justice Hale assesses the challenge ahead for an new appointing body in the following way: 'the commission needs to be strong and forward-looking, explicitly charged with the task of making a difference. This must surely mean going over to applications to be a judge - even if there are some candidates who are "invited to apply" - opening up the field to all qualified lawyers whatever their professional background and taking active steps to encourage people who might not see themselves as candidates to apply.'[73]

(5) A Supreme Court for the United Kingdom

According to Lord Steyn, one of the leading advocates of a Supreme Court among the higher judiciary, there are three principal reasons for having such a body: Firstly, the mixing of legislative, executive and judicial functions conflicted with the requirements of the Human Rights Act 1998; secondly, the emergence of a 'true constitutional state' which requires 'a wholly separate and independent supreme court'; thirdly, reform in the UK has become necessary to be consistent with attempts by the Council of Europe to promote the separation of judicial functions as part of the constitutional structures Eastern Europe in the expanded EU[74]. In view of the general

[73] *The Guardian*, October 30, 2003, transcript of a speach delivered to the Plymouth Law Society.
[74] Lord Steyn 'Creating a Supreme Court' *Counsel*, October 2003 p.14.

increase in litigation, the fact that the resolution of many issues has moved from Parliament to the courts and the problems with separation of powers already discussed at some length above, the introduction of a Supreme Court as an alternative to the House of Lords has potential advantages. For example, Professor Dawn Oliver believes that: 'with a Supreme Court the system would be transparent and the relationship of separation between judges in the highest court and the executive and Parliament would be institutionalised and readily understandable ... and would generate confidence in the courts generally'[75]. Such a court would serve to protect the vital independence of the judiciary at a moment in UK history when the expansion of judicial review, enhanced by the Human Rights Act, presents the courts with so many cases that include a high political content. Preserving the independence of such a court was the element that Lord Irvine stressed in his resignation letter and which has been reiterated by his ministerial successor[76].

In a rather different sense the designation of a distinct building in preference to a committee room within Parliament (which is the current home for the House of Lords) would represent a symbolic statement of separation of powers. Lady Helena Kennedy QC has suggested that a Supreme Court for the nation that reflects our highest aspirations for justice also presents an opportunity for the nation to create an exceptional building[77]. It is pointed out that the court needs to be housed in an emblematic building because it will come to represent the democratic values of the rule of law[78]. There is general agreement among judges and lawyers that the desirability of a Supreme Court will depend upon it being adequately staffed, sufficiently funded and properly accommodated[79].

The jurisdictional scope and administrative form of the new Supreme Court is currently being determined. There is a process of somewhat belated consultation under way on this issue, and it is not possible to anticipate at this stage what the precise outcome will be. It should be noted that the revised departmental structure and proposals for a Supreme Court outlined by Lord Falconer do not follow a Ministry of Justice model proposed by some commentators[80] and the Supreme Court will not be established as a constitutional court although, of course, it will have to preside over cases that raise constitutional issues. While the courts frequently make judgments which develop the principles of the common law they do not have a general power of constitutional review. The Minister for Constitutional Affairs strongly holds to the view that a new Supreme Court should not have such powers. However, it has been indicated that the 12 Lords of Appeal in ordinary will comprise the panel of judges assigned initially to the court.

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[75] Oliver p.347

[76] Constitution Unit, December 2003.

[77] Helena Kennedy QC, *The Guardian* 21st October 2003.

[78] In Lord Steyn's words the new court will neeed to: 'carry in the eyes of the public a badge of independence and neutrality; it will be a potent symbol of the allegiance of our country to the rule of law'.

[79] The Hon. Michael Beloff QC, Observer, 15th June 2003.

[80] D. Oliver *Constitutional Reform in the UK*. D. Woodehouse The Office of Lord Chancellor, Hart Publishing 2001.

The role of a Supreme Court needs be understood in terms of existing constitutional arrangements[81]. The UK in common with other EU member nations is subject to the supra-national appellate jurisdiction of the European Court of Justice on EU matters and the European Court of Human Rights on mattes involving ECHR rights. The appellate committee of the House of Lords has been the highest appellate court in the UK which hears final appeals on both criminal[82] and civil matters. This court is at the pinnacle of a system based on judicial precedent and for that reason it has a significant role in developing the common law. On this point it is worth reminding ourselves that the Human Rights Act 1998 has given the courts (ultimately the House of Lords) a special power to interpret legislation so that it is consistent with the European Convention on Human Rights[83]. The Judicial Committee of the Privy Council is a court which includes the same panel of judges together with certain other senior judges from the UK and Commonwealth. It has a parallel appellate jurisdiction to the House of Lords in respect to the Commonwealth and British Colonies[84]. In essence, it has performed an equivalent role to the House of Lords in regard to mainly Commonwealth appeals. This is a jurisdiction which has gradually diminished in recent years and will probably continue to do so[85].

A Supreme Court and Devolution

Under the devolution legislation the Judicial Committee of the Privy Council rather than the House of Lords ultimately decide 'devolution issues'[86]. Until recently the courts did not have a constitutional jurisdiction, but in regard to devolution there is a judicial role in policing the boundaries of the devolution arrangements. For example, in regard to Scotland where the Parliament and Scottish Executive have been granted the most extensive powers, certain safeguards are in place to prevent unlawful legislation from reaching the statute book. Further, once an Act of the Scottish Parliament has been passed the courts are responsible for deciding the limits of the legislative competence of the Scottish Parliament. Any person or body with *locus standi* can apply to the court for judicial review to determine 'a devolution issue' and this may involve the court declaring an Act of the Scottish Parliament to be invalid[87].

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[81] Oliver 2003, p.346.

[82] Final criminal appeals in Scotland which has its own legal system do not go to the House of Lords.

[83] S.3 Human Rights Act 1998.

[84] The Judicial Committee of the Privy Council consists of: the Lord Chancellor and past Lord Chancellors; The Lords of Appeal in Ordinary, who do most of the judicial work of the Privy Council (these are the same Law Lords who sit in the appellate committees of the House of Lords); Other Lords of Appeal, including former Lords of Appeal in Ordinary; Other Privy Counsellors who hold or have held high judicial office (i.e. are or have been judges of superior courts) within the United Kingdom; this includes past and present members of the Courts of Appeal of England and Wales and Northern Ireland and of the Inner House of the Court of Session in Scotland; Privy Counsellors who are judges of certain superior courts in other Commonwealth countries: at present there are 15 of these overseas members.

[85] For example, from the end of 2003 final appeals from New Zealand will no longer be referred to the Privy Council for resolution.

[86] These are questions relating to the powers and functions of the legislative and executive authorities established in Scotland and Northern Ireland by the Scotland Act 1998 and the Northern Ireland Act 1998, respectively, and questions as to the competence and functions of the Assembly established by the Government of Wales Act 1998.

[87] SA schedule 6, part I: A devolution issue includes: whether any provision falls within legislative competence; whether a function is a function of the Scottish Ministers, the First Minister or the Lord

There is provision in the SA for courts in Scotland as well as England, Wales and Northern Ireland to refer a 'devolution issue' to a higher court for resolution[88] and it was intended that most proceedings in Scotland would be by way of judicial review in the Court of Session[89]. In addition, the Scotland Act allows a devolution issue to be resolved by direct reference to the Privy Council in certain circumstances[90].

The courts perform this new statutory role with the assistance of special interpretative rules[91]. This places judges under an obligation to give a narrow reading to Scottish legislation and subordinate legislation in order to render any measure under consideration within the legislative competence of the Scottish Parliament. Such an approach assists the courts in interpreting legislation and, at the same time, tends to give effect to Scottish laws rather than invalidate them[92]. In making a decision on invalidity the court is required to temper the impact of any decision by making an order removing or limiting any retrospective effect, or suspending the effect until the defect is corrected[93]. There are similar provisions in regard to the vires of the other devolved bodies and thus relating to 'devolution issues' arising in Wales and Northern Ireland[94]. Not withstanding these procedures the Memorandum of Understanding between Westminster and the devolved administrations envisages that problems over the extent of competences should be resolved through negotiation and that references to the Privy Council would be regarded as a matter of last resort[95]. Since the introduction of devolution it should be noted that very few devolution issues have been referred to the Privy Council for final determination[96].

It is pointed out that the Privy Council has the advantage, which has been used on occasion, of being able to compose a panel which has Scottish and Northern Irish Privy Counsellors as well as Law Lords. Thus extending the judges eligible to sit on devolution issues. For this reason it is argued by some senior judges that the devolution jurisdiction should remain under the Privy Council rather than be given to the new Supreme Court, as the government appear to be proposing[97]. However, not all cases with a bearing on devolution fall under the jurisdiction of the Privy Council

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Advocate; whether the exercise of a function or the proposed exercise of a function is within devolved competence of a member of the Scottish Executive; whether the exercise of a function or the proposed exercise of a function or failure to exercise a function would be incompatible with Convention rights or Community law.

[88] SA s.32(2)

[89] SA Schedule 6 Part II and Part III

[90] (a) as part of the pre-enactment scrutiny to determine if the provision comes within legislative competence; (b) to allow for the reference of a devolution issue from existing proceedings; (c) to permit a reference of a devolution issue not from existing proceedings. It should also be noted that the law officers i.e., the Advocate General, the Lord Advocate and the Attorney General have an important role in making sure that this function is properly discharged.

[91] SA s.101.

[92] This is equivalent to s.3(1) of the Human Rights Act 1998.

[93] SA s.102

[94] GWA 1998 s.109 and Schedule 8 and Northern Ireland Act Part VIII ss.79-83 and Schedule 10.

[95] See P. Craig *Adminstrative Law*, 5th ed. London, Sweet & Maxwell 2003 at p.221.

[96] The only case referred to the Privy Council in 2003 was *Clark (Proscurate Fiscal, Kirkcaldy) v Kelly* [2003] UKPC D1; [2003] 1 All ER 1106. It concerned a devolution issue as it was contended that the trial process contravened the Article 6 right to a fair trial because the lay justice depended on advice provided by a clerk employed by the council. It was held that this was not incompatible with Article 6 because the clerk had no role in respect of issues of fact. Advice was only tendered on matters of law.

[97] Lord Bingham in evidence to the Select Committee on Constitutional Affairs, 11 December 2003.

anyway. For example, in terms of its constitutional and political implications *Robinson v Secretary of State for Northern Ireland*[98] is probably the most controversial decision relating to devolution that has so far arisen and the case fell under the remit of the House of Lords[99]. The introduction of a Supreme Court could remove the need for a dual appellate jurisdiction by providing a single final court of appeal at domestic and at commonwealth level[100].

Supreme Court Administration

The Supreme Court will need to have a managerial framework and it has been recognised that a substantial degree of managerial autonomy is a desirable basis for a court which can be regarded as independent. The backdrop is that in recent years reform of the legal system has often been motivated by cost cutting. The changes to legal aid and court administration which were undertaken during the 1980's and 1990's were mainly a pretext for financial savings, as the Lord Chancellor's department was expected by the Treasury to find ways of reducing expenditure on the courts system[101]. The consequent restrictions on access to legal services may have had a negative impact on the administration of justice. It would appear to follow that a way of administering the Supreme Court has to be found that provides adequate insulation from such pressures. Studies have shown that methods of court administration can be considered on a continuum between executive centred models and judge centred models[102]. The former are characterised by administration from a central executive department which has predominant responsibility for most administrative duties. While the latter are characterised by one of a number of types of judge centred administration. For example, the court is self administered by running its own buildings and being responsible for its own financial management and the judge/Chief Executive in charge of the court is responsible for directing the office or department administering the court. In turn, there is responsibility for the court's administration through a minister or directly to the legislature. It has been proposed that one of the Commonwealth systems adopted in Australia or Canada which tend towards giving greater autonomy to the court and the judges than is presently the case in the UK could serve as a model for the Supreme Court[103]. In which case the new body would have its own staff and employees and would have its own budget, but a Chief Executive rather than the senior judge would be responsible for general administration. The advantage of such as system is that relative autonomy

[98] [2002] UKHL 32

[99] The case arose from the failure of the Northern Ireland Assembly to elect a First Minister and a Deputy First Minister within a six week period, as required by section 16(8) of the Northern Ireland Act 1998 (NIA). If the challenge to the election of leader and deputy leader had succeeded, it would have resulted in an immediate dissolution of the Northern Ireland Assembly followed by elections in Northern Ireland.

[100] In time this may well occur but it seems that this has not featured in the government proposals because of the need to consult Commonwealth nations before changing the system.

[101] Woodehouse, 1998 above p.628.

[102] See Professor I. Scott 'A Supreme Court - Court Governance' BIICL Conference, London 27 October 2003.

[103] The merits of these systems were outlined by Professor Scott. See also: M. Freedland *A Place Apart: Judicial Independence and Acountability in Canada*, Canadian Judicial Council, 1995. See chapter 9; T. Church and P. Sallmann *Governing Australia's Courts*, Australian Institute of Judicial Administration, 1991.

gives the courts the scope to make decisions in relation to human and financial resource management. One problem remains, namely, that the executive i.e. government still retain overall control of the budget allocation. It has been suggested that this could be overcome by Parliament determining the funding parameters rather than an executive department[104].

Formulating the panel of judges assigned to preside over any given case is an aspect of court management which might have a direct bearing on the court's reputation for independence. In the United States where the US Supreme Court sits as a single panel the individual views and prejudices associated with particular judges is reflected in the judgments emanating from the court and, as we have seen, this has resulted in presidential nominations of judges based on political reputation. In contrast, it can be assumed that appeals will continue to be heard by panels comprising of 5 (or exceptionally 7) judges and that the judges of the Supreme Court will be appointed on grounds of merit. The Lord Chancellor previously had responsibility for assigning the judges to hear cases (and deciding whether to sit in person). It would seem that this task should be performed by the senior judge who would be designated President of the Court. The grounds for the allocation of judges to hear particular cases would be based on whether s/he has special expertise in the area of law under consideration and on his or her availability given the workload of the court.

(6) Conclusion

According to the Secretary of State for Constitutional Affairs, Lord Falconer, the government's ongoing commitment to constitutional reform is intended: to enhance the credibility and effectiveness of our public institutions; to strengthen our democracy and public engagement with decision-making; to increase trust and accountability in public bodies[105]. This is undoubtedly a worthy set of democratic values, but in making these changes and meddling with separation of powers the government has entered hazardous territory. To the unfamiliar observer the archaic post of Lord Chancellor, with the office holder sporting wig, gown and tights not only appeared as a vision from the past, but the powers vested in the office were in conflict with the most fundamental rules of constitutional design. Nonetheless, the judiciary at all levels in the United Kingdom have been relatively free from executive interference, direct interference at any rate, and have a high reputation for integrity. Turning to the appellate system, the judgments handed down from the House of Lords and Privy Council command wide respect in many parts of the world for their quality and analytical rigour. It is true that constitutional reforms, in particular the Human Rights Act, but also devolution, have to a certain extent modified the role of the courts and introduced a more obvious political dimension. The decision to act suddenly to engineer these reforms has the advantage of forcing substantial change. It is important that the system of judicial appointments becomes more transparent and provides wider representation from those eligible to apply. The challenge is to ensure that the new is a clear improvement on the old. The devil will, of course, be in the detail. For example in regard to judicial appointments, this will depend on the scope for ministerial and Prime Ministerial intervention in vetoing the selections of the

[104] Ibid.
[105] Speech on Constitutional Reform, Lord Falconer, 8 December 2003.

appointments commission. In regard to the Supreme Court, it will depend on whether it is adequately funded and managed, whether appointments continue to be on merit and whether the judicial panels that hear cases are selected on an objective basis by the court and not the minister. Any overall judgment must necessarily be suspended pending the appearance of the new statutes. However, it is clear that a crucial element in achieving successful change will be ensuring that a culture of law is maintained and respected by both government and lawyers which has implicitly held to fundamental values of a separation of powers despite the apparent constitutional contradictions.