Reform of the United Kingdom judicial system

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Abstract

The separation of powers in a state is an essential characteristic of every democratic country, a principle present in many constitutions, most notably that of the United States.

The concept is imperfectly fulfilled in the United Kingdom, given that the executive (Ministers) form part of the legislature and that part of the judiciary (Law Lords) sit in the legislature.

As a result, it was necessary to remove the constitutional anomaly that the highest court of appeal in the United Kingdom was situated within one of the chambers of Parliament.

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JEL Classification: K33, K40

Introduction

Until 1st of October 2009, United Kingdom didn't have a classic Supreme Court of Justice.

These attributions were enforced by a group belonging to House of Lords.

Due to this fact, it was not a separation of powers in the british institutional system.

Whereas in the USA there are three "separate but equal" branches of Government, in the United Kingdom, Parliament was its supreme and highest court in the land seated in the House of Lords.

It was a "weak" separation.

I. General aspects

The functions of the highest courts were divided between two bodies[2].

The Appellate Committee of the House of Lords received appeals from the courts in England and Wales and Northern Ireland, and in civil cases from Scotland.

The Judicial Committee of the Privy Council considers questions as to whether the devolved administrations, the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly are acting within their legal powers.

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[2] Department for Constitutional Affairs – *Constitutional reform:A Supreme Court for the United Kingdom*, 2003, p. 10PE

Both sets of functions raised questions about whether there is any longer sufficient transparency and independence from the executive and the legislature to give people the assurance to which they are entitled about the independence of the Judiciary. The considerable growth of judicial review in recent years has inevitably brought the judges more into the political eye. It is essential that democratic systems do all that they can to minimise the danger that judges' decisions could be perceived to be politically motivated. The Human Rights Act 1998, itself the product of a changing climate of opinion, has made people more sensitive to the issues and more aware of the anomaly of the position whereby the highest court of appeal is situated within one of the chambers of Parliament.

The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, is requiring a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so. So the fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature[3].

The establishment of a separate Supreme Court is an important part of a package of measures which will redraw the relationship between the Judiciary, the Government, and Parliament to preserve and increase judges' independence.

The judicial business of the House of Lords was carried out by the Lords of Appeal in Ordinary, commonly known as the Law Lords.

Their number was fixed by statute, amendable by Order, and was set at a maximum of 12.

The 12 Law Lords have been specifically appointed under the Appellate Jurisdiction Act of 1876 to conduct the judicial activity of the House. All Law Lords are full members of the House and are holders of life peerages. Although the Law Lords sometimes conducted judicial work sitting as the House itself, they usually heard appeals as a Committee of the House called the Appellate Committee.

The role of the House of Lords in the judicial process had its origins in the development of both Parliament and the courts from the curia regis, the Royal Council of English early medieval monarchs[4].

Advice to the King whether about matters of state or responses to petitions for justice was offered by a council containing the great officers of state and the judges who also sat with the lords spiritual and temporal to form the Parliament.

In the fourteenth century, the Lords took the appellate jurisdiction into their own hands, using the judges and others only as assistants. The function has not been permanent. It fell into abeyance altogether in the sixteenth century and was revived as part of Parliament's general asserting of its authority in the seventeenth century.

By the mid-nineteenth century, the inadequacies of the House were such that the Crown attempted to introduce judges appointed for life to undertake the

[3] *Ibidem*, p. 11.
[4] *Ibidem*, p. 14.

judicial functions of the House. In the 1870s, several attempts were made formally to abolish the jurisdiction and set up a separate final court of appeal outside the House. An Act to achieve this was passed in 1873, but was never brought into effect. In the end, the Appellate Jurisdiction Act 1876 confirmed the jurisdiction and made the necessary provision to allow judicially qualified life peers to be appointed to enable the House to perform its judicial functions. The right of appeal from the Court of Session to the Scottish Parliament in civil cases was established by the (Scottish) Claim of Right in 1689. That right translated into a right of appeal to the House of Lords following the Treaty of Union in 1707. It has remained largely unchanged since then, and is now set out in the Court of Session Act 1988.

The House of Lords heard appeals from the Courts of Appeal in England and Wales and Northern Ireland in both civil and criminal matters and from the Court of Session in Scotland on civil matters[5].

It heard also criminal appeals from the High Court in England and Wales and from the High Court in Northern Ireland. The House heard appeals from the Courts-Martial Appeal Court. In rare circumstances, certain types of civil cases may be brought direct from the High Courts in England and Wales and Northern Ireland, bypassing the Courts of Appeal in what is known as the 'leapfrog' procedure.

Cases were normally analysed by a panel of five Law Lords. Each week, a panel of 5 was sitting in the House of Lords and a panel of 5 in the Judicial Committee of the Privy Council, leaving 2 Lords with time for writing judgments and other activities.

The Judicial Committee of the Privy Council was established under the Judicial Committee Act of 1833[6].

The membership of the Judicial Committee is wider than that of the Appellate Committee. All members of the Appellate Committee, including retired Law Lords under the age of 75, are members and in practice do the bulk of the work. Other Privy Counsellors who are or have been senior judges of courts within the United Kingdom are also members.

This includes past and present members of the Courts of Appeal of England and Wales and Northern Ireland and of the Inner House of the Court of Session in Scotland. The final category of members is Privy Counsellors who are judges of certain superior courts in other Commonwealth countries. At present there are 15 of these overseas members.

There were three main functions of the Judicial Committee[7].

First, it is the final court of appeal for a number of Commonwealth jurisdictions and for the Crown Dependencies of Jersey, Guernsey and the Isle of Man.

Second, it hears devolution cases which are referred to it either from the courts in Scotland, Northern Ireland or England and Wales or directly by the UK

[5] *Ibidem*, p. 15.
[6] *Ibidem*, p. 17.
[7] *Ibidem*, p. 17.

Government or one or other of the devolved administrations. Its function is to determine issues relating to the legal competence of the devolved administrations, Parliament or Assemblies having regard to the relevant devolution legislation.

Third, it has a number of more technical jurisdictions, dealing with appeals against pastoral schemes in the Church of England.

A Supreme Court along the United States model, or a Constitutional Court on the lines of some other European countries is a departure from the UK's constitutional traditions. In the United States the Supreme Court has the power to annul congressional legislation, and to assert the primacy of the constitution[8].

In the british democratic system, Parliament is supreme. There is no separate body of constitutional law which takes precedence over all other law. The constitution is made up of the whole body of the laws and settled practice and convention, all of which can be amended or repealed by Parliament. Neither membership of the European Union nor devolution nor the Human Rights Act has changed the fundamental position. Such amendment or repeal would certainly be very difficult in practice and Parliament and the executive regard themselves as bound by the obligations they have taken on through that legislation.

The main argument against the court was that the previous system had worked well and kept costs down. Reformers expressed concerns that the historical admixture of legislative, judicial and executive power in the United Kingdom might conflict with the state's obligations under the European Convention on Human Rights. Officials who make or execute laws have an interest in court cases that put those laws to the test. When the state invests judicial authority in those officials, it puts the independence and impartiality of the courts at risk. Consequently, it was supposedly possible that the decisions of the Law Lords might be challenged in the European Court of Human Rights on the basis that they had not constituted a fair trial.

The reforms were controversial and were brought forward with little consultation but were subsequently extensively debated in Parliament. During 2004, a select committee of the House of Lords scrutinised the arguments for and against setting up a new court.

II. The present situation

The UK Supreme Court is set-up by Part 3 of the Constitutional Reform Act 2005[9].

The initial members of the new Supreme Court are the former Lords of Appeal in Ordinary.

There are presently 12 such Lords of Appeal.

The twelve justices do not all hear every case - typically a case will be heard by a panel of five justices, but sometimes the panel may consist of three,

[8] *Ibidem*, p. 20.
[9] Andrew Le Sueur – *A report on six seminars about the UK Supreme Court*, 2008, p. 6.

seven or nine members. All twelve justices are also members of the Judicial Committee of the Privy Council, and spend some of their time in that capacity.

The Supreme Court is an appeal court, meaning that it only deals with appeals from the Court of Appeal, Civil Division the Court of Appeal, Criminal Division and the High Court (in England and Wales), from the Court of Session (in Scotland) and from the Court of Appeal (in Northern Ireland).

It replaced the House of Lords in its judicial capacity and has assumed the jurisdiction of the House of Lords under the Appellate Jurisdiction Acts 1876 and 1888.

The Supreme Court also has jurisdiction in relation to devolution matters under the Scotland Act 1998, the Northern Ireland Act 1988 and the Government of Wales Act 2006. This was transferred to the Supreme Court from the Judicial Committee of the Privy Council.

The right of appeal to the Supreme Court is regulated by statute and is subject to several statutory restrictions. The relevant statutes for civil appeals are the Administration of Justice (Appeals) Act 1934, the Administration of Justice Act 1960, the Administration of Justice Act 1969, the Judicature (Northern Ireland) Act 1978, the Court of Session Act 1988 and the Access to Justice Act 1999[10].

The Human Rights Act 1998 applies to The Supreme Court in its judicial capacity.

The Act is not confering any general right of appeal to the Supreme Court, or any right of appeal over and above any right of appeal which was provided for in Acts passed before the coming into force of the Human Rights Act 1998.

The Constitutional Reform Act 2005 makes provision for a new appointments process for Justices of the Supreme Court. A selection commission will be formed when vacancies arise. This will be composed of the President and Deputy President of the Supreme Court and a member of the Judicial Appointments Commission of England and Wales, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission. In October 2007, the Ministry of Justice announced that this appointments process would be adopted on a voluntary basis for appointments of Lords of Appeal in Ordinary. New judges appointed to the Supreme Court after its creation will not necessarily receive peerages.

The setting-up of the Supreme Court of the United Kingdom is a constitutional landmark for the United Kingdom. This may be a result of earlier constitutional developments such as the Human Rights Act and Article 6 of European Convention of Human Rights. Its effect is to put into evidence the independence of the highest court, to give added clarity about its constitutional reviewing role and to dissipate confusion that judges are „in the shadows of the legislature".

The jurisdiction of the Supreme Court is very close to that of its predecessor, with the exception that it will hear devolution issues formerly heard

[10] *Ibidem*, p. 8.

by the Judicial Committee of the Privy Council. The 2005 Act does not make any changes to the existing leave requirements for appeals to the top court. Nor does it give the new court any radically new powers. It will perform basically the same function as the Appellate Committee of the House of Lords[11].

One of the main aims of constitutional reform is to remove the perceived constitutional anomaly that the highest court of appeal in the UK was situated within one of the chambers of Parliament.

There were suspicions that this might create confusion about the independent status of the judiciary or might create the misleading impression that the highest court operated under the shadow of the legislature.

Although the Constitutional Reform Act 2005 does not give the new Supreme Court any significantly new powers, it is nonetheless useful. It clarifies the constitutional importance of judicial independence in the British Constitution[12].

The Constitutional Reform Act 2005 promotes the enhanced transparency of the new Supreme Court in other ways[13].

By providing summaries of the cases and press releases, the Supreme Court can contribute to greater public awareness and understanding of the work it does and the decisions it makes, including contributing to more informed media coverage of complex legal issues.

There are more possible reasons why increased transparency about judges" moral and ideological beliefs may undermine (rather than enhance) public trust and confidence in the judiciary[14].

The first concerns the danger that it would increase fears about the subjectivity and potential arbitrariness of judicial decision-making.

The second point is that being more transparent about judges" moral views may in fact lead to greater secrecy about those views and greater concealment of the role they play in judicial decision-making. These worries can also be applied to the prospect of increased transparency the moral, political and ideological foundations of judicial decision-making at the highest level. In the absence of a a legal education, it is very difficult to process the strands of information which may be exposed in such a transparency exercise.

The third point is the worry that putting judge moral and ideological beliefs in the public spotlight will in fact create some strange incentives.

It is necessary for senior full-time judges not to be members of the House of Lords, because it is inappropriate for them both to act as legislators and to perform judicial functions.

Members of the Supreme Court must be full-time judges[15].

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[11] Aileen Kavanagh – *a New Supreme Court for the United Kingdom:Some reflections on judicial independence, activism and transparency,* Legal research Paper Series nr. 58/july 2010, p. 1.

[12] *Ibidem*, p.3.

[13] *Ibidem*, p. 11.

[14] *Ibidem*, p. 14.

[15] *A Supreme Court for the United Kingdom Policy Paper*, 2002, p. 1.

There were no questions of the skill and integrity of the Law Lords in keeping separate their dual roles as both judges and legislators.

Although there is no question of subjective partiality, Law Lords were placed in constitutionally difficult positions.

Maintenance of objective impartiality is particularly important at a time of rapid growth in the role of judges in deciding highly politicised disputes involving the executive and, in some situations, the devolved legislatures.

The increased importance of demonstrating the separation of legislative and judicial functions was put into evidence by the Law Lords themselves.

There are three justifications to keep the Privy Council as a separate body[16]:

- the Privy Council has experience of deciding constitutional issues;
- it has a smaller work load than the Appellate Committee of the House of Lords;
- it has a broader membership than the Appellate Committee

There were three distinct functions of the judiciary[17].

The first is based on classical constitutional theory and the principle of separation of powers, according to which courts are limited to the settlement of specific disputes by applying positive law. The courts would be considered activist when they transgress this function, when they set less stringent rules of standing or when their decision addresses issues that to do not pertain to the dispute they are required to settle.

According with the second function, the judiciary operates as an important actor, in a continuous multi-participant process or network of decision-making. The court is one of many actors, who strive to achieve social consensus or equilibrium. The courts' role in this process can be measured by the social and political background of the decision, both before and immediately after its delivery. A court that contributes towards social change, operating within a social consensus, is fulfilling this second function and hence should not be considered ''activist''.

The third function is included in the United Kingdom's current constitutional structure, under which the courts are granted a central role of protecting and promoting core societal values.

Conclusions

In other states, reformation of the national court systems has been an element of profound change in a broader political system (Germany, Spain, Eastern Europe, South Africa).

The current conditions in the United Kingdom are different.

Top level court reform in is following on programme of constitutional reform enforced by the Labour government of 1997-2001.

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[16] *Idem*, p. 7.

[17] Margit Cohn, *Judicial activism in the House of Lords: A constitutionalist approach*, 2007, p. 2.

The current relationships between the british courts and the European Court of Justice and the European Court of Human Rights will continue.

Finally, it will deepen the process of allignment of british institutional system with the systems of other European Union states.

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