S·L·S
THE SOCIETY OF
LEGAL SCHOLARS

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RESPONSE TO THE CONSULTATION PAPER CP11/03

CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM

Introduction

The Society of Legal Scholars (SLS), formerly the Society of Public Teachers of Law (SPTL), is the foremost learned society for legal academics and jurists. Its purpose is the advancement of legal education and scholarship in the United Kingdom and Ireland. The Society was founded in 1908 and currently has over 2,300 members worldwide. This response was drafted on behalf of the Society by Professor Diana Woodhouse of the Department of Law at Oxford Brookes University, with input from officers of the Society. It was debated, amended and approved at the meeting of the Society's Executive Committee at the Institute of Advanced Legal Studies on 7 November 2003.

Introduction

The Society of Legal Scholars welcomes the Consultation Paper and the proposal contained within it to transfer the jurisdiction of the Appellate Committee of the House of Lords to a Supreme Court for the United Kingdom.

In relation to the questions posed within the Consultation Paper, the Society responds as follows:

1. Question 1: Do you agree that the jurisdiction of the new Court should include devolution cases presently heard by the Judicial Committee?

1.1 Yes, this is essential to prevent uncertainty should the Supreme Court and Judicial Committee reach different decisions on the same point, as could happen, most obviously, in the area of human rights. It is also important that there is no confusion over the Court's constitutional status. This might arise if the Judicial Committee retained jurisdiction over devolution issues.

2. Question 2: Do you agree that the number of full-time members of the Court should remain at 12 but that the Court should have access to a panel of additional members?

Question 3: If there were such a panel, under what circumstances could the Court call on it?

Question 4: Should the composition of the Court continue to be regulated by statute, or should it be more flexible?

2.1 It is important for the Court to be staffed at a level which enables it to carry out its business effectively and efficiently. However, what this should be depends, in part, on the answer to Question 19 i.e. whether the Court should continue to sit as panels or *en banc*. If it were thought desirable for it sit *en banc*, the number of sitting members could reduce to, say, 7 or 9, although there would need to be other arrangements made for the Privy Council. If it were thought appropriate for the Court to operate as two divisions i.e. civil and criminal/constitutional, the number of members might need to be increased, perhaps to 14, allowing for 7 in each division. Otherwise, 12 may be an appropriate number, particularly if members of the Supreme Court relinquish some of the duties currently undertaken by the Law Lords, such as chairing inquiries, which impact upon their availability to sit in the Court.

2.2. The Court should have sufficient permanent members to enable it in normal times to carry out its business without resort to a panel of additional members. Such a panel provides flexibility but there may be a perception that judges who sit only occasionally in the Supreme Court are inferior to permanent members. There is also the issue of perceptions about why a particular occasional member has been called to sit in a particular case. A panel of additional members is thus a poor substitute for full time members. If, however, it is seen as essential as a back-up mechanism, it should consist of retired members of the Court, up to the age of 75, with the President being responsible for the use of members of the panel.

2.3 The composition of the Court should continue to be regulated by statute in which is enshrined the criteria and process for appointment.

3. **Question 5**: **Should there be a Deputy President?**

3.1 Yes. There seems no reason not to follow current practice.

4. **Question 6: Should the posts of President and Deputy President be filled by the same process as membership generally, or should these appointments always be made on the advice of the Prime Minister after consultation, without involving the Judicial Appointments Commission?**

4.1 The jurisdiction of the Supreme Court means that it will be increasingly dealing with cases that are politically controversial. It is therefore important for the appointment process for all members of the Court, including the most senior, to be as independent and impartial as possible. It is also important for the reform of the system of judicial appointments to be coherent. This means there should be no anomalies. All members of the Court should therefore be appointed through the same process. This should involve a special Judicial Appointments Commission for the Supreme Court to take account of the appointments from Scotland and Northern Ireland. This Commission should, if possible, take account of the differing social and policy views of candidates for such appointments, not just issues of gender, ethnic and geographic

diversity. The role of the Prime Minister in judicial appointments should cease.

4.2 It is, however, particularly important that there is accountability to Parliament for these senior appointments. This suggests the Judicial Appointments Commission for the Supreme Court should make recommendations to the Secretary of State for Constitutional Affairs who is accountable to Parliament for them. Moreover, he or she should normally be an elected minister and thus sit in the House of Commons. This enables the minister to be questioned by elected representatives and is important in ensuring the appointments have democratic legitimacy.

5. **Question 7: Should the link with the House of Lords and the Law Lords be kept by appointing retired members of the Supreme Court to the House?**

5.1 Much depends on the future of the Upper Chamber. Assuming that it retains an appointed element, retired members of the Court could be appointed to it with two provisos. First, the position would need to be that all members were appointed. This means that appointment would be automatic and thus bypass the Appointments Commission for the House of Lords. A system whereby appointment depended upon the decision of the Commission could produce a situation where Supreme Court Justices, approaching retirement, were perceived as being overly cautious in order to ensure their appointment.

5.2 Second, in accordance with the need to separate judicial and legislative functions, retired members who still sit in the Supreme Court occasionally should not be appointed to the House. This may mean that, in practice, retired Supreme Court Justices are not appointed until they are 75 and this may affect the desirability of such appointments, particularly if the government is seeking to change the image of the House of Lords

6. **Question 8: Should the bar on sitting and voting in the House of Lords be extended to all holders of high judicial office?**

6.1 Yes. This is also important to prevent a blurring of the judicial/legislative function.

7. **Question 9: Should there be an end to the presumption that holders of high judicial office receive peerages?**

7.1 The awarding of a peerage is an honour and also an entitlement to sit in the Upper Chamber. Because the Appellate Committee was part of the House of Lords, it was necessary for its members to receive a peerage. This will no longer be the case with the removal of the judicial function to the Supreme Court. Moreover, if the judges of this Court continue to be awarded a peerage, the public may have difficulty in understanding that only the honour and not the entitlement is operative. The appearance of separation and independence of the Supreme Court could therefore be undermined.

7.2 However, given that we have an honours system, it seems appropriate that the holders of high judicial office should be appropriately honoured in recognition of their status in society. It would therefore seem appropriate for a new title to be devised.

8. **Question 10**. **Should appointments to the new Supreme Court continue to be made on the direct advice of the Prime Minister, after consultation with the First Minister of Scotland and First and Deputy Ministers in Northern Ireland and with the profession?**

Question 11: If not, should an Appointments Commission recommend a shortlist of names to the Prime Minister on which to advise the Queen following consultation with the First Minister of Scotland and the First and Deputy Ministers in Northern Ireland. Or should it be statutorily empowered to advise the Queen directly?

Question 12: If there is to be an Appointment Commission for Supreme Court appointments, how should it be constituted? Should it comprise members drawn from the existing Appointment bodies in each jurisdiction?

8.1 Appointment should be made by the Queen on the advice of a minister. It would be constitutionally inappropriate for a non-departmental body to make recommendations directly and it would cause problems for accountability. There is, however, no reason why the minister should be the prime minister and good reason why it should not. The most appropriate minister to fulfil this role is the Secretary of State for Constitutional Affairs who will be accountable to Parliament for the appointments.

8.2 The Appointments Commission should make recommendations to the Secretary of State for Constitutional Affairs and to the appropriate ministers in the other jurisdictions. The ministers should present names jointly to the Queen.

8.3 Given that the Supreme Court is a UK Court and will have judicial representation from all jurisdictions, there will need to be a separate Appointments Commission. Membership of this should be drawn from the three jurisdictions. In addition, although Wales does not constitute a separate jurisdiction, consideration should be given to some kind of Welsh input into the appointments process.

9. **Question 13: Should the process of identifying candidates for the new Court include open applications?**

9.1 If the government is serious about making the process open and transparent, it is essential that this should include an application process. It is also fundamental to any policy of equal opportunities. This does not preclude individuals, thought to be particularly suitable, from being encouraged by senior colleagues to apply. It does, however, enable others, who may be equally, but not as obviously, suitable, to put themselves forward.

10. **Question 14: Should there be any change in the qualifications for appointment, for example to make it easier to appoint distinguished academics? Or should this be a change limited to appointment to lower levels of the Judiciary, if it is appropriate at all?**

10.1 The Society recognises that there are already a number of serving members of the judiciary, including some at the highest levels, who have prior experience as academics. But the Society believes that the value of appointment of distinguished academics directly to senior judicial office is demonstrated by experience in other jurisdictions (e.g. Justices Stephen Breyer and Felix Frankfurter (USA), Chief Justice Beverley McLachlin (Canada) and Justice Albie Sachs (South Africa)). While the importance of the current qualification is recognised, there is a strong argument for distinguished academics being eligible to sit in the Supreme Court without necessarily having sat at a lower judicial tier. In particular, where constitutional cases are concerned, they can bring a wealth of knowledge and expertise which outweighs their lack of judicial experience.

10.2 In the Society's view an absence of trial court experience should not be an impediment to appointment, given that the great majority of members of the Supreme Court will have come through the traditional route. Indeed, it would seem short-sighted for the Supreme Court not to avail itself of such academic expertise. It is recognised that in some instances, where academics are used in other jurisdictions, it is in the context of a Constitutional rather than a Supreme Court. Yet distinguished academics can still play an important role, particularly if the new Court were to adopt a model of two divisions. If, however, it was felt essential for academics to have judicial experience before sitting in the Supreme Court, this could be satisfied by a period of one or two years in the Court of Appeal or the Inner House of the Court of Session.

11. **Question 15: Should the guidelines which apply to the selection of members of the new Court be set out administratively or through a Code of Practice subject to parliamentary approval, or in legislation.**

11.1 They should be set out in legislation.

12. **Question 16: what should be the arrangements for ensuring the representation of the different jurisdictions?**

12.1 There needs to be minimum statutory requirements of, say, 1 member from Northern Ireland and 2 from Scotland. There would also need to be a minimum number for England and Wales and, ideally, a requirement that at least one of these should have judicial experience in Wales. Such requirements could conflict with the principle of appointing the best. However, the importance of all jurisdictions being represented outweighs the possibility of candidates from one jurisdiction being particularly weak.

13. **Question 17: What should be the statutory retirement age? 70 or 75?**

13.1 There seems no reason for the retirement age not to stay at 70.

14. **Question 18: Should retired members of the Court up to five years over the statutory retirement age be used as a reserve panel?**

14.1 If such a panel is deemed to be necessary, it is appropriate for it to consist of retired members of the Court. This does, however, present problems, in that if they are appointed on an annual basis, they may be seen to lack the security of tenure required for independence. If, on the other hand, they are given a five year term of office (until they are 75), it is conceivable that, during the period, someone may become unsuitable for the role. The solution is perhaps for the Judicial Appointments Commission to nominate suitable retired members for a period of five years (or until they reach 75) and for the President to have discretion as to whom he or she asks to sit. This will enable a member of the panel to be sidelined if the President thinks he or she is no longer capable of effectively fulfilling the judicial role.

15. **Question 19: Should the court continue to sit in panels, rather than every member sitting on every case?**

15.1 The practicality of the court sitting in panels is recognised but it presents a major problem. While it is true that the Court will not be dealing with as many potentially controversial cases as, say, the United States Supreme Court, it only takes one or two cases where the composition of the panel is perceived to have affected the outcome for its reputation to be damaged. There is already press interest in the background of judges hearing sensitive cases and this will increase. The Court will not be a 'political' court, in the United States sense, but it will be operating in the political arena and judges, as now, are likely to be labelled 'conservative' or 'liberal'. Inevitably, if a decision is controversial, there will be speculation about what the outcome might have been had different judges sat. There might even be speculation that the panel was specifically chosen by the President to ensure a particular result. This would be avoided by the Court sitting *en banc*.

15.2 An alternative model is for the Court to adopt the practice of the Irish Supreme Court, whereby the seven most senior judges sit in cases which are of the utmost constitutional significance.

16. **Question 20: Should the Court decide for itself all cases which it hears, rather than allowing some lower courts to give leave to appeal or allowing appeals as of right?**

Question 21: Should the present position in relation to Scottish appeals remain unchanged?

16.1 While there are good reasons for giving the Supreme Court total control over its workload, they are probably outweighed by the reasons for retaining the current situation. This, however, should be kept under review. If the Supreme Court finds that its workload becomes too heavy, it can be reconsidered.

16.2 As far as Scottish appeals are concerned, the impetus for change should come from Scotland and it may be that, in time, it will decide that the right of appeal in civil cases is no longer appropriate.

17. **Question 22: What should the existing Supreme Court be renamed?**

Questions 23: What should members of the new Court be called?

17.1 The Higher Courts of England and Wales would seem an appropriate title for the current Supreme Court.

17.2 The most appropriate title is Justices of the Supreme Court. It is most important that the title of 'Lord' should no longer apply to members of the new Court. Retention of this title in any way will undermine perceptions of the Court as independent from the legislature. The retitling of members of the highest court has a knock-on effect on the members of the Court of Appeal, who should likewise become Justices (of the Court of Appeal).

7 November 2003