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The United Kingdom's New Supreme Court

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On 1 October 2009, the United Kingdom got a new top court – the UK Supreme Court, replacing committees of the House of Lords and Privy Council as the final court of appeal for all domestic matters. This has introduced a new, real, separation of powers into the British constitution. It also raises the prospect of British judges taking on a more active, interventionist role in public and constitutional life more generally.

Background

Since 1876, the highest court of law for most cases in the United Kingdom has been the Appellate Committee of the House of Lords.[1] The situation abounded with anomalies. Not only was it a committee of a legislative chamber, its members included any member of the House who had held 'high judicial office,' not just the law lords appointed for their judicial expertise. Formally it did not even deliver judgments, but rather members of the committee delivered 'speeches' for the consideration of the House as a whole. (Those speeches were always accepted, as a matter of practice, but it was their adoption by the House as formal advice to the Sovereign that gave them their power.) Significantly, the most senior member of the Appellate Committee was the Lord Chancellor, who also presided over the House of Lords as a legislative chamber and was a government minister responsible for the courts and legal system in England and Wales.

In typically British fashion, these anomalies were regulated by a series of conventions: the limited involvement of Lords of Appeal in Ordinary (as the law lords were formally called) in the normal legislative business of the House of Lords, the abstention of those not appointed as law lords from sitting on the Appellate Committee, and successive Lord Chancellors excusing themselves from Appellate Committee business to varying degrees, particularly if matters concerning the government were before the Committee.

The practical problems of a top-level court that was also part of the legislature were also considerable, though. The Appellate Committee had no dedicated staff; it had limited resources, drawn from the staff of the House of Lords (few of whom were lawyers). Until 2001 its members did not even have research assistance, let alone law clerks or even proper secretarial support (they now share four researchers between the 12 members). For information support it depended on the House of Lords Library and Parliamentary information technology services, both principally designed for the rather different needs of a legislative chamber. It held its hearings in a room at the end of the Committee Corridor in the Palace of Westminster – where there were few suitable facilities like consultation rooms for counsel to discuss the case.

Overlapping with the Appellate Committee was the Judicial Committee of the Privy Council, a body only too familiar to scholars of the Canadian constitution. While the Judicial Committee's remit has shrunk, with many Commonwealth countries barring appeals during the last part of the twentieth century, it is still the final court of appeal for a number of the smaller jurisdictions in the Caribbean. It also acquired a jurisdiction in relation to 'devolution issues' following devolution to Scotland, Wales and Northern Ireland.[2] In practice, there have been few such cases (most of which have concerned the rights

[1] To be precise: its jurisdiction included civil and criminal cases from the courts of England and Wales, Ireland (until 1922) and Northern Ireland (since 1922), and civil cases only from Scotland. The High Court of Justiciary, sitting as the Court of Criminal Appeal, has remained the highest court for Scottish criminal cases since Union in 1707. Certain domestic matters, such appeals against bodies like the General Medical Council regulating certain professions, were considered by the Judicial Committee of the Privy Council.

[2] 'Devolution issues' are defined in the three devolution Acts and include inter-governmental challenges to the legislative competence of Acts and actions of other governments. A devolution issue (in this sense) is fast-tracked to the Judicial Committee, and the law officers of each administration have special rights to be heard in the proceedings relating to such cases. The definition is by no means exhaustive, and other cases may well raise issues of importance to the devolution settlements but fall outside it.

set out in the *European Convention on Human Rights*), but the existence of two courts with similar jurisdictions created a problem of a 'dual apex', with two courts of final appeal reaching offering divergent rulings on the same point of law. Moreover, in practice participation has been a matter only for law lords – reducing the amount of time they had to sit on cases referred to the House of Lords.[3]

Setting up the Supreme Court

Although there had been some discussion of the desirability of reform of the UK's top courts, the announcement of the plan to create a Supreme Court came as a surprise when it materialized as part of a UK Cabinet reshuffle in June 2003.[4] (The announcement also included the planned abolition of the office of Lord Chancellor.) As comparatively little thought had been given to the idea within government, there followed a rather urgent period of consultation, leading to the introduction of legislation into Parliament passed as the *Constitutional Reform Act 2005*.

The 2003 announcement had not been discussed with the UK's devolved administrations beforehand, though central to the plans was the idea of incorporating the 'devolution issues' jurisdiction of the Privy Council in the jurisdiction of the new court. It therefore amounted to a significant change in the constitutional position of the devolved institutions. This failure was quite contrary to the principles for intergovernmental co-ordination set out in the *Memorandum of Understanding* (the master intergovernmental agreement); this was neither the first nor the last breach of it.

While this process was underway, two significant changes were taking place in the relationship between judiciary and government. The first was an increasingly political profile for the courts. This has followed the growth in judicial review of government action since the early 1980s, and the implications of membership in the European Community/Union, and the scope for finding Acts of Parliament void for breach of EC/EU law. (That happened first in 1991, in the *Factortame 2* judgment: [1991] 1 A.C. 603.)

Further, the courts, and most of all the House of Lords, have found themselves making judgments on matters of high sensitivity. Some have concerned grave issues of personal status, such as whether assisting someone with a terminal illness to commit suicide is lawful (R. on the application of Purdy v Director of Public Prosecutions [2009] UKHL 45), or issues related to the use of stem cells and other forms of assisted reproduction (e.g. Quintavalle v Human Fertilisation and Embryology Authority [2005] UKHL 28). Others have been much more obviously political, for example the application to extradite former Chilean dictator Augusto Pinochet (R. v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet [1998] UKHL 41 and [1999] UKHL 17. The case also raised issues of judicial conduct, as judges on the first panel failed to declare an interest as supporters of an intervener in the case). As a result, there is a widespread media and public perception that the judiciary has been taking a more active role in recent years. Given that such cases are brought to the courts for resolution, it would be impossible for judges to avoid these difficult issues; and judges including the law lords have shown no desire to duck them.

The second significant change arises from the *Human Rights Act 1998* (HRA), which made the European Convention of Human Rights enforceable in the UK's domestic courts. The Act authorizes the courts to issue 'declarations of incompatibility' if UK legislation is in breach of Convention rights.[5] It

[3] In principle, though, the Judicial Committee has a large membership. Any judge of the Court of Appeal in England and Wales or Northern Ireland or of the Inner House of the Court of Session in Scotland is qualified to sit on it, as are senior judges from Commonwealth countries that send appeals to it, though this seldom happens.
[4] See for example A. Le Sueur and R. Cornes *What Do the Top Courts Do?* (London: The Constitution Unit, 2001); A. Le Sueur and R. Cornes *The Future of the United Kingdom's Highest Courts* (London: The Constitution Unit, 2001). Available from http://www.ucl.ac.uk/constitution-unit/publications/subject/courtslegal.htm
[5] By contrast, devolved legislation is void and a nullity if (and to the extent that) it does not comply with Convention rights.

also required ministers introducing legislation into Parliament to certify that it is compliant with the Convention rights.[6] While the HRA has generally had more effect within government than through litigation, the introduction of an external standard by which to judge both legislation and executive action has had a significant effect in general terms – and rather more practically with action to control terrorist threats such as 'control orders' (held by the House of Lords to breach Convention rights, to the Government's anger). This in turn has fuelled criticism by some commentators (often conservative ones) to argue against the judiciary's more activist role.[7]

This has been accompanied by issues about the role of the courts in society more generally, and very tangibly about their financing. Over the last few years, the approach to management of the courts has drawn increasingly on approaches derived from 'new public management', with an insistence on managerial efficiency and on the courts 'paying their way' (which inter alia has resulted in charges for court time levied on parties to a case). The combination of managerial and financial pressures with political ones has led to a more difficult relationship between judges and government than the UK is used to. This has been aggravated by the government's (failed) attempt to abolish the office of Lord Chancellor. The abolition of the office was announced in June 2003. Although it proved impracticable to abolish the office completely, its role has been changed and reduced. The House of Lords is now presided over by a Speaker; the President of the new Supreme Court is head of the judiciary; and the title of Lord Chancellor has become a subsidiary one of the Secretary of State for Justice, a government minister, with an obligation of having some legal knowledge. In addition, there are now statutory safeguards for the independence of the judiciary. However, these changes mean that a minister no longer directly speaks in government for the judges and their concerns. The judiciary have lost their voice in government, and that appears to mean that ministers are more likely to criticise them in public.

Practical arrangements for the new court

Inevitably, setting up the new court presented a number of practical challenges. One was identifying suitable premises, and then fitting them out. The choice of Middlesex Guildhall was initially controversial (some preferred a new building not an existing one, some preferred a location nearer the other principal law courts and more distant from the Palace of Westminster). The refurbishment and conversion of a nineteenth-century building took some time, with the usual problems of such projects. Construction did not start until June 2007, and it was ready in the autumn of 2009. It has two court rooms, an interesting and useful website, and resources to film and web-cast its hearings.

Second is the issue of judicial personnel. The first 11 judges were the sitting law lords, who were also appointed as Justices of the new court, so Lord Phillips of Worth Matravers moved from being the Senior Law Lord to the Presidency of the new Court. Subsequent appointments are being made on merit, following public advertisement and selection, and with no peerage to be conferred.[8] Having been an appeal court judge is not necessary experience (judges must have held 'high judicial office' for two years or been a qualified practitioner for 15) – there is no longer a ladder stretching through the lower courts to the Supreme Court. But the appointment process remains a private one, with appointments made by a selection committee chaired by the President of the Court, and no public hearings to approve or confirm

[6] The position is somewhat different for legislation passed by the Scottish Parliament, National Assembly for Wales or Northern Ireland Assembly, which is void as it is ultra vires if it breaches the Convention rights.

[7] This has also led to criticism of the HRA, resulting in proposals by the Conservative Party to repeal it and replace it with a 'British bill of rights' that would better reflect domestic traditions. In 2007, the UK Government suggested it would seek to establish a British bill of rights to complement the HRA. Replacing the HRA would have only limited effect unless the UK were also to withdraw from the European Convention – which would also entail withdrawal from the Council of Europe. A British bill of rights complementing HRA raises a number of problems, including polarising the situation in Northern Ireland, and has made very limited progress.

[8] There should be 12 Justices, with one vacancy at present.

an applicant. Moreover, the need to secure territorial balance is not written into statute. By custom, the House of Lords included two law lords from Scotland and one from Northern Ireland. The only requirement now is that the court as whole must include 'knowledge of, and experience of practice in, the law of each part of the United Kingdom'. There are concerns in Scotland that its distinctive legal system might be represented by only one Scottish judge, and in Wales that Wales's increasing legal distinctiveness may not be recognised at all.

The role of the new court

The big question for the new court is how assertive and activist it will be. On one hand, it grows out of a tradition of judicial restraint, and a belief that contentious issues should be resolved by elected legislators not appointed judges. On the other, some of the factors that helped such an approach to work no longer do. In any event, external rules of law – the binding ones of EU law, the less binding but still authoritative ones of the European Convention on Human Rights – mean the court's increasing salience as an actor in public affairs.

However, one set of issues it is unlikely to deal with to any great extent are ones about the devolution settlements. The UK arrangements have been remarkable for the absence of division-of-powers litigation.[9] While it is conceivable such issues could arise in the future, especially if challenges are brought by third parties, they are unlikely to become central to debates about devolution, which will remain in the political rather than legal sphere.[10]

Further reading

Website of the UK Supreme Court: http://www.supremecourt.gov.uk/index.html

Useful commentary by practitioners: http://www.ukscblog.co.uk/

A. Le Sueur (ed.) *Building the UK's New Supreme Court National and Comparative Perspectives* (Oxford: Oxford University Press, 2004).

D.M. Morgan (ed.) *Constitutional Innovation: the creation of Supreme Court for the United Kingdom; domestic, comparative and international reflections* (Lexis Nexis International, 2004).

[9] There has been some internecine litigation in Northern Ireland, about rights and obligations arising under the Belfast/Good Friday Agreement.

[10] For further discussion, see A. Trench 'Keeping The Judges Out: Why do the courts play such a limited role in devolution in the United Kingdom?'. Paper presented at ESRC Seminar on 'Dispute Prevention and Resolution: the role of the civil service and the courts', Edinburgh, 19-20 June 2009.

