

Final Appeal: A new home for the Appellate Committee

Darren Sylvester reviews the key elements of the consultation paper "Constitutional Reform: A Supreme Court for the United Kingdom" issued by the Department for Constitutional Affairs, July 2003.

Introduction:

Thursday, 12th June 2003 saw calls for the creation of a Supreme Court silenced when we learnt that the UK would follow other western democracies by establishing a new free standing Supreme Court. The UK Supreme Court, whilst being the highest court of appeal, would be detached from the second House of Parliament; the Lords of Appeal in Ordinary would have no connection with the legislature, and the office of Lord Chancellor would be abolished. The Government, in introducing such reforms, believe that they will reflect and enhance the independence of the judiciary: despite their bungling introduction, such progressive reforms are indeed welcome.

Current functions:

The current functions of the highest courts are divided between the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. The Appellate Committee hears appeals from the Court of Appeal in England and Wales and Northern Ireland in both civil and criminal matters, and from the Court of Session in Scotland on civil matters. Criminal appeals from the High Court of England and Wales and the High Court of Northern Ireland are also within the Appellate Committee's jurisdiction.

The functions of the Judicial Committee of the Privy Council are that it acts as the final court of appeal for a number of Commonwealth jurisdictions and for the Crown Dependencies of Jersey, Guernsey and the Isle of Man. It hears devolution cases referred to it from the courts in England and Wales, Northern Ireland, Scotland or from the UK Government¹; and finally, it has jurisdiction to hear admiralty appeals from the Cinq Ports and, in time of war, the Prize Courts; disciplinary appeals involving doctors and dentists, and appeals from ecclesiastical courts e.g. dealing with appeals against pastoral schemes in the Church of England.

Likely functions:

Unlike the US Supreme Court, one function the UK Supreme Court will not have is the ability to strike down Acts of Parliament. Our [unwritten] Constitution comprises the whole body of laws, settled practices and conventions, all of which can be amended or repealed by Parliament. As the consultation paper rightly notes, neither membership of the European Union nor devolution, nor the Human Rights Act has changed the fundamental position.

¹ such judgments being binding precedent on the Appellate Committee of the House of Lords and all lower courts

A further question is whether the Judicial Committee should still be the final court of appeal for devolution issues. The decision to refer devolution cases to the Judicial Committee was deliberately taken at the time of the devolution Acts and the consultation paper suggests that the present arrangements are working well. The pool of available judges is wider for the Judicial Committee than it is for the Appellate Committee; it therefore follows that more opportunities arise whereby Scottish judges and judges from Northern Ireland hear devolution cases.

On balance, the Government holds the view that it would be the correct approach to transfer jurisdiction on devolution cases from the Judicial Committee to the new UK Supreme Court. As regards its non-devolution function, it is noteworthy of mention that the consultation paper is silent on the fact that New Zealand and some Caribbean countries have begun establishing their own final courts – the questions which arise as a result is whether the Judicial Committee’s role will become gradually redundant thereby; or, irrespective of the final courts’ which are being established in other jurisdictions, is it at all likely that appeals in such cases would still tend to be placed at its door?

As the consultation papers avers that no evidence has arisen which suggests the Scottish criminal appeal system requires change, the present arrangements relating to Scottish criminal appeals will remain unaltered.

Composition:

The initial members of the new Supreme Court will be the existing Lords of Appeal in Ordinary. The Government believes that the current number of twelve full-time members of the Court is right, but adds the qualification that the Court is allowed to supplement its full-time membership as and when appropriate to the issues before their Lordships’.²

A greater composition would obviously facilitate an increased workload and allow for the release of members of the court to undertake other functions such as the chairing of public inquiries³. Against this proposition lies the foreseeable problem that the larger the composition of the court, the greater the task becomes of selecting which judges sit on each case.

Enabling the Court to sit in panels will ensure that each case is constituted with the relevant expertise and background required. Other members of the Supreme Court would therefore hear appeals in the Judicial Committee vis-à-vis the independent jurisdictions. It is true of course that comparable common law Supreme Courts have fewer judges – for example, Australia has seven, with Canada having nine; however, it may be stated that a twelve-member Supreme Court would enable it to function efficiently without the need to forego other business which the court would conduct as part and parcel of its remit.

² The Appellate Jurisdiction Act 1876, s.5 allows other holders of “high judicial office” to sit in the Appellate Committee.

³ At the time of writing, Lord Hutton is currently chairing the Inquiry into the circumstances leading up to and surrounding the death of Dr David Kelly.

Selection:

It is pleasing to read that the consultation paper adopts the view that an independent Commission is needed to make appointments. In the event that there is an Appointments Commission for Supreme Court Appointments, it may be strongly argued that its composition should take the following form: representatives of the judicial appointments commission that exist in the separate jurisdictions i.e. England and Wales, Scotland and Northern Ireland; representatives of the Bar; solicitors; academics; government in-house lawyers and senior judges of each of the three legal systems. The role of the Supreme Court Appointments Commission would be to interview candidates for selection and select a shortlist of names⁴ from which the Prime Minister would then consult with the First Minister for Scotland and the First and Deputy First Ministers in Northern Ireland before selecting one for appointment.

The Government is seeking to make the whole judicial appointments process open and transparent. Such a process will [hopefully] contribute in enhancing the diversity of the Court while giving respect to the overwhelming criterion of appointment being on merit. The paper elucidates on what criterion merit will be measured against, these are: legal knowledge and experience; intellectual and analytical ability; sound judgement; decisiveness; communication and listening skills; authority and case management skills; integrity and independence; fairness and impartiality; understanding of people and society; maturity and sound judgement; courtesy and commitment; conscientiousness and diligence.

It is likely that the selection process for the UK Supreme Court will continue to uphold the long-standing convention that two Scottish Lords of Appeal in Ordinary and one Law Lord from Northern Ireland are appointed. To maximize experience in the law of different jurisdictions though some regard ought to be had for ensuring that the Welsh dimension of the England and Wales judicial system is also respected. In this regard, the Government are mooting the possibility of setting out the appointments process by way of a set of guidelines, taking the form of a Code of Practice which is subject to Parliamentary approval; or, alternatively, being set out in forthcoming legislation.

Titles:

The consultation paper predicts that, quite rightly, the current position held by Lord Bingham of Cornhill, Senior Law Lord, would be converted into that of President of the Court. It may be argued that a Deputy President will also have to be appointed should an increased workload reach the new UK Supreme Court⁵ or, alternatively, to be in consultation with the President of the Court in respect of selecting which judges will sit on any case.

The best solution the consultation paper arrives at regarding titles of members of the court is Lord Justice of the Supreme Court. Such a title preserves continuity as Court of Appeal judges hold the title Lord Justice of Appeal.

⁴ Given the small number of appointments together with the likely limited field of candidates, it would be adequate for the Commission to present the names of only one or two candidates.

⁵ It was interesting to note that a new Deputy Chief Justice was appointed in 2003, for the first time.

Conclusion:

Calls for a UK Supreme Court have been voiced by many learned judges on various occasions⁶. In view of the consultation paper which has been produced by the Department for Constitutional Affairs, steps towards achieving an independent UK Supreme Court need to be urgently adopted. Such steps include acquiring its own, properly equipped and resourced building⁷ and receiving regular finance from Government funds, with the power for the court to stipulate its own budget without in any way compromising the notion of judicial independence.

A new UK Supreme Court comprised of judges appointed under a process of transparency, greater degrees of democratic legitimacy with substantive efforts to increase diversity, would, as Lord Steyn articulates, “in the eyes of the public, carry a badge of independence and neutrality: it would be a potent symbol of the allegiance of our country to the rule of law”⁸.

In view of the Government’s failed attempt to modernize the upper house, let us hope that they adhere to the principles contained within the consultation paper and do not lead us on another constitutional mystery tour.

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⁶ “The Case for a Supreme Court” Lord Steyn giving the Neill Lecture in honour of the former Warden of All Souls College, Oxford, Lord Neill of Bladen, QC, 1st March 2002 and “A New Supreme Court for the United Kingdom” Lord Bingham of Cornhill’s lecture to the Constitution Unit, 1st May 2002.

⁷ Somerset House has been suggested as a possible home for the new UK Supreme Court.

⁸ Steyn J. L.Q.R. Vol 118, July 2002 at page 384.