

JUDICIAL RE-ORGANISATION IN ENGLAND AND WALES: CONSTITUTIONAL CHANGE IN PROSPECT

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England, which, with Wales, forms one part of the United Kingdom¹, has no written Constitution. That is not to say that it has no Constitution. On the contrary, there is a wealth of law — both statute and case law ('common law') as well as 'conventions'²— dealing with matters of constitutional importance. There is, however, no general legal concept in do-

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¹ The others are Scotland and Northern Ireland. Each part of the United Kingdom has its own legal system. There are some relatively minor differences between the law of England and the law of Wales, especially since devolution: post p. 15.

² A constitutional convention derives from settled practice. A convention may change over time but will not be lightly disregarded. Examples of modern conventions include that the Queen acts only on the advice of her Ministers and that the Prime Minister must be a member of the House of Commons.

mestic law of an entrenched law that cannot be changed by the ordinary legislative process, only a recognition that it would be politically impossible for certain legislation to be abolished³. The Constitution has evolved over an almost uninterrupted period of 900 years, and continues to do so⁴.

The present Government of the United Kingdom is responsible for a number of constitutional reforms since 1997, including the widely publicised reform of the Upper House of Parliament — the House of Lords. To be a member of the House of Lords it has traditionally been necessary and also sufficient, to be a member of the peerage, that is, of the nobility. Most members of the peerage inherit their titles from their forebears and are known as ‘hereditary peers’, but a person may be appointed to a ‘life’ peerage, which gives him (or her), but not his descendants, the right to sit as a member of the House. There is now a very large number of life peers.

It is the intention of the present (Labour) Government to remove all the hereditary peers from the House and thus from the legislature, and so far they have removed the majority of them. Those remaining were elected by their fellow peers to stay as members until a scheme for a reconstituted House of Lords, without any hereditary members, could be adopted. So far, however, it has proved impossible for Parliament —that is to say both the House of Lords and the House of Commons— to agree on any scheme for a ‘modernised’ House of Lords, whether all elected, all appointed, or partly elected and partly appointed.

This article is not directly concerned with reform of the House of Lords as a House of Parliament, but what has just been said provides part of the background for discussion of the reforms to the constitutional structure of the judicial system and the method of appointing judges that began with a Government announcement, on 12 June 2003. That announcement covered the resignation of the Lord Chancellor, the abolition of his office, the creation of a new Ministry — the Department of Constitutional Affairs — and the replacement of the ancient appellate jurisdiction of the House of Lords by a new ‘Supreme Court for the United Kingdom’

It is hoped that a brief, but critical, account of these reforms and of their progress to date will be of interest, perhaps especially to those who are unfamiliar with an unwritten constitution that has evolved over a long period of time, but before turning to that it is necessary to begin with a

³ For example the European Communities Act 1972, which is the domestic foundation of the United Kingdom’s membership of the European Union. For the effect of European law on a United Kingdom Act of Parliament, see *Reg v. Transport Sec. ex p Factortame Ltd. (No. 2)* [1991] A.C. 603. For a special regime see the Human Rights Act 1998, which gives effect in domestic law to the European Convention on Human Rights and Fundamental Freedoms. Post n. 32.

⁴ BOGDANOR, ‘Our New Constitution’ (2004) 120 L.Q.R. 242.

brief and greatly simplified historical account of the features of that constitution that are due to disappear.

1. A BRIEF AND GREATLY SIMPLIFIED HISTORICAL ACCOUNT OF THE FEATURES OF THE ENGLISH CONSTITUTION THAT ARE DUE TO DISAPPEAR

A) The Lord Chancellor⁵

The office of Chancellor is ancient, and is not unique to England. The King known as Edward the Confessor, who reigned from 1043-1066 and was canonised in 1161, was the first English King to have a chancellor⁶. It was the Chancellor's duty to keep the King's seals, for the use of which he had to account to the King, or rather to the financial office of the King, known as the Exchequer. He was a prominent member of the King's Council, but he had a staff of his own, and was, in effect, Head of his own department, known as the Chancery. Since the King was the fount of justice, legal action in the courts called for a Royal 'writ', which had to be sealed by the Chancellor, and this made him 'the legal centre of the constitution'. In addition, important Government acts such as treaties with foreign powers, summonses to attend Parliament, and so on, had to be sealed.

Throughout their history, the Chancellor and the Chancery were closely connected with the King and his Council, and the Chancellor was the natural destination for many of the petitions that reached the King or his Council. Moreover, the law as administered in the common law courts in the 14th and 15th Centuries was in some respects rigid and technical and in need of some method of alleviating its harshness: the Chancery became the principal organ of an extraordinary jurisdiction capable of achieving this. In due course, towards the end of the 15th Century, the Chancellor began to issue decrees on his own authority, and what was for centuries thereafter to be known as the Court of Chancery came into existence alongside the common law courts, but applying 'Equity' rather than the 'common law', with the Chancellor as its judge. The courts of common law and of Equity were amalgamated in 1875.

It would be tedious and is unnecessary for present purposes to trace the steps whereby the modern Lord Chancellor came to acquire the multiple responsibilities that now attach to his office. Enough has been said, however, to show that by the late 15th Century, the Chancellor was both a judge and an administrator. As a high officer of State he was also a member of the Legislature.

⁵ See W. S. HOLDSWORTH, *History of English Law*, Vol. 1 (ed. 7, 1956) Cap V, from which much of this section is derived.

⁶ It may be that the office even dates as far back as 605 A.D.: LORD MACKAY (himself Lord Chancellor at the time) 'The Lord Chancellor in the 1990s' (1991) *Current Legal Problems* 241.

Seen against a modern constitutional background, the Lord Chancellor's office clearly contains within itself a contradiction of the doctrine of the separation of powers⁷. He is a member of the House of Lords, and normally presides over its debates. He carries responsibility for Government legislation on legal matters. As a part of the Administration, he is a member of the Cabinet. Like any other Minister he can be replaced at any time by another person chosen by the Prime Minister; the sitting Lord Chancellor automatically loses office on a change of Government following an election. He is responsible for a large Department administering the machinery of justice. Such matters as court administration, legal aid and law reform come within his responsibility⁸.

As a judge, the Lord Chancellor is the head of the judiciary. He is entitled to sit in virtually every court in the country, but in practice he sits only in the House of Lords, and that, in modern times, only rarely. On the other hand, as head of the judiciary he has the formal responsibility of ensuring its continued independence. As a member of the Cabinet he is particularly well placed for this.

B) The Appellate Jurisdiction of the House of Lords

In the early Middle Ages, there was no recognition of the differences between the three 'arms' or powers of government — the legislative, the administrative and the judicial. The early Parliaments, which were summoned by the King, combined the three within themselves because all three stemmed from the King himself. In course of time, three separate courts of law grew out of the King's Council — the *Curia Regis*. These were the Court of King's Bench, which was primarily concerned with matters affecting the maintenance of order in the country, the Court of Exchequer, which was primarily concerned with the King's revenue, and the Court of Common Pleas, for litigation between individuals⁹. Nevertheless, the King remained the fount of justice and the judges of those courts were the King's judges. The King, and through him the Parliament, did not lose the judicial power. Eventually, Parliament divided into two Houses — the House of Commons, which consisted of elected representatives from the boroughs and the counties — and the House of Lords, which consisted of the great landowners who were the most important 'tenants' of the King, and known

⁷ But see post, p. 10.

⁸ The Law Commission, an independent statutory body set up for the purposes of law reform reports to the Lord Chancellor. The criminal law, its reform and its administration is primarily the business of the Home Office.

⁹ These courts are known as 'common law courts', to distinguish them from the court of 'equity', ante, p.3. It is to be noted that there was at this time an elaborate system of local courts and the jurisdiction of the King's courts was in effect 'exceptional'.

as 'Tenants in Chief'¹⁰. By the 15th Century it had become clear that the judicial power of Parliament would be exercised only by the House of Lords.

At an early stage Parliament did have an original jurisdiction, but by the mid 17th Century, it was settled that only the ordinary courts could exercise such a jurisdiction. Since then the House has dealt only with proceedings by way of recourse from lower courts¹¹.

In exercising this jurisdiction, all the members of the House, whether legally qualified or not, were once entitled to take part in the proceedings and to vote on the outcome, though they could, and commonly did, call upon the judges for advice. However, in 1844, it was recognised as a constitutional convention that only members who were legally qualified should vote on legal decisions.

An Act of Parliament of 1873 was intended to abolish the jurisdiction of the House of Lords, but, following a change of Government and partly because the House acted as the final court of appeal for all parts of the United Kingdom, not only for England and Wales, opinion changed. In 1875, before the Act of 1873 came into force, the relevant provision of that Act was repealed. It was decided, however, that the system called for revision, and in 1876 an Act was passed providing for the appointment of 'Lords of Appeal in Ordinary' ('Law Lords') as the regular judges to sit when the House was acting in a judicial capacity. This Act is still in force. The Law Lords are professional salaried judges who are given life peerages. At the present time there are 12 of them, and also available to sit are those few peers who hold or have held 'high judicial office'¹² and have not reached the retiring age. Since 1948 cases are heard not by the House itself, but by a special committee known as the Appellate Committee.

The business of the highest court in the United Kingdom is thus conducted by a separate Committee consisting of the most highly qualified and experienced judges in the country. Nevertheless those judges, being life peers, are members of the House and so technically qualified to take part in its legislative business. In modern practice the Law Lords do not take part in debates on politically sensitive topics, and only exceptionally on others, but they serve on various committees dealing with legal matters, such as, for example, those set up to consider legislative proposals from the European Union, and it is widely recognised that their membership of

¹⁰ At the time, and, indeed, as a matter of theory at present, only the King could 'own' land, all of which was held by others either directly or indirectly of the King.

¹¹ The House retained original criminal jurisdiction in cases of impeachment and in case one of its members was charged with a criminal offence. This jurisdiction is now obsolete

¹² Generally speaking, 'high judicial office' means judge of the High Court, the Court of Appeal or the House of Lords itself.

the House of Lords is valuable both to them, as judges of the highest court in the land, and to the other members.

C) Appointment of the Judiciary

The judges throughout the United Kingdom are appointed from amongst the members of the practising legal profession: there is no career judiciary. One of the most important of the many responsibilities of the Lord Chancellor is that relating to the appointment of judges. The judges of the lower courts are directly appointed by him, but the higher judges are appointed by the Queen. So far as judges of the High Court¹³ are concerned, the Queen acts on the advice of the Lord Chancellor. For judges of the Court of Appeal and of the House of Lords the Queen acts on the advice of the Prime Minister. However, before giving his advice to the Queen, the Prime Minister always consults the Lord Chancellor.

On the face of things, there might appear to be opportunity under this system for political—even party political—considerations to influence judicial appointments, and this may have happened sometimes in the past. Nevertheless, despite the great increase in the Lord Chancellor's role during the 20th Century, the evolution of his office and the traditions it has developed have made it possible for each individual holder of the office, in modern times, to maintain a clear distinction between those parts of his role in which he acts as a member of the governing party—as a member of the legislature and a member of the Administration—and those parts of his role such as acting judicially in litigation before the Appellate Committee and in the appointment of judges—where all political considerations must be excluded. The force of tradition is such that there is a relation of trust and no one questions the integrity of successive Lord Chancellors. Even those who wish to see the system changed do not suggest that any Lord Chancellor in modern times has acted otherwise than impeccably and without any consideration of the political affiliations of a candidate for appointment to the Bench.

In the course of deciding on appointments or recommendations for appointment to the Bench, the Lord Chancellor must obviously engage in wide consultation. In the past, such consultation was carried out in secret. So far as the higher judiciary was concerned, no application for appointment was necessary and normally the first a person would know of his impending appointment was an enquiry from the Lord Chancellor or the Prime Minister asking whether he would accept appointment by the Queen if it were offered. At the present time, the extent of the secrecy of the

¹³ The High Court is the Court of first instance of unlimited jurisdiction.

consultation process has been reduced, to make it more transparent, but it is still considered by some that more must be done to make the system more consistent with modern best practice and with contemporary employment law¹⁴.

2. FUTURE LEGISLATION: THE CONSTITUTIONAL REFORM BILL

Since the announcement of 12th June 2003, a number of things have happened. Ironically the first of these was the belated realisation by the Government that, so many and various are the responsibilities of the Lord Chancellor that his office could not simply be abolished as if no more were involved than a routine change in his Cabinet arrangements by the Prime Minister¹⁵. A new Minister —the Secretary of State for Constitutional Affairs (hereafter ‘the Minister’)— has been appointed and he acts for the time being also as Lord Chancellor¹⁶.

Subsequently, a number of discussion papers were issued by Government, and comment invited; a Select Committee of the House of Commons has reported, urging that nothing should be done in haste and that more extensive consultation and consideration was necessary for such far-reaching reforms. However, paying little attention to that, on 24 February 2004 the Government introduced a major piece of legislation into the House of Lords¹⁷. After debate, that House voted to put the Bill before a Select Committee for consideration before taking the matter further. At the time of writing the Bill is with that committee. It remains to be seen what will be the outcome of its deliberations.

The Bill now before Parliament is likely to be amended in ways that cannot yet be predicted, before it becomes law. It is not possible in this article to do more than outline and comment on its most important provisions; these will probably survive with little, if any, major change. First, however, it is worth mentioning that the Bill begins with a ‘Guarantee of continued judicial independence’. This imposes duties on Ministers and others with responsibility for the administration of justice ‘to uphold the continued independence of the judiciary’; Ministers must not seek to influ-

¹⁴ In the English system, a judge is neither an employee nor a civil servant

¹⁵ It is the prerogative of the Prime Minister, not only to choose his Ministers but to reorganise Government departments as he wishes. Until now, so far as is known, no Prime Minister has contemplated abolishing the office of Lord Chancellor.

¹⁶ This Minister — Lord Falconer — is a member of the House of Lords, but it is likely that his successors will be in the House of Commons. Lord Falconer has made it clear that he will not sit as a judge while he retains the office of Lord Chancellor.

¹⁷ The Constitutional Reform Bill. To become law, all legislation must pass both Houses of Parliament but a new Bill may be introduced in either House.

ence judicial decisions 'through any special access to the judiciary' and the Minister must always have regard to the need to defend judicial independence¹⁸.

This curious statutory provision was considered necessary as a replacement for the Lord Chancellor's previous role in protecting judicial independence¹⁹. The effect of it is, however, unclear. It is difficult to see that it can be enforced by any form of legal process, and it could, at least in theory, be repealed by Parliament at any time.

A) Abolition of the Office of Lord Chancellor

As has been mentioned, the office of Lord Chancellor is, in itself, a contradiction of the doctrine of the separation of powers, and that is the main ostensible reason for its abolition. The fact is, however, that that doctrine, as it is generally understood, has never been part of the Constitution of the United Kingdom. To take only the most important example, the Prime Minister and all other ministers in the Government must be members of Parliament. In modern times senior Ministers are almost invariably members of the House of Commons except for the Lord Chancellor himself. Perhaps the European Convention on Human Rights, now incorporated into English law²⁰, may constitute an obstacle to retention of the office of Lord Chancellor, but this is by no means certain.

The abolition of the office of Lord Chancellor is formally achieved by a clause in the Bill to that effect²¹, but, of greater practical importance, is the transfer of his functions to others. For the most part, these are transferred to the Minister or to the Lord Chief Justice²². As the Bill is presently drafted, the transfers are achieved by a series of amendments of individual sections of innumerable different Acts of Parliament²³, a method of legislation that does not make for easy reading or understanding. These transfers are unobjectionable in themselves, given the disappearance of the Lord Chancellor, but what is, in the opinion of this writer, to be deprecated is that, in a substantial number of cases, the Lord chief Justice is required as a preliminary to action on his part to consult the Minister. The Lord Chancellor himself was of course, under no similar requirement, and it may be that the Bill fails to pay sufficient regard to those functions of the Lord

¹⁸ Clause 1.

¹⁹ P. 4, ante.

²⁰ Human Rights Act 1998.

²¹ Clause 12.

²² The Lord Chief Justice (an ancient judicial office) will become 'President of the Courts of England and Wales': Clause 2.

²³ See Constitutional Reform Bill, Schedule 1.

Chancellor that belonged to the 'non-political' side of his office and which have been transferred to the Lord Chief Justice, as opposed to those in which he acted politically. Those functions now transferred to the Lord Chief Justice that belong to the former category should be left to him alone.

Be this as it may, the Government invited no public discussion of the abolition of the office of Lord Chancellor, and seems determined that a unique and ancient office, the holders of which have acquired a reputation of trustworthiness acquired by no other Minister, must go.

B) Abolition of the Appellate Committee and creation of the Supreme Court

It has been noticed that the Appellate Committee of the House of Lords acts as the final court of appeal for each of the constituent parts of the United Kingdom. The Government now intends to abolish that jurisdiction and to replace it with a Supreme Court for the United Kingdom. In so doing the Government has been anxious to stress that no criticism is intended of the manner in which the Appellate Committee has fulfilled its function, and there is certainly no suggestion that its decisions have been influenced by political considerations. Nevertheless it is considered that the time has come for the United Kingdom's highest court to 'move out from the shadow of the legislature'. Two reasons in particular are given for this proposal, the second of which will be considered first for it has nothing in it of principle.

The two Houses of Parliament are accommodated in a fine building in the centre of London, known as the Palace of Westminster. It contains two debating chambers —one for the Lords, one for the Commons— and numerous committee rooms and offices. In addition, a new building has been erected nearby to provide more space. Such has been the growth in the work of Parliamentary committees and in the administrative needs of both houses, however, that accommodation for all the requirements of Parliament and its staff has become inadequate. For the hearing of an appeal, the Appellate Committee sits in one of the committee rooms in that part of the Palace of Westminster that is allocated to the House of Lords, a room that is reasonably well suited for its purpose, save that it allows only limited space for members of the public. On the other hand, the office and other accommodation provided for the Law Lords themselves is no longer adequate. It has been claimed by the Government that the problem could be solved by the creation of a Supreme Court, which would be separately housed in a purpose built building.

This, it must be said, is a wholly insufficient justification for so major a constitutional change as the abolition of the ancient jurisdiction of the

House of Lords. There are, it is true, some commentators who believe that the dignity and authority of the Appellate Committee would be reduced if it ceased to sit in the Palace of Westminster, but if the problem of accommodation within the Palace of Westminster, is really insuperable, additional accommodation for some of the needs of the House of Lords (not necessarily for the Appellate Committee itself) should be provided elsewhere.

Paradoxically, as things stand at present, the actual situation is the converse of that contemplated. Extreme difficulty is being experienced in finding a building suitable for occupation by the Supreme Court, and it is considered by the existing Law Lords — who will become the first judges of the Supreme Court — that that Court should not be brought into existence until suitable separate accommodation is available. Unlike the members of the Appellate Committee, judges of the Supreme Court will have no connection with the House of Lords and would be placed in a difficult position if they were obliged to sit within the Palace of Westminster. It may be that the creation of the Supreme Court will be delayed for a considerable time for this entirely practical reason²⁴.

The principal and a more persuasive reason for the change is the connection of the Appellate Committee to the House of Lords as a whole, and of its members individually to the legislature. Reference has already been made to this and to the virtual separation of the Law Lords from the legislative process. It is, therefore difficult to deny that the case for a Supreme Court rests largely upon appearances. It is argued that it is not always understood that the lay members of the House of Lords play no part in the judicial decisions that are made by the Appellate Committee, so that it may appear that judicial independence is compromised. It is also claimed that the European Convention on Human Rights²⁵, adds force to the argument for change.

It is not easy to justify the proposed abolition of a system that is acknowledged to work well, on the ground that the reality of the present situation is not always understood. It is, no doubt, a familiar adage that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'²⁶, but this is normally taken to refer to the possible appearance of bias or other improper influence affecting an individual judge in an individual case, not to a given court as a whole, and without reference to a particular case.

Be this as it may, the Government seems determined that eventually the ancient appellate jurisdiction of the House of Lords will be abolished and that a new Supreme Court for the United Kingdom will be established to

²⁴ See *The Times* Newspaper, 17 May 2004.

²⁵ See ante n.3.

²⁶ *R. v. Sussex Justices* [1924] 1 K.B. 256, 259, per LORD HEWART C.J.

take its place. Apart from such practical and so far unresolved problems as the provision of a suitable building for the new court and the source of its funding this raises a number of questions, of which reference will be made to two — membership of the Court and its jurisdiction.

a) *Membership*

At present the House of Lords, through the Appellate Committee, acts as the final Court of Appeal for the whole United Kingdom. It therefore includes in its membership judges from Scotland and Northern Ireland²⁷. The balance in the membership is maintained informally, through the advice on a new appointment given to the Queen when a vacancy occurs. In the consultation that precedes the advice to the Queen, the Lord Chancellor²⁸ has played the principal role.

The first judges of the Supreme Court will be the existing Law Lords, but now that the Lord Chancellor is no longer to exist, a new method for the appointment of the judiciary will have to be introduced. This will be discussed below, but special arrangements are necessary for the Supreme Court. Since it is to be a United Kingdom court the systems to be used for the appointment of judges to the English, Scottish and Northern Ireland jurisdictions, respectively, would be inappropriate.

The Bill therefore provides for a special Supreme Court Appointments Commission to be appointed by the Minister when a vacancy arises on the Court. The Commission consists of the President and Deputy President of the Supreme Court and a member of each of the English, Scottish and Northern Ireland Judicial Appointments Commissions, chosen by the Minister. The Commission must submit a list of not less than two or more than five candidates to the Minister who must then consult appropriate authorities in Northern Ireland, Scotland and Wales. The Minister then makes his selection and passes his recommendation on to the Prime Minister. Surprisingly the Prime Minister — unlike the Minister — has no choice, but must recommend to the Queen the appointment notified to him by the Minister.

It may be thought that this scheme gives excessive power over appointments to the Supreme Court to the Minister, who, unlike the Lord Chancellor, is an ordinary member of the Executive. It would be better if the Commission were required only to put forward one name, which the Min-

²⁷ Out of the 12 judges on the Appellate Committee, it is usual for two to come from Scotland and one from Northern Ireland. The law of Scotland differs from that of England and Wales more than does that of Northern Ireland

²⁸ The office of Lord Chancellor is, of course, a United Kingdom office. As it happens the last two Lords Chancellor (one Conservative, one Labour) were Scottish.

ister could accept or reject²⁹. Secondly, it is difficult to understand why the (English) Minister should choose the members of the Scottish and Northern Ireland appointment commissions. This would be better done by members of the devolved governments³⁰. Thirdly, it seems inappropriate that the Minister should have power to prescribe criteria for an appointment to be taken into account by the commission³¹.

b) *Jurisdiction*

It is the intention and expectation that the jurisdiction of the Supreme Court will be the same as that now exercised by the Appellate Committee of the House of Lords. There is no suggestion that it might resemble the Supreme Court of the United States and have power to strike down the legislation of the United Kingdom Parliament³². A particular problem is raised, however, by the advent of devolved Government to Scotland and Wales, and its modernisation in Northern Ireland. Both Scotland³³ and Northern Ireland³⁴ have institutions—in Scotland a ‘Parliament’, in Northern Ireland an ‘Assembly’—capable, subject to a number of restrictions, of enacting primary legislation. Wales also has an ‘Assembly’, but because its separation from England is less pronounced it does not at present have the power to enact primary legislation. The Parliament of the United Kingdom—the ‘Westminster Parliament’—retains its sovereign power for the whole country and includes members from all parts of the United Kingdom, including those to which power has been devolved as well as from England. However, the Westminster Parliament generally refrains from direct interference with those Parliaments to which power has been devolved, provided, of course, that the limits on the devolved power are observed³⁵.

In these circumstances questions of the legality of an exercise of devolved power may arise. Such questions—‘devolution issues’—may be

²⁹ It appears that the Government has now conceded this point, bringing Supreme Court selection into line with the appointment of other judges. (Post p.19). See Debate, 27 May 2004, HC (Hansard Commons) Col 502WH, Mr. Alan Beith.

³⁰ It is true that the Minister can only act on the recommendation of the commission concerned.

³¹ See, for these points, clause 20 of the Bill.

³² For an example of cases where the courts, including the House of Lords, can declare that a Parliamentary law is not compatible with ‘higher’ law, though they lack power actually to annul it, see Human Rights Act 1998.

³³ Scotland Act 1998

³⁴ Northern Ireland Act 1998. At present the devolved powers of the Northern Ireland Assembly are suspended.

³⁵ This gives rise to some controversy. It means that, for example, Scottish members of the Westminster Parliament can and do vote on a matter affecting England only, while, of course, English members have no vote on legislation in the Scottish Parliament,

raised in the courts of any part of the United Kingdom. However, the Court of final appeal is not the Appellate Committee of the House of Lords, but the Judicial Committee of the Privy Council.

The Privy Council of today is the successor of the early King's Council, which retained a residual jurisdiction after the formation of the common law (and other) Royal Courts. It could receive and deal with petitions to the King relating to legal matters not already within the jurisdiction of an established court. During the great period of the British Empire, the Privy Council, through its Judicial Committee³⁶, acted, in effect, as a final court of appeal from the Dominions and Colonies and although most of the countries of the British Commonwealth no longer allow cases to go to the Privy Council, some of that work remains. In addition the Privy Council retains jurisdiction in a variety of specialised matters.

The members of the Council are eminent persons appointed by the Queen³⁷ — some from politics, but also many members of the higher judiciary from within all parts of the United Kingdom and the British Commonwealth. Although the bulk of the judicial work of the Privy Council is actually done by the judges of the House of Lords sitting as Privy Counsellors, the Privy Council was preferred to the House of Lords for devolution cases mainly to avoid the appearance that the United Kingdom Parliament — of which the Appellate Committee of the House of Lords is notionally a part — was acting in a case which directly concerned its own legislation. In addition, a panel of judges sitting in the Privy Council can be chosen from a wider and more diverse group of qualified persons than is available for the House of Lords. Whereas there are, for example, normally no more than two Scottish judges in the House, in the Privy Council it would not be hard to form a panel containing three Scottish judges, if required³⁸.

Whatever the merits of using the Judicial Committee of the Privy Council for devolution cases, it could well be thought to be anomalous to allow it to continue to do so once there is a Supreme Court for the United Kingdom. The Bill therefore provides that this jurisdiction of the Privy Council should be transferred to the Supreme Court. No special provision is made for the enlargement of membership of the Court for devolution

³⁶ Created in 1833 to ensure that judicial work of the Council was done only by legally qualified members.

³⁷ Cabinet Ministers and judges of the Court of Appeal and House of Lords are regularly appointed; others are appointed on the advice of the appropriate Minister — e.g. in the case of a New Zealander, a Minister of the New Zealand Government.

³⁸ Further, arrangements exist whereby a devolution issue, or a potential devolution issue can be referred to the Privy Council for an opinion even in advance of the enactment of possibly offending legislation. Such a procedure is at present unknown in the House of Lords, which can deal only with live litigation.

cases. There is, however, general provision whereby it is open to the President of the Court to invite a person who holds 'high judicial office' or who is a member of the 'supplementary panel' of judges to act as a judge of the Supreme Court in a given case³⁹. One effect of this should be to enable the President to select a panel with, for example, more Scottish judges than are ordinary members of the Court⁴⁰, if he thinks this necessary for the 'devolution issue' in question to be satisfactorily resolved. Only time will tell whether the advantages of bringing devolution cases within the competence of the Supreme Court outweigh the advantages of leaving them with the Privy Council.

C) Judicial selection: England and Wales⁴¹

The tradition of appointment by the Queen is retained and, indeed, extended, under the Bill. Appointment to most judicial offices will be by the Queen on the advice of the Minister, and the Minister will be informed by a newly established Judicial Appointments Commission.

The Commission will consist of 15 members, appointed by the Queen on the recommendation of the Minister, but before recommending a name to Her Majesty, the Minister must consult an 'advisory panel' of three, the chairman of which must be a lay member of the Commission and which must also include the Lord Chief Justice or his nominee; the third member should be the Chairman of the Commission⁴². The membership of the Commission itself is to consist of five judicial members⁴³, two from the legal profession, two holders of minor judicial offices and six lay members, that is members having no connection, present or past, with the judiciary or with legal practice. The Chairman must be appointed from amongst the lay members.

The Commission acts on a request from the Minister that a selection should be made of one or more persons to be recommended to the Queen for appointment to judicial office. For judges of the High Court and the more junior judges the Commission acts as a whole⁴⁴, but for the highest

³⁹ Under the Bill, 'high judicial office' means judge of the Supreme Court, the Court of Appeal, the High Court or the Court of Session (the higher Scottish courts). The main qualification for the supplementary panel is to have held high judicial office.

⁴⁰ It may be expected that certain Northern Ireland judicial offices will be included within 'high judicial office' when devolved powers are restored there.

⁴¹ Similar, but separate arrangements exist for Scotland and Northern Ireland.

⁴² If no Chairman is in office, the panel chairman has the nomination. In addition, the Minister must consult the Judges' Council, in relation to judicial members, and the appropriate professional bodies, in relation to the legal professional members.

⁴³ The judicial members should be drawn from different categories of judge: Schedule 10, para. 6 (2).

⁴⁴ It is for the Commission to determine its own procedure.

offices and for judges of the Court of Appeal it acts through special selection panels⁴⁵. The arrangements for the working of the Commission are complex, but need not detain us here. It is more important for present purposes to consider the extent to which the Minister can influence or control actual appointments to judicial office⁴⁶. A careful balance of power is sought to be maintained, the final outcome of which is that the Minister can ensure that a person whom he regards as unsuitable will not be appointed, while, conversely, he cannot recommend to the Queen the appointment of a person who has not been selected by the Commission. The balance is secured by the following procedure:

When the Commission reports to the Minister with its selection, he has three options. He may make the recommendation proposed by the Commission; he may reject the selection, or he may require the Commission to reconsider:

- a) Where the Minister rejects a selection, the person rejected cannot again be selected for the vacancy in question.
- b) Where the Minister calls for a reconsideration, the Commission may select the same or a different person. If he does not accept the selection, the Minister may again reject it or call for reconsideration.
- c) After a second rejection or requirement for reconsideration, the Minister must recommend the person ultimately selected for appointment by the Commission.

These provisions seem to achieve a satisfactory balance, but even so, the balance is tilted a little further in the Minister's favour by two other provisions. First, it is open to the Minister, after consultation with the Lord Chief Justice to specify certain considerations that must be taken into account by the Commission in assessing a candidate's merit⁴⁷. It is believed that this is intended amongst other things to enable the Minister to require that the gender or ethnic origin of 'candidates' for selection be taken into consideration⁴⁸. Secondly the Commission must have regard to any guidance given by the Minister; there seem to be no limits to the nature of the guidance that may be given. Even though it is for the Commission to decide what weight should be given to such guidance, the Commission would be in breach of its duty if it decided simply to disregard the Minister's

⁴⁵ Clauses 55, 61.

⁴⁶ The Queen —or in certain cases the Prime Minister— must act on the Minister's recommendation.

⁴⁷ Appointment must be on merit: Clause 51.

⁴⁸ The numbers of women and members of minority ethnic groups in the higher judiciary are relatively low

guidance, and that guidance cannot, therefore, be entirely without influence⁴⁹.

3. CONCLUDING OBSERVATIONS

It will be evident to the reader of this article that the writer is critical of the changes to the judicial organisation proposed by the Government and now before Parliament. His criticisms, though not unique to himself, are his own. There are others, including many judges and senior lawyers, who are broadly in favour of a 'modernised' system for the appointment of judges and of a Supreme Court for the United Kingdom whose judges are entirely removed from the House of Lords. On the other hand, there is almost universal condemnation of the manner in which the Government announced its proposals in June 2003⁵⁰, and of the haste with which it proceeded.

It may well be that matters would have been better managed if the proposed changes had required attention to the demands of a written constitution. It should not be supposed, however, that only a written constitution can provide protection of constitutional principle against a Government with a substantial majority. An unwritten constitution is not a non-existent constitution, and on those rare occasions when a problem of principle arises, there is enough of control and flexibility in the system as a whole to result in a satisfactory solution.

As will be demonstrated shortly, this is the most likely outcome of the sequence of events that has been the subject of this article, but before a few final words on that subject, it is useful, first, to draw attention to a case that arose out of events in the Second World War that caused great controversy at the time.

In order to deny their use to the Japanese forces that were advancing rapidly in Burmah, the British authorities destroyed large oil installations and accumulations of oil that belonged to the Burmah Oil Company, a British company. After the War, the company sued for compensation for the destruction of its property, and ultimately the House of Lords decided that compensation was legally due to them⁵¹. The decision was reached in accordance with the common (i.e. non-statutory) law because the existing legislation on compensation for war damage, which made provision for only limited compensation from public funds and not compensation assessed at full value, did not extend to property in Burmah. The result of

⁴⁹ Clause 52.

⁵⁰ Ante, p. 2.

⁵¹ *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75.

the House of Lords' decision was that the company became entitled to full value compensation. Fresh legislation was thereupon introduced into Parliament to rectify the matter, and that legislation was made retroactive so that, if passed, it would deprive the company of the rights to which the House of Lords had held it was entitled.

Eventually the legislation was passed⁵², but not without heated debates both within and outside Parliament. The outcome was essentially that the Constitution, which certainly condemns retroactive legislation as a general rule was able to tolerate and absorb one instance of retroactive legislation that essentially did justice to the sufferers of war damage as a group, without suffering the harm that would be suffered by a written constitution in similar circumstances. As Professor A.L. Goodhart said, 'Thus a crisis was avoided and the British Constitution continued quietly on its way'⁵³.

Turning finally to the proposed changes in judicial organisation, it may be that the Government at first thought that it could achieve its aims almost informally by way of the announcement of 12 June 2003, but if so, it soon found out that it was mistaken. As we have seen, it came to appreciate the complications involved in removing the Lord Chancellor's office; a major, if abbreviated, consultation in the public domain was conducted; a House of Commons Select Committee deliberated for some time and published an important report and the Bill is, at the moment of writing, with a Committee of the House of Lords. And now, as has just been announced (21 May 2004) the Select Committee of the House of Commons is to scrutinise the proposed legislation on the Supreme Court with a view to examination of a number of key questions relating to the Court's independence, to its relationship with Parliament, to its administration and cost, and to its accommodation.

The Act of Parliament that will eventually be enacted will not be to the liking of everyone, but there is nothing out of the ordinary, still less unconstitutional, in that: it is no more than the norm of political life. Leaving aside the messy beginning of the reform, nothing has happened or is likely to happen that could reasonably offend any stickler for constitutional propriety. The unwritten Constitution has neither prevented what is regarded by many as necessary reform, nor enabled that reform to be carried out at the whim of the Government or without due deliberation within Parliament as well as outside.

⁵² War Damage Act 1965.

⁵³ 'The *Burmah Oil Case*, and the War Damage Act 1965' (1966) 82 L.Q.R. 97. He also observed that the flexibility of the unwritten constitution is what has enabled it to survive for centuries: *ibid.*, at p. 97.

