

# Chapter 9 – The Law Lords and the judicial functions of the second chamber

## The appellate function

**9.1** We received an impressive range of evidence on the question of whether the reformed second chamber should continue to exercise the judicial functions of the present House of Lords.<sup>1</sup> In practice, the House acts on the advice of its Appellate and Appeal Committees, composed of the Lords of Appeal in Ordinary<sup>2</sup> and other holders or former holders of high judicial office.<sup>3</sup> A number of weighty and well argued submissions, exemplified by the report of a distinguished Working Group established by JUSTICE and chaired by Lord Alexander of Weedon QC, contended that these functions should no longer be exercised by the second chamber and should instead be transferred to a separate Supreme Court for the United Kingdom.

**9.2** Other interested parties and commentators argued that the issue of whether there should be a separate United Kingdom Supreme Court, and what its jurisdiction should be, is not a matter which should be settled as a by-product of reforming the House of Lords. It was further argued that any such move would need to be carefully considered by a Royal Commission or other appropriate inquiry specifically appointed for that task. That was the line taken by the Lords of Appeal in Ordinary in their written evidence to us.

**9.3** We recognise that the question of how the superior courts of the United Kingdom should be structured raises a number of complex technical issues. Dealing with this question would involve a consideration of the appellate functions of the Judicial Committee of the Privy Council<sup>4</sup> as well as those of the House of Lords. Moreover, any proposal to adjust the arrangements for taking appeals from the Court of Session in Scotland would raise issues under the Act of Union and would appear to involve changes in a matter for which the Scottish Parliament is now responsible. Any such changes would therefore need to be taken forward in consultation with the Scottish Executive and require the consent of the Scottish Parliament.<sup>5</sup> These issues are outside our terms of reference, but we cannot simply leave them to one side.

**9.4** For a start, much depends on the method or combination of methods which will be used to constitute the reformed second chamber. It might, for example, be thought anomalous for appointed Law Lords to sit as members of an otherwise wholly elected second chamber. More generally, we are required to consider what the role and functions of the reformed chamber should be. Another Commission would need to be established

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<sup>1</sup> The House of Lords is the highest court of appeal for civil and criminal cases in England, Wales and Northern Ireland and for civil cases in Scotland.

<sup>2</sup> The 12 Lords of Appeal in Ordinary are salaried members of the House of Lords, appointed as life peers under the Appellate Jurisdiction Act 1876 from among senior judges and practising barristers to assist the House of Lords in hearing and determining appeals.

<sup>3</sup> Other members of the House of Lords who are entitled to sit on the Appellate and Appeal Committees include former Lords of Appeal in Ordinary, current and former Lord Chancellors and other holders or former holders of high judicial office, most of whom would be members of the House by virtue of being made a life peer under the Life Peerages Act 1958. No one can sit judicially after they have reached the age of 75.

<sup>4</sup> This has jurisdiction to decide disqualifications from the House of Commons, appeals from some Commonwealth countries, and determining appeals, a number of professional disciplinary tribunals and certain ecclesiastical matters. It also hears cases raising 'devolution issues' under the Devolution Acts.

<sup>5</sup> See the written and oral evidence received from The Rt Hon Lord Hope of Craighead.

to decide how the superior courts of the United Kingdom should be organised if the second chamber ceased to exercise judicial functions. But it is part of our responsibility to reach a view on whether there is anything to prevent the second chamber from continuing to exercise those functions. The separate question whether the Law Lords – especially the Lords of Appeal in Ordinary but also other holders and former holders of high judicial office – should continue to sit as legislators in the new chamber also touches on our responsibility to consider how the second chamber should be constituted. We are also required to take particular account of the impact of the Human Rights Act 1998, which may have a bearing on the position of the Law Lords. For these reasons, we took the view that we should at least consider the issues to the extent of deciding whether the current arrangements should remain in place pending any future dedicated inquiry into the arrangements for a separate Supreme Court for the United Kingdom.

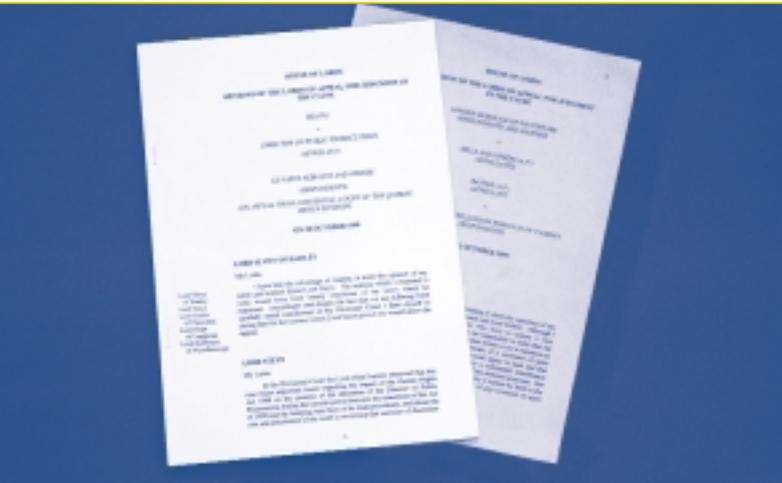
**9.5** One of the arguments for change is that it is wrong in principle for members of a legislature to exercise judicial functions. The ‘separation of powers’ doctrine, however, has never strictly applied in the United Kingdom. In practice there is, by convention, an absolute separation between the judicial and other work of the House of Lords. As the well known passage in Bagehot puts it, “[The judicial function] is a function which no theorist would assign to a second chamber in a new Constitution, and which is a matter of accident in ours.... No one indeed would venture *really* to place the judicial function in the chance majorities of a fluctuating assembly: it is so by a sleepy theory; it is not so in living fact”.<sup>6</sup> The fact that those exercising judicial functions would also be members of the legislature is not, of itself, an argument against the second chamber continuing to exercise the judicial functions of the present House of Lords.

**Conclusion:** There is no reason why the second chamber should not continue to exercise the judicial functions of the present House of Lords.

## The Law Lords

**9.6** The Law Lords make a positive contribution to the work of the House of Lords. They chair or serve on Committees. By convention, Law Lords chair the Joint Committee on Consolidation Bills, the Ecclesiastical Committee and Sub-Committee E (Law and Institutions) of the European Union Committee. They also give decisive opinions on the Privileges Committee. The Law Lords contribute to general debates and to the consideration of proposed legislation, giving the benefit of their extensive judicial experience. Even when they cannot offer personal views they can usefully clarify legal points or help to identify issues which require decision. They can often bring to bear their understanding of how law works in practice. Finally, the Law Lords can draw on their commitment to the rule of law and due process to identify proposed legislation or other developments which could threaten either of those concepts.

<sup>6</sup> Walter Bagehot. *The English Constitution* (1867), Chapter 3. The situation he described was reinforced by the Appellate Jurisdiction Act 1876.



A judgment of the House of Lords

**9.7** We accept that similar contributions could be, and indeed are, made by other members of the second chamber with legal expertise or experience. We would be reluctant, however, to see the Law Lords' contribution to the second chamber removed, unless that was judged to be essential. There is also a powerful argument that in the exercise of their judicial functions the Law Lords – and the judicial system generally – benefit from their membership of the second chamber. Their involvement in the second chamber raises their own awareness of the broader political context in which legislation and policies are formulated. Now that the European Convention on Human Rights has been enshrined in British law, it is even more

vital that the members of the senior judiciary are alert to the wider political context of their work. We therefore conclude, subject to clarification of the conventions about their role, that it would, on balance, be beneficial to Parliament for the Lords of Appeal in Ordinary to continue to be *ex officio* members of the reformed second chamber and to carry out its judicial functions. Given the effective separation between the appellate work and the other functions of the second chamber we do not consider that the continuation of the present arrangements would undermine the independence of the judiciary or public confidence in the judiciary. We consider the arrangements for appointing holders of other high judicial offices to the second chamber in Chapter 13.

**Recommendation 57:** The Lords of Appeal in Ordinary should continue to be *ex officio* members of the reformed second chamber and carry out its judicial functions.

**9.8** In view of our later recommendations about the length of members' terms of service in the second chamber, the terms for which Lords of Appeal in Ordinary can be appointed to the second chamber under the Appellate Jurisdiction Act 1876 should be amended to bring them into line with those of other members of the second chamber. To avoid any suggestion that their tenure could be affected by subjective considerations, they should automatically be reappointed if necessary for as long as they are entitled to sit on the Appellate or Appeal Committees.<sup>7</sup>

**Recommendation 58:** The terms for which Lords of Appeal in Ordinary can be appointed to the second chamber under the Appellate Jurisdiction Act 1876 should be amended to bring them into line with those of other members of the second chamber, subject to automatic reappointment for as long as they are entitled to sit on the Appellate or Appeal Committees.

**9.9** It is important that those exercising judicial functions should be, and be seen to be, open-minded and impartial in dealing with cases. Some mischief or inconvenience could arise if a Law Lord's participation in a debate or vote in the second chamber subsequently limited his or her ability to hear a related case. There is an argument that since the passage of the Human Rights Act and the Devolution Acts such risks have increased because

<sup>7</sup> i.e. until they reach the age of 75.

legislation on which members of the second chamber have commented or voted is more likely to be justiciable in the future. However, we consider that any problems can be dealt with by the judges exercising good sense and observing some basic conventions. The Rt Hon Lord Slynn of Hadley and The Rt Hon Lord Nicholls of Birkenhead explained when they came to see us that serving Law Lords would think seriously before expressing a view on a contentious issue and, if they did so, would then exclude themselves from considering any related case in the future.

**9.10** We appreciate that these conventions have been under some pressure in recent months. It would be helpful, in our view, if they could be set out in writing so that there was a clear framework of principles within which Law Lords could decide what course of action they should take and against which those decisions could if necessary be measured.<sup>8</sup> Any such statement should clarify the line between the Law Lords' judicial functions and their role in the legislature and deal with the concerns referred to above.

**Recommendation 59:** The Lords of Appeal should set out in writing and publish a statement of the principles which they intend to observe when participating in debates and votes in the second chamber and when considering their eligibility to sit on related cases.

## The Lord Chancellor

**9.11** It may be convenient at this point to respond to the proposals which have been put to us regarding the role of the Lord Chancellor. The fact that the Lord Chancellor is head of the judiciary in England and Wales and may sit on the Appellate Committee of the House of Lords is outside our terms of reference. The Lord Chancellor's role as a senior Cabinet Minister and head of an increasingly powerful executive Department is a matter for the Prime Minister. As we have said, we see advantage in maintaining the position that at least two Cabinet Ministers should be members of the second chamber and it could be seen as appropriate that major 'legal' Bills for which the Lord Chancellor is responsible should be introduced in the second chamber. The pending judgment of the European Court of Human Rights in the *McGonnell v the United Kingdom* case may require the position to be reviewed, but we do not consider that the present situation is incompatible with the public interest in an effective second chamber.

**9.12** The Lord Chancellor's role as Speaker of the second chamber carries with it no powers and so has no implications for the post holder's other functions. We consider the point further in Chapter 16 in the context of discussing the role of the Speaker in the reformed second chamber.



The Lord Chancellor

<sup>8</sup> The Court of Appeal judgment in the *Lockabail* etc case, issued on 6 November 1999, deals with many of the issues which such a statement would need to cover.