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The Supreme Court of the United Kingdom (UKSC), an Exploration of the Roles of Judicial Officers and Court Administrators and how the Relationship between them may be improved and enhanced: a Case Study

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Abstract:

This article provides a brief historical summary of the process that culminated in the creation of the Supreme Court of the United Kingdom (SCUK), highlighting important changes in the relevant laws and regulations and the institutional framework within which authority for final appellate review of lower court decisions was and currently is vested. It also examines the administrative organization of the SCUK, where authority for key elements of court administration at that court is vested and how, for practical purposes, the SCUK is administered.

Keywords: Court Administration; Judicial Administration; Court Governance; Court Management; Financial Administration

1. Introduction

The Supreme Court of the United Kingdom (UKSC) is unusual amongst supreme courts for a variety of reasons. This arises partly from its history and the way it came into being. Until 2009 the UK's final court of appeal was the 'Appellate Committee of the House of Lords'.

The judicial role of the House of Lords evolved over more than 600 years: originally from the work of the royal court, the "Curia Regis", which advised the sovereign, passed laws and dispensed justice at the highest level. Until 1399, both Houses of Parliament heard petitions for the judgments of lower courts to be reversed. After this date, the House of Commons stopped considering such cases, leaving the House of Lords as the highest court of appeal.

In 1876, the Appellate Jurisdiction Act was passed to regulate how appeals to the House of Lords were heard. From that time, for practical purposes, the UK had a supreme court in all but name. That Act provided for the appointment of 'Lords of Appeal in Ordinary', often known just as the Law Lords, who were highly qualified professional judges, to work full time on the judicial business of the House. These Law Lords were also able to vote on legislation as full Members of the House of Lords, thereby simultaneously exercising both judicial and legislative authority on behalf of the state, but increasingly by convention did not do so.

Before the Second World War, the Law Lords heard appeals daily in the chamber of the House of Lords. After the House of Commons was bombed in 1941, the Law Lords moved their hearings to a nearby committee room to escape the construction noise of the building repairs, temporarily reconstituting themselves as an Appellate Committee for the purpose. In fact, this temporary arrangement proved so successful that it continued for the remainder of the Appellate Committee's life until 2009.

The United Kingdom has three separate justice systems (one for England and Wales, one for Scotland and one for Northern Ireland) each of which is each headed by a Lord Chief Justice or equivalent. As a consequence the UKSC is the only UK court with UK-wide jurisdiction and the President of the UK Supreme Court (and before 2009 the Senior Law Lord) does not have, and has never had, responsibility for the administration of the courts throughout the UK.

History also accounts for the asymmetric jurisdiction of the UKSC. When Scotland joined the UK through a Treaty and Acts of Union in 1707, it retained its own separate court system. One consequence of this is that today the UKSC does not hear criminal but only civil appeals from Scotland (although it can hear criminal cases which raise human rights points), whereas it hears both criminal and civil appeals from the two other UK jurisdictions.

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2. Creation of the UK Supreme Court

In June 2003, as part of a wider range of constitutional reform which it then announced in order to make clearer the constitutional separation of powers between the Executive, the Legislature and the Judiciary, the UK Government decided to separate out the judicial and legislative roles of the House of Lords, by creating a fully separate Supreme Court of the United Kingdom.

The subsequent relevant legislation was enacted as the Constitutional Reform Act 2005 (CRA).
The UKSC legally replaced the House of Lords on 1 October 2009 as the UK final court of appeal, when the refurbishment of the former Middlesex Guildhall to be the new home of the UKSC had been completed and the relevant provisions of the CRA were brought into force. On 1 October 2009, the former Lords of Appeal in Ordinary were sworn in as Justices of the new UKSC.

The new court has exactly the same jurisdiction as the House of Lords did (final court of appeal on all cases in England & Wales and Northern Ireland and in all civil cases in Scotland), with the addition of jurisdiction over devolution cases (disputes between the UK Government and Parliament and the devolved administrations in Scotland, Northern Ireland and Wales), which was transferred from the Judicial Committee of the Privy Council (JCPC – see also the next paragraph). With some limited exceptions (so-called leapfrog appeals), appeals to the UKSC can only be made on appeal from the appeal courts in the three territorial jurisdictions on points of law of general public importance. There are no appeals on matters of fact. As was the case with the House of Lords there is also a 'permission to appeal' (PTA) regime in respect of appeals from England & Wales and Northern Ireland. Scottish appeals at present require certification from two Scottish Advocates that they are fit to come to the UKSC, although there is legislation currently before the Scottish Parliament, which would replace the certification process with a PTA regime similar to that which applies from the two other territorial jurisdictions. Written PTA applications are considered by panels of three justices, who decide whether to grant permission for an oral hearing. At present the Court receives around 250 PTA applications a year of which around 30% are granted - leading in the last year to around 80 actual UKSC judgments given.

At the same time in October 2009, the Judicial Committee of the Privy Council (JCPC), which remains the final court of appeal for around 30 Commonwealth, British Overseas Territories and Crown Dependency jurisdictions (including e.g. the Channel Islands, the Isle of Man and Gibraltar – **a full list is attached to this paper at Annex A**) moved from its former home at 9 Downing Street to be co-located with the UKSC. The Lords of Appeal in Ordinary, as they then were, also had served as the JCPC Board, so it made logistical sense to bring the physical locations of the two courts together. The administrations of the two courts were finally merged (under the Chief Executive of the UKSC) in April 2011.

3. Administration of the UKSC

The relationship between administrators and judges in the Supreme Court is in part set by statute, the Constitutional Reform Act 2005 (CRA), as subsequently amended by the Crime and Courts Act 2013. This clearly defines the key powers of the President of the Court and the Chief Executive, as well as those of the Lord Chancellor, the UK equivalent of the Minister for Justice. Although the relevant part of the CRA was passed to make manifest the independence of the UKSC from the legislature, in practice in its early years, the challenge has been to ensure the reality of its independence from the Executive. The relevant statutory provisions are set out below.

The court is supported by a Chief Executive (CE), Miss Jenny Rowe. She holds a statutory office created by s48 of the CRA, and she must carry out her functions in accordance with any directions given to her by the President of the Court, to whom she reports. She also may not act inconsistently with the standards of behaviour required of a civil servant or in breach of her duties as an Accounting Officer. Under the CRA, the present Chief Executive was appointed by the Lord Chancellor after consulting the President of the Court. In order to underline the independence of the Court from the Executive, the President was, however, successful in getting this provision changed in the Crime and Courts Act 2013; now the President of the UKSC will appoint future Chief Executives. The CRA also provides that the President may appoint the other officers and staff of the court, but under s48 (3) of the CRA the President of the Court may delegate to the Chief Executive this function and all other non–judicial functions of the Court; both Lord Phillips, the Court's first President, and now Lord Neuberger have indeed so delegated them.

The Chief Executive, officers and staff of the court are all civil servants and have their pay, terms and conditions determined as such. The CRA provided that the Chief Executive might determine the number of officers and staff of the Court and the terms on which they are appointed, with the agreement of the Lord Chancellor. Again, however, in order to underline the independence of the Court from the Executive, the President was successful in getting the statutory requirement for the agreement of the Lord Chancellor to staff terms and conditions removed in the Crime and Courts Act

2013, so these are now entirely determined by the Chief Executive, although they must remain consistent with the provisions which apply to the Civil Service as a whole.

Under the CRA, the Lord Chancellor is under a statutory duty to ensure the UKSC is provided with such accommodation and other resources as he thinks are appropriate for the Court to carry on its business. The Chief Executive is placed under a parallel statutory duty to ensure that the court's resources are used to provide an efficient and effective system to support the Court in carrying on its business. The administration of the UKSC is classed as a Non–Ministerial Department in its own right for Government accounting purposes. It is not part of the Ministry of Justice (MOJ).

So from 1 April 2010 onwards, i.e. its first full UK financial year of operations, the Court has had its own Estimate. Since 2010, for the financial year starting on 1 April 2011 onwards, it has had its funding allocation determined directly by the Treasury as part of the Treasury–led, Government-wide Spending Reviews, which normally cover a four year period. The next such Review is expected to take place in 2015 for the four years 2016 – 2020. Although the Treasury determines the allocation, it comprises money voted directly by Parliament, contributions from the three jurisdictions from which cases come to the UKSC, money raised from fees charged to parties to cases and a small amount from so called 'wider – market initiatives,' e.g. hiring out space for events to be held in the court building.

The justices have consistently regarded maintaining tangible independence from both the Legislature and the Executive, particularly the MOJ, as a key constitutional objective, the more so because the Executive, either Her Majesty's Government or another statutory public authority, is in practice a party in slightly more than half the cases in which an application is made or a hearing takes place before the UKSC. The CE is therefore also an Accounting Officer in her own right, accountable directly to the House of Commons Public Accounts Committee.

The CE has two immediate deputies: the Director of Corporate Services, who is also de facto the deputy Accounting Officer, who is responsible for the institutional and organisational side of the UKSC; and the Registrar, who is the court's senior lawyer and is responsible for the progress of cases and the Court's business. **An organogram of the staffing structure is attached to this paper at Annex B.**

Corporate services cover broadly (1) accommodation & health and safety; (2) finance; (3) human resources; (4) communications, publicity and educational outreach; and (5) records, IT and library services. The head of this function is also Secretary to the UKSC's Management Board.

The Registry functions cover the listing and progress of (1) applications for permission to appeal; (2) the actual hearing of appeals; (3) the issuing of judgments; and (4) the resolution of disputed costs issues. The Registrar has management responsibility for the justices personal support staff, namely their legally qualified) judicial assistants and their personal secretaries. The Registrar also has judicial functions delegated to her under the Supreme Court Rules of 2009, which together with the 14 Practice Directions, which supplement them, provide the practice and procedure to be followed by the Court. Thus the Registrar has two lines of accountability, one to the President and the Justices on her judicial responsibilities, and one to the Chief Executive on her administrative and management responsibilities.

We have found that, in trying to put the CRA into practice, there are internal tensions. Some of those have now been resolved through further legislation, for example, in relation to the appointment of the Chief Executive and the setting of staff terms and conditions, in the Crime and Courts Act 2013. Others potentially remain. During the passage of the Bill for the CRA, the Government gave repeated assurances to Parliament that the UKSC would be independent of Government and that its Chief Executive (and thus its administration as a whole) would be 'principally answerable to, and operate under, the day to day guidance of the President of the Supreme Court'; and that the Chief Executive 'will be accountable directly as Accounting Officer for the court rather than under the DCA [now MOJ] Permanent Secretary' (Lord Chancellor Hansard HOL 14 Dec 2004, col 1236 – 37). He said:

'The model now proposed by the Government is to establish the Supreme Court as an independent statutory body with its own estimate within the overall Department for Constitutional Affairs departmental expenditure limit and, as a result of a separate Estimate, independent financing from the Consolidated Fund through the normal supply process. The Chief Executive of the Supreme Court will be a separate Accounting Officer in right of the court itself and not a sub-accounting Officer under the DCA Permanent Secretary.

'Treasury accounting regulations make it unnecessary to spell out in full detail in the Bill how the revised model will work. However, I am sure that the House will appreciate my placing on the record how the model is to operate. The Supreme Court will be an independent statutory body responsible for appointing the staff for its own administrative service. That

service will be headed by a Chief Executive – a civil servant appointed by a process involving an *ad hoc* commission and designed to exclude political interference.

'The staff of the court will also be civil servants, accountable to the Chief Executive and not to the Minister. The Chief Executive himself will be principally answerable to, and operate under the day-to-day guidance of, the President of the Supreme Court and will be accountable directly as accounting officer for the court rather than under the DCA Permanent Secretary.

'The President of the Supreme Court and the Chief Executive will determine the bid for resources for the court in line with Governmental Spending Review timescales, and they will pass it to the Minister, who will include it as a separate line in the overall DCA bid submitted to the Treasury. The Treasury will scrutinise the overall DCA bid and approve the overall expenditure before putting the bid before the House of Commons as part of the overall Estimates. The House of Commons will approve the overall Estimates and transfer resources accordingly. Because the Supreme Court will have its own Estimate, the funds approved will be transferred to the court direct from the Consolidated Fund and not via the DCA. That assures the Supreme Court a high level of independence in securing and expending resources and in the day-to-day administration of the court.

'In this revised model, the Minister will simply be a conduit for the Supreme Court bid and will not be able to alter it before passing it on to the Treasury. Once the Treasury has scrutinised the bid and it has been voted on by Parliament, the funds will go directly to the Supreme Court from the Consolidated Fund rather than via the DCA. That ring – fences the Supreme Court budget and ensures that it cannot be touched by Ministers. The Chief Executive will be able to allocate resources as he considers appropriate to ensure an effective and efficient system to support the Court in carrying out its business. In other words the Chief Executive will be solely responsible for the administration of the Court, in accordance with directions from the President, and will be free from Ministerial control.

'Your Lordships will note, however, that this model retains some Ministerial involvement. That remains absolutely necessary, as it is a key constitutional principle that a Minister must remain ultimately responsible for securing funding from the Treasury and be answerable to Parliament for its overall operation.'

Perhaps because this explanation was not subsequently embodied in the words of the statute, we have found that a part of the challenge for the court administration since 2009 has been to hold subsequent Governments to operate pursuant to the statutory provisions, especially those in relation to the process for bidding for resources in the Government-wide spending Reviews, in accordance with the assurances Lord Falconer then gave.

The other key relevant undertaking subsequently given to Parliament was that by Lord Bach in 2010 during the passage of the Bill for the Constitutional Reform and Governance Act 2010. This was to make it clear that, although UKSC staff are civil servants, they do not report to and are not accountable to UK Government Ministers. Although Section 7 of that Act creates a statutory requirement for civil servants to carry out their duties for the assistance of the administration they serve, Lord Bach said, on moving the Second Reading of the Bill for that Act in the House of Lords on 24 March 2010 (Hansard col 960):

'Clause 7(2) provides that the Civil Service and the Diplomatic Service codes must require civil servants who serve an Administration, mentioned in Clause 7(3), to carry out their duties for the assistance of the Administration as it is duly constituted, whatever its political complexion. The Administrations in question are Her Majesty's Government and the devolved Administrations in Scotland and Wales. This does not affect civil servants who are on loan to or directly employed by bodies such as the Supreme Court, the Scottish Court Service or arm's length bodies, whose duty is to serve the organisation they are seconded to or employed by, and not the aforementioned Administrations.'

4. Practical Operation of the Court

We have developed both formal and informal mechanisms of working together with the Justices, to ensure that difficult issues can be raised and dealt with, but also to ensure that there is good communication on a daily basis. Although the President of the Court has formally delegated to the Chief Executive the non-judicial functions of the Court, this is on the basis that he is kept informed of issues.

This means the Chief Executive is very clearly responsible and accountable for issues such as finance, appointment of staff, provision of corporate services, etc. Having a civil servant accountable for these functions is important in ensuring that Parliamentary scrutiny is confined to civil servants and not to judges. This is why it is the Chief Executive that the Act

places under a direct statutory responsibility to Parliament to ensure that the Court's resources are used to provide an efficient and effective system to support the Court in carrying on its business.
S48 (4) of the CRA does provide that the Chief Executive must carry out her functions 'in accordance with any directions given by the President of the Court', but this formal statutory power has never been used.

There is at least a theoretical tension between this power and the Chief Executive's direct statutory responsibilities. Obviously this power could not be used to direct the Chief Executive to do anything illegal, and we think it could not be used to direct her to do anything which was either clearly incompatible with her status as a civil servant or in conflict with her direct statutory duty to use the resources provided by Parliament for the purposes for which they were voted and in the way which achieves the best value for money for the taxpayer. So far this has not been put to the test; we hope that such a test never comes to pass.

Any President would be foolish even to try to do so, since this could potentially risk exposing the Justices to the kind of Parliamentary and political scrutiny and accountability from which the existence of the statutory office of Chief Executive is designed to insulate and protect them and in order to preserve their independence from both Parliament and the Executive.

Further Reading:

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ANNEX A

Jurisdictions where the Privy Council is the final Court of Appeal
Anguilla
Antigua and Barbuda
Ascension
Bahamas
Bermuda
British Antarctic Territory
British Indian Ocean Territory
British Virgin Islands
Cayman Islands
Cook Islands
Dominica (albeit its Government has announced its intention to leave the JCPC)
Falkland Islands
Gibraltar
Grenada
Guernsey
Isle of Man
Jamaica
Jersey
Kiribati
Mauritius
Montserrat
Niue
Pitcairn Islands
Saint Christopher and Nevis
St Helena
St Lucia
St Vincent and the Grenadines
Sovereign Bases of Akrotiri and Dhekelia
Trinidad and Tobago
Tristan da Cunha
Turks and Caicos Islands
Tuvalu

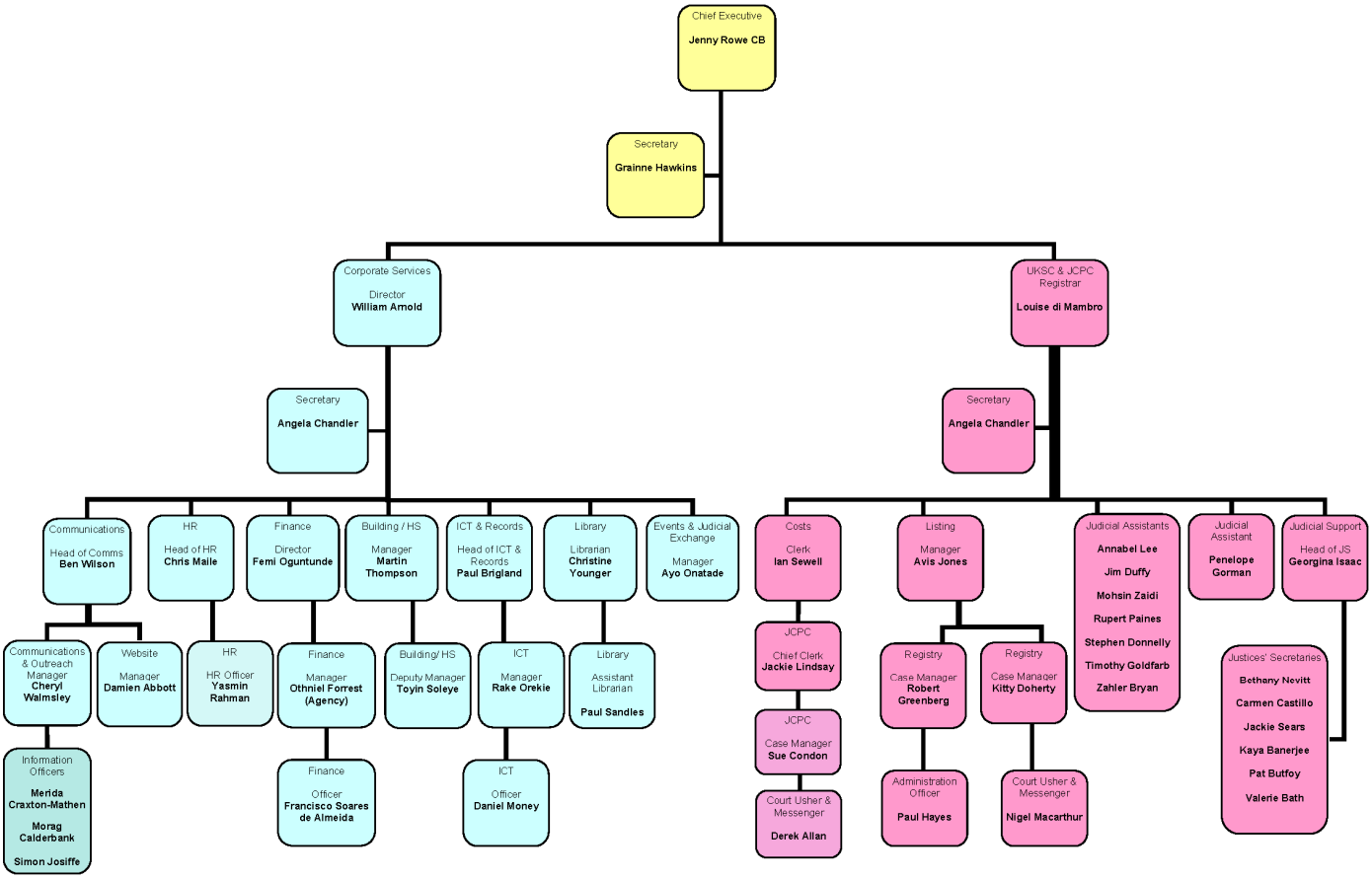
Brunei
Civil Appeals from the Court of Appeal to the Sultan and Yang Di-Pertuan for advice to the Sultan

UK
Royal College of Veterinary Surgeons
Church Commissioners
Arches Court of Canterbury
Chancery Court of York
Prize Courts
Court of the Admiralty of the Cinque Ports

Power to refer any matter to the Judicial Committee under section 4 of the Judicial Committee Act 1833.

Annex B

The UK Supreme Court Organisation Chart



The UK Supreme Court | Judicial Committee of the Privy Council
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