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# **A Report on Six Seminars About the UK Supreme Court**

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**A report on six seminars about the  
UK Supreme Court  
at the School of Law  
Queen Mary, University of London**

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# 1. Introduction

## Scope of the seminars: what is there still to discuss?

Six seminars on the UK Supreme Court took place between January and June 2008 in the School of Law at Queen Mary, University of London. The participants were members of the judiciary, academics, legal practitioners and others (see Part 9). The topics for discussion were identified by a small working group during late 2007. By then, many aspects of the new court were already in place.

- Part 3 of the Constitutional Reform Act, setting the basic legislative framework for the new court's work, had been on the statute book since March 2005.
- Building work at Middlesex Guildhall, the premises that will accommodate the new court, was underway.
- The Draft Supreme Court Rules had been published in January 2007 by the Judicial Office of the House of Lords and the consultation period had come to an end in April 2007.

### BOX 1 TIMELINE

|                      |   |
|----------------------|---|
| <b>June 2003</b>     | Government announce their intention to create a UK Supreme Court        |
| <b>February 2004</b> | Constitutional Reform Bill introduced to Parliament                     |
| <b>December 2004</b> | Government announce selection of Middlesex Guildhall to house the court |
| <b>March 2005</b>    | Constitutional Reform Bill receives Royal Assent                        |
| <b>January 2007</b>  | Draft Rules of the UK Supreme Court Rules published for consultation    |
| <b>April 2009</b>    | Rules of the Supreme Court to be submitted to the Lord Chancellor       |
| <b>October 2009</b>  | UK Supreme Court opens for business                                     |

During 2003–05, there was a great deal of political and academic debate about the merits or otherwise of creating a new court in the form envisaged by the Government. There was also was a considerable amount of official consultation. The Department for Constitutional Affairs, the House of Lords Committee on the Constitutional Reform Bill, the House of Commons Constitutional Affairs Committee, and the Justice 2 Committee of the Scottish Parliament all took written and oral evidence on the reasons for establishing a new court, its proposed structure and its likely impacts on the constitution. But as a Law Lord speaking at the first seminar said, these political exercises were inevitably ‘a rather blunt instrument’ and there remains a need for more detailed consultation and discussion on a range of issues relating to the work of the new court.

The invitations to participants of the Queen Mary seminars explained the purpose of the discussions in this way:

‘The overarching aim of the seminar series is to stimulate debate about the operation of the new Supreme Court, due to commence work in October 2009, by considering what aspects of current features and arrangements in the House of Lords work well and ought to be preserved when the jurisdiction is transferred to the new Court; and what changes and innovations ought to be considered. Given the blend of participants—academics, judges, practitioners, officials—the ideas that emerge are likely to range from the exploratory to the practical. It is hoped, however, that some of the views expressed may be taken into account in preparing for the opening of the Court.’

## The Chatham House rule

The seminars were conducted under the Chatham House Rule. The discussion at the seminars was extraordinary frank and lively, no doubt in part at least because of the confidence inspired by the Chatham House Rule. This report keeps to the spirit of the Rule.

## Purpose of this report

This report cannot hope to capture the full richness of the exchanges of views that took place during 12 hours of discussion. Each seminar began with three or four short presentations on the topics in hand followed by fairly free-flowing conversation. Nonetheless, given the importance and general public interest in the topics discussed, it was decided that a record should be made of the seminars.

Readers with limited time who want to see the gist of the points that emerged during the seminars will find these summarised under the heading **Key issues** near the start of each part of the report. A list of questions, which call for discussion and debate, were identified during the seminars and are set out below. Some parts of the report end with suggested further reading for people who wish to delve deeper into the topics.

For readers with more time, each part of the report goes on to set out more fully the threads of discussion during each seminar. The 50 or so people who attended some or all of the seminars were not invited according to any rigorous scientific selection process, so the views expressed do not purport to be representative in any proper sense of that term; the points to emerge from the discussions do however reflect a range of opinions on most questions.

## General themes

Many points were considered during the conversations that took place at Queen Mary. From all of these it is possible to detect two broad themes.

The first is the importance of effective communication. In years gone past, the higher courts spoke only through the words of their judgments. In more recent times, we recognise that courts are significant public institutions which ought to explain their constitutional role to the public. The importance of the UK Supreme Court's website was referred to in several seminars—as a source of information for legal practitioners as well as interested citizens. We also debated questions about the format and style of judgment-writing in the new court. These are not new issues but they have been given a particular relevance (some participants argued) because the creation of a new court marks a moment in which change might take place. Other participants made a principled and pragmatic defence of current judgment-writing practices.

The second broad theme is the importance of the relationships between the UK Supreme Court and other courts and tribunals. No court is an island, entire of itself. We spoke at some length about the roles of the Court of Appeal in England and Wales and also that of the Inner House of the Court of Session in Scotland. There was considerable interest (though no consensus) in the ideas put forward—perhaps not new but certainly timely—that these intermediate courts of appeal might sit in panels of five or seven to determine appeals on some types of points of law of general public importance rather than expecting the UK Supreme Court to deal with them. The European dimension was also discussed, with interesting suggestions as to how the UK Supreme Court's relationships with the European Court of Human Rights and the European Court of Justice might develop in the years to come.

## Specific questions for discussion and debate

In addition to these two broad themes, a series of more specific questions emerged during the course of the seminars.

1. The current *Practice Directions and Standing Orders of the House of Lords* provide that 'Leave to appeal is granted to petitions that, in the opinion of the Appeal Committee, raise an arguable point of law of general public importance which ought to be considered by the House at

this time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. A petition which in the opinion of the Appeal Committee does not raise such a point of law is refused on that ground.’

Is this formulation sufficient or should the criteria for permission be set out more fully?

2. Should reasons be given (a) for the refusal and (b) for the grant of permission?
3. Should the practice of permission in each case being determined by three Law Lords continue in the UK Supreme Court or would there be benefits in involving a larger number of Justices in the process?
4. Should the UK Supreme Court receive submissions from third party interveners at the permission stage?
5. Should the UK Supreme Court receive fuller submissions from respondents at the permission stage?
6. Should appeals from the Inner House of the Court of Session be made subject to a general requirement of permission?
7. What information about pending petitions for permission, and appeals awaiting hearing, should be contained on the UK Supreme Court website?
8. Would there be benefits in the intermediate courts of appeal sitting more routinely in panels of five, seven, or even nine to determine questions of law?
9. In relation to the Court of Appeal (Criminal Division) in England and Wales, the Administration of Justice Act 1960 provides that a pre-condition to granting permission is that the Court certifies that ‘a point of law of general public importance is involved in the decision and it appears to that court ..., that the point is one which ought to be considered by the Supreme Court’.
  - a. Should this be repealed on the basis that it is undesirable for a court to have a veto over appeals from its judgments?
  - b. Should this be applied more vigorously, with emphasis on the criterion that ‘the point is one which *ought* to be considered by the Supreme Court’?
10. What, if any, changes should be made to the arrangements for selecting panels of Justices to hear appeals?
11. Should the UK Supreme Court sit more regularly in panels of seven or nine or even eleven? What criteria should determine which cases are heard by larger panels?
12. Are there changes in practice and procedure that could be introduced to help reduce the high costs of making an appeal?
13. What provision should there be for protective costs orders in the UK Supreme Court?
14. Would it be helpful to have a mechanism whereby the UK Supreme Court could flag up questions to be included in the Law Commissions’ programmes of work?
15. Should the UK Supreme Court adopt the same approach to writing judgments as currently applies in the House of Lords? Should a single judgment of the court be adopted more frequently?
16. Should a press release summarising of each judgment be released?
17. Should proceedings of the UK Supreme Court be (a) webcast via the Court’s website and (b) made available to broadcasters?
18. When making references to the European Court of Justice for preliminary rulings, should the UK Supreme Court adopt a practice of indicating its provisional view of the question?

## 2. The legislative framework for the UK Supreme Court

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The aim of this part of the report is to set out the framework within which the UK Supreme Court will operate.

### Key issues

- Part 3 of the Constitutional Reform Act 2005 provides the basic statutory framework for the work of the UK Supreme Court but it is neither immutable (some amendments are already being considered) nor comprehensive (rights of appeal are defined in several other Acts of Parliament).
- Draft Rules of the UK Supreme Court were published for consultation in January 2007. The Law Lords and officials in the Ministry of Justice continue to work on the Rules; while they are not entirely set in stone, the time to be suggesting wholesale re-writing (if anyone is minded to do this) is past. The Senior Law Lord will pass the Rules to the Lord Chancellor by April 2009 and they will take the form of a statutory instrument.
- Great importance must be attached to the statutory requirements that the Supreme Court Rules be ‘accessible, fair and efficient’ and ‘simple and simply expressed’.
- Many features of the day-to-day working practices of the UK Supreme Court will be covered by Practice Directions (to be published at the same time as the Rules).
- The internal working practices adopted by the Justices of the UK Supreme Court will also be important.
- Other informal aspects of the UK Supreme Court’s operations—notably the court’s website and public access to the building—also need to be considered.

### Jurisdiction

The UK Supreme Court is established in law by Part 3 of the Constitutional Reform Act 2005. Section 23, which creates the UK Supreme Court, will be brought into force when ‘the Lord Chancellor is satisfied that the Supreme Court will at that time be provided with accommodation in accordance with written plans that he has approved’ (section 148). This is expected to be at the start of October 2009.

The jurisdiction of the UK Supreme Court is defined partly by Part 3 of the Constitutional Reform Act 2005 and in part by several other Acts of Parliament. During the seminars two possible amendments on the horizon were identified (see further Part 7):

- The possibility that section 40(3) of the Constitutional Reform Act 2005—‘An appeal lies to the Court from any order or judgment of a court in Scotland if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section’—may be amended if at some point in the future it is decided that appeals from the Inner House of the Court of Session should be subject to a general requirement that permission is granted before an appeal is made (as it is for appeals from the courts of England and Wales and Northern Ireland).
- The possibility that section 57 of the Scotland Act 1998, which confers jurisdiction over ‘devolution issues’ on the UK Supreme Court, may be amended if the Commission on Scottish Devolution under the chairmanship of Sir Kenneth Calman recommends adjustment to the basis on which appeals on Convention rights from the Scottish courts, especially in the criminal justice context, are handled.

The appointments process for Supreme Court Justices was not considered in the seminars, but it may be noted that in March 2008 the Draft Constitutional Renewal Bill proposed amendments to the arrangements established by the Constitutional Reform Act 2005 by removing the entirely formal role of the Prime Minister from the process.

### Appeal routes to the Supreme Court

The UK Supreme Court is a creature of statute. Rights of appeal to the court exist only in so far as they are created by an Act of Parliament. There are various routes by which an appellant may seek to come to the court. These differ according to whether the case started in England and Wales, in Northern Ireland, or in Scotland. There are also different arrangements depending on whether the appeal is in a criminal or civil case. Some of these differences were regarded by some participants in the Queen Mary seminars as unjustified and in need of reform; any change would require changes to primary legislation.

#### *Appeals from the courts of England and Wales*

The Constitutional Reform Act 2005 section 40(2) creates a right of appeal in *civil* cases from the courts of England and Wales and section 40(6) qualifies that right by requiring that permission must be given either by the Court of Appeal or the Supreme Court (Box 2).

#### **BOX 2 CONSTITUTIONAL REFORM ACT 2005**

##### **Section 40 Jurisdiction**

- (1) The Supreme Court is a superior court of record.
- (2) An appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings.
- (3) An appeal lies to the Court from any order or judgment of a court in Scotland if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section.
- (4) Schedule 9—
  - (a) transfers other jurisdiction from the House of Lords to the Court,
  - (b) transfers devolution jurisdiction from the Judicial Committee of the Privy Council to the Court, and
  - (c) makes other amendments relating to jurisdiction.
- (5) The Court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment.
- (6) An appeal under subsection (2) lies only with the permission of the Court of Appeal or the Supreme Court; but this is subject to provision under any other enactment restricting such an appeal.

*Criminal* appeals from the courts of England and Wales are governed by other legislation (Box 3). The Criminal Appeal Act 1968 section 33 creates a qualified right of appeal from the Court of Appeal (Criminal Division) to the UK Supreme Court.<sup>1</sup> There is a double hurdle.

- First, the Court of Appeal must certify that there is ‘a point of law of general public importance’ *and* the point is ‘one that ought to be considered by the Supreme Court’.
- Secondly, either the Court of Appeal or the UK Supreme Court must grant permission.

As we discuss in Parts 3 and 4, some participants in the Queen Mary seminars questioned whether there is any need for this double hurdle in criminal cases and suggested that the certification stage should be removed. Others, however, contended that the certification stage could in future provide a basis for a greater number of cases being dealt with by the Court of Appeal (Criminal Division) sitting in larger panels than at present.

<sup>1</sup> All legislation in this part is presented as if the amendments contained in schedule 9 to the Constitutional Reform Act 2005 are in force. Those amendments not already in force will be brought into force before the UK Supreme Court opens for business in October 2009.



**BOX 3 CRIMINAL APPEAL ACT 1968****Part II Appeal to Supreme Court from Court of Appeal (Criminal Division)****Section 33 Right of appeal to Supreme Court**

(1) An appeal lies to the Supreme Court, at the instance of the defendant or the prosecutor, from any decision of the Court of Appeal on an appeal to that court under Part I of this Act or section 9 (preparatory hearings) of the Criminal Justice Act 1987 or section 35 of the Criminal Procedure and Investigations Act 1996.

(2) The appeal lies only with the leave of the Court of Appeal or the Supreme Court; and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court.

(3) Except as provided by this Part of this Act and section 13 of the Administration of Justice Act 1960 (appeal in cases of contempt of court), no appeal shall lie from any decision of the criminal division of the Court of Appeal.

In two circumstances, there is a possibility of an appeal to the UK Supreme Court directly from the High Court, bypassing the Court of Appeal.

- The first situation is a so-called ‘leapfrog appeal’ made in civil cases under the terms of the Administration of Justice Act 1969 (Box 4A). Although not greatly used —there was one appeal to the House of Lords via this route in 2006; four in 2007— leapfrog appeals may be useful where an important point of statutory interpretation arises and it seems clear that the Court of Appeal will be bound by a precedent of the House of Lords/UK Supreme Court.
- The second is under the Administration of Justice Act 1960 in relation to ‘a criminal cause or matter’ (Box 4B). The High Court deals mainly with civil cases but aspects of the work of the Administrative Court relate to challenges to the legality of decisions taken during the criminal justice process. In such cases the High Court will normally sit as a ‘Divisional Court’ of two judges rather a single judge. These proceedings include: judicial review claims against magistrates’ courts determinations and some decisions of the Director of Public Prosecutions; ‘appeals by way of case stated’ from magistrates’ courts; and some applications for the writ of habeas corpus.

**BOX 4A ADMINISTRATION OF JUSTICE ACT 1969****Section 12 Grant of certificate by trial judge**

(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied—

- that the relevant conditions are fulfilled in relation to his decision in those proceedings, and
  - that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal, and
  - that all the parties to the proceedings consent to the grant of a certificate under this section,
- the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.

(2) This section applies to any civil proceedings in the High Court which are either—

- proceedings before a single judge of the High Court (including a person acting as such a judge under section 3 of the Judicature Act 1925), or
- proceedings before a Divisional Court.

(3) Subject to any Order in Council made under the following provisions of this section, for the purposes of this section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in that decision and that that point of law either—

(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or

(b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the Supreme Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Supreme Court (as the case may be) in those previous proceedings.

(4) Any application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings:

Provided that the judge may in any particular case entertain any such application made at any later time before the end of the period of fourteen days beginning with the date on which that judgment is given or such other period as may be prescribed by rules of court.

(5) No appeal shall lie against the grant or refusal of a certificate under this section.

(6) Her Majesty may by Order in Council amend subsection (3) of this section by altering, deleting, or substituting one or more new paragraphs for, either or both of paragraphs (a) and (b) of that subsection, or by adding one or more further paragraphs.

(7) Any Order in Council made under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) In this Part of this Act 'civil proceedings' means any proceedings other than proceedings in a criminal cause or matter, and 'the judge', in relation to any proceedings to which this section applies, means the judge . . . referred to in paragraph (a) . . . of subsection (2) of this section, or the Divisional Court referred to in paragraph (c) of that subsection, as the case may be.

### **Section 13 Leave to appeal to the Supreme Court**

(1) Where in any proceedings the judge grants a certificate under section 12 of this Act, then, at any time within one month from the date on which that certificate is granted or such extended time as in any particular case the Supreme Court may allow, any of the parties to the proceedings may make an application to the Supreme Court under this section.

(2) Subject to the following provisions of this section, if on such an application it appears to the Supreme Court to be expedient to do so, the Supreme Court may grant leave for an appeal to be brought directly to the Supreme Court; and where leave is granted under this section—

(a) no appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal, but

(b) an appeal shall lie from that decision to the Supreme Court.

(3) Applications under this section shall be determined without a hearing.

## **BOX 4B ADMINISTRATION OF JUSTICE ACT 1960**

### **Section 1 Right of appeal in criminal cases**

(1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court, at the instance of the defendant or the prosecutor,—

(a) from any decision of the High Court in a criminal cause or matter.

(2) No appeal shall lie under this section except with the leave of the court below or of the Supreme Court; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court.

(4) For the purpose of disposing of an appeal under this section the Supreme Court may exercise any powers of the court below or may remit the case to that court.

(5) In this Act, unless the context otherwise requires, 'leave to appeal' means leave to appeal to the Supreme Court under this section.

**Section 2 Application for leave to appeal**

(1) Subject to the provisions of this section, an application to the court below for leave to appeal shall be made within the period of fourteen days beginning with the date of the decision of that court; and an application to the Supreme Court for such leave shall be made within the period of fourteen days beginning with the date on which the application is refused by the court below.

(3) Except in a case involving sentence of death, the Supreme Court or the court below may, upon application made at any time by the defendant, extend the time within which an application may be made by him to the Supreme Court or the court below under subsection (1) of this section.

*Appeals from the courts of Northern Ireland*

The Judicature (Northern Ireland) Act 1978—the principal piece of legislation governing the structure of the court system in Northern Ireland—creates routes of appeal from the Northern Ireland Court of Appeal to the UK Supreme Court in criminal matters and civil matters (Box 5). The ‘leapfrog appeal’ provisions under the Administration of Justice Act 1969 also apply (Box 4A).

**BOX 5 JUDICATURE (NORTHERN IRELAND) ACT 1978****Section 41 Appeals to the Supreme Court in other criminal matters**

(1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court, at the instance of the defendant or the prosecutor,—

- (a) from any decision of the High Court in a criminal cause or matter;
- (b) from any decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or a magistrates’ court.

(2) No appeal shall lie under this section except with the leave of the court below or of the Supreme Court; and, subject to section 45(3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the Supreme Court, as the case may be, that the point is one which ought to be considered by that House.

(4) For the purpose of disposing of an appeal under this section the Supreme Court may exercise any powers of the court below or may remit the case to that court.

(5) Schedule 1 shall have effect in relation to appeals under this section.

(6) In this section, sections 44 and 45 and Schedule 1—

- (a) any reference to the defendant shall be construed—
  - (i) in relation to proceedings for an offence, and in relation to an application for an order of mandamus, prohibition or certiorari in connection with such proceedings, as a reference to the person who was or would have been the defendant in those proceedings;
  - (ii) in relation to any proceedings or order for or in respect of contempt of court, as a reference to the person against whom the proceedings were brought or the order was made;
  - (iii) in relation to a criminal application for habeas corpus, as a reference to the person by or in respect of whom that application was made,

and any reference to the prosecutor shall be construed accordingly;

(b) ‘application for habeas corpus’ means an application for a writ of habeas corpus ad subjiciendum and references to a criminal application or civil application shall be construed accordingly as the application does or does not constitute a criminal cause or matter;

(c) ‘leave to appeal’ means leave to appeal to the Supreme Court under this section;

(d) an appeal under this section shall be treated as pending until any application for leave to appeal is disposed of and, if leave to appeal is granted, until the appeal is disposed of and an application for leave to appeal shall be treated as disposed of at the expiration of the time within which it may be made, if it is not made within that time.

**Section 42 Appeals the Supreme Court in civil cases**

(1) Subject to the provisions of this section and to any restriction imposed by any statutory provision which has effect by virtue of subsection (6), an appeal shall lie to the Supreme Court from any order or judgment of the Court of Appeal in any civil cause or matter.

(2) No appeal shall lie under this section except with the leave of the Court of Appeal or the Supreme Court.

(6) No appeal from an order or judgment of the Court of Appeal shall, unless it involves a decision of any question as to the validity of any provision made by or under an Act of the Parliament of Northern Ireland or a Measure of the Northern Ireland Assembly, lie under this section in a case where by any statutory provision, including a provision of this Act, it is expressly provided (whatever form of words is used) that that order or judgment is to be final.

**Section 43 Appeals to the Supreme Court from High Court**

Nothing in this Part of this Act affects the operation of Part II of the Administration of Justice Act 1969 (which provides that an appeal from the High Court shall in certain circumstances lie direct to the Supreme Court).

Routes of appeal from the Scottish courts are discussed in Part 7.

**The Supreme Court Rules**

Section 45 of the Constitutional Reform Act 2005 governs the making of the Supreme Court Rules (Box 6). Draft Supreme Court Rules were published in January 2007 and the consultation period came to an end in April 2007.<sup>2</sup> During 2009, the Rules will be published in the form of a statutory instrument.

**BOX 6: CONSTITUTIONAL REFORM ACT 2005****Section 45 Making of rules**

(1) The President of the Supreme Court may make rules (to be known as 'Supreme Court Rules') governing the practice and procedure to be followed in the Court.

(2) The power to make Supreme Court Rules includes power to make different provision for different cases, including different provision—

- (a) for different descriptions of proceedings, or
- (b) for different jurisdiction of the Supreme Court.

(3) The President must exercise the power to make Supreme Court Rules with a view to securing that—

- (a) the Court is accessible, fair and efficient, and
- (b) the rules are both simple and simply expressed.

(4) Before making Supreme Court Rules the President must consult all of the following—

- (a) the Lord Chancellor;
- (b) the bodies listed in subsection (5);

(c) such other bodies that represent persons likely to be affected by the Rules as the President considers it appropriate to consult.

(5) The bodies referred to in subsection (4)(b) are—

- The General Council of the Bar of England and Wales;
- The Law Society of England and Wales;
- The Faculty of Advocates of Scotland;

<sup>2</sup> [http://www.parliament.uk/documents/upload/SupremeCourt\\_rulesconsultation.pdf](http://www.parliament.uk/documents/upload/SupremeCourt_rulesconsultation.pdf) (accessed 4 November 2008).

The Law Society of Scotland;  
The General Council of the Bar of Northern Ireland;  
The Law Society of Northern Ireland.

### **Practice Directions and internal working methods**

Behind the Rules of the Supreme Court there will be Practice Directions. These will not take the form of delegated legislation but they are being drafted in tandem with the Rules. A Law Lord involved in the design of the Rules and Practice Directions told that seminar that accessibility will be important in each of these categories of rules.

There will also be areas of practice—working methods—which will be essentially inward looking at how Justices carry on their work. The Law Lord described these as ‘open ground’ in respect of which there is search for ideas. He felt that the six seminars were a unique opportunity to gather views. However, he stressed that it would be for the Justices to decide their business. He said they would listen with open minds and share their thoughts but ultimately the responsibility was theirs.

The Law Lord noted that section 3 of the Constitutional Reform Act 2005 states that the Lord Chancellor must uphold the continued independence of the judiciary. The Law Lord viewed judicial independence not just as a collective phenomenon but as a principle which attaches to each individual member of the judiciary. He also noted that section 27 of the 2005 Act states that selection for appointment must be on merit. He said that the consequence of these two provisions was that no members of the judiciary can or should be dictated to by anyone. He believed that the strength of the argument would be important in deciding what changes to make to working practices.

## 3. Case selection for the UK Supreme Court

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This part of the report considers questions relating to the ways in which the UK Supreme Court will select which cases should be go continue to full argument and judgment. The focus is on civil appeals from England and Wales. Criminal appeals are considered in Part 4 and appeals from Scotland in Part 7.

### Key issues identified in the seminar

- Should the creation of the UK Supreme Court prompt any change in the criteria on which permission to appeal is determined? Leaving aside criminal appeals from England and Wales and possible developments in Scotland, no arguments were advanced for any significant changes. Some participants did however foresee a time when the UK Supreme Court's case load would be dominated by public law appeals.
- Should the criteria for permission be set out with more fully and formally? Opinion was divided as the benefits of such a change. Some participants favoured this—either expressly in the UK Supreme Court Rules or by a process of publishing reasons in individual cases—on grounds of transparency and accessibility. Others argued that flexibility was important.
- When, if at all, should reasons be given for the grant and refusal of permission? A range of views was expressed on this question—some participants confessing that they had changed their mind during the course of the discussion.
- What arrangements should the UK Supreme Court make for publishing information about permission applications received and their outcomes? This is considered further in Part 6.
- To what extent should the intermediate courts of appeal continue to be able to grant permission to appeal to the UK Supreme Court? The Court of Appeal in England and Wales may grant permission but does so only sparingly. Some participants argued that in all cases decisions about which cases to accept for appeal should be for the UK Supreme Court alone; others took the view that there are practical benefits in the arrangement which enables would-be appellants to seek permission first from the Court of Appeal.
- Should the practice of three Law Lords deciding applications for permission continue, or should a larger number—perhaps all—Justices be involved? The seminar was reminded of arrangements in the US Supreme Court, where all nine Justices are involved in selecting any case. If current practices in the House of Lords continue to be used in the UK Supreme Court, it was suggested that better systems of communication should be adopted to enable all Justices to have information about the petitions that have been lodged and which have been granted.
- There was discussion about the possible advantages of appointing one of the Justices to have a role of 'rapporteur' for each case; it was suggested that this might assist with case management. Some participants were unconvinced about the benefits of case management at the level of the Supreme Court.
- A number of comments were made about the need to reform permission arrangements in relation to the overseas jurisdictions of the Judicial Committee of the Privy Council. The Justices of the UK Supreme Court, like the Law Lords before them, will hear a significant number of such appeals each year, in the specially designated courtroom within Middlesex Guildhall.



## Background

Most—but not all—rights of appeal to the UK Supreme Court will be subject to a ‘leave’ or ‘permission’ requirement (the terms are interchangeable): either the UK Supreme Court itself or a lower court will act as a gate-keeper, determining which would-be appeals receive a full hearing resulting in a judgment. Different arrangements apply to Scottish appeals and these are considered in Part 7.

The UK Supreme Court will, like the House of Lords, therefore have considerable scope to select which of the cases brought to it should be subject to full hearing and judgment. In recent years, the House of Lords has rejected far more petitions for appeal than it has allowed to proceed.

|      | Petitions for leave to appeal determined | Number allowed |
|------|--|----------------|
| 2005 | 255                                      | 79 (40%)       |
| 2006 | 198                                      | 45 (23%)       |
| 2007 | 199                                      | 53 (27%)       |

The criteria for permission are currently set out in the Practice Direction and Standing Orders of the House of Lords:

Leave to appeal is granted to petitions that, in the opinion of the Appeal Committee, raise an arguable point of law of general public importance which ought to be considered by the House at this time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. A petition which in the opinion of the Appeal Committee does not raise such a point of law is refused on that ground.

### The criteria for permission

A Law Lord gave a short presentation to the seminar in which he summarised the current position. Cases are selected if they raise a point of law which is (i) likely to affect significantly a fair number of people or (ii) is of general public importance, significance or interest. The point of law must be one which (iii) needs clarification, (iv) may need to be changed, (v) involves inconsistency with other decisions, or (vi) simply requires the authority of the Law Lords. Bearing in mind the other currently listed appeals, the case must be (vii) suitable on its facts and (viii) justified in view of other pressures.

The Law Lord said that there was a case for saying that, at least in general terms, the current approach should not be changed in the UK Supreme Court. The Supreme Court was not created to make substantive change and the judicial resources will be identical. Whether, and if so the extent to which, the approach of the Supreme Court should differ from that of the House of Lords will depend in part on other decisions affecting the resources of the court—how many Justices should sit on appeals, how many days a year the court will sit, whether oral hearings become shorter and whether there is a reduction in the case load of the Judicial Committee of the Privy Council.

### Which courts should decide whether to grant permission?

An academic argued that, with one or two minor exceptions, the responsibility for determining the caseload of the Supreme Court should be the Court’s alone—and not a role for the lower courts. The experience of the House of Lords shows that a 12-judge Supreme Court could comfortably handle 60 to 70 cases a year, which is not out of line with the caseload of, say, the Supreme Court of Canada, the High Court of Australia or the US Supreme Court. This may mean that the Court will have to spend more time considering petitions for leave to appeal, but this additional time could be off-set by reducing the number of appeals heard by the Justices when sitting in the Judicial Committee of the Privy Council. To achieve that reduction, new leave requirements would need to be introduced for such appeals. These requirements do not need to be identical to those for Supreme Court appeals.

The time required to consider such leave petitions would be much less than that required to hear the appeals themselves.

A Law Lord took a different view, arguing that the Court of Appeal should retain the power to grant permission to appeal; he did not feel that it is a power that is over-exercised.

A practitioner agreed. He said that if a party loses before the Court of Appeal, applying to the Court of Appeal for permission to appeal to the House of Lords/ Supreme Court is a cheap way of ‘having another go’. He noted that permission is nearly always refused. He considered that if in the future the Court of Appeal did not have the power to grant leave to appeal, more litigants will want to petition the Supreme Court, which would lead to costs for the litigant and the taking up of resources in the Supreme Court.

### The giving of reasons

An academic called for the permission criteria to be set out with greater precision and reasons to be given for granting and refusing permission. He suggested that setting out the permission criteria with greater precision is important for practitioners in determining whether an appeal is likely to be entertained. Moreover, articulating reasons for which cases are selected and rejected would enable the court to explain its role more effectively to the public. In respect of giving reasons, the reasons need not be long, but they should convey the rationale for why a particular case was selected or not selected. The reasons should be readily accessible on the Supreme Court website. This increased transparency would facilitate better targeted interventions from third parties.

A Court of Appeal judge expressed the view that where an application is *granted*, no reasons should be given. He considered that where an application is refused, reasons should also be given. Reasons could be short but they should be less formulaic and more case-specific than the current criteria. He commented that the losing party, the lawyers, and the public all need to know why a petition is refused, and that it is also helpful for both future appellants and for the judges themselves. He also suggested that there could be a procedure for a review of the petition if it is refused. There should be the facility to have an oral hearing if the judges think it is appropriate to do so. Refusals should be publicly available on the Court’s website, which should also set out the petitions granted with a summary of the issues.

Another judge took a different view, arguing that a litigant should be entitled to know why permission is *granted* because taking the case to the Supreme Court will cost a lot of money. He gave an example of a case which was taken to the House of Lords when it was not clear to the respondent why it was going there and was ultimately faced with a £90,000 costs order. He thought it was important to be thinking about why leave is being granted and also who is going to pay for it.

An academic argued that the Supreme Court should be more detailed than the House of Lords in the reasons it gives for granting or refusing permission to appeal—which presupposes that it needs to develop new criteria against which to assess petitions for leave. These criteria should in turn reflect the purposes for which the Supreme Court exists. The Supreme Court should not be (or, at least, very rarely be) merely a court of error, correcting ‘wrong’ decisions made by lower courts. That is a function which can be performed by the lower tier of appeal courts. The Supreme Court is there to ensure: (a) that legal rules with significant impact on individuals and/or parts of society are clear and just; (b) that there is relative uniformity between the laws applying in different parts of the United Kingdom; (c) that there is relative consistency between different branches of the law (criminal and civil; public and private; substantive and procedural); and (d) that, where appropriate, there is relative harmony with the legal solutions adopted by other countries or by international courts. Judgments in the Supreme Court should be fuller, more contextual, more comparative, more ‘legal’ than judgments in any lower court.

A Law Lord expressed interest in the idea of fuller reasons. It is not the job of the Lords to correct errors of law. The Law Lords—and in future the Justices of the Supreme Court—would be able to deduce more principled ways of going about things if they gave reasons. But



the question needed to be posed whether it is dangerous to give reasons for *granting* leave: a litigant who is granted leave for the reason that the decision was right but the reasoning was hopeless might not want to pursue the appeal any further.

A practitioner said that he had come to the seminar thinking that reasons for refusing leave to appeal should be given; now he was not so sure. He considered that the role of the Supreme Court should not be merely to correct decisions of the court below, so he felt that care should be taken to avoid litigants seeing reasons for refusal of permission as a substitution of the decision below. He also felt that it would be difficult to define criteria in advance and that perhaps it would be better to work on a case by case basis

### Procedure and practice points

A practitioner questioned the provision in the Draft Supreme Court Rules that ‘No application may be made to intervene in support of an application for permission to appeal’. He suggested that there might be cases where neither party represents a public interest but third parties do.

A Law Lord said that petitions should continue to be on paper. However he considered that perhaps *respondents* could be encouraged, more than they are at the moment, to make written submissions. He also considered whether the petitions should just be considered by three judges. He noted that in the US, all nine Justices consider applications. He commented that if it remains with three judges, it is important that all the judges are aware of all the petitions and applications and that they have the opportunity to see the petitions and make representations. He also considered that perhaps any differences in views between the three judges should be spelt out.

Another Law Lord thought that it might be appropriate to consider giving directions, such as a time estimate, at the permission stage. He thought that it would make sense to have a Justice to act as case manager or *judge rapporteur* to identify which judges and also the number of judges that should hear a case.

A different Law Lord agreed that it will be desirable for the Justices of the Supreme Court to have more information about the petitions that have been received, which are pending, and so on.

A practitioner commented that he is troubled by the granting of permission when the result was correct but the reasons were not, because the litigant would be arguing a case that was already won, that the Supreme Court thinks will win, but the Court wants to tidy up the reasoning. He asked whether the Court could say in advance that the case will be heard but that the decision will not be changed.

### Further reading

B Dickson, ‘The Processing of Appeals in the House of Lords’ (2007) 123 *Law Quarterly Review* 57

G Drewry, L Blom-Cooper and C Blake, *The Court of Appeal* (Oxford: Hart Publishing, 2007) chs 5-6

A Le Sueur, ‘Panning for Gold: Choosing Cases for Top-level Courts’, ch 12 in A Le Sueur (ed), *Building the UK’s New Supreme Court: National and Comparative Perspectives* (Oxford: OUP 2004)

## 4. Relations with lower courts and tribunals

### Key issues identified in the seminars

- Whether the Court of Appeal in England and Wales should sit more often in panels of five or seven judges—rather than the normal three—to decide significant cases, so reducing the need for appeals to progress to the UK Supreme Court. Several participants expressed support for such a development. A similar point in relation to the Inner House of the Court of Session is considered in Part 7.
- This idea was considered, in particular, in relation to the Court of Appeal (Criminal Division) because, on one view, that recent expertise in criminal law contained in that court was more likely to lead to certainty in the law compared to judgments of the UK Supreme Court. For this reason, some participants in the seminar favoured a change to current arrangements so that the Court of Appeal (Criminal Division) should not normally grant a ‘certificate’ (a precondition to granting permission in criminal appeals) unless the appeal had been considered by a panel of five or seven Lords Justice. Other participants took a different view, arguing that the whole certification requirement should be abolished as it in effect allows the court to be appealed from a veto over possible appeals—an arrangement that they saw as objectionable in principle.
- There is an obvious need for effective communication, including through clear judgments that are as short as possible. (This issue is considered further in Part 6).

### Practical problems

In opening remarks to the seminar, a Law Lord said that in his experience there were two main areas of concern about the House of Lords. One was that the speeches in House of Lords cases were too long, there were too many of them in each case, and they were sometimes difficult to reconcile with each other. Secondly, there had sometimes been a failure to deal urgently with the few appeals that truly did require expedition. He favoured the Court of Appeal in England and Wales sitting in panels of five or seven more often to resolve difficult points of law. He also favoured the UK Supreme Court hearing fewer appeals, sitting in larger panels, to avoid the 3:2 divisions that sometimes arose under current arrangements.

### The distinct roles of the Court of Appeal and the UK Supreme Court

In a presentation to the seminar, an academic said that the UK Supreme Court would have a ‘review’ function (correcting erroneous decisions in the courts below) and a ‘supervision’ function (developing broad principles on important points of law). Like the House of Lords, it could be assumed that the overwhelmingly predominant function of the UK Supreme Court will be one of supervision.

It was important to remember that very few cases are allowed to progress to the highest court, so the Courts of Appeal in England and Wales and in Northern Ireland and the Inner House of the Court of Session in Scotland are in practice the courts of last resort for most categories of case. The ‘supervisory’ role of the UK Supreme Court will also filter downwards to all courts, including tribunals and magistrates’ courts in which there is lay participation. This raises the issue of the importance of good, clear communication.

The academic noted that 40 years ago, the Court of Appeal in England and Wales granted leave to appeal to the House of Lords in a high proportion of cases but now, in most cases, the Court of Appeal leaves this decision to the House of Lords (and presumably, in the future, to the UK Supreme Court).

The subject matter of cases selected for hearing in the House of Lords has changed markedly over time. Forty years ago a large proportion of the appeals that went to the House of Lords were tax cases. More recently the House of Lords has moved in the direction of a public law court. He questioned whether the UK Supreme Court will become a constitutional court.

The spadework done in the courts below will be important for the effective working of the UK Supreme Court. The facts of the cases are already established in the courts below. He noted the existence of the ‘leapfrog’ appeal procedure (see Box 4A above) and commented that although they speed up the process, they do not allow for the refinement of legal argument in the Court of Appeal.

## Criminal appeals

### *Background: the double requirement of a certificate before permission*

The Administration of Justice Act 1960 (see Box 4B above) abolished the previous requirement that the Attorney General would grant a ‘fiat’ as a precondition to an appeal in criminal matters to the House of Lords. The threshold criterion was reduced from an ‘exceptional’ to a ‘general’ point of law of public importance. The requirement of exceptionality had resulted in very few criminal appeals being heard by the House of Lords: just 23 appeals in the period 1907-1960. The 1960 Act also created avenues of appeal in criminal matters from the Divisional Court.

### *A proposal for criminal appeals in England and Wales*

A Court of Appeal judge urged that there should be radical re-think about the role of the UK Supreme Court in relation to criminal appeals from England and Wales. He noted that Sir Robin Auld’s review of the Criminal Courts in 2001 had not addressed the issue. There were currently two preconditions for a criminal appeal heard by the Court of Appeal (Criminal Division) receiving a second appeal by the House of Lords/UK Supreme Court. First, a certificate must be issued by the Court of Appeal (Criminal Division) that the appeal involves a ‘point of law of general public importance’ and ‘the point *ought* to be considered by the House of Lords’. The judge argued that too many cases were certified by the Court of Appeal (Criminal Division). This was because there is too much focus on the first element often overlooking the second element of the test. Secondly, leave to appeal must be granted either by the Court of Appeal or the UK Supreme Court (see above Box 3 in respect of the Court of Appeal and Box 4B in respect of Divisional Courts).

The judge said that some of the Law Lords, and in future the Justices of the UK Supreme Court, will have no criminal justice experience and none will have *recent* criminal justice experience. There are numerous areas of law which will have changed since Supreme Court Justices will have sat as a criminal trial judge—changes in recent years have affected the way in which a criminal trial judges exercise their discretion; the changes include hearsay, character, vulnerable witnesses and case management.

The experience of judges in the Court of Appeal (Criminal Division) is different, the judge said. Many of them sit regularly with two trial judges and, as single judges, they consider applications under section 31 of the Criminal Appeal Act 1968 ‘by the shed load’. These applications are a constant reminder of the problems faced by trial judges. The UK Supreme Court will simply not be able to possess this kind of knowledge.

There is another problem in the way the criminal appeal jurisdiction currently operates: absence of certainty. The law of provocation illustrates the point. Section 3 of the Homicide Act 1957 says what the law is. For 20 years we were all deciding cases in accordance with the House of Lords decision in *Camplin* (1978) and *Morhall* (1996). Everyone thought they understood the law. Then came the Privy Council decision in *Luc Thiet Thuan* (1997), which included a powerful dissenting judgment by Lord Steyn. Then suddenly *R v Morgan Smith* [2000] UKHL 49 appeared in which by 3 to 2 the House of Lords recognised that what Lord Steyn had said represented the law. We had a new law of provocation. Then we had a bit of uncertainty. Then there was an appeal from Jersey to the Privy Council in *Holley* [2005] UKPC 23; a court of nine decided, by a majority of 6 to 3, that we should revert to the law prior to *Morgan Smith*. That presented the Court of Appeal (Criminal Division) with rather a problem as judgments of the Privy Council are not binding. The Court of Appeal (Criminal

Division), sitting as a panel of five presided over by the Lord Chief Justice, gave a judgment in *R v James* [2006] EWCA Crim 14 agreeing with *Holley*; the House of Lords did not give leave to appeal. So a decision of the House of Lords was in fact overturned by a judgment of the Privy Council followed by the Court of Appeal. In each of these cases there were extremely learned speeches—but we had five years of uncertainty in which directions were being given to juries in relation to provocation which were far too favourable to the defendant. And what is worse, there were five years in which convictions for murder were being overturned on the inaccurate basis that the House of Lords in *Morgan Smith* was right, including cases referred to the Court of Appeal (Criminal Division) by the Criminal Cases Review Commission in the light of the changed law. It is not a question of whether the House of Lords was right or wrong. All the speeches were beautifully reasoned.

The judge proposed that the Court of Appeal (Criminal Division) should act rather differently to the way it has been acting. Generally no case should be ‘certified’ unless it has been considered by a panel five judges (rather than the normal panel of three). Cases could often be identified before they are heard as one that requires five judges, or if it is identified as such a case during the hearing, then the hearing could be adjourned and remitted to a panel of five. He proposed that the five judges would include the three judges who heard the appeal and also the Lord Chief Justice and the Vice President of the Court of Appeal (Criminal Division). If there were five judges there would be a fuller and more refined argument and therefore there would be fewer cases in which it would need to be ‘certified’ that not only that there is a point of law of general public importance but that the case is one that *ought* to be heard by the House of Lords/UK Supreme Court. There would be rare and occasional cases where that test would be satisfied, for example questions on the impact of the Human Rights Act on the criminal justice system. Another example would be where a Court of Appeal decision involved the creation or recognition of an offence.

At present, the Court of Appeal (Criminal Division) is required by statute to give a single judgment. If panels of five were used, consideration should be given to resuscitating the availability of the dissenting opinion (though in practice that does not often arise).

The judge said that the main problem with his proposal would be precedence. The House of Lords/UK Supreme Court should be asked to develop the rules of precedent so that a five judge panel of the Court of Appeal (Criminal Division) can overrule a three judge panel without using any of the current exceptions to the current general rule that the Court of Appeal is bound by its own previous decisions.

#### *An alternative proposal: remove the certificate requirement*

During the seminars, some participants—including a Law Lord and a judge of the Court of Appeal—argued that the certification requirement should be removed, leaving criminal appeals to be dealt with simply on the basis of whether permission should be granted (as is the case with civil appeals).

The Court of Appeal judge said that if the Court of Appeal refuses to give a certificate, that decision is final. There could be a temptation for judges to ring-fence their decisions. The arrangement also perhaps implied that criminal law is less important than civil law. This is not something that he could accept as criminal law is very difficult and extremely important. There was, he concluded, no reason why the rules should be different in criminal and civil cases.

#### *Discussion*

A Court of Appeal judge expressed the view that the proposals for larger panels were sensible, though dissenting judgments would need to be permitted if the Court of Appeal (Criminal Division) regularly sat in panels of five or seven.

A practitioner said that he was persuaded by many of the points made in the proposal for the Court of Appeal (Criminal Division) to be the final court in more cases. However, he said, it

was true to say that the Law Lords lack recent experience of conducting trials in all areas of law, not just in criminal law. He noted the danger of over specialisation and suggested that there are advantages of coming to a problem from a different perspective.

A Law Lord suggested that the proposal for panels of five judges able to overrule panels of three might extend from the Court of Appeal (Criminal Division) to the Court of Appeal (Civil Division). Two other judges urged caution about this—not least because of the manpower problems that might arise if the Court of Appeal was regularly sitting in panels of five or even seven.

A Court of Appeal judge referred to the convention that the Court of Appeal (Criminal Division) hardly ever grants leave to appeal to the House of Lords/Supreme Court. He wondered whether the Court of Appeal could adopt a practice of giving an indication if it thinks that the UK Supreme Court should look at a case and alert the UK Supreme Court if there is an urgent or important case. Another judge agreed that informally ‘flagging up’ cases regarded by the Court of Appeal as important would be useful.

A Court of Appeal judge praised the current relationship between the House of Lords and the Court of Appeal. He commented that there is sometimes a backlog of questions, particularly in relation to the Asylum and Immigration Tribunal, but there is good co-operation with Lord Bingham. He hoped that this would continue with the UK Supreme Court. He agreed that it is important to get the facts clear before cases get to the House of Lords. He also agreed that judgments in the Court of Appeal are sometimes too long. He considered that larger panels might be a good idea in some circumstances. The role of the UK Supreme Court will be to develop the great questions of law of the day and to make such decisions clear for the lower courts. He therefore stressed the importance of judgments being clear.

### Case study on the determination of two points of law

The seminar concluded with a case study presented by a Court of Appeal judge, which illustrates the often protracted interaction between the courts and tribunals in the determination of a point of law (see Box 7). There were two questions of law that were quite fundamental to the operation of the Asylum and Immigration Tribunal—namely how Article 8 of the European Convention on Human Rights (protecting respect for home and family life) fits into immigration control, and who decides it. The system took nine years and three House of Lords judgments, all at public expense, the judge lamented. For a period of three years in the middle, the courts and tribunals were applying an ‘exceptionality test’, only to be told later that there was no such test (although the result would probably be the same). If the purpose of the system is to provide guidance to the lower courts and tribunals, it needs to operate quicker and more efficiently than this.

#### BOX 7 CASE STUDY

- (1) In what circumstances does an interference with private or family life under Art 8 ECHR override the requirements of immigration control?
- (2) Is the judgment that of the Home Secretary reviewable by the Asylum and Immigration Tribunal only on *Wednesbury* principles; or is the tribunal entitled to substitute its own decision on the merits?

February 1999 Razgar, an Iraqi national, claims asylum in the UK; he had left Iraq and arrived in Germany in 1997

May 2000 Home Secretary authorises Razgar’s return to Germany as ‘safe third country’ under the provisions of the Dublin Convention. Judicial review claim commenced, alleging breach of Arts 3 and 8 ECHR, permission was refused; permission to appeal was lodged but discontinued.

2000-2001 Razgar makes further representations to the Home Secretary

April 2001 Home Secretary certifies Razgar’s human rights claim as ‘manifestly unfounded’;



|               |  |
|---------------|--|
|               | Razgar commences a new judicial review claim. Permission is granted by the Court of Appeal on amended grounds in December 2001.  |
| October 2002  | House of Lords gives guidance on meaning of 'manifestly unfounded': <i>R (Yogathas) v Secretary of State for the Home Department</i> [2002] UKHL 36  |
| November 2002 | <i>R (Razgar) Secretary of State for the Home Department</i> [2002] EWHC 2554 (Admin): Richards J quashes Home Secretary's certificate   |
| July 2003     | CA dismisses appeal: <i>Razgar</i> [2003] EWCA Civ 840, [2003] Imm AR 29   |
| June 2004     | HL agrees with lower courts that the claim was not 'manifestly unfounded': <i>Razgar</i> [2004] UKHL 27. Lord Bingham ([17]) sets out five questions under Art 8, and adds: 'Decisions taken in pursuant to the lawful operation of immigration control will be proportionate in all save a minority of exceptional cases, identifiable only on a case by case basis' ([20])   |
| March 2005    | <i>Huang and Kashmiri v Secretary of State for the Home Office</i> [2005] EWCA Civ 105 in the CA: Laws LJ's judgment, following <i>Razgar</i> , holds that the adjudicator erred in failing to consider on the merits whether the case was 'truly exceptional'. Huang's appeal succeeds; Kashmiri is held unarguable on the facts.   |
| March 2007    | <i>Huang and Kashmiri v Secretary of State for the Home Office</i> [2007] UKHL 11 in the HL: dismisses Secretary of State's appeal in Huang but allows Kashmiri appeal in a single 'report' of the Appellate Committee. <i>Razgar</i> questions approved; but there is no 'test of exceptionality'. Lord Bingham in <i>Razgar</i> was expressing 'an expectation ... not purporting to lay down a legal test.' ([20]). No other test suggested. HL upholds decision to remit Huang to the Asylum and Immigration Tribunal; Home Secretary concedes, without discussion, that Kashmiri should also be remitted (even though found 'unarguable' by Laws LJ).   |
| October 2006  | <i>AG (Eritrea) v Secretary of State for the Home Department</i> (Carnwath LJ, permission to appeal)—one of many cases awaiting decision pending <i>Huang</i> . Carnwath LJ refuses to approve consent order, remitting to the Asylum and Immigration Tribunal on grounds that tribunal had wrongly applied an 'exceptionality' test; but grants permission to appeal, commenting: 'Although it is now clear that exceptionality as such is not a distinct legal test, I doubt if there is much difference in practice from saying that the result of the correct approach is that only a very small minority of cases will succeed. The implicit assumption must be that there has to be something unusual about the particular case to depart from the ordinary principles of immigration control.' He directs full hearing to enable CA to give further guidance. |
| July 2007     | <i>AG (Eritrea) v Secretary of State for the Home Department</i> [2007] EWCA Civ 801 (substantive appeal)—CA reinterprets <i>Razgar</i> guidance in the light of <i>Huang</i> : 'no set formula for determining proportionality... a structured decision about it case by case' ([37]).  |
| January 2008  | Asylum and Immigration Tribunal (Hodge J and SIJ Storey) give guidance on Art 8 in the light of <i>Huang</i> and <i>AG (Eritrea)</i> : 'structured approach... following 5-stage <i>Razgar</i> approach but without an 'exceptionality' test; 'insurmountable obstacles' test still relevant: <i>VW and MO Uganda</i> [2008] UKAIT 00021   |

### Further reading

ATH Smith 'Criminal Appeals in the House of Lords' (1984) 47 *Modern Law Review* 133

R Nobles and D Schiff 'The Right to Appeal and Workable Systems of Justice' (2002) 65 *Modern Law Review* 676

## 5. Procedures and costs in the UK Supreme Court

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### Key issues identified in the seminar

- The seminars acknowledged the high cost of litigation in the UK Supreme Court and the restriction this created on access to justice. Various options for controlling costs were considered.
- Protective costs orders, it was argued by some participants, should be applied flexibly in the UK Supreme Court.
- There was general agreement that hearings before the UK Supreme Court should operate on the basis of a dialogue between the judiciary and the bar. Some participants felt that the present length of oral argument is, in some cases, excessive.
- It was suggested that third party interventions ought to be allowed at the permission stage.
- The procedures by which panels of Justices will be selected were considered. Some participants called for greater transparency. There was some support for the Supreme Court sitting in panels of seven or nine more often than the House of Lords currently does.
- There may be value in the Supreme Court identifying points of law that could be examined by the Law Commissions.

### Procedures in the UK Supreme Court

A Law Lord introduced discussion by saying that he was not going to comment on the Draft Supreme Court Rules (published in January 2007).<sup>3</sup> Comments on the rules had been requested and there had been approximately 30 replies, some of which were very long. Some major institutions, including the Bar Council and the Law Society, had not responded. Given the stage reached in the consultation process, people should be clear that there was no possibility of major redrafting of the rules.

The civil justice system at appeal level had traditionally depended on oral argument and mutual trust and dialogue between the judiciary and the bar. He considered that this approach had huge strengths and should not be abandoned. This had been a factor when looking for a new building for the UK Supreme Court, with the judges wanting to ensure that the court was not like an old Victorian court with the judges sitting on high, but that it was arranged more like a seminar.

He noted that the present system is not perfect and there is room for improvement. Established structures should not, however, be pulled down merely on a theory that something might be an improvement. There would be change enough in moving the Law Lords and all their possessions to the new building. He considered that there should not be a radical change.

The Law Lord touched briefly on the topic of case management. Judges and the bar both know that cases can change unpredictably all the way up the appellate ladder and that often the key issues only become clear a week before the hearing. He was against piling case management on at the Supreme Court level, which would often be the third or fourth level of appeal. Issues should be clear and if they are not, this would not be saved by case management. There are some cases where case management is relevant and he gave the example of a patent case where the Law Lords were told that it would take weeks to have the

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<sup>3</sup> [http://www.parliament.uk/documents/upload/SupremeCourt\\_rulesconsultation.pdf](http://www.parliament.uk/documents/upload/SupremeCourt_rulesconsultation.pdf)

science explained to them. Seminars with a professor were therefore arranged for the five judges in advance of the hearing. The judge considered that this had been a success but noted that such cases would be exceptional.

### A solicitor's perspective

A practitioner referred to the principles on which the Supreme Court should operate—namely that it should be accessible, transparent, as economical and efficient as possible, and fair. He referred to a bill on a recent case that had gone to the House of Lords, a relatively simple appeal lasting three days that it had been relatively cheap because junior counsel had been used. He said that counsel's fees had amounted to £82,000 plus VAT, judicial fees without including applications for extensions of time had been £4,600 and printing had been £7,500. The total bill was £213,000 excluding VAT.

The practitioner noted that at the moment there cannot be intervention at the leave stage but he considered that there are some cases where a public interest intervener might have something interesting to say. He welcomed the rule that there will be no costs for or against an intervener to the appeal.

The practitioner explained that intervention can be haphazard because people do not always know about cases. A statement that a petition has been served or that permission has been granted should be posted on the Supreme Court's website with a summary of the issues. He gave an example of a recent intervention that had come about by pure chance by way of various conversations between lawyers at social engagements. This is not the best way for the system to operate. The Supreme Court registry could make arrangements with key players, such as the Equality and Human Rights Commission, to ensure that they were aware of relevant cases.

In respect of protective costs orders, he said that parties had to consider costs such as those for stationery etc. but there is also the risk of paying the other side's costs. The current rule was that the claimant or appellant must not have a personal interest in the matter; the interest must be public only. However, under the Human Rights Act, a person must be a 'victim' to have standing in judicial review claims which rely on Convention rights and therefore they would automatically have a personal interest. He thought a similar situation would arise if the case had constitutional impact. He gave the example of *Bradley* [2008] EWCA Civ 36, where the issue was how the government should respond to an ombudsman report. He explained that the claimants had lost out because their pension schemes had failed and they had relied on a government promise. He considered that the rule should therefore be applied flexibly.

### A barrister's perspective

Another practitioner spoke to a short paper dealing with two issues: restrictions on the right of access to the Supreme Court; and the selection of panels.

#### *Restrictions on the right of access*

The draft Supreme Court Rules appear to acknowledge that they can have an impact on the ability of litigants to exercise rights of appeal. For example, the current obligation on appellants to give security for costs by paying into the House of Lords Security Fund Account within 7 days of the presentation of a civil appeal the sum of £25,000 (unless all of the respondents agree to waive it), does not appear to have been replicated under the proposed Supreme Court Rules.

On bundles, similarly, the proposed new flexibility about the presentation of appeal documents will significantly lighten the burden on less well resourced appellants when preparing appeal. Nevertheless, the Rules and fee levels of the Supreme Court must be designed to avoid hindering appeals where appropriate from pro bono appellants, NGOs and appellants who are subject to protective costs orders or conditional fee arrangements.



On third party interventions, the practitioner said that the proposed Rule 45 (which prohibits costs orders being awarded for or against interveners) is a welcome proposal since a Home Office threat of seeking costs from Liberty as an intervener resulted in their withdrawal from the appeal in *R (on the application of Marper) v Secretary of State for Home Department* [2004] 1 WLR 2196.

On protective costs orders (PCOs), the practitioner said that in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, the Court of Appeal held that PCOs may be awarded at any stage of the proceedings, on such conditions as the court thought fit, provided that:

- the court was satisfied that the issues raised were of general public importance; that the public interest required that those issues should be resolved;
- the claimant had no private interest in the outcome of the case;
- having regard to the financial resources of the claimant and the defendant and to the amount of costs that were likely to be involved, it was fair and just to make the order; and
- if the order was not made the claimant would probably discontinue the proceedings and would be acting reasonably in so doing.

Nevertheless, the potential costs liability for claimants in making an application for a PCO (whilst reduced) may still be a decisive obstacle to bringing proceedings; and the Supreme Court Rules will need to acknowledge this difficulty in how such applications are to be addressed.

### *Selection of panels*

The practitioner said that, as he understood it, the current system is that the draft programme for cases is prepared by the Clerks to the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council some weeks before the beginning of term and then submitted to the Senior Law Lord and Deputy Senior Law Lord to finalise the programme for the following term. The heart of the system is that there is an exercise of discretion about which judges sit on which cases (unlike, for example the Supreme Court of the United States or Canada where eight Associate Justices and the Chief Justice sit on every case). The scope of the discretion is wide and includes: the selection of the panels themselves; the selection of ad hoc judges for particular panels; and the selection of the cases and panels which are to be heard by seven or even nine judges.

Under the Constitutional Reform Act 2005 the discretion about the selection of panel will include decisions:

- to use acting judges under section 38 at the request of the President of the Supreme Court which may include: (i) a person who holds office as a senior territorial judge; and (ii) a member of the supplementary panel;
- to use supplementary judges under section 39 which comprises any member of the House of Lords who (i) meets one of the conditions below; (ii) does not hold high judicial office; (iii) has not attained the age of 75; and (iv) is not a person who was appointed to the office of Lord Chancellor on or after 12 June 2003, becomes a member of the panel. The conditions are (a) that he ceased to hold high judicial office less than five years before the commencement of these provisions; (b) that he was a member of the Judicial Committee of the Privy Council immediately before that commencement; (c) that he ceased to be a member of that Committee less than five years before that commencement. A person becomes a member of the supplementary panel on ceasing to hold office as a judge of the Supreme Court or as a senior territorial judge; but only if, while he holds such office (i) his membership of the panel is approved in writing by the President of the Supreme Court, and (ii) the President of the Court gives the Lord Chancellor notice in writing of the approval. A member of the supplementary panel may resign by notice in writing to the

President of the Court. Unless he resigns, a person ceases to be a member of the supplementary panel (a) at the end of five years after the last day on which he holds his qualifying office; or (b) if earlier, at the end of the day on which he attains the age of 75;

- the use a specially qualified advisors if the Supreme Court thinks it expedient under section 44.

The practitioner said that the traditional justification for the current system is claimed to be: that the system for selecting judges is no different from that used in other UK courts; the discretion in the system allows the Appellate Committee to deal with its case load with reasonable dispatch; and the system allows the territorial composition and expertise of the panel to be fine-tuned.

The criticisms of the system are a lack of transparency and the effect on outcomes. For example in the *Pinochet* cases, if the composition of the first panel had been different, then the case would have taken a different course. Another illustration is the conflicting decisions on retrospectivity in criminal cases under the Human Rights Act 1998: *R v DPP Ex parte Kebeline* [1999] UKHL 43, *R v Lambert* [2001] UKHL 37, and *R v Kansal (No 2)* [2001] UKHL 62. Some might argue that the outcome in the recent 3:2 judgment in *YL v Birmingham City Council* [2007] UKHL 27, about whether a care home is a public authority for the purposes of the Human Rights Act, might have been different, were the composition of the panel different.

The same issue can arise in other courts, for example in the Court of Appeal (see *Hello! v Douglas* [2000] EWCA Civ 353 where the important decision of Brooke LJ, Sedley LJ and Keene LJ took place because a two judge court could not agree the previous day). However, the practitioner suggested, the constitutional character of the Supreme Court requires a more principled approach.

If, on the other hand, the Supreme Court sat en banc (as a plenary court rather than in panels), that arrangement would achieve complete transparency and ensure that no questions could arise about how the composition of the panel affected the outcome. Such benefits would be at the cost of the Supreme Court: radically altering working methods (for example by restricting the length of oral hearings and requiring more judicial assistants); reducing the number of cases that can be heard; and making the exercise of identifying the ratio of a decision more difficult, as experience of looking at the decisions of the Supreme Court of Canada confirms. Such a development would be regrettable because of its adverse consequences for the volume of cases that could be heard in domestic and Privy Council appeals.

The practitioner submitted that any consideration of the issues implicit in the selection of panels should be informed by applying the following principles: the issue of selection involves larger questions than principles of case management; the issue of selection ought to acknowledge a perception that the composition of the panel may influence the outcomes of cases; the constitutional character of the Supreme Court means that selection of panels for decisions should be addressed by explicit procedures rather than historical conventions; and the explicit procedures should be as transparent as practicable.

### Discussion on panel selection

A Law Lord acknowledged that even the Law Lords did not know exactly how panel selection was handled in practice. He explained that the Law Lords tell the Registrar of the Judicial Office what days they are not available, and a preliminary list is put forward. He explained that they do identify people with particular skills and that the panel is made up of people with a variety of skills such as jurisdictional expertise. He commented that that was important when building the team. He explained that the two senior Law Lords scrutinise the list and he said that they probably decide who should chair which case. He explained that sitting was not decided at the leave stage: one has to allow for the fact that the list falls apart as people fall ill,

cases overrun etc, so it cannot be guaranteed that the panel set up will sit on the case. He considered that selection was done on a 'best efforts' basis.

Another judge said that there were no options other than: sitting en banc; choosing panels at random; or the present system. If judges were 'bidding' to hear cases, it would be more likely to lead to a loaded court.

A practitioner said it was very difficult to explain to a client, when they have lost 3:2, that if one judge on the panel had been different, they would have won. He stressed that the client must not be forgotten.

A Law Lord commented that random selection would cause a problem when a complex case arose and there was no expert in that field on the panel.

A Court of Appeal judge suggested a further possibility, namely that the court could sit as seven or nine. He explained that those people not in the House of Lords have no idea what moves the court to sit as seven or nine. He considered that sitting as seven or nine would reduce the chances of knife-edge decisions and having to explain this to clients. He said that he would be interested to know why the House of Lords sits in larger numbers and asked whether it is possible to explore whether this could happen in more cases.

A Law Lord responded by explaining that if there is a question of the Law Lords departing from a decision made by five, then the court will sit as seven. He said that the court sitting as nine is more difficult to explain; this was more of an ad hoc process. On the recent question of the legality of the Iraq war [*R (on the application of Gentle) v The Prime Minister* [2008] UKHL 20], the court sat as nine.

A practitioner pointed out that there was one case in European Court of Human Rights where the court had split 10:9. He said they have a system where they can relinquish a case to the Grand Chamber if they think it is going to be a knife-edge decision. He suggested that a similar system could be used here whereby a case could be relinquished to a larger panel in such circumstances.

An academic asked whether when selecting a panel a combination of expertise and randomness could be used whereby two or three slots are filled according to territorial and subject expertise and then the final slots are filled according to randomness.

A practitioner commented that whatever the system is, it would be useful for people to know why a panel is chosen the way it is. A Law Lord responded by asking whether it be acceptable to say how the selection process is *normally* carried out because he considered that there needed to be flexibility.

### Discussion on costs

A Court of Appeal judge referred to the costs figures given by the practitioner (see above) and expressed his own concern about the extreme cost of litigation. If a party has to risk £200,000 in costs, the courts are not accessible. He commented that the level of costs is frightening and considered that without a radical change, accessibility would not be achieved.

Another judge commented that the draft Supreme Court Rules, which currently say merely that tax officers shall make an assessment at an oral hearing, need more meat. He said that in the Iraqi Airways case, Lord Bingham had said that the Civil Procedure Rules would apply by analogy and that is what is done. He explained that the revised Practice Direction in the House of Lords seeks to limit costs but this does not seem to work.

A practitioner stressed that it is important to control costs. He considered that there is some room for reform, such as removing the need for a statement of facts. He explained that the facts are usually clear from the judgment in the lower court, and if they are not clear, it will be because they are not agreed. A lot of time is wasted in the parties agreeing the facts. There is value in having a statement of issues and also in the printed case. He agreed that the primacy of the oral hearing must be maintained but he suggested that the length of submissions could be reduced. He commented that Law Lords used to be rude but now they are very polite and

tend to tolerate lengthy submissions! He suggested that a few days before a hearing, the arguments that would most assist the judges could be identified and therefore the hearing could be limited to those arguments.

A Law Lord noted that under the current Practice Direction, any case that is going to last more than two days requires a letter to be sent to the Judicial Office in the House of Lords. The rule could be altered so that a letter must be sent if the case is to last more than one day. Would it be too much to ask everyone to justify the length of the case? Almost all Privy Council cases ‘go short’; that is a problem because it wastes time. The way that the system works is that parties bid for how long they are likely to speak for and then the judges look at the arithmetic. If a case is given two days, it will usually last for two days.

Another Law Lord commented that the Judicial Office in the House of Lords knows about the listing but the Law Lords are not always aware of the list. The Law Lords should decide the time estimates for a hearing, not the parties. He suggested that the views of the parties be heard by either a judge rapporteur or the presumed presider, who would then determine the length of the hearing. Another Law Lord agreed that the Law Lords ought to decide how long a case should last as they have the best idea about how long it will take for them to make a decision on the issues.

A practitioner said that the length of a hearing would depend on the function of the hearing. If submissions were not allowed on paper this would mean a longer hearing but if the judges were just going to explore the most relevant issues this would mean a much shorter hearing.

A Court of Appeal judge agreed that a hearing is important for judges to explore the issues. Could a controlled experiment be conducted on some cases? This could take place either in the House of Lords or the Court of Appeal and it could be done before the Supreme Court is established. A judge could look at the papers, discuss them with his colleagues and then identify areas where argument is needed. One would then be able to see if this focused a hearing.

A Law Lord said it would be a good idea to have a judge rapporteur who was responsible for the case from the permission stage to the hearing. He thought that it would help time estimates and the rapporteur might be able to say if it was likely that there would be a divergence of views and therefore recommend the case to be heard by seven or nine. He noted that in the Court of Appeal the judges do discuss a case before it is heard, albeit briefly, whereas in the House of Lords discussion takes place only after the case has been heard.

Another Law Lord explained that usually questions between the leave stage and the hearing can be referred to the Appeal Committee (of three Law Lords) who gave leave. The judge expected there would be resistance to the idea of having someone to identify issues or restrict the parties’ issues or to restrict the court’s thinking.

A different Law Lord commented that that if there was a rapporteur to restrict issues, the Lords would have to be more disciplined in their approach.

Another Law Lord considered that it would be impossible to identify issues until the Committee has read all the papers. Another Law Lord agreed: the only person who can take control is the presiding judge in that case. He said that the Court of Appeal do discuss cases in advance but the idea in the House of Lords is to keep an open mind until as late as possible, which perhaps is not the object in the Court of Appeal.

A practitioner commented that if documents are prepared long before the hearing this adds to costs. She asked whether there were any statistics in relation to the time delay between filing papers and the hearing.

Another practitioner commented that the whole discussion was about ends and means. He said that the ends were that it was desirable to have access to justice, fairness and transparency. He noted that there had been no discussion about procedural autonomy. He said that the Supreme Court has a unique status as a court of last resort. It is not there to correct wrong decisions. It must have freedom to regulate its own business.

A judge made the point that 'printed cases' provide a valuable and historic document collection. He noted that the draft Supreme Court Rules say that these documents can be destroyed at the Registrar's discretion. He considered that bound cases are valuable and contain original documents that cannot be found elsewhere. He therefore asked that the Registrar ensure that these would be made available not only to historians but that spare copies would be made available to libraries.

An academic suggested that there should be the possibility of the Supreme Court granting leave for an appeal but ordering that the costs of the appeal from that moment (on both sides) should be borne by the public purse. This would be appropriate, for example, when the outcome of the particular appeal may be fairly obvious but the Supreme Court wishes to take advantage of the opportunity to clarify the law more broadly or to set out its reasons (for the benefit of Parliament and others) as to why the law needs to be reformed.

### References to the Law Commissions

During discussion there was consideration about whether the Supreme Court should have the power officially to refer points of law that had arisen in an appeal to one or more of the UK's Law Commissions.

A participant explained that such a referral would cause practical problems. He said that the Law Commission would wish to retain control over their programme. Perhaps, however, there could be a more formalised procedure whereby the judges could formally record that they want the Law Commission to review something and then ask the Law Commission to include that issue in its current programme.

A judge gave examples where cases have been heard by the House of Lords at the same time that the Law Commission has been dealing with the same issue.

Another judge said that in a recent case in the House of Lords, two Lords had disagreed with the majority. In that situation it would have been useful to refer a particular issue to the Law Commission. Of course, any such referral should not affect the outcome of the case.



## 6. The UK Supreme Court's communication methods

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One theme to emerge during the seminars was the importance of effective communication by the UK Supreme Court. This part of the report brings together two aspects of this theme: the approach of the court to writing judgments; and, more broadly, the ways in which the court will communicate to the general public, particularly through its website.

### Key issues identified in the seminars

- There was discussion of practices in relation to writing judgments. Some participants in the seminar argued for the retention of the status quo in the UK Supreme Court: that the norm should be seriatim judgments in which each member of the court is able in turn to state in his or her own words the reasons for the decision. Others suggested that the creation of the UK Supreme Court presented an opportunity to introduce a more routine use of a single judgment of the court (along the lines of the European Court of Human Rights) to which Justices might, if needs be, add concurring or dissenting judgments.
- There was broad agreement about the importance of judicial deliberations before and after a hearing.
- There was general agreement about the value of webcasting hearings on the UK Supreme Court's website. Some concern was, however, expressed about permitting broadcasters to use this material in news reports.
- There was no dissent from the suggestion that the UK Supreme Court website should include information about the court's working practices, pending applications for permission, and the outcome of those applications.
- The majority of participants seemed to favour making available on the UK Supreme Court's website the parties' 'printed cases' (ie the documents lodged in advance of the hearing summarising the submissions that the party would seek to make). There was some concern that this may lead to the printed cases being used for publicity purposes and becoming overly long, rather than serving their true purpose of informing the court.
- Press releases were seen as helpful to journalists and it was noted that they are routinely used in some other courts. There was some concern as to who could be expected to write them accurately.

### Judgment writing: the case for maintaining the status quo

A Law Lord introduced discussion on whether the UK Supreme Court might move from the practice of the Appellate Committee of the House of Lords by more often using single judgments of the court. People have been debating this for many years—it is like the debates over a permanent date for Easter or fixed British Summer Time in that it comes up every year and is part of our legal landscape. So, although it is now brought out in a new guise, the topic is an old one. Frankly, the arguments on both sides are well known.

At present, the practice is for each of the each of the Law Lords to decide whether to write separately, either a concurring speech or a dissent. Sometimes, however, where all the judges are agreed, either one judge writes a substantial speech which all the rest concur in or, in a practice that has been followed more recently, a single text is prepared in the form of a report of the Appellate Committee and the House gives effect to that. That has been done, for example, in criminal cases where the argument is said to be that there is advantage in a very clear and uncluttered formulation to be used by judges directing juries. Last summer, *R v Kennedy* [2007] UKHL 38 was prepared in the form of a report (on the question of when is it appropriate to find someone guilty of manslaughter where that person has been involved in

the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death). It is less common in civil cases, though not unknown (for example *Henderson v 3052775 Nova Scotia Ltd* [2006] UKHL 21). Sometimes the report names a single author; sometimes it will profess at least to be the work of the Committee (even though in reality nearly all the work has been done by one person). It may or may not be significant that both *Kennedy* and the *Nova Scotia* case were both cases heard on the last day of court term when people were going on holiday and were only too happy to hand over all the work to a colleague!

The Law Lord said that he himself does not favour any change from present practice, which he believes serves our system well. For the most part, the speeches do present a largely coherent picture. That is not to deny that there are occasions when the speeches result in the House sending forth a less than certain sound. Lord Justice Carnwath has commented on the performance of the House of Lords in a recent article in *Counsel* magazine.<sup>4</sup> Of course, the variety of reasoning in those cases may seem unfortunate to people who have to advise on the point in the future or to judges who have to consider a similar problem in a subsequent case. But the variety of approaches in speeches represents a genuine divergence of opinion among the judges as to the proper way to approach the issue. Indeed, in *Kay v Lambeth London Borough Council* [2006] UKHL 10 (on the scope and application of the right to respect for the home protected under Article 8 ECHR) what subsequently caused a problem for the Court of Appeal was not so much the separate speeches but the famous paragraph 110 in the speech of Lord Hope to which Lord Scott, Baroness Hale and Lord Brown pledged their loyalty so as to provide a ratio. It was the attempt to produce a united approach when the rest of their speeches suggested they may be taking a different line that caused the problem! The cases could have been put out for a further hearing to try to resolve the differences but that would be hard on the parties—at least one of whom may only be interested in getting an answer in the particular case. In any event, law is not like mathematics where there is a single right answer. Or if there is a single right answer to dispose of the appeal, there may be a variety of ways of coming to that answer. Where there are a variety of speeches, they tend to reflect that reality. Of course, occasionally—say construing a contract or a minor provision in a statute—the judge may throw his weight behind a particular view which he does not actually find convincing just to obtain a majority and so settle that interpretation. There is a case where Lord Diplock quite expressly did that.

On the whole, the judges should be free and encouraged to express their conclusions in their own way, even if that means that there are divergent approaches.

Firstly, that is consistent with the independence of the judiciary. Judges are all independent and though they cooperate rather well together, that cooperation must be based on the ultimate recognition that they cannot be forced to ‘toe a party line’. For obvious reasons, the need to maintain that independence is of paramount importance.

Secondly, in the longer run at least, our system would be impoverished not enriched if we had more single judgments. Would we really be better off if, for instance, we did not have the benefit of all the insights which Lord Hoffmann has produced over the years? Would we be better off without those additional comments, which judges add usually because they do not fully share the reasoning of the leading speech? They often contain lines of thought which prove helpful in subsequent cases. *Hedley Byrne v Heller* [1964] AC 465, is perhaps the classic example of that. That case was opening up a huge new area of tort liability, the nature of which was inevitably not fully understood by the judges, so they all saw things in slightly different ways. The speech of Lord Devlin, the most junior judge, contains a famous passage professedly written after he had studied the speeches of his colleagues. It takes a distinctive line. The market value in shares in Lord Devlin’s speech has fluctuated wildly over the years—plummeting following an attack from Lord Griffiths, then rising more steeply quite recently.

<sup>4</sup> Lord Justice Carnwath, ‘Devil We Know or New Start?’ *Counsel*, June 2008, 6.

These fluctuations simply reflect stages in the continuing attempt to understand this area of the law. A single judgment, with all its inevitable compromises, would have given a spurious certainty to law which is genuinely uncertain.

The Law Lord noted that we have considerable experience of single judgments in the European Court of Justice (ECJ). But anyone who has the least familiarity with, say, the ECJ's jurisprudence on the Acquired Rights Directive knows it is actually very difficult to understand that case law *even though* it comes out in single texts designed to give certainty. These texts almost always represent the lowest common denominator. Much the same goes for the European Court of Human Rights. There are of course good reasons why those courts adopt the form of judgments that they do, but happily they are not reasons which apply to the UK Supreme Court.

Single judgments of the court tend to be drab and lack individuality. Would we really be better off without Lord Bingham's historical accounts? Or Lord Hoffmann's references to Jane Austin? Or Lord Hope's accounts of what he sees in the London Underground on his journeys to and from the House? Without Lord Steyn's constant delight in statutes which are 'always speaking'? Or without Lord Mance's researches among the heavier works of German legal scholarship? We would be impoverished without them. And yet we could not really have any of these things as embellishments on a judgment that genuinely purported to be the judgment of the court, the majority of whom who could perhaps not even read the German text.

Judges who come to the House of Lords usually come because they find judicial work, including writing judgments, congenial. The silencing of them, or forcing them to make compromises in a judgment written by a colleague is only likely to lead to considerable frustration and unhappiness without improving the quality of output of the court. Genuine enthusiasm for the job—which is shown the care taken to prepare speeches—would not long survive an attempt to force them into uniformity. The judges in the House of Lords are a small group. *Forcing* judges to agree a single text would only lead to real unease within the group. Any determined attempt to do so would be a recipe for disharmony, which would be quite the worst start for the Supreme Court. Real unity of approach comes from a court in which the judges work in harmony and whereby reasoning things through for themselves they come to see that one particular approach should be followed.

Writing a speech is the only way to get to the bottom of a subject. Any expectation of a move towards the use of single judgments would actually lead to less attention to detail. That would be bad for the system in the long run.

Finally, any change to a single judgment would tend to increase the power and influence of the senior members of the court at the expense of the more junior members. Of course, in good times, with someone like Lord Bingham in charge, that may not matter very much. The judge said that he was a great admirer of Lord Diplock in many ways, but he was sure that the kind of dominance that he exercised over his colleagues was pretty unhealthy.<sup>5</sup> Having a single judgment would give a future Lord Diplock even more power and tend to block up the outlet for productive thought among his colleagues.

For all these reasons, the Law Lord said that he believed very firmly that the balance of advantage lies in leaving it to the judges to decide what they should say and how they should say it. If they cannot be trusted to exercise that freedom sensibly and responsibly then they should not have been appointed in the first place.

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<sup>5</sup> Editor's note: Stephen Sedley and Godfrey Le Quesne, in their entry on Lord Diplock in the *Oxford Dictionary of National Biography* write 'But it was not only advocates who feared Diplock. The disdain he found increasingly difficult to conceal for judicial views contrary to his own sometimes stifled discussion and dissent. It was to this, as much as to policy, that the tendency of the house when he was in the chair to limit decisions to a single speech may have been due; but that the single speech was as often as not Diplock's was more of a tribute to his phenomenal industry than to his personal dominance'.



### Judgement writing: the case for change

A judge of the Court of Appeal said that there are basically three forms of judgment in appellate or ‘apex’ courts.

(1) The single (sole) judgment, as seen in the Court of Appeal (Criminal Division), mostly in the Judicial Committee of the Privy Council, the European Court of Justice and some civilian courts.

(2) Seriatim judgments, which we see in England and Wales, where judges on a panel give individual judgments in succession. The reasons for adopting this model is said to be (a) judicial independence; (b) accountability of judges; (c) the avoidance of any risk of adjustment of reasoning.

(3) Single majority and separate dissenting/concurring judgments, seen in the US Supreme Court. The reasons for adopting single majority judgments include that it *should* make the law more certain, coherent and accessible. But where there is a *single* judgment, the judges have to modify their reasoning in order to get the largest majority to sign up to the judgment. That means judgments are not fully stated and can reduce the development of the law. That may be why the judgments of the US Supreme Court have been described as a ‘great literary wasteland’.

All these models are familiar, but none should be taken to be ‘pure forms’. All have variants. There is a spectrum of models of judgment writing and a wide variety of choices.

The US Supreme Court developed the practice of single judgments during the time of Chief Justice Marshall. He encouraged the court to deliver a single opinion. In the last 20 years or so, the judgments of the US Supreme Court have become more fragmented but it is still not that court’s style to have seriatim judgments.

No one would disagree with the proposition that we should have dissenting judgments. They plant the seeds for future development of the law. Obiter dicta are also very valuable. Lord Devlin once wrote that they are the ‘rumblings from Olympus, which signal bad weather in the future’.

Factors influencing the model of judgment include the personalities of judges. In the US Supreme Court, Justice Scalia is extremely outspoken and very critical of his colleagues; Justice Sandra Day O’Conner, by contrast, had a practice of trying to bring different judges together. She preferred to work behind the scenes. You cannot have all Scalias; you cannot have all Day O’Connors—but the fact is the make-up of the court is going to have an influence on the form of judgments.

Resources are also an influence. Some courts have more funds for law clerks to help the judges than other courts do. In some jurisdictions, judges have been reduced in status to the editors of judgments, rather than writers.

Institutional arrangements to facilitate internal engagement also affect the form of judgments. These may be formal meetings but they also include informal arrangements—conversations in rooms, over the phone. If these are in place, it is more likely that common agreement can be more easily achieved.

The judge assumed that everyone wants to get the best out of all possible models. There are ways in which the seriatim judgment practices might be improved. In a previous seminar, a Law Lord had stressed the importance of accessibility of judgments in the new Supreme Court as a guiding factor in the need for improvements. Reforms directed at improving accessibility might include (a) the use of ‘roadmaps’ in judgments, (b) issuing press summaries, (c) fuller headnotes, and (d) shortening judgments.

We need to have a radical look at the *forms* of judgment. The public are bound to ask why is it necessary to have separate judgments from each member of the court when it is unanimous when there is a fair chance of repetition—for instance, judges citing the same passages from the authorities. That does sometimes happen in the Court of Appeal, but only rarely. After the

hearing a decision is taken as to who is going to prepare the judgment and in practice people do not tend to write their own judgment. How would we respond to this criticism?

The judge did not dissent from the importance of individual contributions. But we have had the present system of writing seriatim judgments for centuries. The institution of the Supreme Court is a wonderful opportunity, which will never come again, to think again about our practices.

Leading supreme courts across the world have considered the use of seriatim judgments and have decided to adopt some other model as their main model. The Canadian Supreme Court, in response to criticism from the profession about prolix judgments, decided some years ago that it would strive for a single judgment wherever possible and for a single dissenting judgment if there were opposing views. That change was very well received.

The judge said that it is not necessarily appropriate for the UK Supreme Court to have a single majority judgment. Looking at various jurisdictions, it can be seen that the form of the judgment is always going to be a matter for the ethos of the particular court. But there is no reason to have just one form of judgment. We should look at the possibility of change as part of the process of bringing about the UK Supreme Court.

The judge suggested that there should be more regular consideration of the various options for forms of judgment. If you could have a single substantive judgment, that could be an improvement—but the old adage applies that it takes longer to draft short (ie a single judgment) than it does to write long. Priorities have to be identified and balanced. The value of having every single Justice express the reasoning in his or her own words is not necessarily as great as having a coherent and certain statement of the law covering all the points that the Justices individually would have wished to raise. Concurring or dissenting judgments should only be given if you have something different to say. If you are going to write a concurring judgment, or a dissenting judgment, it is necessary to make it clear what it is you agree with and what it is you do not agree with. It is preferable if you do not repeat the facts and do not repeat citations of authority. The Law Lord had said that students had ‘hours of fun’ looking at *Hedley Byrne v Heller*, but practitioners today do not have hours to spend reading our judgments. But where there is something new to add, something different to say there should certainly be separate judgments. When it comes to writing separate judgments, it is not quite enough to say ‘these are my reasons, which are *substantially* the same as those in the main judgment’. It is much better to be quite clear about it.

Finally, the judge stressed the value of ‘internal engagement’. It does not have to be lengthy, it does not have to be formal. Pre-hearing conferences are important. Post-hearing engagement is too. If the case is breaking new ground—and most cases in the UK Supreme Court will be done that—you are not simply deciding the case, saying ‘the answer is X for the following four reasons’. You are also thinking hard about the development of the law and the direction you want to point it in for the future. That sort of thing is much better done when there has been internal engagement and people have thought and spoken about those deeper issues. Coherence of the law is very important, making sure it hangs together. To have coherence, you need to have collaboration among the people who are writing the judgments. It is internal engagement which will ensure that the UK Supreme Court will have judgments that are lasting and of the highest quality. How you achieve internal engagement, or any change, requires consensus about the aims of judgment writing and the role of the Supreme Court generally and in the individual case which is being decided.

### Discussion

A Law Lord referred to judgments of the European Court of Human Rights. The process resulted in a single, authoritative text that lacks the monolithic features of the European Court of Justice’s judgments (which frequently bear the signs of the lowest common denominator since it speaks with a single voice and carries no assents or dissents). The beauty of the Strasbourg model—which is very much the US Supreme Court’s model as well—is that to that single judgment, which is the voice of the court, and which sets out a rationale to which

the majority assent, can be added both assenting and dissenting judgments. The individual voices *are* heard and, indeed, some of the better prose is found in those judgments. That is a useful model and the real alternative to seriatim judgments. So far as concerns certainty, the judge was troubled by the reference earlier in the seminar to giving ‘spurious certainty’ to law that is in reality uncertain. The one thing that judges are not allowed to do is announce that the law is uncertain. As collegiate courts of three, five, seven or nine, we have to come to a conclusion for better or for worse as to what the law is. We have to do the best we can to produce certainty.

The Law Lord said that he believed that the European Court of Justice style of judgment was based on a process that is not transparent and leads to some very unsatisfactory judgments. There was however *something* to be said for an overall review of the kind that does not usually take place once judgments have been written. There is no system of a rapporteur or anyone standing back and asking ‘where are we getting to?’. There are exceptions to this and he had found those valuable. The judge said that at present the Law Lords have quite inadequate facilities for meetings so it is not as easy as it will be in the new building. Under the present system there is a slight risk that people, having written exhaustively a judgment, part with it and say ‘that’s it’. There is some scope for more discussion to see whether there is possibly some overlap which could be excised or, more importantly, alternatively whether there might be some points which could be further explored with a view to trying to achieve a greater or more satisfactory consensus. Having said that, paragraph 110 of *Kay v Lambeth London Borough Council* [2006] UKHL 10, which notoriously caused problems, was an attempt at that.

Another Law Lord agreed that it is desirable that there should be more rather than less discussion between members of the court. He was all for people writing their own judgments but it is important that at the end of the case that it should be as clear as possible what the court has actually decided. The person writing the press notice at the end of the case would be the most important person! Surely it all depends on the class of case which is the best approach. You cannot have a one size fits all. For example, in criminal cases the single most important point is that trial judges should know what they are to tell the jury. The same is true of some kinds of civil case. He questioned the value of long concurring judgments. He deprecated any ‘Diplockian rule’ that there should only be one judgment but it is surely desirable in many classes of case to have one judgment or at any rate one leading speech. Those who wish to add their *bon mots* should certainly do so, but concurring judgments should focus on points of difference and should be rather shorter.

A different Law Lord commented on the question of certainty: *of course* you have to be certain as to why a particular appeal is disposed of as it is but there may be differing reasons as to why you take that view and very different views as to which way the law should go from that point on. With the best will in the world, we are not required to be certain and to specify a ‘party line’ on that. We really must remain at liberty to indicate our thinking. We used to say in the Court of Appeal, if it is a difficult case (and nowadays most cases coming before the Law Lords are) you ‘see how it writes’. Until you start writing it, you really do not know what your thinking is. By all means, let us meet more often afterwards if there is time—and we can hear fewer appeals—and try to achieve a greater consensus. The judge said he did not know how a civil servant would be able to write press releases. Dissents are clearly valuable on occasion. Lord Ackner’s explanation of when you dissent is a good one: when your sense of outrage at your colleague’s stupidity exceeds your natural indolence!

Another judge raised another aspect of judgment writing that had not been touched on, namely style. Length is important. The Australian High Court’s experience is that the length of judgments has been directly related to the number of law clerks the Justices have (they now have three and the judgments have become longer). Another issue is the material used. For a number of years, the Canadian Supreme Court in their official reports includes, as well as ‘cases’ and ‘legislation’, ‘literature’ cited. That is of some value. There is a more general issue that comes up. The courts are now receiving more amicus briefs and it may be that there will be more policy-type arguments. Some thought has to be given to that over the coming years.

A further aspect is courtesy. In the US Supreme Court, footnotes in judgments are often used to comment on other judgments and sometimes those comments are acerbic. In the UK Supreme Court there should be a continuation of the courtesy which the Law Lords exhibit to each other and to more junior judges.

A practitioner said there is a case at the moment wending its way to Strasbourgh in which a dissatisfied litigant from the House of Lords is arguing that English law on a particular topic is not clear, predictable and accessible—and is seeking to demonstrate that by pointing out the differences between the Law Lords' speeches (who all reach the same conclusion but for some fairly significantly different reasons). It is a case where allegedly he has been deprived of his property otherwise than 'in accordance with the law' because the law of England on matrimonial finance proceedings is not clear, predictable and accessible. That said, the practitioner was very much in favour of continuing to have separate judgments and concerned about the suggestions that the majority reasoning should be contained in a single judgment, which may have less well presented prose than the dissenting judgments.

Another practitioner said that from his perspective as a practitioner he had never found any greater difficulty in dealing with an array of judgments than single judgments. To take an example: in *Douglas v Hello! Magazine* there is a single judgment of the Court of Appeal which was neither more nor less easy to grapple with than the array of judgments in the House of Lords. As a practitioner and also perhaps as a member of the public one gets a certain sense of security in seeing that all the judgments are out there in the top court and they can compete against each other, not just in the disposition of the particular appeal but also over time. Through a Darwinian process, a particular judgment may come out on top.

A participant, who has experience of the Law Commission, agreed with those who were supporting the continued use of separate 'dissenting' judgments—ie not necessarily dissenting in the result, but dissenting in the analysis. In many cases, it is the difference in the analysis that provides food for future development and is the driving-engine for change in the future.

A practitioner said he hoped that the judges would not go away thinking that all members of the bar were quite as conservative on the question of separate speeches! Three points occurred to him. First, the importance of deliberation in improving the quality of judgments. If two barristers were jointly instructed to advise, if barrister A had done the first draft, there is no doubt at all that before putting his name to it, barrister B would have suggested inadequacies in A's reasoning, improvements in the way things are expressed, possibly causing A to think carefully about things he had asserted confidently—he wondered whether it is so very different for judges. Secondly, in his experience, law students often struggle to understand the complexity of what is being said in five separate judgments. These judgments are not for barristers but for Citizens Advice Bureau workers, for students trying to work out what the law is. The more one can do by way of a judgment of a court to indicate what the law is, the better. Third, the UK Supreme Court will be giving judgments on matters of concern to people in other jurisdictions. The practitioner had been asked by a foreign lawyer what the House of Lords had decided in a particular case. The practitioner had the embarrassing task of explaining that there were five separate speeches, only one of them had even referred to speeches other than his own—and that was to say that he thought his opinion was broadly in agreement with theirs. The overseas lawyer gave up in the end and decided, as is often the case, that the UK was a bit of a mystery.

A judge of the Court of Appeal, tying together the various threads of argument, referred to a case in which he sat in the Court of Appeal and gave joint judgments in two cases (both of which were overturned). He wrote the easy part—what is sometimes called the 'scaffolding'. Judge X wrote the guts of one of them and Judge Y the guts of the other. It was a judgment of the court. To anyone who knew anything about the three judges, it was absolutely clear who had written which bit.... That perhaps does illustrate some of the problems in writing a single judgment where different people have written different parts.



## A practitioner's perspective on the engagement of the UK Supreme Court with the public

A practitioner introduced the topic of the engagement of the Supreme Court with the public. He started from the premise that the Supreme Court will perform its important constitutional functions most effectively if it communicates effectively with the public. He had a number of practical suggestions for measures that the Supreme Court could adopt to promote engagement with those members of the public who are listening.

First of all, the working methods of the court need to be clearly explained on the court's website, for example how panels are chosen. The procedures adopted need to be explained very carefully so that people understand what is going on.

Secondly, the court's website should identify very clearly when applications for permission have been made and when an appeal has been granted—so that everyone knows what cases are pending and what cases are under consideration.

Third, in the weeks before an appeal commences, the court's website should enable all interested persons to obtain access to the statement of facts and issues (assuming that such a document remains in the Supreme Court) and also the 'printed cases' (see Box 8) for the parties. There is absolutely no reason why those documents should not be widely available to anyone who wishes to understand what points are going to be decided. Of course, there may be exceptional cases where there is something confidential that needs to be concealed, but he could not remember a case in recent years where there has been something in the 'printed cases' that is so confidential. In the days preceding the appeal, the Supreme Court ought to follow the practice that has been adopted for many years in the European Court of Justice and the European Court of Human Rights of having a press release that summarises in broad terms what the issues in the case are. That would not be in any way binding on anyone, but it would serve a very valuable purpose in informing people about what is going on.

Fourthly—and this may be controversial, though the practitioner did not understand why—there is no longer any justification, if ever there was, for refusing to allow people outside the courtroom to watch an appeal on matters of public interest and importance. All cases in the UK Supreme Court are going to be of public interest and importance. The European Court of Human Rights provides on the internet a webcam broadcast of hearings, which is available on the day of the hearing. You can watch the whole of the proceedings from London or wherever. The presence of the cameras, which have fixed positions, provides no distraction whatsoever for those participating in the hearing. This enables students, law lecturers, judges, members of the public who cannot attend the proceedings to learn about the issues which are the subject of the argument. Perhaps more controversial would be whether broadcast organisations should be allowed to use this material in news programmes. The prohibition in s 41 of the Criminal Justice Act 1925 on a person taking photographs in a courtroom does not apply to the UK Supreme Court (Constitutional Reform Act 2005, s 45).

A final suggestion is that when judgments are given, the UK Supreme Court should follow the practice now adopted in the European Court of Justice and the European Court of Human Rights and issue a press release summarising the judgment. Again, this is not binding in any way. This is especially important if we retain the practice of divergent and complementary judgments rather than a judgment of the court. This is particularly important in complex cases in which journalists have deadlines to meet that the court assists them to understand what has been decided and in broad terms why. It does no service whatsoever that journalists who read the material, most of whom are not expert lawyers, have to struggle to understand what has been decided and by whom and then communicate that in a way that may not be accurate.

These practices would bring the working practices of the UK Supreme Court into line with the practices that are followed, without controversy, by other supreme courts throughout the common law world. Those other courts have followed these practices because they have recognised that no supreme court is an island entire of itself. Whatever it does, the UK

Supreme Court will, sadly, be misreported and misrepresented on occasions. To improve understanding of the function of the Supreme Court and to promote understanding of its decisions, it would be well advised to take all reasonable and practical steps to enhance and promote communication with the outside world.

#### **BOX 8: DOCUMENTS CURRENTLY REQUIRED IN THE HOUSE OF LORDS**

##### **11. STATEMENT OF FACTS AND ISSUES**

11.1 It is the appellants' responsibility to lodge a Statement of the facts and issues (with an Appendix (see direction 12)). The Statement should be a succinct account of the main facts of the case, including an account of judicial proceedings up to that point and an account of the issues raised by the appeal. The appellants are responsible for drawing up the Statement in draft and they must submit it to the respondents for discussion and agreement. The Statement must be a single document agreed between the parties. In the event of disagreement, disputed material should be removed from the draft Statement and included instead in each party's case (see direction 15). The Statement must be signed on behalf of each party by at least one counsel who appeared in the court below or who will appear at the hearing before the House.

##### **15. APPELLANTS' AND RESPONDENTS' CASES**

15.1 The case is the statement of a party's argument in the appeal.

15.2 The case should be confined to the heads of argument that counsel propose to submit at the hearing and omit material contained in the Statement of facts and issues. The members of the Appeal Committee who gave leave to appeal may not be sitting on the Appellate Committee; and so it cannot be assumed that the members of the Appellate Committee will be familiar with the arguments set out in the petition for leave to appeal.

#### *Discussion*

A Law Lord responded by assuring the practitioner that almost everything that he had suggested has been considered by the committee of Law Lords planning for the Supreme Court. The Judicial Committee of the Privy Council has had experience of a webcam in the Pitcairn Islands case. A request was made for the entire proceedings to be recorded and made available on Pitcairn. As far as the Law Lords in that case were concerned, the recording was totally unobtrusive and he could not see any objection to that being done.

On printed cases, the judge's concern was that they are drafted by advocates for a particular audience; the whole point of a printed case should be to introduce oral argument to those who are going to have to listen to it. The judge wondered whether there is a risk in the future of counsel 'grandstanding' by using printed cases as an opportunity for propaganda, which would diffuse the utility of printed cases. Printed cases sometimes tend to be too long, and may become longer if counsel knew they were going to be made available to the public.

On broadcasters: one point that can be taken for granted is that we are not dealing with the problems that arise if one were attempting to televise a criminal trial. The problem really is the extent to which broadcasters would engage with getting the message across in a responsible way. In small doses it may have a value.

A judge of the Court of Appeal said that the televising of the giving of judgment in the first Pinochet case was widely seen around the world and watched live by huge crowds in public squares in Chilean cities as a kind of 'penalty shoot-out'. It did the UK's standing the world of good in legal circles elsewhere in the world.

Another judge took up the point about the public availability of printed cases. He noted that not everyone in the seminar agreed with that proposition but he thought it was extremely important. The Civil Procedure Rules have recently been amended so that particulars of claim and defences are publicly available unless the court makes a special order. Even more recently, in the Administrative Court ruled that acknowledgements of service in judicial review proceedings are the equivalent of defences and they should be publicly accessible. It would be rather unfortunate if the UK Supreme Court takes a more restrictive approach towards printed cases, which are in some ways analogous to particulars of claim and defences.

It is also extremely important for anyone who wishes to take a serious interest in the arguments to see the printed cases; after all, they will be taken as read by the Justice of the Supreme Court.

Another participant said that the Law Commission and academics, who deal with the law to see its future as a working tool, obviously find it extremely helpful to see printed cases the moment they are available. They can be obtained from counsel when we know about them, but accessibility would be so much better through a website.

A judge said that judges operate as public servants. There has to be more transparency and accessibility today than in the past.

### Further reading

D Oliver, 'Singularly supreme?' *Counsel*, April 2008, 8

Lord Justice Carnwath, 'Devil We Know or New Start?' *Counsel*, June 2008, 6

Lady Justice Arden, 'The Form of Judgments in Common Law Jurisdictions: A Comparison - Conference in Honour of Lord Bingham' (online at [http://www.judiciary.gov.uk/docs/speeches/amatter\\_of\\_style\\_bingham\\_conference.pdf](http://www.judiciary.gov.uk/docs/speeches/amatter_of_style_bingham_conference.pdf))

## 7. The UK Supreme Court and Scotland

### Key issues from the seminars

In several of the seminars, questions relating to Scottish appeals were considered. The points made are brought together in this part of the report.

- There is no permission/leave requirement for Scottish civil appeals to the UK Supreme Court. Among the seminar participants, including those with experience of legal practice in Scotland, there was recognition that this was an anomalous arrangement that could no longer be easily justified. Views differed on the scale and urgency of the problem. Legislation by the Scottish Parliament (or the UK Parliament with the consent of the Scottish Parliament) would be needed if reform is to be made.
- The UK Supreme Court has no general jurisdiction over Scottish criminal appeals. There was a shared understanding that any suggestion that the UK Supreme Court should have a role in relation to Scottish criminal law raises constitutional and practical questions. Nonetheless some participants in the seminars attached importance to the uniform interpretation of UK statutes and saw a role for the UK Supreme Court in this, even in criminal cases from Scotland.
- The use of section 57 of the Scotland Act 1998 has created an appeal route for ‘devolution issues’ in criminal justice matters to the Privy Council—and in future to the UK Supreme Court—where it is alleged that there has been a breach of Article 6 ECHR. The seminar heard that the use of this appeal route in the way it has developed was not intended in 1998 and that it has led to practical problems in criminal trials and appeals. The Commission on Scottish Devolution chaired by Sir Kenneth Calman is currently looking into this. Primary legislation by the UK Parliament, amending the Scotland Act, would be required to implement reforms.
- The possibility of legislation by the Scottish Parliament to end all civil appeals to the UK Supreme Court was noted. While such a development is not imminent (the seminar was told) it appears to be closer than at any time in the recent past. It could be brought about by the legislation in the Scottish Parliament. Clearly such a step would have significant constitutional implications for the whole of the UK.

### Background: appeals from the courts of Scotland to the Supreme Court

Section 40(3) of the Constitutional Reform Act 2005 (see Box 2 above) preserves the arrangements for appeals from the Scottish court system to the House of Lords for the UK Supreme Court, but does nothing to explain what they are. The constitutional starting point for any explanation of the position is Article XIX of the Union with Scotland Act 1706 (see Box 9).

### *No criminal appeals from the High Court of Justiciary*

In criminal cases, there is no right of appeal from the High Court of Justiciary to the UK Supreme Court. In *Mackintosh v Her Majesty's Advocate* (1876), the House of Lords held that it was incompetent to appeal from the High Court of Justiciary to the House of Lords. Section 124(2) of the Criminal Procedure (Scotland) Act 1995 now provides that, subject to provisions in the Scotland Act 1998 on ‘devolution issues’, ‘every interlocutor and sentence pronounced by the High Court under this Part of this Act shall be final and conclusive and not subject to review by any court whatsoever’. The High Court of Justiciary is therefore Scotland’s supreme criminal court—subject to the rather complex and still uncertain arrangements under which the Judicial Committee of the Privy Council has jurisdiction over ‘devolution issue’ appeals relating to alleged breaches of Convention rights in some aspects of the criminal justice system (see below).



**Box 9 UNION WITH SCOTLAND ACT 1706, Article XIX**

That the Court of Session or Colledge of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Priviledges as before the Union subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain And that hereafter none shall be named by Her Majesty or Her Royal Successors to the Ordinary Lords of Session but such who have served in the Colledge of Justice as Advocats or Principal Clerks of Session for the space of five years or as Writers to the Signet for the space of ten years With this provision That no Writer to the Signet be capable to be admitted a Lord of the Session unless he undergo a private and publick Tryal on the Civil Law before the Faculty of Advocats and be found by them qualified for the said Office two years before he be named to be a Lord of the Session, yet so as the Qualifications made or to be made for capacitating persons to be named Ordinary Lords of Session may be altered by the Parliament of Great Britain. And that the Court of Justiciary do also after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kindom and with the same Authority and Priviledges as before the Union subject nevertheless to such Regulations as shall be made by the Parliament of Great Britain and without prejudice of other Rights of Justiciary.

*Civil appeals from the Court of Session*

Civil appeals to the UK Supreme Court from the Inner House of the Court of Session to the UK Supreme Court are governed generally by section 40(3) of the Constitutional Reform Act 2005 (see Box 2) by the Court of Session Act 1988 (Box 10). Appeals are restricted to points of law; findings of fact and the exercise of judicial discretion cannot therefore be appealed. Legislation also precludes appeals beyond the Inner House in relation to a number of specific decisions.

Where the appeal is on an interlocutory matter (ie against a ruling made by the court between the commencement of legal proceedings and their final determination), leave is needed from the Court of Session unless there is a dissent among the panel of judges which heard the case.

Some Acts of Parliament also impose a leave requirement (eg Aircraft and Shipbuilding Act 1977 section 9; Tribunals and Inquiries Act 1992 section 11)

In relation to final judgments of the Inner House of the Court of Session, there is no general requirement for appeals to be granted leave/permission, either from the Inner House or the UK Supreme Court. Instead, there is a rule that the petition of appeal must be signed by two counsel who must certify that the appeal is reasonable.

**Box 10 COURT OF SESSION ACT 1988****Section 40 Appealable interlocutors**

(1) Subject to the provisions of any other Act restricting or excluding an appeal to the Supreme Court and of sections 27(5) and 32(5) of this Act, it shall be competent to appeal from the Inner House to the Supreme Court—

(a) without the leave of the Inner House, against a judgment on the whole merits of the cause, or against an interlocutory judgment where there is a difference of opinion among the judges or where the interlocutory judgment is one sustaining a dilatory defence and dismissing the action;

(b) with the leave of the Inner House, against any interlocutory judgment other than one falling within paragraph (a) above.

(2) An interlocutor of the Inner House granting or refusing a new trial, on an application under section 29 of this Act, shall be appealable without the leave of the Inner House to the Supreme Court; and on such an appeal the Supreme Court shall have the same powers as the Inner House had on the application and in particular the powers specified in sections 29(3) and 30(3) of this Act.

(3) It shall be incompetent to appeal to the Supreme Court against an interlocutor of a Lord Ordinary unless the interlocutor has been reviewed by the Inner House.

(4) On an appeal under this section all the prior interlocutors in the cause shall be submitted to the review of the Supreme Court.

### *Devolution issue appeals*

When the United Kingdom's systems of devolution was created in 1998, it was clear that there needed to be a judicial body to determine any legal disputes about the limits of the powers of the Scottish Parliament, Scottish Government, Northern Ireland Assembly, Northern Ireland Executive, National Assembly for Wales and the Welsh Assembly Government. The devolved institutions are expressly prohibited by the devolution Acts from legislating or acting contrary to Convention rights—defined in the same way as in the Human Rights Act 1998—and European Union law (see Box 11). This role was given to the Judicial Committee of the Privy Council ('the Privy Council') rather than the Appellate Committee of the House of Lords. In practice, the same judges—the Law Lords—sit in both courts, though the legislative framework governing the composition of the Privy Council allows for some flexibility—for example, senior judges from England and Wales, Scotland, and Northern Ireland who are not Law Lords are also eligible to sit. Jurisdiction over 'devolution issues' is transferred to the UK Supreme Court by the Constitutional Reform Act 2005. If current trends continue, devolution issues will be a relatively small proportion of the caseload of the UK Supreme Court.

#### **BOX 11 SCOTLAND ACT 1998**

##### **Section 57 Community Law and Contention Rights**

(2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.

(3) Subsection (2) does not apply to an act of the Lord Advocate—

(a) in prosecuting any offence, or

(b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section.

##### **Schedule 6 Devolution Issues**

In this Schedule 'devolution issue' means—

(a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,

(b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,

(c) a question whether the purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, within devolved competence,

(d) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law,

(e) a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law,

(f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters.

In his report commissioned by the Scottish Executive, *Improving Practice: the 2002 Review of the Practices and Procedure of the High Court of Justiciary*, Lord Bonomy recommended that 'Schedule 6 of the Scotland Act should be amended to make it clear that acts or failures to act by the Lord Advocate as prosecutor, and anyone acting on his authority or on his behalf as prosecutor, are excluded from the definition of a devolution issue. The Scottish Executive should urge the United Kingdom Parliament to make that amendment' (para 17.14).<sup>6</sup> The 'mechanisms for dealing with 'devolution issues'' is one of the matters under review by the

<sup>6</sup> <http://www.scotland.gov.uk/Publications/2002/12/15847/14122>.

Commission on Scottish Devolution, chaired by Sir Kenneth Calman.<sup>7</sup> The Calman Commission intends to make a final report during 2009.

### A view of the Scottish legal system

This section summarises a presentation given by a member of the judiciary. He emphasised how few Scottish cases are currently dealt with by the House of Lords. During the 1980s and 1990s there were, on average, 5.6 appeals each year from Scotland but in the period since 2000 it has dropped to below 5 (which he regarded as a fairly stable situation). The most likely explanation for the reduction in numbers of appeals is the cost to the litigant. The average number of devolution appeals (currently dealt with by the Privy Council) was 2.5 a year but in the five most recent years of published statistics this has dropped to 1.5 a year. This is explained by an initial enthusiasm from the Scottish criminal bar, with support from the emerging human rights bar, in the early years after the Scotland Act 1998. There were on average just under 5 petitions for ‘special leave’ to the Privy Council, down to less than three in recent years.

### Influence of the House of Lords

The qualitative effect of this (the judge suggested) is that for many Scottish appeals, the House of Lords does not act as a top level, creative supervisory court. In practice, it deals with Scottish cases which turn on their own special facts, or particular contract clauses, which are of no huge national significance. There are examples of some very low value cases. In some appeals, the appellants’ cases have been regarded as hopeless by the House of Lords. These cases had not been of public importance and had not necessarily been an appropriate matter for the House of Lords.

Problems arise because in all but a few cases the litigant in Scotland has a right of appeal without leave. The creation of the UK Supreme Court assumes that there will be no change. If this is so, Scottish cases will continue to include appeals of the sort just described. *Donoghue v Stevenson* (1932)—the landmark cases from which the modern law of negligence stems—was the Scottish legal system’s 15 minutes of fame; what has happened since then has been anticlimactic. Apart from a period in the 1960s, when the House of Lords provided necessary correctives to the Inner House of the Court of Session, it has not decided cases of great importance from Scotland.

### Absence of a leave requirement

Should there be a requirement of leave, the judge asked? After *Wilson v Jaymarke Estates Ltd* [2007] UKHL 29, it would be very difficult to sustain the argument that the requirement of leave ought not to be imposed. There was no justification for Scottish litigants having a privileged position, compared to those in other parts of the UK, on such an important matter. It is also wrong in principle that a final court of appeal should in some of these cases be at the mercy of a litigant’s own decision to invoke its jurisdiction. A hallmark of a final court of appeal should be that it retains authority to determine which cases deserve its attention. There is only one argument that could be put forward to justify the current position: that we have the safeguard that counsel has to certify that the case is worthy of the attention of the House of Lords. Often, however, counsel get a fixed view that the case is ‘a winner’ and are happy and indeed anxious to certify it.

### Looking to the future

The judge said that Professors Himsworth and Paterson have argued that the current situation—in which there are appeals in civil cases and no appeals in criminal cases—is

<sup>7</sup> <http://www.commissiononscottishdevolution.org.uk/index.php>.

actually the least satisfactory of all.<sup>8</sup> On the other hand, Lord Bingham in his UCL Constitution Unit lecture strongly supported the view that there should not be appeals in Scottish criminal matters to a UK Supreme Court.<sup>9</sup> It is most unlikely that there will be pressure in Scotland for the UK Supreme Court to have jurisdiction in criminal cases. The question really is this: in a re-badging exercise, where you simply transfer jurisdiction to the new UK Supreme Court, is there pressure that there should be no appeal in Scottish civil matters? There is a distinct likelihood of this. It is naive to imagine that there will be no change.

In Scottish appeals, the House of Lords adheres to the theory that it sits as a Scottish court. As Lord Advocate Boyd said in a lecture,<sup>10</sup> it is committed to preserving the integrity of the Scottish system. With the UK Supreme Court, it may be that people's attitudes will change and they will look upon the Supreme Court jurisdiction on a much broader basis. There would be a very serious possibility that a UK Supreme Court sitting as the final court in both English and Scottish civil appeals will set itself on the path to convergence and ultimately assimilation. One reason for thinking this, the judge said, is the rapid growth of UK-wide legal practices. There is an increasing amount of forum shopping by Scottish commercial litigants to England and a general acceptance, certainly in the commercial world, that uniformity in some areas is not only a possibility but something to be desired. Alternatively, if the UK Supreme Court is simply going to be seen as an additional, third-level of appeal court, then it becomes less and less obvious why that courts, sitting out with Scotland, with a minority of Scottish judges, is worth the disproportionate costs to the public and the litigant. This is obviously a big question.

One option, the judge explained, would be simply to cut off the right of appeal to the UK Supreme Court so that the decision of the Inner House of the Court of Session would be final. There would be no great novelty in that, because a great many of the Inner House's decisions *are* already final—in valuation for rating matters, appeals from the Scottish Land Court, certain planning matters, and certain other tribunal appeals.

A second option would be to allow an appeal from the Inner House of the Court of Session to a larger division of the Inner House (constituted as a panel of five, seven, nine or eleven judges). There are regularly five judge constitutions and they do work very well.

A third option would be the creation of a Scottish Supreme Court. At the time of the debate on the Scotland Bill the Scottish National Party adopted a surprisingly supine attitude on the question of House of Lords appeals and there was no agitation on the subject. Then in 2003 there was a Member's Bill proposed in the Scottish Parliament to abolish the right of appeal to the House of Lords. With every passing day it increases in topicality. The argument, when it comes, is if New Zealand and Ireland can have Supreme Courts, why can't Scotland? Reform is not imminent, but that it is significantly closer than it was a year ago.

### *Devolution issues and Scottish criminal justice*

The judge also commented briefly on section 57 of the Scotland Act 1998 (see Box 11 above). This prevents a Scottish minister from taking any steps that are contrary to Convention rights. This section has been seized upon by the Scottish Bar to obtain a route of appeal in criminal cases to the Privy Council. This is a result that was never expected and never intended. The origin lies in the fact that in Scotland there is only one ground of appeal in criminal cases: miscarriage of justice. The argument runs like this: since Article 6 ECHR requires that

<sup>8</sup> C Himsworth and A Paterson, 'A Supreme Court for the United Kingdom: Views from the Northern Kingdom' (2004) 24 *Legal Studies* 99.

<sup>9</sup> 'A New Supreme Court for the United Kingdom', UCL Constitution Unit Lecture Spring Lecture 2004.

<sup>10</sup> 'The UK Supreme Court', Lecture to Law Society of Scotland Conference, 21 January 2004. <http://www.scotland.gov.uk/News/News-Extras/185>

everyone should have a fair trial, then if there has been a miscarriage of justice, it stands to reason that there has not been a fair trial, and there can be an appeal to the Privy Council. Exactly where the boundaries lie has not yet been fully clarified in the case law. At ground level, this is causing endless trouble by prolonging criminal trials in Scotland. In a period of six years, the average length of a contested criminal trial has increased by one complete day. It is also causing huge delays in the criminal appeals system. The problem must sooner or later be resolved, the judge said. There has been considerable academic criticism of the jurisdiction. There is a question as to whether it was intended to be a transitional arrangement because in 1998 (when devolution started) the Human Rights Act had not been brought into force. There is a question whether it really is necessary now that human rights are better understood and all the main human rights issues in relation to criminal trials have at least been canvassed if not fully resolved. The judge concluded by saying that there is every likelihood that this question will be opened up by the Calman Commission, which has been appointed to review the workings of the devolution settlement.

### Background: leave in Scottish cases

The question of whether a permission requirement should be introduced for civil appeals from the Court of Session was considered during the passage of the Constitutional Reform Bill. The UK Government took the view that no change should be made to the current arrangements. The July 2003 Department for Constitutional Affairs consultation paper on the Supreme Court set out three reasons for not imposing a permission requirement on appeals from the Court of Session:<sup>11</sup>

‘It could be argued ... that it is an unjustified anomaly that citizens in different parts of the Kingdom have different rights of access to its highest court. The disadvantages of changing this are threefold. First, in respect of Scotland, the arrangement whereby Scottish civil cases currently lie to the House of Lords as of right is long established; there is no evidence that change is needed; and there are strong arguments for leaving the position unchanged. The second disadvantage, in all respects, is that it would mean that more of the work of the Court would be absorbed in deciding what cases to hear, rather than hearing them. It would lead, in practice, to fewer cases being heard or to cases taking longer to come before the Court. The third disadvantage is that it would mean that all those seeking the judgment of the Court would have to incur the cost of petitioning for the right to appeal.’

At that time, others took a different view at the time. For example, in her response to the DCA consultation paper, Baroness Hale of Richmond stated that ‘There is no justification for continuing to discriminate between the Scots and the rest. Everyone should be subject to a leave filter’. In 2005, the Law Lords were divided on the point. Some regarded the present arrangement as an anomaly that ‘however rarely’ may result in an unmeritorious appeal, while others ‘would not wish to disturb a long-standing procedure which gives rise to minimal difficulty in practice’.

Neither the House of Lords select committee on the Constitutional Reform Bill nor the Scottish Parliament Justice 2 Committee felt that there was a need to introduce a permission requirement.

The debate on the point has however continued. In *Wilson v Jaymarke Estates Ltd* [2007] UKHL 29—a recent appeal from the Court of Session to the House of Lords—Lord Hope commented that the debate on the issue of appeals without a requirement of leave ‘must not be regarded as closed’, warning ‘If it is at risk of being abused, the public interest may require that the privilege be looked at again’.

Two main views on the question of leave requirements for Scottish appeals emerged at the Queen Mary seminars. A few participants saw no pressing need to alter current arrangements,

<sup>11</sup> Consultation Paper CP11/03, para 56.



given the relatively small number of cases involved and the political sensitivities in Scotland that might surround attempts to legislate on the matter.

Other participants identified reasons of practicality and principle for change. A Law Lord argued that there was ‘a strong case for consistency between Scotland and the rest of the UK’, while acknowledging that ‘achieving consistency would be tricky because of traditions and constitutional sensitivities’. He added that two of the recent Scottish appeals heard by the House of Lords would not have been given leave had they been from England and Wales—though one of them turned out to have an interesting and significant point of law.

Another judge posed the question whether the distinction in relative ease of access to the Supreme Court for Scottish litigants and those from other parts of the UK is compliant with Convention rights.

### Discussion: criminal appeals from Scotland

During the passage of the Constitutional Reform Bill<sup>12</sup> several people questioned the rationale for excluding jurisdiction over the Scottish criminal appeals (including Lord Donaldson of Lynton, the Judges Council [of England and Wales], and Baroness Hale of Richmond). The Faculty of Advocates in their written evidence to the select committee on the bill did not altogether rule out change, but concluded that the case for innovation ‘has not been made out’. The Law Lords were opposed to any change: Lord Hope told the select committee in 2005 that

‘It is difficult to emphasise how different Scots criminal law is, both in terms of substance and procedure. I am not criticising my colleagues in this but I think it is quite difficult for them to grasp not just the terminology, which in almost every respect is different, but how differently cases are handled, how differently judges deal with cases when they sum up at the end of the trial; the whole feel of it is quite different. Without having worked in the system and known something about it is difficult to grasp the depth of the difference’.

At the Queen Mary seminars, a judge of the Court of Appeal addressed current arrangements on criminal appeals throughout the UK. He said that the reasons for Scottish criminal appeals not coming to the House of Lords/UK Supreme Court were historic and one could ask the question whether they are justified. We *could* abolish criminal appeals from England and Wales and Northern Ireland—that would make for constitutional tidiness and solve the ‘judicial West Lothian question’ (in which Scottish Law Lords are involved in deciding English criminal law but English Law Lords have no say on Scottish criminal law). He did not adhere to that view. A radical re-think was, however, needed about the way criminal appeals are dealt with in England and Wales. His proposal would significantly reduce the number of English criminal appeals going to the UK Supreme Court (for more on this point, see Part 4).

A Law Lord expressed concern about calls for the UK Supreme Court’s influence to be reduced over Scottish appeals (and indeed over criminal appeals in England and Wales). The UK Supreme Court is a UK court. It will deal with UK treaties and UK statutes. If a UK statute creates an offence, it should be uniformly applied throughout the UK. A recent employment case from Scotland (*Archibald v Fife Council* [2004] UKHL 32) involved an important point in the interpretation of the Disability Discrimination Act 1995, which is a UK Act. There were reasons to be worried about what cases do *not* get through to the House of Lords and the UK Supreme Court.

### Further reading

Justice 2 Committee of the Scottish Parliament, Report on the Constitutional Reform Bill (27 May 2004) (accessible at <http://www.scottish.parliament.uk/justice2/reports/j2r04-04-01.htm>).

<sup>12</sup> House of Lords Select Committee on the Constitutional Reform Bill Report, paras 220-223.



C Himsworth and A Paterson, 'A Supreme Court for the United Kingdom: Views from the Northern Kingdom' (2004) 24 *Legal Studies* 99

A O'Neill QC, 'Judging democracy: the devolutionary settlement and the Scottish constitution' (2004) 8 *Edinburgh Law Review* 177

K Goodall, 'Ideas of 'Representation' in the UK Court Structures', ch 4 in A Le Sueur (ed), *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford: OUP 2004)

TH Jones, 'Splendid isolation: Scottish criminal law, the Privy Council and the Supreme Court' [2004] *Criminal Law Review* 96

J Chalmers, 'Scottish Appeals and the Proposed Supreme Court' (2004) 8 *Edinburgh Law Review* 4

A Sinclair, 'The Supreme Court: a separation of powers or a union of laws? Some further problems of Anglo-Scots legal relations' (2005) *The Criminal Lawyer* 6

## 8. The UK Supreme Court: constitutional relationships

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The last of the six seminars at QMUL dealt with two broad aspects of the constitutional role of the UK Supreme Court. The first is its relationship with the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR or ‘the Strasbourg court’)—in particular the nature of the dialogue between the courts. Secondly, there was discussion of the constitutional context in which the UK Supreme Court had been created and how its relationships with Government and the UK Parliament may develop.

### Key issues identified in the seminar

- There is an effective dialogue between the House of Lords and the ECtHR, which can be expected to continue with the UK Supreme Court. UK judgments are discussed in the judgments of the ECtHR, often in detail. In some important cases, the ECtHR has responded to criticisms made by the House of Lords in developing the human rights case law.
- The picture in relation to the ECJ is rather different. There is little or no direct engagement with judgments from member states’ courts by the ECJ. A developing practice was noted in respect of references of questions by the House of Lords for preliminary ruling to the ECJ: a short judgment stating the Law Lords’ views on how a disputed point of law should be resolved is now, more often than in the past, sent along with the question referred. This was regarded as a welcome development which could be followed by the UK Supreme Court.
- A database of judgments from the courts of member states on important points of European Union law is needed. The creation of such a database would appear to be more likely to stem from national courts working together, or by publishers on a commercial basis, rather than being set up by the ECJ.
- Relationships between the quality of parliamentary scrutiny of executive action and proposed legislation on the one hand, and the approach of the courts on the other, were debated. An academic put forward a hypothesis that in jurisdictions with relatively ineffective legislatures, supreme courts tended to be more activist. Views differed on the merits of this analysis and how it might be applied in the context of the UK.
- Especially among the judicial participants in the seminar, there was a very strong sense that there was no reason to think that merely calling the UK’s top level court ‘a Supreme Court’, and moving it outside Parliament, would result in the new court being more ‘activist’ (however that might be defined) than the House of Lords.

### The UK Supreme Court, Strasbourg and Luxembourg

A practitioner spoke about relations between the UK Supreme Court, the ECtHR and the ECJ.

#### *The Strasbourg court*

When Sir Nicolas Bratza QC delivered the Slynn lecture in 2007, he described what he saw as the ‘major and distinctive contribution of the United Kingdom courts’ to the Strasbourg case law, singling out the House of Lords. As he put it, ‘national courts have ...made a major and distinctive contribution to that case-law—sometimes urging caution when the Court has gone too far; sometimes, on the contrary, encouraging our Court to be bolder in its development of fundamental rights; but, in every case, enriching the jurisprudence by the clarity and cogency

of the analysis of the Convention issues'.<sup>13</sup> Although Sir Nicolas did not mention specific examples, it is not difficult to think of developments in Strasbourg that were directly prompted by the House of Lords—for example, the impact of *Barret v Enfield London Borough Council* (1999) causing the Strasbourg court to row back from its position in *United Kingdom v Osman* (on the compatibility of immunities for public authorities in tort law and Article 6 ECHR), the impact of the judgment in *R v Spear* [2002] UKHL 31 (on courts martial), and the impact of *Alconbury* [2001] UKHL 23 (on Article 6 ECHR and impartiality in administrative decision-making). This assistance is particularly welcome when one considers the extraordinary overload under which the Strasbourg court is operating. The backlog of cases reached 100,000 in the second half of 2007 and continues to increase. Meanwhile the 14th Protocol to the European Convention on Human Rights, which would offer some streamlining to the court's proceedings, remains ineffective because, although ratified by every other State, it has not been ratified by Russia. Of course, the great majority of cases are declared inadmissible but the court gave more than 1,500 full judgments in 2007—that is twice the number of 2004 and indeed it is twice the number given in the period between 1955 and 1997. So one can understand why the Strasbourg court is grateful for help from a national court that has very much more time to consider the issues.

Should the relationship change? The practitioner said that it does not need to change. The jurisprudence of the Human Rights Act 1998 is, it is true, focused to a remarkable extent on the Strasbourg case law, as exemplified by the so-called *Ullah* doctrine. In *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, Lord Bingham said 'The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'. Depending on the side one is on, one emphasises either the 'no more' or 'no less'! The merits of that approach may be debated, but if the aim is to influence the Strasbourg court, then there is advantage in an approach that is focused on the Convention.

### The ECJ

Turning to European Union law and relations with the ECJ, the practitioner said that between UK accession in 1973 and the end of 2007, the House of Lords decided almost 100 cases substantially concerning European Union law, referring 36 of them to the ECJ. That is a respectable proportion of the 434 references made by all UK courts and tribunals. Among the very impressive decisions which the House of Lords reached for itself, one can point to *R v Secretary of State for Employment Ex parte Equal Opportunities Commission* (1994) and *Three Rivers District Council v Bank of England* [2000] UKHL 33 the judgment (on the question whether the First Banking Co-ordination Directive afforded rights to people in the position of the depositors).

All this said, the impact of the House of Lords on the development of EU law has been minimal—and that may be putting it kindly. Sir David Edward, when he was a judge of the ECJ, was asked to list in an article the British contributions to law and legal process in the European Union.<sup>14</sup> His role of honour included the British tradition of advocacy, the habit of detailed citation of precedent, the approach to the teaching of European Union law, the quality of writing about European Law, and the reports of the House of Lords Select Committee on the European Communities (as it was then known). But the courts in general and the House of Lords in particular, were acknowledged only for the questions they had referred for ruling; not for anything they had decided for themselves. Indeed, there has been no 'Euro Pinochet'—a case in which the ruling of the House was eagerly awaited, studied and

<sup>13</sup> 'Winds of Change in the Strasbourg Court', 17 May 2007 (on-line at <http://www.slynn-foundation.org/main.htm>).

<sup>14</sup> 'The Development of Law and Legal Process in the EU' in BS Markesinis (ed), *The British Contribution to the Europe of the Twenty-First Century* (Oxford: Hart, 2002).

imitated across the world. Nor even is there a dialogue as rich as that which has developed over a much shorter period between the House of Lords and Strasbourg.

Is there anything that could be done to render the UK Supreme Court more influential? the practitioner asked. It was rather doubtful. The principal obstacle to the emergence of a genuine dialogue between the ECJ and national supreme courts is the third paragraph of Article 234 EC which, subject to the *acte clair* doctrine devised by the ECJ requires any disputed question to be referred to the ECJ for resolution (see Box 12). The House of Lords, like many other national supreme courts, has pushed hard against the limits of the *acte clair* doctrine. To take only one example: the point in issue in *Three Rivers District Council v Bank of England* [2000] UKHL 33 was one on which members of the Court of Appeal had expressed different views. But the obligation still remains, which in effect prohibits national supreme courts from deciding difficult or controversial of European Union law. The ECJ has recently strengthened that obligation by declaring it to be enforceable by infringements actions at the suit of the European Commission against a member state and even by claims for damages by disappointed litigants.

Arguments have been advanced for the amendment or repeal of Article 234, but that hardly lies in the power of the UK Supreme Court. Is there anything else, looking perhaps at the experience of supreme courts in other member states, that might be considered? Only two things spring to mind, said the practitioner.

The first would be for the UK Supreme Court in cases which it does refer to the ECJ, to adopt or adopt more frequently, the German and Dutch habit of stating its own views on how the disputed questions should be answered. This course has been very occasionally taken. Recently, in *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA* (*The Front Comor*) [2007] UKHL 4, Lord Hoffmann, for a unanimous House, explained in no uncertain terms why they opposed the suggestion that anti-suit injunctions in support of arbitration clauses were prohibited by the EU Regulation.

#### **BOX 12 ARTICLE 234 TREATY ESTABLISHING THE EUROPEAN COMMUNITY**

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

The second possibility takes us into altogether deeper waters. Thanks in part to the very clear terms of the European Communities Act 1972, the reception of European Union law into the legal systems of the UK has been relatively unproblematic. We have not had the struggles encountered by the courts of France, Germany, and Italy in the 1970s and 1980s. Yet, if one asks which national courts have had the greatest influence on the development of European Union law, it has been those courts which have laid down an institutional marker to the ECJ and to the other Community institutions as regards the conditions on which they were prepared to accept the primacy and direct effect of Community measures. The obvious example of this is the development of the ECJ's fundamental rights jurisprudence as a reaction to the threatened rebellion of the German Federal Constitutional Court in its *Solange I* judgment in 1974. Another less known example is the resistance by that some court and others to the use of Article 308 EC (formerly Article 235 EC) as the legal basis for which there is no specific power in the Treaty to take (see case study in Box 13). The EU

institutions, whether for this reason or not, have become more restrained in their use of Article 308 EC. Could anything like this happen in the UK? Mr Justice Laws in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)—the so-called ‘Metric Martyrs’ case—having had the German and Danish judgments cited to him, seemed to think so. If such a case does arise, it would be a case truly worthy of attention from a ‘constitutional court’ in the UK.

### **BOX 13 CASE STUDY ON CONSTITUTIONAL/SUPREME COURT INFLUENCE ON JUDICIAL AND LEGISLATIVE PRACTICE IN THE EUROPEAN UNION**

#### **Article 308 (ex 235) EC**

‘If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament take the appropriate measures.’

#### ***Brunner v European Union Treaty* (‘Maastricht’) [1994] 1 CMLR 57 (Federal Constitutional Court, Germany)**

‘If to date dynamic expansion of the existing Treaties has been based upon liberal interpretation of Article 235 of the EEC Treaty ... and upon interpreting the Treaty in the sense of the maximum possible exploitation of the Community’s powers (*‘effet utile’*), ... when standards of competence are being interpreted by institutions and governmental entities of the Community in the future ... interpretation of such standards may not have an effect equivalent to an extension of the Treaty: indeed, if standards of competence were interpreted in this way, such interpretation would not have any binding effect on Germany.’

#### ***Opinion 2/94* [1996] ECR I-1788 (European Court of Justice)**

‘[Article 235] cannot be applied as authority for an expansion of the scope of jurisdiction of the Community in excess of the general scope which follows from the provisions of the Treaty as a whole ... Under no circumstances can the Article be applied as authority for the determination of provisions the actual consequence of which is that the Treaty is altered without the prescribed procedure being followed.’

#### ***Carlsen v Rasmussen* (‘Maastricht’) [1999] 3 CMLR 854 (Supreme Court, Denmark)**

‘Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the European Court of Justice is based on an application of the Treaty which goes beyond the surrender of sovereignty according to the Act of Accession. Similar interpretations apply with regard to Community law rules and legal principles which are based on the practice of the European Court of Justice.’

#### ***Thoburn v Sunderland City Council* (‘Metric Martyrs’) [2002] EWHC 195 (Admin) (Laws LJ)**

‘[69] In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the 1972 Act were sufficient to incorporate the measure and give it overriding effect in domestic law. But that is very far from this case ...’

### **Discussion on European Convention and EU points**

A Law Lord commented on the relationship between the two European courts and UK courts. One feature of the Strasbourg court’s judgments is how visible their thinking is. You can see a dialogue actually going on. For example, the Strasbourg’s judgment in *Pretty v United Kingdom* (2001) which began with a huge quotation from Lord Bingham’s speech in *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61 and analysed and applied it throughout the judgment. Another example is *McCann v United Kingdom* (2008) on Council tenants and Article 8 ECHR, which is based very clearly on Lord Bingham’s minority view in an earlier House of Lords case. The advantage the Law Lords have is that we can see what the Strasbourg court is saying—in effect ‘tick signs’ against what we said. One is conscious that if we were are critical of how the Strasbourg court is framing its judgments and setting tests for national courts for national courts to apply, they may pick that up the message and try to



refine the tests into something that we can use. For example in *Osman v United Kingdom* (1998)—on the Article 2 ECHR positive obligation situation—is a very clear test that we can just adopt and apply. Other decisions remain rather impenetrable. The Strasbourg court obviously reads what we say; when they like what we say, they tend to say so; we hope that when they do not like what we say, that they are still thinking about it!

The ECJ is quite different, the judge said. It does not have anything concrete on the face of their judgments taken from judgments of member states' courts. The technique Lord Hoffmann used in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* (*The Front Comor*) [2007] UKHL 4 was used again recently in a case where the House of Lords was being asked to construe one of the rulings of the ECJ itself and the House of Lords failed to reach agreement and we had to send it back to the ECJ. Lord Hoffmann has set out in fairly trenchant terms what he believes is the ECJ was saying in the hope that it may assist them to say 'yes'! There is a mechanism for not actually having a full reference proceeding but in effect adopting, by order, what the national court is proposing to do (Box 14). We are testing that in that case by in effect saying that 'this is how we understand the ruling and we propose to give effect to it in this way'. We hope that a full-blown reference will not be necessary. The problem remains how relatively invisible the ECJ's thinking is. The House of Lords has moved away from the technique of simply stating a question with nothing attached to it. From the ECJ's perspective, it is probably helpful to have a view from the national court in addition to the parties'.

#### BOX 14 PROCEDURES IN THE ECJ RELATING TO PRELIMINARY RULINGS

##### Article 104 of the ECJ's Rules of Procedure:

3. Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case-law.

The Court may also give its decision by reasoned order, after informing the court or tribunal which referred the question to it, hearing any observations submitted by the persons referred to in Article 23 of the Statute and after hearing the Advocate General, where the answer to the question referred to the Court for a preliminary ruling admits of no reasonable doubt.

4. Without prejudice to paragraph (3) of this Article, the procedure before the Court in the case of a reference for a preliminary ruling shall also include an oral part....

A practitioner responding by saying that the Strasbourg court does have some advantages compared to the ECJ because it always has a full judgment from the last British court, which has had to decide the point for itself. The ECJ will normally only have a question from the national court. Also in Strasbourg, they are applying the margin of appreciation and are prepared to give national authorities, including the courts, some leeway—whereas in the ECJ they are declaring what the law is and there is no latitude at national level.

A Law Lord gave a further example of where the House of Lords, in making an Article 234 reference to the ECJ, has given a view on the interpretation: a EU Regulation was seeking to implement a UN resolution on sanctions against the Taliban and the Al-Qa'ida network and the reference stated, in no uncertain terms, what the House of Lords' view on the interpretation in the hope that the ECJ shares that view: *R (M) v HM Treasury* [2008] UKHL 26.

A judge raised the pragmatic point that it is very expensive to have a House of Lords hearing. There has to be hearing before the House of Lords can express even a preliminary view on a point of EU law. When a reference is made, the view expressed by a national court must be less than ten pages or, if over, it must be précised. The ECJ avoids engaging with national courts because their judgments have to be supra-national, acceptable and understandable in all member states. Insofar as anyone engages with national courts, it is the Advocate General.

Another judge supported the developing practice of courts in the UK expressing views when they make a reference to the ECJ for a preliminary ruling.



Another judge suggested an alternative to a short judgment accompanying a reference for a preliminary ruling would be for the national appellate courts to summarise relevant domestic judgments, rather than leaving this to be done by the Registry of the ECJ.

### *Management of information on EU judgments*

A judge of the Court of Appeal said that there was a need for a database to provide better information about what decisions are being made in other member states.

A practitioner responded by saying that he did not sense that the ECJ was very interested in promoting a database of that kind, though it was plainly a good idea. He wondered whether this might be a project for an organisation of European Supreme Court judges.

A Law Lord added that such a database would be very useful when a national court is called upon to apply *CILFIT* ruling (see Box 15).

#### **BOX 15 Judgment of the ECJ in *CILFIT*, Case 283/81 (6 October 1982)**

The third paragraph of Article [234] of the EEC Treaty—see Box 12 above—is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

### **Judicial independence and anxieties about ‘judicial activism’: a Law Lord’s observations**

The seminar moved on from ECJ and Strasbourg court matters to consider domestic constitutional relationships.

A Law Lord told the seminar about a paradox that seems to have been present in the constitutional reform proposals since they began. Listening to the House of Lords debate on the proposals in February 2004, it was clear that there was an idea that the head of the judiciary would no longer be a Cabinet minister and that this was seen as not reinforcing but undermining the independence of the judiciary. In that debate and elsewhere, the idea of moving the ‘apex court’ out from under the cover or protection of Parliament was also seen as not reinforcing but undermining the independence of the judiciary. To anyone outside Britain, those two notions would be quite astonishing, but they were very seriously held by all sorts of people. In particular, they thought that once the Law Lords were no longer part of Parliament, both Government and Parliament would feel freer to criticise the senior judiciary for what they did. This was the flavour of those debates. And it was combined with another view that once the Law Lords moved out of Parliament, and became a supreme court in name as well as essence, we would get Trans-Atlantic ideas above our station. It was put to judges appearing before the House of Commons Constitutional Affairs Committee that both the US Supreme Court and the High Court of Australia had become bolder in challenging the legislature when they had moved into their own prestigious accommodation. Lord Bingham was able to say that the evidence did not bear this out, at least in relation to Australia (which in 2004 could not be regarded as an activist court).

There were even more outlandish ideas in the special issue of the journal *Legal Studies* published in March 2004. Professor Diana Woodhouse suggested that ‘the institutional separation could result in the Supreme Court becoming a political institution in its own right, in the sense of being subject to lobbying by pressure and interest groups, many of which believe that they are more likely to achieve their ends through the court than through elected representatives’.<sup>15</sup> Moreover, Woodhouse went on to say ‘in the long term, it is possible to see

<sup>15</sup> ‘The Constitutional and Political Implications of a United Kingdom Supreme Court’ (2004) 24 *Legal Studies* 134 at 144.

parliamentary sovereignty being replaced as the defining principle of the constitution by a more robust version of the separation of powers and a system of checks and balances which recognises the devolved institutions, as well as the Supreme Court, as having a checking function on central government.<sup>16</sup> Professor Jeremy Webber went even further: ‘the debate over the new Supreme Court has been a shadow debate, purporting to be about the independence of the judiciary, but vitiated by its reliance on a superficial and formalistic conception of judicial independence and by confusion over the true motive for reform: the desire to move the United Kingdom incrementally towards a constitutionally limited political order’.<sup>17</sup>

So (the Law Lord asked), is the Supreme Court a Trojan horse, leading to an expansion of judicial willingness to challenge Parliament and leading ultimately to a written constitution? There was nothing (the judge suggested) in anything written or said by those people actually instrumental in the policy of creating a UK Supreme Court that lent any support to any of those suggestions.

That said, the House of Lords *has* changed out of all recognition over the last 30 years. During the 1950s and 60s there was hardly any judicial review; hardly any civil liberties; hardly any ‘ordinary people’s law’; of course, the words ‘human rights’ never cropped up at all. The idea of what the House of Lords was for in the 1950s was quite different from the idea of what it is for now. We know what the reasons are: the explosion of judicial review of executive action; there is EU law; the Human Rights Act; and there will be devolution cases. Devolution cases will turn the Supreme Court into a constitutional court in the proper sense of the term. If you put all of those things together, does that mean we will eventually turn ourselves into a rather different kind of institution? It is not an adequate answer to that question to say that Parliament made most, if not all, of these changes and Parliament could take them away. Of course it could! But on the assumption that that is rather unlikely, we have to do the job that Parliament has given us for the time being. We have to decide what that job is. Does this suggest that on moving across Parliament Square, we should be especially cautious for a while? Or should it mean business as usual? Or how long do you give us before the storm?

### **The UK Supreme Court in the context of the Government’s overall constitutional reform agenda: a view from Whitehall**

A civil servant—speaking in a personal capacity—said it would be useful to step back and look at the very big picture. The constitutional reform agenda of the Labour administration goes back to 1997, with the changes made to the governance of the Bank of England, the introduction of devolution, the first phase of reform of the House of Lords, the introduction of Freedom of Information legislation, and of course the Human Rights Act. The theme in this first phase of reform was very much about democratic accountability and bringing that home in some sense—a sense that we are still seeing playing out. An interesting feature of that suite of reforms was the provision in the Human Rights Act 1998 that specifically retained to Parliament the ability to legislate contrary to the European Convention on Human Rights and did not provide the courts with ability to strike down primary legislation. That is characteristic of the general tenor of the constitutional reforms having as their theme the strengthening of democracy and the re-balancing of power in favour of the citizen.

The proposals for the UK Supreme Court were introduced as part of the second phase of constitutional reform, looking in particular at the relations between the judicial and the other branches of the constitution. It is arguable that the Supreme Court proposal was less significant than, and arguably consequential on, the changes made at that time to the role and office of Lord Chancellor. The Lord Chancellor is no longer the head of the judiciary in England and Wales, not a judge, not even a Lord. Taking a Lord out of the Supreme Court is

<sup>16</sup> 153.

<sup>17</sup> ‘Supreme Courts, Independence and Democratic Agency’ (2004) 24 *Legal Studies* 55 at 71.

a bigger deal than taking the Supreme Court out of the Lords! Now that the role of head of the judiciary in England and Wales has passed to the Lord Chief Justice, that is a change of very profound significance to the Executive and of fundamental constitutional importance. The relationship between the judiciary and Government, now managed on the basis of the Concordat drawn up in 2005 and under a Partnership Framework which engages the judiciary with decision-making about the resourcing of HM Court Service and the part that judges and judicial performance plays in the availability of those resources. Of course, the Lord Chancellor remains the minister responsible for the courts, he has a statutory duty to maintain the rule of law, and to maintain the independence of the judiciary. In recognition of the unique nature of that office, it is important to note that many of the Lord Chancellor's responsibilities may be transferred to other ministers only with the agreement of Parliament and not under 'machinery of government' changes.

So the intention behind setting up the UK Supreme Court was to follow through the idea of the separation of powers inherent in the changes made to the role of the Lord Chancellor—in a way that took account of public expectations about the *visible* independence and transparency of the judicial system. It is important to note how little was understood about the role of the Appellate Committee of the House of Lords. Similar thoughts are being played out in debates about the role of the Attorney General. A lot of this is about perception in a world where perception translates into constitutional confidence.

There are, of course, many reasons why we have come to the point of setting up the UK Supreme Court. Some commentators have argued that the growth of judicial review of executive decision-making has made it particularly desirable to distance the senior judiciary more visibly from the political arena. Some have also argued that the 'policies' of the human rights movement, as opposed to the strict legal requirements of the Human Rights Act, have set very high standards for the visible separation of powers.

If it is correct to say that the place of the Supreme Court, and possibly its future shape and characteristics, are highly dependent on how the overall constitutional reform package comes to be viewed, then this discussion becomes highly premature because we are still very much in the throes of the third wave of constitutional reform. We see the themes of the separation of powers and the strengthening of confidence in democracy are being played out to a degree in the proposals for a Constitutional Renewal Bill and the wider 'Governance of Britain' agenda. The top-line theme is very much about strengthening the role of Parliament, particularly as against the Executive. There is no evidence in any of this—indeed, evidence to the contrary—for a view of the Supreme Court as distinctively and inherently more activist than the existing House of Lords.

#### *Discussion of the constitutional position of the UK Supreme Court*

An academic responded to the suggestion that the changes to the Lord Chancellor's role were more significant than the creation of the UK Supreme Court. Viewed from the perspective of 2008 that may be so, as the reforms to the office of Lord Chancellor have already been implemented and the UK Supreme Court has not yet started work. Should we take a static or dynamic view of the role the UK Supreme Court is going play? A rather wild comparative speculation may help (he tentatively suggested). One could look at three models: the High Court of Australia, the Canadian Supreme Court and the Supreme Court of New Zealand. (He deliberately ignored the US Supreme Court model as it is so utterly different in every respect). He posed the questions: are these courts activist or deferential, and why? The Australian High Court is not activist; the Supreme Court of Canada is very activist; and it is unknown whether the Supreme Court of New Zealand is activist given it only became independent in 2004.

What are the reasons why some courts are more activist than others?, the academic asked. One theory much touted in the media is that sometimes the courts are substituting or compensating for the failings of Parliament. Putting it simplistically: if Parliament is ineffective in curbing the Executive's abuses of power, then the courts step in to fill that

vacuum. In Canada, the Parliament is pretty supine; both Houses are less effective than their opposite numbers in the UK. In Australia, the Parliament is weaker in the House of Representatives but stronger in the Senate (which takes an interest in constitutional matters). The New Zealand Parliament was ineffective and dominated by the Government until 1996 when the system changed; Parliament is much more effective now as a result. The question is whether the top court in the UK will be *tempted* to become more activist?

A civil servant said that the Labour administration's constitutional reform programme as a whole acknowledges that there are areas where Parliament could do better. That was being addressed by strengthening the role and powers of Parliament. That is why any nexus between the ineffectiveness of parliaments and the willingness of the courts to step in may perhaps not be so closely correlated in the UK context—the Executive having said that they recognise this and are doing something about it. The difficult question is always 'who says Parliament is ineffective—who has the legitimacy to make that judgement?' That is where the difficult area is. It would not be surprising if, after the last 30 or 40 years, the Executive said that was not a call of the courts. It will be interesting to see whether this sense of context percolates through.

A Law Lord asked: what is the mechanism to achieve that? How can you stop the courts being approached by litigants? The courts are demand-led. If someone brings a case to us, which we have the jurisdiction to hear, we have a task to perform. How can the courts be excluded? It could lead to a very real struggle if the Executive tries to persuade Parliament to put down some form of block.

The civil servant responded by saying that it was not a case of a block being put down as such. There were two things that could be imagined. One is the general interpretive approach by the courts, bearing in mind the legislative context. That may sound vague and high-level, but that is not the same as saying that it has no impact. The other is to see where this is going to end up. We can do no more than speculate at the moment. Thinking is still very, very live. It is quite interesting if you think about pieces of legislation like the Human Rights Act and the Freedom of Information, which have effectively colonised by statute areas that were previously operated on a discretionary basis and which had therefore been subject to judicial review on an open-textured basis. What we are seeing is a codification of the direction of travel: the checks on the Executive set down in statute. It would not be surprising to see this continue into other areas.

A judge commented that the cynic may say that the Executive would rather give power to Parliament, because they could control Parliament in a way they cannot control judges.

A Law Lord said that the Law Lords simply do not have cause to think in any given challenge whether this was a case where Parliament had been supine or ineffective. The Law Lords are there to 'audit the performance of the law' (to use a phrase of Lord Bingham's): to decide whether a case has been lawfully dealt with hitherto. No doubt if Parliament is supine and ineffective, that will throw up more unlawful decisions and more vulnerable legislation. That is the only relationship.

A civil servant said it may be useful to consider what might be meant by the terms supine or ineffective. It may be taken to mean that Parliament has failed to legislate and specify what it wants to see done in a particular area, so leaving it open to the courts to work that out. Or, that Parliament has legislated in an extremely open-textured sort of way, so inviting the courts to fill in the detail. These are areas where Parliament has some choices it can make.

Another judge said that there was nothing particularly new in all this. You can trace a whole series of bits of legislation where the courts interpret it in a way that does not appeal to the Government, and the interpretation is followed by an amendment or some re-framing of the legislation. The courts are not trying to be activist or ineffective; they are simply trying to respond to a point raised by a litigant.

A judge said that the key point is whether we can foresee a time when the UK Supreme Court holds that an Act of Parliament is unconstitutional and should be struck down. We are so inbred in the country with the idea that Parliament is supreme that it is unlikely that the



courts would strike it down. However, he also did not foresee that the courts' powers would be narrowed in some way. The civil servant responded by saying that in a way, the courts' powers are narrowed every time there is an incursion of statute law into an area previously unoccupied by legislation.

An academic said that we can see in the two rounds of litigation over anti-terrorism legislation what the respective roles of Parliament and the legislature are. He explained that the legislation was passed in 2001; the first challenge by the House of Lords was in 2004 which declared part of the Act (on detention without charge or trial) incompatible with the ECHR. There then ensued what Canadian jurists might call a 'dialogue' because the Executive sought to legislate once more in order to control suspected terrorists—and that went to the courts again. The idea of Parliament being 'supine and ineffective' could be refined: in the House of Commons, a Government with a majority will normally get its way; but the Joint Committee on Human Rights produces very detailed reports on whether bills comply with Convention rights, which are taken very seriously particularly in the upper House. So it is not as crude as saying that there is a political institution (Parliament) confronting a legal one (the courts).

A different judge asked how, given the tasks allocated to the judiciary which involve challenging Parliament—both by the European Communities Act 1972 (which is crystal clear) and in the Human Rights Act 1998—how do we go about doing that? New questions come up all the time. There is a case at the moment about how 'the Convention right' are defined. We can answer that in a variety of ways. How far does the *Ullah* statement go in leaving it to the ECtHR to define them? How much of the definition of 'the Convention rights' is for the courts, and how much is for Parliament? This is a big question not defined in the Human Rights Act at all. That is a good example of a question that Parliament has given the Law Lords to decide. There are bolder and less bold answers to that.

A judge of the Court of Appeal gave an example of the House of Lords filling the void left by Parliament: the issue of termination of life support. Fifty years ago, perhaps less, the courts would have left it to Parliament. He went to repudiate the use of the word 'activist'. He suggested that doing nothing in the face of something that needs to be done is a very 'activist' stance indeed. The 1930s was a greatest period of parliamentary inertia. A weak and ineffective Government led to the growth of power not in the judiciary but in the civil service. In times of a strong Parliament, judges saw themselves being faced down in public, which was a breach of the unwritten rules of the separation of powers. The Human Rights Act and the Freedom of Information are very different. He explained that the Freedom of Information can be likened to machinery that is constitutional and the courts are really in the role no more than engineers whose role is to ensure that it runs smoothly. The Human Rights Act is different; it introduced to the law a series of open-textured one-liners which it was the job of the courts to give life and body to. That is a constitutional project of a very serious order. This was a better example of constitutional confidence.

An academic spoke about the distinction between Parliament and the Supreme Court. The best example is India where the Supreme Court is too activist and unrealistic in its judgments. Is it not the case (and this is really a psychological question) that one's self image as a judge will change after the creation of the UK Supreme Court? You—the judges—will see yourselves in terms very distinctively as a third branch of the State. You will be more conscious as to what you may suggest by way of law reform to the other two branches. Because you will have devolution issues, will you not be much more conscious of your constitutional role?

A judge responded by saying that it is a funny idea that being in the House of Lords should be holding the Law Lords back, pressing us down and making us less prepared to do the job than we will feel when we are across the square. The judge did not foresee feeling any different.

A practitioner said that those who appeared before the Appellate Committee do not get a feeling that the Law Lords are 'holding back' from telling the Government that they are in breach of constitutional principles. It was difficult to see why that should change. It is a truism that the approach of judges must be affected by the constitutional principles and

traditions in the country where they are operating. Those principles are well developed in the UK. They will no doubt continue to evolve but we are not talking about a radical change, just people moving geographically who are the same people, all of whom who have been judges and who are therefore imbued with the ethos of how a judge behaves. They are going to be governed by exactly the same laws—in particular the European Communities Act and the Human Rights Act—and all the precedents to be applied will remain the same. The concern is not that there will be greater activism but that in order to demonstrate to people outside that there is no greater activism, the Supreme Court *may*—not doubt unintentionally—hold back in what it *would* have said had it remained in Parliament.

An academic commented that the much of the discussion had been based on a sense of ‘what’s in a name? What’s in a place?’. There appeared to be a strong sense among the Law Lords present at the seminar that just because the court will be called a Supreme Court and not located inside Parliament will not mean that things will be done in any different way. There was no sense that the UK Supreme Court will turn into a ‘real’ supreme court with powers to strike down primary legislation.

### Further reading

B Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford: OUP, 2007)

D Anderson, ‘The Law Lords and the European Courts’ ch 9 in A Le Sueur (ed), *Building the UK’s New Supreme Court: National and Comparative Perspectives* (Oxford: OUP, 2004)



## 9. Participants in the seminars

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The following attended some or all of the seminars.

### Members of the judiciary

|  |   |  |
|--|---|--|
| The Rt Hon Lord Phillips of Worth Matravers  | } | House of Lords<br>UK Supreme Court   |
| The Rt Hon Lord Hope of Craighead            |   |  |
| The Rt Hon Lord Rodger of Earlsferry         |   |  |
| The Rt Hon Lord Walker of Gestingthorpe      |   |  |
| The Rt Hon Baroness Hale of Richmond         |   |  |
| The Rt Hon Lord Brown of Eaton-under-Heywood |   |  |
| The Rt Hon Lord Mance                        |   |  |
| The Rt Hon Lord Neuberger of Abbotsbury      |   |  |
| <br>   |   |  |
| The Rt Hon Lord Judge                        | } | Court of Appeal and High Court<br>in England and Wales                                     |
| The Rt Hon Sir Anthony Clarke                |   |  |
| The Rt Hon Sir Mark Potter                   |   |  |
| The Rt Hon Sir Mark Waller                   |   |  |
| The Rt Hon Sir Stephen Sedley                |   |  |
| The Rt Hon Dame Mary Arden DBE               |   |  |
| The Rt Hon Sir John Dyson                    |   |  |
| The Rt Hon Sir Andrew Longmore               |   |  |
| The Rt Hon Sir Robert Carnwath CVO           |   |  |
| The Rt Hon Sir Rupert Jackson                |   |  |
| Sir Ross Cranston FBA                        |   |  |
| <br>   |   |  |
| The Hon Lord Gill                            | } | Lord Justice Clerk and President of<br>the Second Division of the Inner<br>House, Scotland |

### Academics

- Richard Cornes, University of Essex
- Dr Penny Darbyshire, Kingston University
- Professor Brice Dickson, Queen’s University, Belfast
- Professor Janet Dine, Queen Mary, University of London
- Professor Gavin Drewry, Royal Holloway, University of London
- Professor Robert Hazell, UCL
- Professor Andrew Le Sueur, Queen Mary, University of London
- Professor Kate Maleson, Queen Mary, University of London
- Professor Dawn Oliver, UCL

## Practitioners

Barristers were invited following contact with the main specialist bar groups, including the Constitutional and Administrative Bar Association (ALBA), the Bar European Group, the Chancery Bar Association, Commercial Bar Association (COMBAR), Criminal Bar Association, Family Law Bar Association, and the London Common Law and Commercial Bar Association (LCLCBA).

|                                   |  |
|-----------------------------------|--|
| David Anderson QC                 | Ali Malek QC                                   |
| Charles Béar QC                   | Stephen Nathan QC                              |
| Margaret Bowron QC                | Sally O'Neill QC                               |
| Richard Clayton QC                | David Pearson, Treasury Solicitor's Department |
| Malcolm Davis-White QC            | David Pannick QC                               |
| David di Mambro                   | Vikram Sachdeva                                |
| Richard Gordon QC                 | Rabinder Singh QC                              |
| Christopher Grierson, Lovells     | Michael Smyth, Clifford Chance                 |
| Stephen Grosz, Bindman & Partners | Jemima Stratford                               |
| Javan Herberg                     | Lucy Theis QC                                  |
| Simon James, Clifford Chance      | James Turner QC                                |

## Others

Rowena Collins Rice, Ministry of Justice  
 The Rt Hon Sir Terence Etherton, Law Commission  
 Stephen Foot, Ministry of Justice  
 Louise di Mambro, Registrar of the UK Supreme Court  
 Senior Master Peter Hurst  
 Kenneth Parker QC, Law Commission  
 Diana Procter, Incorporated Council of Law Reporting for England & Wales  
 Jenny Rowe, Chief Executive of the UK Supreme Court  
 Master Roger Venne, Registrar of Criminal Appeals

## 10. Acknowledgments

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Each seminar started with short presentations (some of them supported with written papers) and ended with a rapporteur's summary of the issues that had been raised. I would like to thank those who took on these roles and all who participated in the seminars.

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Andrew Le Sueur