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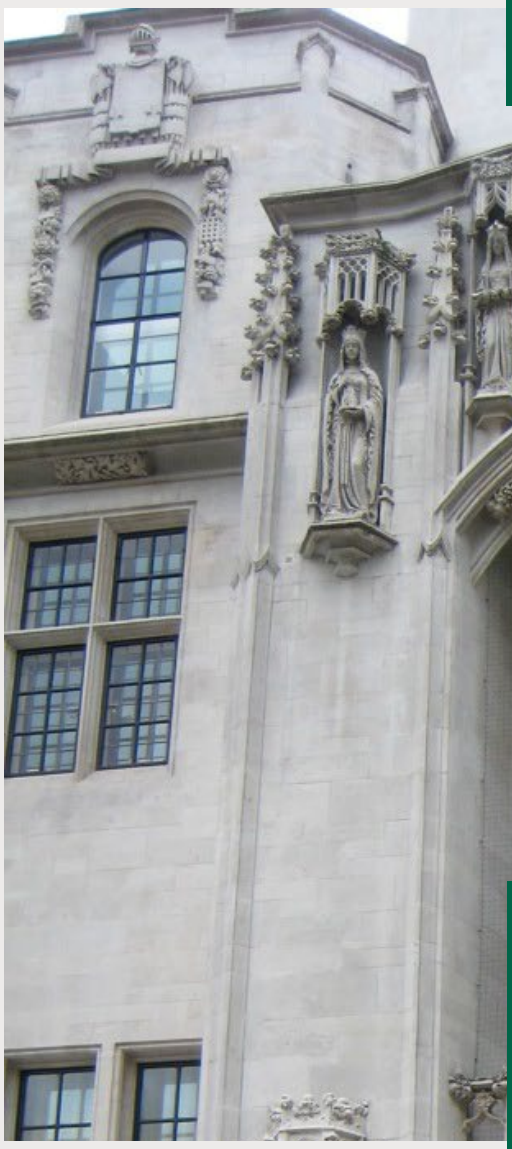
The UK Supreme Court



We are grateful to the UK Supreme Court for assistance with collating the data for several tables in the Annex. Any errors in them are the responsibility of the Commons Library.

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Summary

The UK Supreme Court (UKSC) was established in October 2009 under the Constitutional Reform Act 2005 (CRA 2005). It marks its 15th anniversary this year. The UKSC was created as part of a push to strengthen the separation of powers in the UK constitution, by removing the judiciary (the Law Lords) from the upper house of the UK legislature (the House of Lords).

The 12-member Supreme Court is the final court of appeal for civil matters throughout the UK and for criminal matters in England and Wales and in Northern Ireland. It also has a special role in relation to the devolution statutes in Scotland, Wales and Northern Ireland: it adjudicates on devolution "issues" raised and "references" made under those statutes.

The Supreme Court plays an important role in interpreting and applying the law of the UK's three territorial jurisdictions. Like its predecessor, the Appellate Committee of the House of Lords, it ensures the law is correctly interpreted and applied, and that the legal limits on the powers of public institutions are respected.

The Supreme Court's role is primarily that of an appellate jurisdiction. This means it is a forum for reconsidering the legal decisions of other courts and tribunals, rather than one that considers original disputes directly. Most of the cases heard by the Supreme Court are themselves brought from other appellate courts, but exceptionally some are brought directly from courts of first instance.

Devolution and compatibility "references" are unusual, in that they can be made directly to the UK Supreme Court. Before 2009, devolution references were made to the Judicial Committee of the Privy Council (JCPC), rather than the Appellate Committee of the House of Lords. For example, if the UK Government believes a bill passed by a devolved legislature would exceed that legislature's competence, its Law Officers can ask the UKSC to rule on that question before the bill is presented for Royal Assent.

The Supreme Court is physically based in the former Middlesex Guildhall, on the opposite side of Parliament Square from the Palace of Westminster. It shares its building, secretariat and facilities with the JCPC. The JCPC mainly functions as a final court of appeal for a range of Commonwealth jurisdictions, including the Crown Dependencies and some but not all British Overseas Territories, Commonwealth realms and Commonwealth republics.

UK Supreme Court judges also serve on the Judicial Committee of the Privy Council. By agreement, two serving justices of the UK Supreme Court also used to serve on the Hong Kong Court of Final Appeal (HKCFA). The UK Supreme court discontinued this arrangement in March 2022.

1 Overview

The UK Supreme Court (UKSC) is a relatively new constitutional institution, only having come into existence on 1 October 2009. It directly replaced the constitutional functions of the Appellate Committee of the House of Lords, which previously sat as the apex or final appeal court in the UK's constitution.

On its creation, the UKSC also assumed some of the responsibilities of the Judicial Committee of the Privy Council (JCPC): those in relation to "devolution issue" references.

1.1 The jurisdiction of the UK Supreme Court

The United Kingdom has three distinct legal and courts systems. These are split according to territorial jurisdiction:

- England and Wales;
- Scotland; and
- Northern Ireland.

The UK Supreme Court is unique in that it hears appeals from the courts of all three of these territorial jurisdictions. It therefore acts in different capacities depending upon whether it is hearing an appeal from England and Wales, from Scotland, or from Northern Ireland.[1]

Appellate jurisdiction

The UKSC is the final court of appeal in both England and Wales and in Northern Ireland, for both civil and criminal matters. In Scotland, it is only the final court of appeal for civil matters.

Devolution references

The UKSC's jurisdiction is not confined to the appellate functions previously exercised by the House of Lords.[2] It also assumed certain functions previously

1 CRA 2005, section 41(2): "A decision of the Supreme Court on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as the decision of a court of that part of the United Kingdom."

2 CRA 2005, section 40.

exercised by the Judicial Committee of the Privy Council (JCPC) between 1999 and 2009 in relation to devolution matters.[3]

Each of the devolution statutes (Scotland Act 1998, Northern Ireland Act 1998, Government of Wales Act 2006) allows or requires in certain situations either (a) a domestic court or (b) a government law officer to refer certain points of law directly to the Supreme Court for determination. These are known as "devolution issue" references.

The JCPC, unlike the Lords Appellate Committee, still exists. It is a final court of appeal from several Commonwealth jurisdictions, including Crown Dependencies (such as Guernsey), some British Overseas Territories (such as Bermuda), some independent realms (including Jamaica), and some independent republics (including Trinidad and Tobago).

Other reference procedures

Retained EU Law (Revocation and Reform) Act 2023

The Retained EU Law (Revocation and Reform) Act 2023 includes measures that would expand the role of the UK Supreme Court in hearing references, rather than just appeals. Section 6 of the Act provides that direct references to the UKSC can be made, both from lower courts and by government law officers, on the interpretation and application of legacy EU law.[4]

These new procedures are part of a wider package of measures intended to make it easier, and quicker, for lower domestic courts to depart from existing caselaw. Older caselaw handed down by the UKSC or Appellate Committee of the House of Lords, concerned with matters of (what was then) EU law, would otherwise have remained binding in relation to the interpretation of any law preserved under the EU (Withdrawal) Act 2018.

However, at the time of writing, the relevant provisions of the 2023 Act have not yet been brought into force.[5] Therefore, no references under the new procedures have yet been made.

UNCRC (Incorporation) (Scotland) Act 2024

The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 was passed by the Scottish Parliament in January 2024, coming into force six months later. It incorporates, within the Scottish Parliament's areas of devolved competence, the UNCRC (an international treaty to which the UK is a party).

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3 CRA 2005, Part 2, Schedule 9.

4 See Commons Library research briefing CBP-9841, Retained EU Law (Revocation and Reform) Act 2023, 28 July 2023, pp39-41.

5 Commencement regulations were made by the previous Government on 24 May 2024 (SI 2024/714), to bring the provisions into force from October 2024. However, the regulations were revoked by the current Government on 17 September 2024 (SI 2024/976).

This legislative framework shares some similarities with the Human Rights Act 1998. It confers certain powers on the Scottish courts, including the UK Supreme Court, either to "strike down" or to "declare incompatible" Acts of the Scottish Parliament that are inconsistent with the UNCRC.

As part of the enforcement apparatus, cases can arise either through judicial review/appeals or via a specific "compatibility issue" reference procedure, under Part 5 of the Act. These provisions came into force in July 2024 but have not yet been used to bring a case before the UK Supreme Court.

1.2 How does the appellate jurisdiction work?

An "appellate jurisdiction" is one which allows the decisions of lower courts to be overturned by a higher court. The appeals process in the UK's legal systems is governed by a combination of:

- Statutes (Acts of the UK Parliament and devolved legislatures);
- Procedure Rules (usually made by a Procedure Rule Committee or the judicial leadership and contained in statutory instruments); and
- Practice Directions (issued by the senior judiciary and which supplement the Procedure Rules).

There are different laws, rules and directions for different types of appeal, and the source of those rules differs depending on whether a lower court decision was taken in England and Wales, Northern Ireland, or Scotland.

The UK Supreme Court is unusual in being an appellate court that mainly hears appeals from other appellate courts. To provide legal certainty as to the decisions of those other appellate courts, and to ensure the UK Supreme Court is not overburdened with cases, the restrictions on appeal are typically more onerous than they are for challenging the decisions of first instance courts and tribunals. Most notably, the UK Supreme Court will not hear an appeal unless it raises an "arguable point of law on a matter of general public importance".[6]

England and Wales

In England and Wales, the UK Supreme Court is the final court of appeal for both civil and criminal cases. Litigants normally appeal against a decision of the Court of Appeal or, in exceptional "leapfrog appeals", directly from the High Court or equivalent bodies like the Upper Tribunal.[7] There are some

6 See UK Supreme Court Practice Direction 3.3.3.

7 Administration of Justice Act 1969, sections 12-15 and CRA 2005, subsections 40(2) and (4)(a) and Part 1 Schedule 9.

contexts, however, where there is no right of appeal at all to the UK Supreme Court against a decision of the Court of Appeal.[8]

Northern Ireland

Although Northern Ireland has a distinct legal and courts system, it closely resembles the structure of the courts of England and Wales. Cases considered by the UK Supreme Court normally come from the Northern Ireland Court of Appeal, though in a similar fashion to England and Wales, leapfrog appeals can also come directly from its High Court.[9]

Scotland

The courts system in Scotland is structured differently from the rest of the UK. The UKSC's role as an appellate court in civil cases is substantially the same as in the rest of the UK, except those cases come from the Inner House of the Court of Session instead of a body called a "Court of Appeal" and there is no equivalent of the "leapfrog" appeal, for example, from the Outer House.

No general right of appeal in criminal proceedings to the UKSC

Most notably in Scottish criminal law matters the UKSC is treated differently. There is no general right of appeal to the UKSC against decisions of the High Court of Justiciary, which is instead the final or apex court.

This limitation also applied to the appellate jurisdiction of the House of Lords prior to 2009, and is a consequence of Article 19 of the Acts of Union 1706-07.

"Devolution issues" and "compatibility issues" in criminal proceedings

The Scotland Acts, however, have created a narrow but important exception to this general principle of non-appealability. If the High Court of Justiciary determines a "devolution issue" or a "compatibility issue" in the course of Scottish criminal proceedings, that decision can then be challenged before the UK Supreme Court. Prior to 2009, challenges were heard by the JCPC.

The most notable example of this type of challenge was *Cadder v HM Advocate*, on which the UK Supreme Court ruled in 2010. That case related to the admissibility rules for certain types of police interview evidence, and its (in)compatibility with the ECHR's requirements on the right to a fair trial (under Article 6). Lord Hope, a former Deputy President of the Supreme Court, described the proceedings before the Court as "in effect, an appeal against the decision of the High Court of Justiciary".[10]

Since that case, the statutory role of the UK Supreme Court has narrowed. The Scotland Act 2012 now requires a distinction to be drawn between "devolution issues" (which can be appealed as before) and "compatibility issues" (in

8 UK Supreme Court, Practice Direction 1.2.21.

9 Administration of Justice Act 1969, section 16.

10 *Cadder v HM Advocate* [2010] UKSC 43.

respect of which the UKSC's role is more limited).[11] The UKSC can still overrule the High Court on the determination of a "compatibility issue" but it must now remit the rest of the proceedings back to the High Court for determination.

Permission to appeal

The right to appeal against a particular type of court decision is not usually absolute or unlimited. If it were, it would place significant pressure on appellate courts in terms of time and resources and would risk undermining the legal certainty of decisions taken by lower courts. Instead, an unsuccessful party must typically seek "permission" (sometimes known as "leave") to appeal against the decision of a lower court. In relation to UKSC appeals, this involves a decision of either the lower court or the UKSC itself to allow the case to proceed.

Someone can be granted "permission to appeal" but go on to lose the appeal itself. Permission is a preliminary procedural hurdle that must be cleared to secure (usually) a full oral hearing on the legal dispute at hand.

An arguable point of law on a matter of general public importance

The general test that both the relevant lower court and the UK Supreme Court will adopt – when deciding whether to grant permission to appeal to the UKSC – is whether there is:

> an arguable point of law on a matter of general public importance, which ought to be considered by the Supreme Court at this time.

This test is set out in several statutes and is reflected in the Practice Directions of the UK Supreme Court.

This threshold is somewhat higher than that for other domestic appellate courts, where it would usually be sufficient to demonstrate there is an arguable point of law at stake. The reasons for a more stringent requirement when appealing to the Supreme Court (and its predecessor, the Lords Appellate Committee) were explained by Lord Bingham in the case of *R (Eastaway) v Secretary of State for Trade and Industry*:

> In its role as a supreme court the [Appellate Committee of the] House [of Lords] must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.[12]

In 2013, Lord Reed further emphasised, in the Supreme Court case of *Uprichard v Scottish Ministers*, that the "public interest" is served by "bearing

[11] See Scotland Act 2012, section 36, inserting Criminal Procedure (Scotland) Act 1995, section s288AA.

[12] *R (Eastaway) v Secretary of State for Trade and Industry* [2000] UKHL 56.

in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal".[13]

Permission first to be sought from the lower court

As of October 2024, UK Supreme Court Rule 10(2) provides that:

> An application for permission to appeal must be made first to the court below, and an application may be made to the Supreme Court only after the court below has refused to grant permission to appeal.[14]

Normally, the "court below" will be either of the Courts of Appeal or the Inner House of the Court of Session. Those three courts serve as the initial "gatekeepers" on permission decisions, rather than the Supreme Court itself (though they can ultimately be overruled by the UKSC).

Exceptionally, under a "leapfrog" appeal in England and Wales or Northern Ireland, the "court below" will be a Division of the relevant High Court. One of the most notable examples of a "leapfrog" appeal to the Supreme Court was the *R (Miller) v Prime Minister* case on prorogation.[15] Partly for reasons of urgency, it was considered better that the appeal against the High Court decision should be heard directly by the UK Supreme Court instead of being relitigated first in the Court of Appeal.

Not all decisions of lower courts can be appealed

In certain situations, permission to appeal cannot be sought from the UK Supreme Court at all if the court below refuses permission to appeal.[16]

Most notably in England and Wales, if the Court of Appeal has refused a party permission to appeal a decision of (for example) the High Court, that party cannot then appeal that refusal of permission to the Supreme Court.[17]

Territorial differences

Previously, it was easier to secure permission to appeal to the UK Supreme Court against a decision of the Inner House of the Court of Session in Scotland than in the rest of the UK. This was because there was usually no requirement for permission to be sought from the Inner House.[18] However, the Courts Reform (Scotland) Act 2014, passed by the Scottish Parliament, brought Scotland's rules broadly into line with the rest of the UK.[19]

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13 *Uprichard v Scottish Ministers* [2013] UKSC 21.

14 The Court expects that a new set of rules will enter into force in December 2024. This would become new Rule 12(1). See UK Supreme Court, Consultation on revision of the Supreme Court Rules: Summary of responses and Supreme Court response, August 2024.

15 *R (Miller) v Prime Minister* [2019] UKSC 41 on appeal from [2019] EWHC 2381.

16 Criminal Appeal Act 1968, section 33(3); Court of Session Act 1988, section 40(3).

17 Access to Justice Act 1999, section 54(4).

18 Instead, the signature of two counsel (advocates or solicitor advocates) to the effect that the appeal was "reasonable" was sufficient.

19 Courts Reform (Scotland) Act 2014, section 117 (inserted new s40 and 40A into the Court of Session Act 1988).

1.3 Legal precedent and the Supreme Court

Previous practice with the Appellate Committee

The Appellate Committee of the House of Lords was able to issue decisions that were binding on lower courts. This meant lower courts had to follow the Appellate Committee's interpretation of the law in subsequent cases that came before them.

The Appellate Committee also had the authority to depart from its own precedents. The approach it took to departing from its own case law was set out in a Practice Statement made on 26 July 1966.[20]

The approach of the Supreme Court

The UK Supreme Court has adopted the same practice, which is that it will normally treat decisions of the Appellate Committee, and its own decisions, as binding, and will only depart from such a previous decision "where it appears right to do so".[21]

The UK Supreme Court therefore issues binding precedent on lower courts, including the Courts of Appeal and the Court of Session. However, a precedent set in a decision in (for example) an English case will not be binding on Scottish courts simply because it has been issued by the UK Supreme Court. As the Stair Memorial Encyclopaedia puts it:

> Decisions of the [UK Supreme Court] are not... strictly binding on the Scottish courts unless pronounced in Scottish appeals. [Supreme Court justices'] interpretation of statutes applicable to Great Britain or the United Kingdom pronounced in English or Irish appeals will be followed in Scotland unless, after argument in the Scottish courts, grounds for a different construction because of the context of Scots law are established. This is a matter for the Scottish courts and cannot be predetermined.[22]

Territorial cross-over and precedent

There are many situations where the domestic law is substantially the same on either a Great Britain-wide or UK-wide basis. In those contexts, it is highly likely that a judgment handed down by the UK Supreme Court with respect to one jurisdiction will be followed in another, even if it is taken only to be "persuasive" authority rather than "binding".[23]

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20 HL Deb 26 July 1966 c677.

21 UK Supreme Court Practice Direction 3; *Austin (FC) v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28.

22 Stair Memorial Encyclopaedia, Sources of Law (Formal) Volume 22, para 282.

23 For example, the English courts followed the infamous "Snail in the Bottle" House of Lords case of *Donoghue v Stevenson* [1932] UKHL 100 on the law of negligence, even though it was heard on appeal from the Scottish courts.

Where cases from different jurisdictions are heard together, the resulting judgment or judgments will be capable of binding lower courts in both or all relevant jurisdictions. Notable examples of this include the conjoined cases of:

- *R (Miller) v Prime Minister* and *Cherry v Advocate General for Scotland* (concerning the legal limits on the power to prorogue Parliament);[24] and
- *Cart v Upper Tribunal* and *Eba v Advocate General for Scotland* (concerning the availability of judicial review of Upper Tribunal decisions to the Court of Appeal in England and Wales and to the Court of Session in Scotland).[25]

1.4 The Justices

Twelve permanent justices

The Supreme Court consists of a maximum of twelve full-time judges. They are appointed on a permanent basis, subject to the UK-wide mandatory retirement age for judicial appointments, which is now 75 years.[26]

Judges can be drawn from any of the three legal systems in the UK (England and Wales, Scotland, or Northern Ireland).[27]

Like other holders of high judicial office, justices hold their appointment "on good behaviour" and can only be removed from office by an address from both Houses of Parliament.[28]

Parliament's power to remove senior judges from office has its origins in the Act of Settlement 1701. Those powers have never been used in relation to a Supreme Court justice or a Law Lord.[29]

President and Deputy President

Two of the twelve permanent judges have special titles and responsibilities. The President and Deputy President of the UK Supreme Court exercise statutory, leadership, and ambassadorial functions on behalf of the Court.

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24 [2019] UKSC 41 on appeals from [2019] EWHC 2381 (QB) and [2019] CSIH 49.

25 [2011] UKSC 28 and [2011] UKSC 29 on appeals from [2010] EWCA Civ 859 and [2010] CSIH 78.

26 Prior to the passage of the Public Service Pensions and Judicial Offices Act 2022, the mandatory retirement age for most judicial offices, including Supreme Court justices, was 70. Some UK Supreme Court justices previously served until age 72 or 75 under transitional arrangements in the Judicial Pensions and Retirement Act 1993.

27 Typically there are two judges from Scotland's legal system and one from that of Northern Ireland.

28 CRA 2005, section 33.

29 The power was only used once, in 1830, when Sir Jonah Barrington was removed as a High Court Judge in Ireland for misappropriation of court funds. Both Houses of Parliament delivered a humble address to King William IV, who then removed Barrington from office.

They oversee the judicial work of the court (including deciding the panel composition for cases) and work closely with its Chief Executive on various administrative matters.

An annual practice has emerged whereby the President and Deputy President give evidence to the House of Lords Constitution Committee.[30] The purpose of those sessions, in part, is to facilitate continued dialogue between Parliament and the judiciary, now that sitting senior judicial office-holders are disqualified from participating in the proceedings of the House of Lords.

Supreme Court panels and oral hearings

The number of Supreme Court judges that sit on a case varies. Usually there will be five justices. Some matters are disposed of by a panel of only three justices (for example, Appeal Panels that decide whether to grant permission to appeal a lower court's decision).[31] Sometimes cases will be presided over by a panel of seven, nine or eleven justices. This typically only happens if:

- the Court is asked to depart from one of its previous decisions;
- the case is of high constitutional importance;
- the case is otherwise of great public importance;
- the case requires the UKSC to resolve a conflict between decisions of its own, the Appellate Committee, or the JCPC; or
- the case raises an important point in relation to Convention rights.[32]

Normally, when cases come from the Scottish courts, both Scottish judges will sit on the panel, with a similar expectation arising in relation to cases from the Northern Ireland courts and the Northern Ireland judge. However, this is not a legal requirement.[33]

Oral hearings of the UK Supreme Court are (unless the Court has directed otherwise) open to the public, live streamed on its website, and recorded.

Acting Judges and the Supplementary Panel

From time to time, it is either necessary or expedient for the UK Supreme Court to rely on additional judges to sit on its panels and to transact its business. This has happened in the past, for example, in cases of illness or

30 See most recently Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 1 May 2024.

31 UK Supreme Court Practice Direction 3.1.1. Appeal Panels often make a determination "on the papers" (ie without a full oral hearing, based on written submissions).

32 UK Supreme Court Panel Numbers Criteria.

33 If a judge has recently been appointed to the Court, they may be ineligible to preside over an appeal, having made the appealed-against decision in their previous capacity. This explains, for example, why Lord Reed could not sit on the panel to hear the case of *Imperial Tobacco v Lord Advocate* [2013] UKSC 61 on appeal from [2012] CSIH 0009.

unavailability of one or more permanent justices, but could also happen in the event of recusal (when a judge steps aside due to a potential or actual conflict of interest).

Under sections 38-39 of the Constitutional Reform Act 2005 a judge can "act as a judge of the [Supreme] Court" in one of two situations. They must be:

- a sitting "senior territorial judge"[34]; or
- a retired judge, sitting on the Court's "supplementary panel".

Senior Territorial Judiciary

The court's senior leadership has, in recent years, made a point of involving senior territorial judges in its work, as a means of building connections with the wider judiciaries of the UK and encouraging more judges to apply for future Supreme Court vacancies. Lord Reed noted in evidence to the House of Lords Constitution Committee in May 2024 that:

> There is a danger that [justices of the Supreme Court] are in some sort of ivory tower, divorced from the rest of the legal system. We try to address that by, first, as I have mentioned, welcoming judges from the lower courts to sit with us. In the last year, we had nine judges sit with us, some of them more than once. Half a dozen were from England and Wales, two were from Scotland, from the Court of Session, and one was from Northern Ireland.
>
> I have been doing that every year for the last four years. We have now got through the whole of the Inner House of the Court of Session and about half the Court of Appeal in England. That is partly to encourage people to think about applying to join us, but it is also to remove the sense of distance and mystery about the court.[35]

Most of this wider participation has happened in relation to (Commonwealth) JCPC cases, rather than (domestic) UKSC cases (see **Annex, Tables 6-8**).

The Supplementary Panel

The supplementary panel consists of former senior judges who have not yet reached the age of 75 and who have retired from judicial office within the last five years. This includes willing former Supreme Court justices and former senior territorial judges. All appointments to this panel must be approved by the President of the Supreme Court and must be made within two years of the person ceasing to hold office.

Unlike serving judges, members of the supplementary panel are not, by that reason alone, disqualified from sitting in the House of Lords. There is

[34] This means the judge normally sits in the Court of Appeal in England and Wales or Northern Ireland, or in the Inner House of the Court of Session in Scotland.

[35] Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 1 May 2024, Q3.

therefore separate guidance for supplementary panel members with regard to their extra-judicial conduct.[36]

Judicial appointments

Ten of the eleven original justices of the Supreme Court were, immediately prior to its creation, Lords of Appeal in Ordinary (Law Lords).

Lord Clarke of Stone-cum-Ebony, then Master of the Rolls in the courts system of England and Wales, was appointed directly to the Supreme Court on its creation (and was, incidentally, already a life peer).

The vacant twelfth position was later filled by the appointment of Lord Dyson. He was previously a Court of Appeal judge in England and Wales but not a peer.

The appointments process for the UK Supreme Court differs from those in place for other domestic courts. Those are governed by three territorial judicial appointment bodies:

- the Judicial Appointments Commission;
- the Judicial Appointments Board for Scotland; and
- the Northern Ireland Judicial Appointments Commission.

Whenever a vacancy arises in the Supreme Court, or is soon expected to arise, a bespoke statutory appointments commission is set up by the Lord Chancellor to select a candidate.

Prerequisite qualifications

As with other senior judicial appointments, there are eligibility criteria for becoming a Justice of the UK Supreme Court. A candidate for Supreme Court justice must have done at least one of the following:

- held high judicial office for at least two years;
- satisfied the "judicial-appointment eligibility condition" in England and Wales on a 15-year basis; or
- been a "qualifying practitioner" in Scotland or Northern Ireland for at least 15 years.

Selection commissions

The selection commission must have representation from the UK's three territorial judicial appointments bodies. It must also have a non-legally

[36] UK Supreme Court, Guide to Conduct for Members of the Supplementary Panel (PDF), August 2021.

qualified person among its number. Further requirements are set out in regulations.[37]

Once the commission has selected a candidate, the Lord Chancellor is responsible for nominating them, whereafter the monarch formally appoints the justice by Letters patent (a form of written order from the King). Whereas historically the Lord Chancellor had considerable influence over the nomination for appointment of Law Lords, he or she has only a limited power to require the selection commission to reconsider the selection of a candidate for Supreme Court justice.[38]

Territorial selection criteria

When selecting a candidate for the UKSC bench, the selection commission must "ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom."[39]

This has been interpreted as an expectation that there will be judges representative of Scotland and Northern Ireland's legal professions among the permanent justices. Except for the short period following the death of Lord Rodger in 2011, there have always been two Scottish judges on the court, and one judge from Northern Ireland.

Diversity selection criteria

Since amendments made in 2013, the Constitutional Reform Act 2005 has included an "equal merit" tie-breaker provision.[40] This allows the selection commission to choose one candidate over another equally suitable candidate "for the purpose of increasing diversity within the group of persons who are the judges of the Court".

Of the 33 individuals to have served as a Supreme Court justice, only five are women. None have been from Black, Asian or minority ethnic backgrounds. As of October 2024, only two women serve as permanent justices of the Court. The supplementary panel includes a further female judge.

As of September 2024, there is a higher proportion of judges who are women in the other three domestic appellate courts. The Court of Appeal in England and Wales has 11 women (27%) and the Inner House of the Court of Session has three (27%). The Court of Appeal in Northern Ireland has only ever had one female justice, the current Lady Chief Justice Dame Siobhan Keegan.

The UK Supreme Court launched a Judicial diversity and inclusion strategy in 2021. Annual reports are published setting out the progress made against the key objectives.[41]

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37 Supreme Court (Judicial Appointments) Regulations 2013 (SI 2013/2193)

38 As above, regulations 20-22.

39 CRA 2005, section 27(8).

40 CRA 2005, section 27(5A).

41 See for example the 2024 Annual Update (PDF).

2 Historical context and the judicial Parliament

The UK Supreme Court replaced the Appellate Committee of the House of Lords as the UK's apex court. This section provides background, explaining:

- why the courts and legislature institutionally cohabited in the first place;
- why the House of Lords, rather than both Houses/Parliament generally, came to exercise judicial functions;
- how the system of appointing of Lords of Appeal in Ordinary (Law Lords) evolved;
- why the House of Lords created an Appellate Committee; and
- how that Committee operated prior to its abolition.

It also provides an overview of the Judicial Committee of the Privy Council, to which certain matters were referred instead of the judicial House of Lords. Those two bodies long had a close association, sharing, among other things, their core judicial membership.

For a more detailed history of the judicial House of Lords, you may wish to consult the House of Lords Library Note:

- The Appellate Jurisdiction of the House of Lords, 20 November 2009

2.1 The High Court of Parliament

Writing in 1978, Hood-Phillips and Jackson argued that:

> In origin Parliament was not primarily a lawmaking body, nor are its functions exclusively legislative at the present day. A "parliament" was a council summoned to discuss some important matter, and the name is still appropriate to its present activity of debating policy and questioning and criticising the government. The tile given it in the Book of Common prayer [last revised 1662], the "High Court of Parliament," reminds us that Parliament was, and [as of 1978] still is, a court–the highest court in the land. [42]

England's predecessor to Parliament, the "Curia Regis" (or King's Court) was best understood as a form of "court" through which the King sought advice

[42] O Hood Phillips and Paul Jackson, Constitutional and Administrative Law, 1978, pp123-124.

and exercised his powers to resolve disputes within his Realm, whether by means of resolving specific disputes or by enacting statute law. This helps to explain why the legislature had a prominent role in judicial matters until the 21st century.

It also explains the historical context behind Parliament's two Houses assertion of certain "privileges" to govern their respective affairs. This legacy continues to this day. For example, both Houses continue to exclude the judiciary from reviewing their own disciplinary proceedings, and the Bill of Rights [1688] prevents the "questioning" of Parliamentary proceedings in a court of law.

2.2 The judicial upper House

Originally, both Houses of Parliament in England asserted what would now be understood as a judicial role. Each of them would settle disputes between private parties, whether or not the dispute had been heard already in a common law court. However, by the 15th century, the primacy of the House of Lords in judicial matters became fairly settled. As David Lewis Jones put it:

> A significant part of Parliament's role, from the reign of Edward I, lay in providing remedies for petitioners either reluctant to pursue their causes in other courts or, to a lesser extent, wishing to appeal from a lower court. With the development of the two Houses of Parliament in the fourteenth century, petitions could be and were sent to either House. The Lords claimed, by the early fifteenth century, that judgment belonged to them alone: petitions considered by the Commons were sent to the Lords for confirmation, but petitions dealt with by the Lords were not referred to the Commons.[43]

Decline of judicial work in 16th century

With the emergence of specialised common law and equity courts, the volume of cases in the House of Lords declined dramatically in the 16th century. Only five cases were heard between 1514 and 1589, and none whatsoever between 1589 and 1621.[44]

Revival in 17th century

This trend reversed thereafter, with a significant and steady growth in cases in the 1620s. Petitions, if allowed by the House, would typically be sent to an ad hoc committee for consideration. The committee would then report the matter back to the House, whereafter the whole House would render a decision. This ad hoc arrangement was replaced with a standing committee in 1621, consisting initially of eight members, of which only two had legal

[43] David Lewis Jones, The Judicial Role of the House of Lords before 1870 in Blom-Cooper, Dickson and Drewry (eds), The Judicial House of Lords 1876-2009, 2009, p3.

[44] James Hart, Justice Upon Petition: The House of Lords and the Reformation of Justice 1621-1675, 1991, p15.

training and experience, though quickly expanding to 39 members within eight years. The work of the Committee on Petitions was supported by judges of from England's senior courts, who were issued writs to attend and give expert advice on both legislative and judicial matters. From 1624, the standing committee was given the authority to hear and grant petitions on their own initiative, rather than via reference.[45]

The English Civil War and the Restoration

The judicial work of the House of Lords was interrupted from 1629-1640, during which period Charles I sought to govern as monarch without recourse to Parliament. The outbreak of the English Civil War in 1642 also severely disrupted the House's ability to meet and transact any of its business, including the hearing and disposal of its judicial petitions. As James Hart has said of this period:

> In simple practical terms, the radical depletion of its membership and the desertion of the greater part of [the House of Lords'] judicial personnel drastically impaired efficiency. It was difficult to delegate judicial responsibilities when the referees (both inside and outside the house) had disappeared. The committee structure, on which judicature largely depended, had collapsed and with it went the procedural mechanisms which had defined and ordered proceedings. Hearings in individual cases had to be conducted by the assembled house, which was understandably disinclined to devote the time and attention needed for private causes when the public ones had become so overwhelmingly important.[46]

Hart also pointed to the institution having lost credibility:

> The house could no longer claim to be a large and widely representative tribunal committed to mediating without prejudice between the legal interests of subject and subject, and between subject and sovereign. Nor, despite protestations to the contrary, could the House be said to be exercising legal authority in the name of the Crown. The king's success in establishing his government in exile, in holding Parliaments in Oxford and in convening courts of law had made that abundantly clear and cast a very long shadow over all the concurrent proceedings at Westminster… it was obviously difficult to provide genuinely effective legal remedy when the weight of judicial authority and the principal instruments of judicial process lay in Oxford.[47]

At the beginning of the Protectorate established by Oliver Cromwell in the 1650s, the legislature functioned as a unicameral body. Towards the end of the Protectorate, however, moves were made to establish an "other House" with similar judicial functions to that of the pre-War House of Lords.

Following the Restoration of the monarchy, the House of Lords was restored and recommenced its judicial work along similar lines to its pre-War configuration. A new Committee on Petitions was established to consider and

45 James Hart, Justice Upon Petition: The House of Lords and the Reformation of Justice 1621-1675, 1991, p37.

46 As above, p175.

47 As above.

report to the House on petitions, whether at first instance or on appeal from the decision of other courts.

The shift to an appellate-only jurisdiction

The late 17th century marked the end of the House of Lords' role as a first-instance court.

In the 1660s the case of *Skinner v East India Company*, the House of Lords asserted its right to resolve a dispute referred to it, following a petition delivered to King Charles II by Thomas Skinner (a merchant). The East India Company, some of whose members sat in the Commons, had protested that the Lords should not take an "original complaint" of this kind (in other words it should not act as a court of first instance).

The Lords ruled otherwise, leading to a dispute between the two Houses about whether Skinner's petition, and its disposal, represented an abuse of the upper House's privileges. In 1669, Charles II ordered both Houses to expunge any records of the dispute from their Journals. Since then, the House of Lords has not asserted a right to act as a court of first instance, except in relation to cases concerned with impeachment and peerage claims.[48]

The case of *Shirley v Fagg*, in the 1670s gave rise to another dispute between the two Houses. That case concerned the authority, or otherwise, of the House of Lords to hear cases involving members of the House of Commons. The case, and others related to it, concerned the availability of appeals from the equity courts (Court of Chancery) rather than the common law courts. The Lords ultimately retained that appellate jurisdiction over courts of equity, but the cases against Fagg and others were discontinued.

Impact of the Treaty of Union 1706

The pre-Union Parliament of Scotland was unicameral. It had no judicial upper House. There was no appeal against the final decisions of the High Court of Justiciary (in criminal cases) though individuals could "protest for remedy of law" to the King and Parliament (of Scotland) against sentences pronounced by the Court of Session (in civil cases). The Claim of Right Act 1689 (broadly the equivalent of the Bill of Rights [1688] in England) provides:

> That it is the right and privilege of the subjects to protest for remedy of law to the King and Parliament against Sentences pronounced by the lords of Session providing the same Do not stop Execution of these sentences.

The question arose, during the negotiation of the Treaty of Union in 1706, whether cases from Scotland's appellate courts should be appealable to the House of Lords, following the extinction of the Parliament of Scotland. This

[48] David Lewis Jones, The Judicial Role of the House of Lords before 1870, p6; House of Lords Library, The Appellate Jurisdiction of the House of Lords, LLN 2009/010, 20 November 2009, p4.

was part of a wider concern about whether, and to what extent, Scotland would retain a separate and independent legal system from England.

Article 19 of the Treaty, which was incorporated into domestic law by both the Union with England Act 1707 (passed by the Parliament of Scotland) and the Union with Scotland Act 1706 (passed by the Parliament of England) sought to address these issues. Among other things, it said that both the Court of Session and High Court of Justiciary were to:

> remain, in all time coming, within Scotland, as [they are] now constituted by the Laws of that Kingdom, and with the same Authority and Privileges, as before the Union, subject nevertheless to such Regulations for the better Administration of Justice, as shall be made by the Parliament of Great Britain.

Further to that, Article 19 provided that:

> No Causes in Scotland [shall] be cognizable by the Courts of Chancery, Queen's Bench, Common-Pleas, or any other Court in Westminster-Hall; and that the said Courts, or any other of the like Nature, after the Union, shall have no Power to cognize, review, or alter the Acts or Sentences of the Judicatures within Scotland, to stop the Execution of the same.

Despite those provisions, which on one reading appeared to exclude appeals from decisions of the Court of Session and the High Court of Justiciary, it was regarded as an open question whether the House of Lords would accept civil and/or criminal appeals from Scotland. However it was also expected that, if cases were brought, they would be few and far between, owing to the perceived impracticality of bringing a case from Scotland down to London.[49]

In 1708, the case of *Roseberry v Inglis* provided an explicit precedent for Scottish civil appeals being allowed by the upper House. When the volume of civil cases from Scotland grew rapidly, and far in excess of expectations, legislation was passed to restrict the circumstances in which appeals could be brought against Court of Session decisions.[50]

The situation with criminal appeals was slightly different. In 1713, the House of Lords overturned a decision of the High Court of Justiciary (*Magistrates of Elgin v Ministers of Elgin*) and other similar cases were brought in the first seventy or so years following the Union. However, in the capital case of *Bywater v Lord Advocate*, the House of Lords dismissed the appeal, saying that since no right of appeal lay to the Parliament of Scotland against High Court of Justiciary decisions in capital cases, the Treaty of Union conferred no right of appeal to the House of Lords.[51] Although further attempts were made to appeal against Scottish criminal cases until 1876, none were successful.

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49 House of Lords Library, The Appellate Jurisdiction of the House of Lords, LLN 2009/010, 20 November 2009, p5.

50 See the Court of Session Act 1808 and the Administration of Justice (Scotland) Act 1808.

51 *Bywater v Lord Advocate* 2 Paton's Ap. 564.

2.3 Self-denying restraint of non-judicial members

Historically, the judicial function of the House of Lords was exercised by the upper House in plenary session. Although a matter would often be referred to a committee, many of whom might have considerable legal experience and expertise, the final decision would, formally at least, be a matter for the House as a whole.

However, given the expertise and experience of judicial peers, it became increasingly rare for the House to deliberate and separately vote upon judicial matters.[52] The expectation had emerged that the conclusions of the Law Lords, even if not unanimous and even if at odds with the general sentiments of Peers as a whole, would be allowed to stand.

However, a clear convention did not crystalise until 1844, when the House considered an appeal against a conviction for conspiracy of Daniel O'Connell, a prominent Irish politician. The Law Lords had divided 3-2 in favour of upholding his appeal, only for non-judicial members of the Lords to begin delivering their own opinions in Lords proceedings. At the exhortation of the Prime Minister, Sir Robert Peel, the lay members of the House of Lords did not force a division, and O'Connell had his conviction successfully overturned. [53]

Since then, the position was as described in the 2007 Companion and Guide to the Standing Orders of the House of Lords:

> By convention, members of the House who are not Lords of Appeal take no part in judicial proceedings.[54]

A lay peer last sought to intervene in judicial business in 1883. Lord Denman sought to concur with the dissenting judgment in *Bradlaugh v Clarke*. His contribution was ignored and the majority judgment was upheld.

2.4 Attempted abolition of the appellate upper House

In 1873, the Gladstone Liberal government introduced the Supreme Court of Judicature Bill. This legislation proposed radically to overhaul the (then) convoluted and disparate courts system in England. It proposed, in effect, to

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52 David Lewis Jones notes that by the late 1830s, the House had seven peers with judicial experience and that this was sufficient for a quorum to hear House of Lords appeals. See The Judicial Role of the House of Lords before 1870 in Blom-Cooper, Dickson and Drewry (eds), The Judicial House of Lords 1876-2009, 2009, p11.

53 See above and *O'Connell v The Queen* (1844) 11 Cl. & Fin. 155.

54 Companion and Guide to the Standing Orders of the House of Lords, 2007, para 11.11.

merge several different courts into what we would recognise today as the High Court's "divisions" and the unified Court of Appeal.

As part of these reforms, however, the Bill also proposed to end the appellate jurisdiction of the House of Lords in England, making the new Court of Appeal the final appellate court.[55] Among the reasons for this change, the Liberals argued that the House of Lords system was ill-suited to the appointment of the most able judges, as the upper House (at that time) relied almost exclusively on hereditary peerages to underpin its membership.[56]

The Supreme Court of Judicature Act 1873 was passed, but never came properly into force. The appellate jurisdiction of the House of Lords was therefore ultimately retained following the passage of further legislation under Benjamin Disraeli's Conservative government.

2.5 The Appellate Jurisdiction Act 1876

The Disraeli Conservative government legislated, through the Appellate Jurisdiction Act 1876, to retain or reinstate (depending on one's perspective) a role for the House of Lords as the final court of appeal in England. However, in recognition of concerns about judicial appointments and hereditary peerages, the 1876 Act provided an innovation, to bring a clearer professional hierarchy to key judicial appointments, and move away from a dependence on hereditary peerages.

Lords of Appeal in Ordinary

The 1876 Act initially allowed for the appointment of up to two salaried "Lords of Appeal in Ordinary" (or Law Lords) to the House of Lords, for the purposes of supporting the transaction of its judicial business. These statutory Law Lords would be granted peerages and would, under the original plans, be ex officio members of the House of Lords. They would preside over cases alongside the Lord Chancellor and any other senior judges (or former senior judges) who happened to be members of the House of Lords.[57]

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55 Appeals in Scottish and Irish cases to the House of Lords would not have ended under the 1873 Act. It was thought constitutionally inappropriate to make such appeals available to a Court of Appeal that would be fundamentally English in character and composition, especially given Article 19 of the Treaty of Union 1706.

56 Would-be House of Lords judges would either have to inherit a peerage, or a new hereditary peerage would have to be created for them, neither of which the Liberals saw as desirable.

57 At that time, this would typically include the Lord Chancellor's predecessors and any other senior judges (or former senior judges) that had been granted, or inherited, an hereditary peerage e.g. the Lord Chief Justice and/or Master of the Rolls (from England) and the Lord President of the Court of Session (from Scotland), were often hereditary peers. Latterly, some members of the senior territorial judiciary were conferred life peerages under the Life Peerages Act 1958 (e.g. Lord Cullen of Whitekirk and Lady Butler-Sloss) hence were eligible to preside as additional Lords of Appeal.

The first two 1876 Act Law Lords were Lord Blackburn and Lord Gordon of Drumearn.[58]

Additionally, the 1876 Act provided for the creation of two further Law Lords in the (relatively) near future. This would follow the death or other vacation of office of other paid judges who were members of the Judicial Committee of the Privy Council.[59]

This further expansion of the new scheme gave rise to the appointment of Lord FitzGerald in 1882 and Lord Hannen in 1891. From 1891 onwards, there were therefore four Lords of Appeal in Ordinary.

This arrangement was subsequently modified in two important ways by further legislation.

Law Lords to be peers for life

Firstly, the Appellate Jurisdiction Act 1887 enabled those appointed Law Lords under the 1876 Act to continue sitting as Peers after vacating judicial office (whether by resignation or retirement).[60] Therefore, Law Lords became the first type of life peerage with full rights of participation in Lords proceedings.

Raising the maximum number of Law Lords

Secondly, the maximum number of Law Lords was successively increased:

- the Appellate Jurisdiction Act 1913 raised the limit from four Law Lords to six;
- the Appellate Jurisdiction Act 1929 further raised the limit to seven;
- the Appellate Jurisdiction Act 1947 further raised the limit to nine; and
- the Administration of Justice Act 1968 further raised the limit to eleven.

Thirdly, the Administration of Justice Act 1968 made it possible to increase the maximum number of Lords of Appeal in Ordinary by way of an affirmative statutory instrument. This power was only used once. The Maximum Number of Judges Order 1994 (SI 1994/3217) allowed for up to 12 Lords of Appeal in Ordinary, rather than 11. This maximum formed the historical basis for the UK Supreme Court consisting of up to 12 permanent justices.

The number of Lords of Appeal in Ordinary repeatedly increased because of a commensurate increase in judicial work for the House of Lords. As then Lord Chancellor, Lord Mackay of Clashfern put it when proposing the 1994 Order:

> the judicial business of your Lordships' House and the Judicial Committee of the Privy Council shows no sign of abating. Indeed, petitions for leave to

58 Lord Watson replaced Lord Gordon of Drumearn when he died in office.

59 The Judicial Committee of the Privy Council at that time would have included, for example, hereditary peers who held high judicial office.

60 This was done ostensibly to allow Lord Blackburn to continue to sit as a Peer after retiring.

> appeal to the House of Lords this year have already significantly exceeded the total of petitions presented last year and the indications are that the number of appeals presented will show a marked increase over the level of recent years.[61]

He also drew attention to the other "public duties" Lords of Appeal were increasingly expected to carry on in the 1990s, including chairing public bodies and public inquiries and maintaining links with the judiciaries of other countries, especially those in the Commonwealth, United States and European Union. These duties meant that existing Law Lords were occasionally unable to sit, and therefore others were needed to take their place.

By the time that the appellate House of Lords was to be abolished in 2009, there were more Lords of Appeal in Ordinary than other Lords of Appeal (whereas the reverse used to be true). This transition was attributable both to the raising of the cap on 1876 Act appointments and to the more stringent rules on judicial retirement introduced in the mid-1990s.

House of Lords panel sizes

Although the judicial House of Lords could be quorate with just three judges present (under the 1876 Act) a panel would more often sit with five, and occasionally seven or nine judges.[62]

In exceptional cases, judges who were not Lords of Appeal used to be summoned to the bar of the House Of Lords to render their opinion on a dispute, which would support its deliberations.[63]

2.6 The Appellate Committee

The longstanding practice until 1948, had been to hold judicial sittings in the House of Lords chamber until 4pm. There would then be a brief suspension of the sitting, whereafter the House would transact its public business.

In 1941, the House of Commons Chamber was hit by an incendiary bomb, and completely destroyed by the ensuing fire. After a brief period during which both Houses convened in Church House, the House of Commons was given temporary use of the House of Lords Chamber, with Peers (secretly) using the Palace of Westminster's Robing Room during the remainder of the Second World War.

After the war, remedial works were carried out in the Palace of Westminster. The noise this caused made conditions "intolerable" for the Law Lords during

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61 HL Deb 30 November 1994 c687.

62 For example, the case of *Jackson v Attorney General* [2005] UKHL 56 concerning the limits of Parliamentary sovereignty was heard by a panel of nine Law Lords.

63 For example, in *Allen v Flood* [1898] AC 1, a bench of nine Lords of Appeal was assisted by the opinions of eight High Court judges.

judicial sittings. As a "purely temporary measure" it was suggested that an Appellate Committee should be created.[64] This would allow Law Lords to convene and hear a case in a (quieter) committee room. The Committee, consisting of the Law Lords on the panel for a case, would then "report" their opinions to the House as a whole, including their judgments and proposed order or remedy, whereafter the House would formally adopt their decision. When Parliament was in recess, the Appellate Committee could continue to sit in the Lords Chamber, though typically it would only do so in October.[65]

This "temporary" measure ultimately proved convenient in other respects, enabling the House of Lords to commence its public business earlier on sitting days. The arrangement persisted through until the abolition of the House of Lords' appellate judicial functions in 2009.

The Appellate Committee should not be confused with Appeal Committees. The latter were committees of the House of Lords that considered an application for permission to appeal against the judgment of a lower court. If an Appeal Committee (which usually consisted of three Law Lords) was minded to grant permission to appeal, there would then be a full hearing on a case, heard by the Appellate Committee.

Being committees of the House, neither Appellate nor Appeal Committees of the House of Lords had the legal authority to dispose of a case on their own. The Companion and Guide to the Standing Orders of the House of Lords, prior to 2010, said of judicial procedure:

> Appeal and Appellate Committees have no power to determine the matters referred to them, but must report their conclusions to the House. The agreement of the House to Appeal Committee reports is usually signified by silent Minute entry. The reports of Appellate Committees however are considered and agreed to at judicial sittings of the House. Such sittings generally take place at 9.45 a.m. on Wednesdays. Proceedings are brief: the House agrees to consider the report of the committee on a particular cause; each Lord of Appeal then indicates his Opinion on the appeal by reference to his written speech (made available free of charge to those present); the House then agrees to the report and a final, detailed question disposes of the substantive issues raised by the appeal. In urgent cases, the Lords of Appeal can ask the House to dispose of an appeal before their written Opinions have been prepared.[66]

64 James Valance White, The Judicial Office, in Blom-Cooper, Dickson and Drewry (eds), The Judicial House of Lords 1876-2009, 2009, p36.

65 Mark Littmann, Appellate advocacy: a view from the Bar in Blom-Cooper, Dickson and Drewry (eds), The Judicial House of Lords 1876-2009, 2009, p423.

66 Companion and Guide to the Standing Orders of the House of Lords, 2007, para 11.10.

2.7 The "modern" judicial House of Lords

How were Law Lords latterly appointed?

In a report for the UCL Constitution Unit published in 2001 (PDF), Andrew Le Sueur and Richard Cornes described the (then) process of appointing Law Lords as follows:

> Law Lords are appointed by the Monarch on the advice of the Prime Minister. The Prime Minster is provided with a list of potential appointees by the Lord Chancellor. The extent to which the Prime Minister is guided by the Lord Chancellor, and the number of names put to the Prime Minister, are unknown and presumably dependent on the characters of the Prime Minster and Lord Chancellor and the relationship between them. It at least seems clear that unlike in Australia the decision is one shared (though perhaps in varying ways) between these two Ministers, that the Cabinet does not play a role, and that partisan politics does not usually, if ever now, play a part. In considering the list of candidates to be put to the Prime Minster, the Lord Chancellor will consult with senior members of the judiciary.[67]

As with other judicial appointments (prior to the creation of the independent judicial appointment bodies) therefore, the Lord Chancellor, simultaneously (a) a Cabinet Minister (b) presiding officer of the House of Lords and (c) head of the judiciary in England and Wales, had a great deal of influence on the appointment of Law Lords in the event of a vacancy.

The Senior and Second Senior Law Lords

Historically, the Lord Chancellor had presided on the Woolsack during House of Lords judicial proceedings. As Lord Hailsham explained in 1984:

> Before it was changed in 1969, the custom was that in the absence of either the Lord Chancellor or an ex-Lord Chancellor, the senior Lord of Appeal in Ordinary would sit [as] Speaker, seniority being based on the seniority in the peerage, so that a Lord of Appeal in Ordinary holding a higher rank in the peerage would take precedence over one holding a lower rank in the peerage.[68]

In 1969, changes were made so that the senior Lord of Appeal in Ordinary would take precedence over former Lord Chancellors in the current Lord Chancellor's absence. This was thought more appropriate given their typical relative judicial experience. It was also thought more urgent, given that the Lord Chancellor by that point was more often absent owing to other commitments. The new arrangement also based seniority on the date of appointment of a Law Lord, rather than the rank of their peerage.

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67 Andrew Le Sueur and Richard Cornes, The Future of the United Kingdom's Highest Courts (PDF), June 2001, para 13.2.

68 HL Deb 27 June 1984 c915.

From 1984 onwards, however, new arrangements were put in place, to create two specific roles: those of "Senior Law Lord" and "Second Senior Law Lord". Rather than being positions assigned by date of appointment, Law Lords would be appointed to these positions by the Lord Chancellor and would take precedence ahead of other Law Lords when presiding over judicial proceedings of the House. In their absence, other Law Lords would continue to be ranked by date of appointment for the purposes of presiding over proceedings.

This change was made to enable Lord Diplock to relinquish his responsibilities as the highest-ranking Law Lord, while continuing to serve as an "ordinary" Law Lord. However, its wider effect was to formalise an appointed leadership structure among the judges of the apex court. This would eventually lead to the UK Supreme Court having a President and Deputy President appointed distinctly from ordinary justices on a similar basis.

2.8 The Judicial Committee of the Privy Council

The UK has had, for centuries, more than one apex court. The Judicial Committee of the Privy Council (JCPC) is the sometimes-forgotten sister body of (previously) the judicial House of Lords and (now) the UK Supreme Court.

Its history mirrors, in many respects, the appellate jurisdiction of the House of Lords, in that it also emerged out of the Curia Regis (King's Council). It similarly existed as part of a larger body that was far from exclusively judicial in character (the Privy Council).

Judicial Committee of the Privy Council Act 1833

The Committee was put on a statutory basis from 1833 onwards.[69] Whereas the judicial House of Lords would deal with the vast majority of domestic legal appeals, the JCPC was principally concerned with colonial, and later certain Commonwealth, appeals. To this day, the JCPC hears appeals from:

- the Crown Dependencies (the Isle of Man, Guernsey and Jersey)
- British Overseas Territories (such as Gibraltar and Bermuda)
- several Commonwealth realms (such as The Bahamas and Grenada)
- a Commonwealth monarchy, Brunei and
- some Commonwealth republics (such as Trinidad and Tobago).

The JCPC still transacts, though very rarely, domestic judicial business. This includes appeals to His Majesty in Council from:

[69] Judicial Committee of the Privy Council Act 1833.

- the Disciplinary Committee of the Royal College of Veterinary Surgeons; and
- certain schemes of the Church Commissioners under the Pastoral Measure 1983.

The JCPC is responsible at first instance for resolving disputes under the House of Commons Disqualification Act 1975. This arrangement was more important prior to 2009, as it ensured, nominally at least, that no part of the House of Lords was responsible for adjudicating on the application of the membership rules of the House of Commons.

Other more obscure domestic judicial business of the JCPC can potentially include appeals from:

- the Court of Chivalry (on heraldry disputes);
- the Prize Courts (relating typically to the seizure of ships);
- the Court of Admiralty of the Cinque Ports (dealing with piracy and collisions at sea); and
- certain ecclesiastical courts.

Section 4 of the 1833 Act also allows His Majesty to refer any other matter to the Judicial Committee of the Privy Council for its opinion.[70]

Judicial membership

The membership of the JCPC, though not identical to that of the judicial House of Lords, was invariably very similar. Historically, the JCPC was chaired by the Lord President of the Council, though the Lord Chancellor, as Keeper of the Great Seal, was also a member. Those who were (or were former) Law Lords or territorial judges, provided that they were Privy Councillors, could also participate in JCPC proceedings.

The most significant difference between the apex courts was that, particularly in relation to colonial or Commonwealth appeals, other statutes might provide for non-UK judges also to preside over, and non-Peers could be appointed to, the JCPC.

The Judicial Committee Amendment Act 1895 allows current and former judges from certain overseas jurisdictions to become a JCPC judge. However, they have to meet two eligibility criteria.

Firstly, the person in question must be a Privy Councillor. Secondly they must be, or have been, either a Chief Justice or a Justice of a designated Supreme or superior court for the purposes of the 1895 Act.

[70] Judicial Committee of the Privy Council, Role of the JCPC.

New Zealand's Chief Justice, for example could technically sit on the JCPC provided they were also a member of the Privy Council.[71] This is the case even though New Zealand has itself passed legislation (in 2003) to end its domestic appeals to the JCPC.[72]

In the more distant past, Sir Shadi Lal (previously the Chief Justice of the Lahore Court) was an appointed member on the JCPC between 1934 and 1938, to hear cases from (what was then known as) British India.

Contemporary membership of the JCPC

The Constitutional Reform Act 2005 updated the membership criteria of the JCPC, which are set out mostly in section 1 of the Judicial Committee Act 1833. The practical effect of the changes was to remove the Lord President of the Council and the Lord Chancellor as members of the Committee.

Any person who is under 75 years old and who holds, or has held, high judicial office (as defined in the 2005 Act) is able to preside on the JCPC. This means, in theory, that any current or former senior territorial judge (whether appellate or first instance) could conceivably sit on JCPC cases where requested.

In practice, the most JCPC panels consist exclusively, or mostly, of those who are also current justices of the UK Supreme Court. It is rare for more than one JCPC panellist in a given case not to be a current UKSC justice.

Nevertheless, 28 sitting senior territorial judges participated in JCPC cases since 2020:

- 21 from the judiciary of England and Wales
- 4 from the judiciary of Scotland
- 3 from the judiciary of Northern Ireland

These participation figures are drastically higher than for UK Supreme Court cases over the same period.[73] The increased use of senior territorial judges, especially in JCPC cases, has been a deliberate part of attempts to encourage candidates to stand for vacancies to the Supreme Court and to increase judicial diversity. As Lord Reed explained in evidence to the House of Lords Constitution Committee in April 2022:

> I have been inviting judges from the lower courts and, to a disproportionate extent, women, to sit with us. This is something that is new. Over the last year, I have invited 15 judges from the Court of Appeal or its equivalents to sit with us. Seven of those were women and one of those sat with us twice so women

[71] The current holder is not a member of the Privy Council, but her predecessor was.

[72] Under transitional arrangements in New Zealand's Supreme Court Act 2003, appeals in relation to pre-existing cases continued. The last of these, *Pora v The Queen* was decided in 2015, with (then) NZ Chief Justice Dame Sian Elias participating on the panel of five JCPC members.

[73] See Annex, Tables 6-8 for data on senior territorial judges presiding over UKSC and JCPC cases.

> have been more than pulling their weight. As a proportion, of course, they are well below 50%. If I have been inviting 50% women, that has been favouring them. The idea is to demolish some of the myths about the court and let them see what it is really like to work with. Hopefully, they find we are a friendly bunch and it is interesting work so they think about applying.[74]

Reintroducing non-UK justices to the JCPC

Although some jurisdictions, like New Zealand, have severed ties with the JCPC, almost all of the court's work still relates to non-UK appeals. Acknowledging this, Lord Reed, the President of the UK Supreme Court, said in evidence to the Lords Constitution Committee in March 2021:

> I am acutely conscious... we are 12 British people from a British culture sitting on appeals from countries that are very different from this one. Sometimes that becomes very obvious... we recently had two cases about same-sex marriage, which is an intensely controversial issue in the jurisdictions that the cases came from... religion generally is of more central significance to society in some of these jurisdictions than it is in this country now.
>
> The suggestion I have put forward is that we should be enabled to invite judges who actually have experience of sitting in these countries to sit with us. This used to happen with judges, for example, from India sitting in the Privy Council, and from Ceylon, as it then was. However, it does not happen now. In fact, it cannot happen now because there are none who are Privy Councillors and whom we could invite to sit. I have proposed a way forward on that, which would give the Privy Council a rather different look; it is currently with the Government for consideration.[75]

In May 2024, the Judicial Committee of the Privy Council issued a press release indicating that the UK Government had agreed to proceed with proposals to add non-UK judges to its membership.[76] It noted:

> The Court and the Ministry of Justice are now working on detailed arrangements to welcome judges from countries served by the JCPC, subject to the approval of His Majesty the King.

Lord Reed also advised the Lords Constitution Committee that:

> I first made the proposal to government three years ago. I am pleased to be able to tell you that the Lord Chancellor has now approved the proposal and we are working on the detailed arrangements. What is needed is Orders in Council to cover jurisdictions that are not currently covered, and the appointment of suitable judges as privy counsellors. That is not a matter simply for me or the Lord Chancellor; ultimately it is a matter for the King. However, that work is now in train, following the approval I received for my proposal.[77]

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74 Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 6 April 2022, Q11.

75 As above, Q18.

76 Judicial Committee of the Privy Council, JCPC proposal approved by the government, 8 May 2024.

77 Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 1 May 2024, Q8.

In late August 2024, the King approved the appointment of Dame Janice Pereira, the recently retired Chief Justice of the Eastern Caribbean Supreme Court, as a Privy Councillor.[78] Lord Reed subsequently announced in September 2024 that she would sit alongside other justices in a number of JCPC hearings in December 2024, adding that:

> She will bring to our work a wealth of experience and expertise. Having a judge with direct experience of life in the Caribbean will strengthen our ability to serve the countries there from which we hear appeals.[79]

Devolution issues jurisdiction

When the Scotland Act 1998, Northern Ireland Act 1998 and the Government of Wales Act 1998 were passed, they created a new type of legal challenge, known as the "devolution issue" jurisdiction. This type of challenge allowed for questions about the competence of devolved institutions to be dealt with under a reference procedure. The intention was to ensure UK-wide consistency in the application of similar statutory rules about legislative and executive competence.

Originally, this jurisdiction was overseen by the JCPC, rather than the judicial House of Lords. This reflected the approach previously taken to similar arrangements in the Government of Ireland Act 1920 and the Northern Ireland Constitution Act 1973. Part of the reason for this approach was the sensitivity around the Treaty of Union 1706, and the idea of cases from Scottish courts (especially its criminal courts) being determined by the Appellate Committee of the House of Lords.

The JCPC handed down between zero and four devolution issue judgments each year between 2000 and 2009. It never had a bill of a devolved legislature referred to it prior to Royal Assent.

When the UK Supreme Court was created, the devolution jurisdiction was transferred from the JCPC to it.

Co-location with the UK Supreme Court

Prior to 2009, the JCPC would typically meet in the Privy Council Chamber in Downing Street. It now shares the former Middlesex Guildhall with the UK Supreme Court, and pools administrative resources. There are three main court rooms in the shared facility, two of which are usually used for Supreme Court business, and the other for JCPC cases.

78 HM Government, Privy Council Appointments: 28 August 2024.

79 UK Supreme Court, Caribbean Judge the Hon Dame Janice M. Pereira DBE to sit on the Judicial Committee of the Privy Council.

3 The Constitutional Reform Act 2005

The creation of the UK Supreme Court was a decision by the Labour Government to strengthen the separation of powers in the UK's constitution. It was part of a wider set of reforms that departed from a more "fused" constitutional settlement. That package of reforms, legislated for in the Constitutional Reform Act 2005, had three notable objectives to this end:

- to end the practice of Law Lords (members of the judiciary) and other senior judges simultaneously exercising both judicial and legislative functions;
- to separate out the functions of the Lord Chancellor, so that he was no longer simultaneously (a) a senior member of the executive (b) the head of the judiciary and (c) the Speaker of the House of Lords; and
- to create an independent Judicial Appointments Commission, distancing the executive (and in particular, the Lord Chancellor) from day-to-day decisions about the selection of candidates to become judges.

As also explained in 2.8 above, the 2005 Act reformed aspects of the UK's other apex court, the Judicial Committee of the Privy Council.

3.1 The separation of powers

The doctrine of the "separation of powers" is the idea that different types of state power should be functionally independent of one another. As John Locke put it in his Second Treatise of Government:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.[80]

The separation of powers is often understood as underpinning, among other things, the rule of law. It does this by preventing power from being exercised in arbitrary or unlimited ways. The traditional model recognises three main kinds of power, or "branches", in respect of which there should be a degree of separation:

[80] John Locke, Second Treatise of Government, 1690, Chapter 12.

- the **legislative** branch (with the power to make laws);
- the **executive** branch (with the power to implement laws); and
- the **judicial** branch (with the power to interpret and apply laws).

Separating these functions is usually understood to be a "check and balance" against abuses of power or tyranny. As James Madison described it in the 47th of the Federalist Papers:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[81]

Different constitutions embrace the separation of powers to different extents and in different ways. Presidential systems, such as that of the USA, often adopt a stricter approach to separation of powers (especially between the executive and the legislature). By contrast, a lot of parliamentary systems of government have a weaker form of separation of powers, as the executive is derived from and secures its mandate via the legislature and its elections.

Separation of powers and judicial independence

The idea of "separation of powers" is closely related to judicial independence. Although the UK historically has not had a strong formal separation of powers, the independence of the judiciary has been an important part of our constitutional arrangements for centuries. Emphasising the importance of judicial independence, the judiciary's website says:

> Judges must be free to exercise their judicial powers without interference from litigants, the State, the media or powerful individuals or entities, such as large companies. This is an important principle because judges often decide matters between the citizen and the state and between citizens and powerful entities. For example, it is clearly inappropriate for the judge in charge of a criminal trial against an individual citizen to be influenced by the state. It would be unacceptable for the judge to come under pressure to admit or not admit certain evidence, how to direct the jury, or to pass a particular sentence. Decisions must be made on the basis of the facts of the case and the law alone.[82]

The UK's constitution being uncodified, and having evolved over several centuries, there were several features in the early 21st century that would be regarded as anomalous and inconsistent with even a looser principle of separation of powers. Some of these might be regarded as a risk to, or at least to the perception of, judicial independence.

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81 The Federalist Papers, No. 47, 1 February 1788.

82 Courts and Tribunals Judiciary, Independence.

It was in this context that the (then) Labour Government began to consult on:

- the removal of the Law Lords from the House of Lords;
- reform (or even abolition) of the office of Lord Chancellor; and
- introducing more transparent and independent arrangements for judicial selection and disciplinary processes.

3.2 Judges and Parliament

Under a strict separation of powers doctrine, it would be unthinkable for individuals to act both as members of the legislature and members of the judiciary. As Walter Bagehot said of the judicial function in 1867:

> It 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. Gradually, indeed, the unfitness of the second chamber for judicial functions has made itself felt. Under our present arrangements, this function is not entrusted to the House of Lords, but to a Committee of the House of Lords... 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.[83]

The Wakeham Report (2000)

The Labour Government legislated for the removal of most hereditary peers from the House of Lords in 1999, following on from a manifesto commitment.[84] It then set up a Royal Commission to look at wider proposals for House of Lords reform. The resulting Wakeham Report concluded, on the Law Lords, that there was "no reason" why a reformed second chamber should not continue to have Law Lords among its membership and continue to exercise the House of Lords' judicial functions.[85]

In reaching this conclusion, Wakeham advanced (broadly) four arguments to the effect that:

- the UK's constitution did not have, and did not need, a strict adherence to the separation of powers;
- the Law Lords played a positive role in the House of Lords' non-judicial work, bringing specific kinds of expertise, experience and leadership to bear;

83 Walter Bagehot, The English Constitution, 1867, Chapter 3.

84 House of Lords Reform Act 1999, Labour Party Manifesto 1997.

85 Royal Commission on the Reform of the House of Lords, Report: A House for the Future (PDF), 2000, p93.

- membership of the legislature made Law Lords better aware of the political context in which legislation was formulated; and
- constitutional conventions would be sufficient to ensure a firewall between Law Lords' legislative and judicial activities.[86]

Calls for reform

Notwithstanding the tentative conclusion of the Wakeham Report, there were other calls for reform of the UK's two apex courts (the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council). In 1999, Richard Cornes published a report for the UCL Constitution Unit, exploring the case for and against reforming the role of the Law Lords. The arguments in favour of the status quo were, broadly, that:

- Law Lords were (for the most part) a non-controversial legal resource for the House (and would often chair key scrutiny committees and sub-committees);
- the arrangement gave the senior judiciary an insight into Parliamentary affairs; and
- the overlap had already become largely symbolic.

However, conversely he also identified that the status quo:

- was a breach of the principle of the separation of powers;
- posed real, not just theoretical, risks of controversy;
- risked the expression of views by judges in Parliamentary debate that would preclude them sitting on subsequent cases;
- risked perceived conflicts of interest especially on devolution matters; and
- sat uneasily with the UK's obligations under Article 6 of the European Convention on Human Rights.[87]

In a follow-on report in 2000, jointly authored with Andrew Le Sueur, Cornes added that a Supreme Court would help to "improve the autonomy" of the UK's highest courts, including in the context of budgetary independence. They emphasised the importance of there still being "adequate formal channels of communication" with other institutions of government.[88]

86 Royal Commission on the Reform of the House of Lords, Report: A House for the Future (PDF), 2000, p93.

87 Richard Cornes, Reforming the Lords: the role of the Law Lords (PDF), UCL Constitution Unit, 1999.

88 Andrew Le Sueur and Richard Cornes, The Future of the United Kingdom's Highest Courts (PDF), UCL Constitution Unit, 2001, p78.

Lord Bingham: The statement of principles, and support for reform

Lord Bingham, the Senior Law Lord, set out principles to govern the Law Lords' interaction with the House of Lords and its public business in June 2000, following the Wakeham Report. In his statement to the upper House he said:

> As full members of the House of Lords the Lords of Appeal in Ordinary have a right to participate in the business of the House. However, mindful of their judicial role they consider themselves bound by two general principles when deciding whether to participate in a particular matter, or to vote: first, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.[89]

In a lecture organised by the UCL Constitution Unit in May 2002, he also came out in support of the creation of a supreme court independent of Parliament, saying:

> To modern eyes, it was always anomalous that a legislative body should exercise judicial power, save in very restricted circumstances. This anomaly may not have mattered in the past. But if the House of Lords is to be reformed, and even if it is not, the opportunity should be taken to reflect in institutional terms what is undoubtedly true in functional terms, that the law lords are judges not legislators and do not belong in a House to whose business they can make no more than a slight contribution.[90]

Consultation on a UK Supreme Court

In July 2003, the then Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton, published a consultation document on proposals to create the UK Supreme Court. It covered a range of questions about the new court's:

- name, and the styling of its members;
- proposed jurisdiction (including on territorial matters);
- appointments and leadership positions; and
- relationship with the House of Lords

The core justification for the changes was that the Government doubted whether there was:

89 Statement on the Royal Commission on House of Lords Reform, HL Deb 22 June 2000 cc419-420.

90 Lord Bingham of Cornhill, A New Supreme Court for the United Kingdom (PDF), UCL Constitution Unit, May 2002.

> sufficient transparency of independence from the executive and the legislature to give people the assurance to which they are entitled about the independence of the Judiciary.[91]

It noted that judicial review had grown in "recent years". The Human Rights Act 1998 both reflected, and reiterated the importance of, ensuring that judicial decisions were not "perceived to be politically motivated". It described as an "anomaly" the arrangement whereby the highest court of appeal was situated in one of the chambers of the legislature.

Much of the then Government's concern was about the **perception** of a lack of independence. The Government was keen to stress that the changes implied no criticism of the way the Law Lords had discharged their functions in recent years. There had been no "accusations of actual bias" either in the manner of their appointment or the judgments arising from the Appellate Committee system.[92] However, it also had specific concerns rooted in the incorporation of the European Convention on Human Rights into domestic law and particularly the role of the Lord Chancellor in relation to it:

> The fact that the Lord Chancellor, as Head of the Judiciary, was entitled to sit in the Appellate and Judicial Committees and did so as Chairman, added to the perception that their independence might be compromised by the arrangements. The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires 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.[93]

This was also seen as working in the other direction. The Law Lords had increasingly recused themselves from public business in the Lords, out of an appreciation for the need to appear impartial and independent of the legislature and the legislative process. This withdrawal had the effect of "reducing the value to both [the Law Lords] and the House of their membership".[94]

Some pragmatic considerations also played a part. The Government noted that the (physical) space provided to the Law Lords within the Palace of Westminster was widely considered to be inadequate. One Law Lord did not have an office of their own and the secretariat worked in "cramped conditions". A dedicated new facility was considered desirable for both the UK Supreme Court and the Judicial Committee of the Privy Council.[95]

When the devolution settlements were first put in place, legal challenges to devolved competence could arise either in appeals to the House of Lords or in references to the Judicial Committee of the Privy Council. With the creation of

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91 Department for Constitutional Affairs, Constitutional Reform: a Supreme Court for the United Kingdom, CP 11/03, July 2003, para 2.

92 Department for Constitutional Affairs, Constitutional Reform: a Supreme Court for the United Kingdom, CP 11/03, July 2003, para 5.

93 As above, para 3.

94 As above.

95 As above, para 4.

a UK Supreme Court, the Government proposed to simplify this arrangement. Although the JCPC would still exist (for Commonwealth and limited other purposes) the entire appellate and reference jurisdiction in relation to devolution would rest with the same body (the new Supreme Court).[96]

Contemporary reaction

The Constitutional Reform Act 2005 eventually implemented the Supreme Court substantially along the lines proposed in the consultation.

There was some dissent at the reforms from individual members of the senior judiciary, including some of the then Law Lords. Lord Nicholls of Birkenhead said it was "unnecessary" and would "achieve nothing of real value", and that the new Supreme Court would have to rebuild the institutional goodwill that the Appellate Committee had built up for itself.[97]

Others, like Lord Hope of Craighead, expressed doubts as to whether a Supreme Court in separate premises would be adequately (or as well) resourced as a court operating in the upper House.[98]

Lord Hoffmann expressed regret that the move towards a more formal separation of powers represented an "abandonment of the constitutional pragmatism on which this country has always prided itself" and suggested that the wider package of changes, including to the role of Lord Chancellor, was the result of the Government pursuing "a quick fix for personal squabbles in the Cabinet".[99]

3.3 The Lord Chancellor

Lack of separation of powers

Prior to the Constitutional Reform Act 2005, the Lord Chancellor was the most notorious example of a lack of separation of powers in the UK's constitution. The office-holder was, simultaneously:

- a senior Cabinet Minister (responsible for the courts and tribunals system);
- the presiding officer in the House of Lords;
- a senior judge eligible to preside over appeals in the House of Lords and in the Court of Appeal;

96 Department for Constitutional Affairs, Constitutional Reform: a Supreme Court for the United Kingdom, CP 11/03, July 2003, paras 19-27.
97 HL Deb 12 February 2004 c1227-1228.
98 HL Deb 12 February 2004 cc1300-1301.
99 HL Deb 12 February 2004 cc1259-1260.

- head of the judiciary in England and Wales and therefore responsible (except so far as the matters were devolved) for:
  - the appointment or nomination to most judicial offices; and
  - judicial discipline.

Lord Chancellor as a peer and judge

Because the Lord Chancellor was both the upper House's presiding officer and a senior judge, in practice they were both a Peer and legally qualified. The last non-lawyer Peer to serve as Lord Chancellor, the Earl of Shaftesbury, relinquished the role during the reign of Charles II, in 1673.

As a judge, the Lord Chancellor would take both the oath of allegiance and the judicial oath, under the Promissory Oaths Act 1868. This was seen as an important symbolic way of protecting the independence of the judiciary, which (lack of separation of powers notwithstanding) was seen as one of the core functions of the role of Lord Chancellor.

Steps to abolish the role of Lord Chancellor

Tony Blair's 2003 Cabinet reshuffle led to the creation of the Department for Constitutional Affairs, which would assume, among other things, the responsibilities of the Lord Chancellor's Office. The new Department would be led by a Secretary of State, Lord Falconer. The role of Lord Chancellor itself was ear-marked for abolition.[100]

What did the Constitutional Reform Act change?

However, when it came to legislating for the Constitutional Reform Bill, the office was retained, albeit its judicial, legislative, appointment and discipline functions were radically curtailed. The legislation and associated proposals changed the role so that:

- the Secretary of State and Department for Constitutional Affairs would assume many of the Lord Chancellor's executive and administrative functions;
- the Lord Chancellor would relinquish their presiding functions in the House of Lords (and the upper House would make arrangements for what should replace this);[101]

[100] Department for Constitutional Affairs, Constitutional reform: reforming the office of the Lord Chancellor, CP13/03, September 2003, paras 6-9.

[101] There was some discussion during the passage of the Bill about whether the Lord Chancellor should have to be a member of the House of Lords. In the end, the final Act did not include this requirement.

- the Lord Chancellor would cease to be a judge;[102]
- the Lord Chief Justice would replace the Lord Chancellor as the head of the judiciary in England and Wales;[103]
- the new Judicial Appointments Commission would assume primary responsibility for candidate selection to fill vacancies to non-devolved judicial offices;
- a new independent body (originally the Office for Judicial Complaints, now the Judicial Conduct Investigations Office) would be established to deal with complaints about judicial discipline; and
- the Lord Chancellor would retain a role in making regulations about the independent bodies and their functions, but these would often be exercisable concurrently with the Lord Chief Justice for England and Wales.

Changes to the oath requirements

Although the Lord Chancellor no longer takes the judicial oath, the Constitutional Reform Act 2005 provides the office-holder with a bespoke oath to:

> respect the rule of law, defend the independence of the judiciary and discharge [their] duty to ensure the provision of resources for the efficient and effective support of the courts for which [they are] responsible.[104]

The Act also places the Lord Chancellor under a statutory obligation to "uphold the continued independence of the judiciary". It further provides that the Lord Chancellor and other ministers must not "seek to influence particular judicial decisions through any special access to the judiciary".[105]

No requirement to be a peer or a lawyer

As introduced, the Constitutional Reform Bill would have required the Lord Chancellor:

- to be a member of the House of Lords; and
- to have previously held high judicial office, or been a qualifying practitioner for at least 15 years.

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102 In practice, Lord Falconer, who succeeded Lord Irvine did not preside over any cases as a judge. Lord Irvine withdrew from continued participation amid concerns about challenges being made under the Human Rights Act 1998 as to judicial independence. See Rachel Sylvester, Irvine withdraws from sitting as a judge in the Lords, The Daily Telegraph, 21 February 2001.

103 CRA 2005, section 7.

104 See CRA 2005, section 17 inserting Promissory Oaths Act 1868, section 6A.

105 CRA 2005, section 3.

Both requirements were removed from the Bill, and did not form part of the final Act. Instead, section 2 requires the Prime Minister to be satisfied that the Lord Chancellor is "qualified by experience" which need not arise from professional legal practice.

The House of Commons' Constitutional Affairs Committee argued at the time that suitable candidates for the reformed role could also be found in the lower House, but acknowledged there would be some "advantage" to the role being held by a someone with legal experience.[106]

The absence of these requirements enabled Jack Straw to become the first Lord Chancellor to be a member of the House of Commons (in 2007) and later enabled Chris Grayling to become the first Lord Chancellor in over 300 years not to hold any formal legal qualifications (in 2013).

Further reform and review

Since 2007, the post of Lord Chancellor has always been held concurrently with that of Secretary of State for Justice. This followed the replacement of the Department for Constitutional Affairs with the Ministry of Justice, which also took on responsibilities from the Home Office for, among other things, the criminal justice and prisons systems.

In December 2014, the House of Lords Constitution Committee published a report focusing on the office of the Lord Chancellor and his or her role in upholding the rule of law and judicial independence.[107] A further report was published in January 2023, reflecting on both the role of Lord Chancellor and the roles of the Law Officers.[108]

3.4 Independence of judicial appointments and discipline

Prior to the Constitutional Reform Act 2005, the Lord Chancellor had significant responsibility for judicial appointments in (mostly) England and Wales. For more senior judicial appointments, the Prime Minister notionally advised the Crown. However, the established practice was that the Prime Minster would themselves seek advice from the Lord Chancellor at first instance.

For appointments below the Court of Appeal, the Lord Chancellor would advise the Crown directly or would even have direct powers of appointment. Statute would stipulate minimum qualifications for certain roles had to be

106 Constitutional Reform Committee, Constitutional Reform Bill [Lords]: the Government's proposals (PDF), HC 275-I, 25 January 2005, paras 27-30.

107 Constitution Committee, The office of Lord Chancellor (PDF), HL Paper 75, 11 December 2014.

108 Constitution Committee, The roles of the Lord Chancellor and the Law Officers (PDF), HL Paper 118, 18 January 2023.

met, but the decisions on appointments would, in practice, mostly rest with the Lord Chancellor.

Practice before the Constitutional Reform Act

The administration of the judicial appointments processes was supported by the Legal and Judicial Services Group within the Department for Constitutional Affairs. For example, in practice the Lord Chancellor rarely had day-to-day involvement in the interview process, but would set the framework within which civil servants would carry out the shortlisting process.

The Commission for Judicial Appointments (not to be confused with the Judicial Appointments Commission) had been created in 2001 to provide an "ongoing audit" of judicial appointments, but had no role in selection itself.

Why reform judicial appointments further?

The then Government in 2003 argued that there was a need for greater transparency in judicial appointments, and to relieve the administrative burden from the holder of the office of Lord Chancellor.

What was proposed was the Judicial Appointments Commission. Three different models were considered:

- an Appointing Commission (which would remove ministers completely from judicial appointments);
- a Recommending Commission (which could leave it to a minister to select from all qualified candidates); or
- a Hybrid Commission (which would be a mix of the two).[109]

In the end, the Government proceeded with a Recommending Commission, but under a model where the discretion of the Lord Chancellor is heavily circumscribed. Although a candidate, once selected, can be rejected or referred back for reconsideration, only those who have been recommended for appointment can be nominated by the Lord Chancellor.

Scotland and Northern Ireland

In Scotland, responsibility for judicial appointments was devolved as part of the Scotland Act 1998 settlement. In 2002, the then Scottish Executive established the Judicial Appointments Board for Scotland (JABS) on a non-statutory basis. This provided an arm's length judicial selection process along similar lines to that would become the Judicial Appointments Commission for

[109] Department for Constitutional Affairs, Constitutional reform: a new way of appointing judges, CP10/03, July 2003, paras 30-52.

(mainly) England and Wales. JABS was given a statutory underpinning in the Judiciary and Courts (Scotland) Act 2008.

Similarly in Northern Ireland, judicial appointments are dealt with by a separate body. The Justice (Northern Ireland) Acts 2002 and 2004 provide the basis for the Northern Ireland Judicial Appointments Commission, established in 2005. Although that body was originally subject to UK Government oversight, justice is now a transferred matter in Northern Ireland and so the Lord Chancellor no longer has a role in those appointments.

Judicial disciplinary matters

Historically, the Lord Chancellor, as head of the judiciary in England and Wales, had significant responsibility for the discipline of judges, arising out of his powers in relation to the removal of judges guilty of misconduct. As with the office's role in relation to judicial appointments, this was seen as anomalous with a robust separation of powers, and risked a perception of a lack of judicial independence.

As part of the 2003 consultation the Department for Constitutional Affairs proposed that an independent body be established to hear complaints about judicial conduct. Originally, this gave rise to the Office for Judicial Complaints in 2004 (given a statutory underpinning by regulations made under the Constitutional Reform Act 2005). However, this body was replaced by the Judicial Conduct Investigations Office (JCIO) in 2013.

Complaints to the JCIO can be made about the personal conduct of a judge. For example, this includes instances of discriminatory language being used, misuse of judicial office for personal advantage, inappropriate use of social media, falling asleep in court or unduly delayed judgments.

The JCIO cannot be used to challenge the substance of a decision made by a judge. The appropriate avenue for complaints of this kind, as the Department for Constitutional Affairs noted in its 2003 consultation paper, is for individuals to seek legal advice on the availability of an appeal against the decision.[110]

[110] Department for Constitutional Affairs, Constitutional reform: a new way of appointing judges, CP10/03, July 2003, para 101.

4 Regulation of Supreme Court justices

4.1 Appointing Supreme Court justices

The rules that govern the appointment of Supreme Court justices are partly set out in the Constitutional Reform Act 2005. However, they are also supplemented by the Supreme Court (Judicial Appointments) Regulations 2013 ("the 2013 Regulations"). A decision was taken as part of the Crime and Courts Act 2013 that key aspects of the appointments process would be contained in delegated legislation, rather than the parent Act, making it easier to make changes without further primary legislation.

Regulations of this kind, to change various aspects of the appointments process, can only be made by the Lord Chancellor with the agreement of the senior judge of the Supreme Court (usually that means the President).[111] They are also subject to prior Parliamentary approval by both Houses of Parliament (under the draft affirmative procedure).[112] The Lord Chancellor must also consult the First Ministers of Scotland and Wales, the Northern Ireland Judicial Appointments Commission, and the senior territorial judiciary about any proposed regulations before they are made.[113]

Twelve "full-time equivalent" justices

Under section 23(2) of the Constitutional Reform Act 2005, the maximum number of justices that can be appointed to the UK Supreme Court is a full-time equivalent of twelve.

Originally, the statute took no account of the possibility of part-time justices, and simply provided for a maximum of twelve justices. This was changed by the Crime and Courts Act 2013.

To date, no permanent justice has been appointed on a part-time basis (though an application can be made on that basis). Nor does the current process, for example, explicitly provide for two candidates to make a joint application for a "job-share" arrangement (though the Court states that it "supports flexible working").

111 CRA 2005, section 27A(1).
112 CRA 2005, section 144.
113 CRA 2005, section 27A(3).

The 2013 change in statutory language could in theory allow there to be more than twelve justices of the Supreme Court in total, provided two or more of the permanent justices were appointed on a part-time basis.

What happens when a vacancy arises?

If a vacancy arises in the office of President or Deputy President of the Court, or it appears that one will soon arise, the Lord Chancellor must convene a selection commission to nominate a candidate to fill the vacancy.

Otherwise, if the Court is short, or soon expected to be short, of its full complement of 12 full-time equivalent judges, the Lord Chancellor has discretion about whether to convene a selection commission, having consulted with the most senior justice on the Court.[114]

The Lord Chancellor can delay the convening of a selection commission in certain circumstances. This mainly relates to where the recruitment process is already active for one of the two leadership positions (President or Deputy President).[115]

Composition of the selection commission

Under the CRA 2005, a selection commission must contain an odd number of members (no fewer than five). Of those on the commission, at least one must:

- **not** be legally qualified (meaning that they have never held a judicial office or practiced law);
- be a Supreme Court justice;
- be a member of the Judicial Appointments Commission;
- be a member of the Judicial Appointments Board for Scotland; and
- be a member of the Northern Ireland Judicial Appointments Commission

One member can meet more than one of the conditions. For example, a lay member of the Judicial Appointments Commission might sit on the panel, fulfilling both the first and third of the above requirements.

The 2013 Regulations impose additional requirements as to the composition of a selection commission. Most importantly, they explicitly disqualify individuals from sitting on a commission if they are incapacitated or intend to apply for the (imminent) vacancy in question.[116]

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[114] Under the original Constitutional Reform Act 2005, the Lord Chancellor had no discretion about whether to set in motion the process to fill a vacancy. This changed with the Crime and Courts Act 2013. See CRA 2005, new section 26(5A).

[115] CRA 2005, Schedule 8.

[116] Disqualification is set out in regulation 16.

Commission to fill a vacancy for ordinary justice or Deputy President

If a selection commission has been set up in relation to a vacancy for the position of an ordinary justice, or of the Deputy President of the Court:

- the President must normally sit on and chair the selection commission;[117]
- the President must nominate a further senior judge to sit on the commission; and
- at least two of those representatives from the other judicial appointments bodies must **not** be legally qualified, and each is to be nominated by their respective body.

When the President, or their substitute, nominates a senior judge for the commission, they must have regard to the:

- gender balance;
- racial diversity; and
- territorial composition

of the selection commission.

Commission to fill a vacancy in the office of President

If the selection commission is tasked with proposing a new President of the Court, the regulations differ from those that apply to other select commissions as follows:

- the current President cannot be a member of the commission;
- the Deputy President (or if they are disqualified, the most senior eligible justice) must be a member of the commission; and
- the chair of the commission must
  - be a member of one of the other judicial appointments bodies; and
  - **not** be legally qualified.

Each judicial appointments body takes it in turns (on rotation) to chair the selection commission for a vacancy in the office of President of the Court.

[117] If the position of President is vacant, or the President is disqualified/unavailable, the responsibility for chairing devolves first to the incumbent Deputy President, or failing that to the most senior undisqualified justice.

Qualifications of a candidate

Legal experience

Most judicial appointments in the United Kingdom require prior legal experience. This usually involves being in legal practice (or having carried out recognised equivalent activity) for a specified period. A candidate cannot be considered for appointment to a position if they do not meet the statutory qualification requirements.

The judicial-appointment eligibility condition and qualified practitioners

In England and Wales, eligibility for judicial office is determined by the "judicial-appointment eligibility condition" (JAEC). This was introduced under the Tribunals, Courts and Enforcement Act 2007. That Act sets out a range of qualifying legal activities via which a minimum length of service can be met. Depending on the judicial office in question, the JAEC must usually be met on either a five or a seven-year basis.

In Scotland and Northern Ireland, the JAEC does not apply. Instead, the qualifications for office are determined by being a "qualified practitioner" for a given number of years. This means someone has been an advocate or barrister, or has been a solicitor with certain rights of audience, for a given number of years.

With Supreme Court justice appointments the requirement is more onerous than for other appellate courts. If someone is not already a holder of high judicial office, they must meet the JAEC on a 15-year basis.[118]

The qualification requirements can be met more easily if someone is already a holder of high judicial office. If such office has been held for at least two years, the individual in question is eligible to become a Supreme Court justice.

Most UK Supreme Court justices served as senior judges first

The vast majority of UK Supreme Court judges have had substantial experience as appellate judges prior to their appointment.[119] However, two notable appointments were made from less traditional routes.

- In 2012, Jonathan Sumption QC was made a justice, becoming Lord Sumption. He was the first Supreme Court justice to have been appointed directly from the Bar, rather than having first served as a full-time

[118] See CRA 2005, section 25. In Scotland and Northern Ireland, they must have been a "qualifying practitioner" for 15 years. In Scotland this means an advocate or a solicitor with right of audience in the Court of Session and High Court of Justiciary, whereas in Northern Ireland it means either a barrister or a solicitor of the Court of Judicature.

[119] Typically, this was gained in the Court of Appeal in England and Wales or Northern Ireland, or the Inner House of the Court of Session in Scotland.

judge.[120] He had been a barrister for over 35 years and had been a Queen's Council (QC) for 25 years.

- In 2020, Professor Andrew Burrows QC became the first Supreme Court justice to be appointed directly from academia. Like Lord Sumption, he had served as a part-time judge prior to his appointment. He had also been made an honorary QC in 2003.

Ability to provide a reasonable length of service

The UK Supreme Court publishes an information pack whenever it is seeking to fill a vacancy.[121] The purpose of this pack is to inform candidates of key aspects of the role, including any non-statutory criteria.

One of the important non-statutory criteria used by selection commissions is the expectation that a justice will be able to provide a "reasonable length of service" prior to the mandatory retirement age (now 75). The information pack for the most recent appointment in 2023 indicated an expected minimum length of service of three years.[122]

The previous recruitment round in 2022 sought only two years. This was somewhat lower than the Judicial Appointments Commission expects for other judicial appointments in England and Wales, where the reasonable minimum length of service is usually placed at 3-5 years.

Selecting a candidate

There are three key provisions in section 27 of the CRA 2005 that govern the selection of a candidate:

- the requirement for selection to be "on merit";
- the "equal merit" diversity tie-breaker provision;
- the need for the Court as a whole to have judicial experience across the whole of the UK; and

Additionally, the Lord Chancellor's powers under sections 27A and 27B extend to making regulations and guidance (respectively) about the selection process. To date, only one set of regulations has been made (in 2013) and no additional Lord Chancellor's guidance has been issued.

Otherwise, it is for the selection commission to determine the selection process, having consulted (as required by the 2013 Regulations) the senior

120 Lord Sumption had previously served on a fee-paid part-time basis in England and Wales, and as a Court of Appeal judge in Jersey and Guernsey.

121 See information pack for Judicial vacancy 2023.

122 UK Supreme Court, Information Pack - Vacancy for appointment as a justice of the Supreme Court (PDF), April 2023.

judiciary, Lord Chancellor, First Ministers of Scotland and Wales, and the Northern Ireland Judicial Appointments Commission.

Appointments based "on merit"

Like the three judicial appointments bodies, the selection commissions have to make selections for appointment "on merit". This means, broadly speaking, that they should be made on the basis of ability to do the job, rather than political, financial or personal connections.

Equal merit and diversity

In 2013, the Supreme Court selection process was changed to promote diversity within the judiciary. Where there are two or more candidates of "equal merit" the rules now explicitly allow (but do not require) a selection commission to prefer one such candidate over others:

> for the purpose of increasing diversity within the group of persons who are the judges of the Court.[123]

This potentially embraces several different types of diversity, and is not confined to gender or race.

Legal experience across all parts of the UK

As a matter of convention, the Law Lords typically included among their number two judges from Scotland and one from Northern Ireland.

There is no explicit legal requirement, when a Scottish or Northern Ireland justice vacates office, that they should be replaced by a judge with legal experience in the same country. Instead, the 2005 Act provides that:

> In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.[124]

When Lord Lloyd-Jones was appointed as a Supreme Court justice in 2017, it was noted that he was unique among the justices in speaking Welsh.[125] He also served as a judge on the Wales Circuit of the High Court and was part of the Lord Chancellor's Standing Committee on the Welsh Language from 2008-2011.

Although the substance of the law often differs in Wales (by virtue of devolution) and though there are Welsh-specific devolved tribunals, Wales continues to share a single legal system with England. It remains unclear to what extent familiarity with the law Welsh-specific law will be a factor in future Supreme Court appointments.

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123 See CRA 2005, section 27(5A) inserted by Crime and Courts Act 2013, Schedule 13.

124 CRA 2005, section 27(8).

125 UK Supreme Court, Former Justices.

The Lord Chancellor's choices

The 2013 Regulations embody a process whereby the selection commission chooses a candidate and then reports that selection to the Lord Chancellor. Having received the report, the Lord Chancellor can then choose:

- to notify the selection;
- to reject the selection; or
- to ask the commission to reconsider its selection.

If a candidate's selection is notified, this means the Prime Minister is then under a legal obligation to recommend to the King that the individual should be appointed as a Supreme Court justice.

The rules are structured in such a way that the Lord Chancellor cannot repeatedly reject or require reconsideration of candidates. After a maximum of three commission reports, one of the candidates selected has to be notified. Moreover, the reasons for not notifying a candidate have to be set out by the Lord Chancellor in writing.

Where the Lord Chancellor exercises powers of rejection or mandatory reconsideration, they must explain in writing why there is insufficient evidence either to support the suitability of the candidate or to show that the committee has complied with the other statutory criteria.

4.2 Terms of appointment

Oaths or affirmations to be taken

As with other judges, UK Supreme Court justices must take two oaths or affirmations on taking office.[126] The first is the oath or affirmation of allegiance, which takes the form:

> I, [Full name of judge], do [swear by Almighty God/solemnly sincerely and truly declare and affirm] that I will be faithful and bear true allegiance to [Title of Sovereign], [his or her] heirs and successors, according to law.

The second is the judicial oath or affirmation, which takes the form:

> I, [Full name of judge], do [swear by Almighty God/solemnly sincerely and truly declare and affirm] that I will well and truly serve [Title of Sovereign] in the office of [Justice/President/Deputy President] of the Supreme Court of the United Kingdom, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.

[126] See CRA 2005, section 32. The two oaths themselves are set out in the Promissory Oaths Act 1868.

The oaths or affirmations must be taken in the presence of another Supreme Court justice.[127] In practice, a ceremony is usually held in the main courtroom of the Supreme Court itself, at which the other serving justices and other dignitaries are present.

Tenure of justices

Once a Supreme Court justice has been appointed, they hold office "on good behaviour" and until their 75th birthday, which is the current mandatory retirement age for all senior judicial appointments in the UK.[128] There are other ways a justice can leave office. Typically, this is by reason of early retirement or because they have been appointed to another judicial office.[129]

Removal by Parliament

If both Houses of Parliament resolve by way of an address that a UKSC justice should cease to hold office, they can be removed. This arrangement is similar to that for other senior judicial offices. However, Parliament has never in modern times exercised powers of this kind.

Medical retirement

The CRA 2005 also allows for the forced medical retirement of a Supreme Court justice. In practice, this provision would only apply where a justice became permanently incapacitated and was incapable of resigning voluntarily. The Lord Chancellor must secure the agreement of the most senior justice on the Court (other than the forced retiree) before invoking the medical retirement provisions.[130]

Completion of proceedings after retirement

A Supreme Court justice can, under section 27 of the Judicial Pensions and Retirement Act 1993, continue to serve for the purposes of disposing of a case to which they were assigned prior to their vacating office. This arrangement also applies to most other senior judicial offices.

For example, Lord Carnwath was one of five justices assigned to the case of *The Law Debenture Trust Corporation plc v Ukraine*.[131] Oral hearings took place in December 2019. Lord Carnwath retired as a UKSC justice in March 2020, but continued to serve on the bench in that case. A further hearing took place in November 2021 and judgment was handed down in March 2023.

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127 If the President of the Court is being sworn in, the witness will be either the Deputy President or the longest serving ordinary judge. Otherwise, the witness will usually be the President of the Court. See CRA 2005, section 32.

128 CRA 2005, section 35 (as amended).

129 Supreme Court justices have chosen to leave office early, for example, to become Lord Chief Justice or Master of the Rolls, those being senior leadership positions within the judiciary in England and Wales.

130 CRA 2005, section 36.

131 *The Law Debenture Trust Corporation plc v Ukraine (Represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine)* [2023] UKSC 11.

Lord Carnwath gave a (partly) dissenting judgment from the majority. He was able to do so despite no longer being a UKSC justice or ever becoming a member of the UK Supreme Court's Supplementary Panel.

Titles and styles

All of the original eleven UK Supreme Court justices were Peers, having been either a Law Lord or a Life Peer prior to the new Court's creation. Although disqualified, for that time being, from sitting in the House of Lords, those justices kept their respective titles, for example Lord Hope of Craighead and Lady Hale of Richmond.

If a UK Supreme Court justice does not hold a peerage they are, nevertheless, entitled to use the courtesy style of Lord or Lady. This has no statutory basis but is provided for under a warrant issued by the Sovereign.[132] The intention of this arrangement is to ensure consistency in how individual justices are to be addressed. Hence for example Sir John Dyson became Lord Dyson and Jonathan Sumption QC became Lord Sumption on being appointed as Supreme Court justices, despite not holding peerages.

4.3 Restrictions on justices

Disqualification from membership of the Commons

Prior to 2009, Law Lords were disqualified from membership of the House of Commons by virtue of their membership of the House of Lords.[133] Justices of the Supreme Court are now barred from membership of the House of Commons on the same basis as most other holders of judicial office, under Schedule 1 of the House of Commons Disqualification Act 1975.

Disqualification from participating in Lords proceedings

Current Justices of the Supreme Court are not disqualified from continuing to hold, or being granted, a peerage. The same is true of other holders of high judicial office. However, all holders of high judicial office are disqualified from

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132 See UK Supreme Court, Press Notice: Courtesy titles for Justices of the Supreme Court (PDF), 13 December 2010.

133 This bar was not statutory but was considered to be part of the law and custom of Parliament that no individual could be a member of both Houses. See also *Re Bristol South-East Parliamentary Election 1961* 3 All ER 354. In that Election Court case, Tony Benn was deemed to have been disqualified as a candidate in a Commons by-election. He had involuntarily inherited a peerage following the death of his father, Viscount Stangate, which had created the vacancy in the first place. At that time, there was no mechanism by which any peerage could be disclaimed (though this is now possible under the Peerage Act 1963). Life Peers can now resign their membership of the House of Lords, and this enables them to stand for election to become an MP, but they cannot thereafter become a member of the House of Lords again. See section 4 of the House of Lords Reform Act 2014.

sitting or voting in the House of Lords for as long as they hold a disqualifying office, under section 137(3) of the Constitutional Reform Act 2005.

Peerages for former Supreme Court justices?

To become a Law Lord a judge usually had to be granted a peerage under the Appellate Jurisdiction Act 1876.[134] Such a peerage was a lifetime appointment, even though a Law Lord was required to retire from their judicial duties on reaching the mandatory retirement age.[135]

When the UK Supreme Court was created in October 2009, all of its inaugural eleven members were already peers (ten because they had been Law Lords, and one, Lord Clarke of Stone-cum-Ebony, because he had been given a life peerage a few months earlier). All eleven therefore became disqualified from participating in Lords proceedings while being holders of high judicial office, but they did not lose their peerages.

This created an anomaly, whereby "legacy" justices would be able to participate in the work of the legislature on their retirement, whereas post 2009 appointees would not, unless they were already, or otherwise made, a peer.

The original intention of the (then) Labour Government was that retiring justices of the new Supreme Court would be awarded life peerages upon their retirement. As it said in response to a report of the Commons Constitutional Reform Committee:

> The Government agrees with the Committee's recommendations that all Justices of the Supreme Court should be appointed to the House of Lords upon retirement.[136]

No legislative mechanism was provided to guarantee that this would happen. The commitment therefore depended on the emergence of a convention that Governments would nominate outgoing justices for peerages. No justices retired while Labour remained in office, and the envisaged arrangement did not materialise under subsequent Governments.

Since the creation of the Supreme Court, only one Supreme Court justice, past or present, has been granted a peerage.[137] Lord Reed of Allermuir was ennobled on his appointment as President of the Court in 2020, having previously served the court as Deputy President and an ordinary justice

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134 Unless they were already an hereditary peer or had already received a life peerage.

135 Originally, the Appellate Jurisdiction Act 1876 provided only ex officio House of Lords membership, but this was changed by the Appellate Jurisdiction Act 1887.

136 Judicial appointments and a Supreme Court (court of final appeal): The Government's response to the report of the Constitutional Affairs Committee, Cm 6150, para 22.

137 There was controversy when Lord Dyson, who had served as both a Supreme Court justice and Master of the Rolls, was not granted a peerage on his retirement, in apparent variance with past practice. See Michael Cross, Back to tradition as master of the rolls appointed to Lords, Law Gazette, 23 December 2020.

without any peerage.[138] Lord Reed is the only current justice on the court to hold a peerage.

Parliamentarians on the Supplementary Panel

Members of the Supreme Court's supplementary panel are not, by that reason alone, excluded from participation in House of Lords proceedings. Nor, technically, is there a bar on them becoming MPs. No supplementary panel member has ever stood for election as an MP. It is also highly unlikely that a former judge who subsequently became active on a party-political basis would be selected for, or remain on, the panel.

As of June 2022, two of the six members of the supplementary panel are sitting members of the House of Lords:

- Lord Neuberger of Abbotsbury sat as a Law Lord from 2007-09, before taking up the position of Master of the Rolls. After serving as President of the Supreme Court from 2012-2017, he resumed his place in the House of Lords;

- Lord Thomas of Cwmgiedd was ennobled at the same time as becoming Lord Chief Justice in 2013, but was disqualified from participating in Lords proceedings until his retirement in 2017.

4.4 Judicial Conduct and related guidance

As a distinct part of the judiciary, the UK Supreme Court issues its own Guide to Judicial Conduct (PDF). Although similar in content, this is separate from three other similar guidance documents issued for other courts and tribunals.[139] It is a non-statutory document, but a reliable guide as to what is expected of UK Supreme Court justices when they carry on their work.

The Bangalore Principles of Judicial Conduct

As with the other guidance documents, it embodies the Bangalore Principles of Judicial Conduct, which were endorsed the United Nations Human Rights Commission in 2003 and published with a commentary in 2007. The six principles are that:

1. Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and

[138] The previous three Presidents of the Supreme Court (Lord Phillips, Lord Neuberger and Lady Hale) were former Law Lords so already held peerages.

[139] HM Courts and Tribunals Judiciary, Guide to Judicial Conduct (PDF), March 2020; Lord President of the Court of Session, Statement of Principles of Judicial Ethics for the Scottish Judiciary (PDF), December 2016; Northern Ireland Lord Chief Justice's Office, A Statement of Ethics For the Judiciary in Northern Ireland (PDF).

exemplify judicial independence in both its individual and institutional aspects.

2. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

3. Integrity is essential to the proper discharge of the judicial office.

4. Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.

5. Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

6. Competence and diligence are prerequisites to the due performance of judicial office.

Key issues addressed in the Supreme Court guidance

The document provides further guidance to justices under headings for each principle, with a particular focus on:

- avoiding bias, whether actual or perceived of any kind;
- exercising caution in public statements and social media use;
- avoiding conflicts of interest in outside and commercial activities; and
- exercising due caution when providing references (including character references in court).

Supplementary panel members and political activity

The UK Supreme Court has specific guidance on conduct for its supplementary panel members (PDF), which acknowledges the potential for a conflict of interest in their extra-judicial and (where relevant) their parliamentary, activities:

> Whilst it would not be appropriate to restrict membership of the Panel to persons who are not members of the House of Lords, or to require that such persons refrain from voting or sitting in the House of Lords while they are Panel members, the participation of Panel members in the work of Parliament gives rise to particular risks, real or perceived, that their independence and impartiality in the discharge of their judicial functions will be undermined by their legislative activities.[140]

[140] UK Supreme Court, Guide to Conduct for Members of the Supplementary Panel (PDF), August 2021, para 7.

The guidance treats certain forms of participation in the legislature's proceedings as an explicit conflict of interest, justifying recusal from related cases:

> If a Panel member has been involved in the passage of legislation relevant to the determination of a case, that Panel member should disclose such involvement to the President, should he or she be invited to sit on an appeal, and should decline the invitation.[141]

More broadly, the Guidance document considers that legislative activity "poses a risk" to the Court's reputation where it concerns matters of "strong party-political controversy". Supplementary panel members are, effectively, expected to exercise the same degree of self-restraint in legislative activities as the Law Lords had done, by convention, since at least 2000.[142]

Lord Sumption's resignation from the supplementary panel

In January 2021, the former Supreme Court justice, Lord Sumption, resigned from the supplementary panel. Since retiring from the Supreme Court in 2018, he had expressed views on a range of matters of public interest and political controversy, through a series of Reith Lectures on BBC Radio 4, columns in national print publications, and appearances before Parliamentary select committees. Matters of controversy included the role of the European Court of Human Rights, the approach certain politicians had taken to Brexit, and the prorogation dispute of 2019.

In correspondence to the President of the Supreme Court, subsequently published in response to a Freedom of Information Request in July 2021, Lord Sumption said:

> I have not sat [on a UK Supreme Court case] since the spring of 2019 and in September 2019 I asked [Lady Hale, the previous President of the Court] not to be listed to hear appeals in view of public criticisms which I was making of the government. I very much doubt whether it will be appropriate for me to sit again at any time in the next three years which remain before I reach the age of 75. Unless you disagree, I think that the time has come for me to withdraw from the supplementary list.[143]

In acknowledging his resignation, the President of the Court, Lord Reed, replied that it was "the right decision given [Lord Sumption's] high public profile in relation to controversial questions of public policy."

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141 As above, para 8.

142 See also Lord Bingham, Statement on the Royal Commission on House of Lords Reform, HL Deb 22 June 2000 cc419-420.

143 UK Supreme Court, Request for information about the membership of the Supplementary Panel, 12 July 2021.

5 Wider debates

5.1 Notable constitutional cases

Since its creation, the UK Supreme Court has, in effect, continued the judicial work of the Appellate Committee of the House of Lords, as well as assuming the "devolution issue" work previously carried on by the Judicial Committee of the Privy Council. The Court typically hands down:

- 60-80 full judgments every year; and
- over 200 permission to appeal decisions every year.[144]

Below is a non-exhaustive list of constitutionally notable cases considered by the Court. However, it should be borne in mind that the Supreme Court also hears cases that raise a point of law of general public importance, regardless of whether constitutional law or principles are at stake. Like other senior courts, it also has an important role in interpreting the relationship between domestic law and the UK's international obligations (for example enforcing the Human Rights Act 1998 and the European Convention on Human Rights which it incorporates into domestic law).

Constitutional cases

- *R v Chaytor* [2010] UKSC 52 (on whether parliamentary privilege precluded criminal proceedings being brought during the MPs Expenses Scandal)
- *R (Cart) v Upper Tribunal* [2011] UKSC 28 and *Eba v Advocate General for Scotland* [2011] UKSC 29 (on the availability of judicial review against permission to appeal decisions of the Upper Tribunal)
- *R (HS2 Alliance Limited) v Secretary of State for Transport* [2014] UKSC 3 (on whether the UK Parliament's hybrid bill procedure was compatible with its other international obligations)
- *R (Evans) v Attorney General* [2015] UKSC 21 (on the extent of the Attorney General's "veto" in relation to Freedom of Information requests)

[144] These figures do not include Judicial Committee of the Privy Council cases. For annual statistics on the caseload of both appellate jurisdictions, see the joint Annual Reports available on the UK Supreme Court website.

- *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (on the need for parliamentary authority to trigger the Article 50 Brexit process)
- *R (UNISON) v Lord Chancellor* [2017] UKSC 51 (on the legality of a scheme of employment tribunal fees)
- *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 (concerning availability of judicial review against decisions of the Investigatory Powers Tribunal)
- *R (Miller) v Prime Minister* and *Cherry v Advocate General* [2019] UKSC 41 (on the legality of a five week prorogation of Parliament)
- *R v Adams* [2020] UKSC 19 (concerning the Carltona principle and the legality of an order forcibly detaining Gerry Adams during the troubles)
- *R (Begum) v Secretary of State for the Home Department* [2021] UKSC 7 (concerning the legality of deprivation of UK citizenship of a dual-national)
- *R (O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department* [2022] UKSC 3 (concerning the legality of fees imposed in connection with registering children as British citizens)
- *Allister and Peeples* [2023] UKSC 5 (concerning the compatibility of the Northern Ireland Protocol with the Acts of Union, the Belfast/Good Friday Agreement, and the Northern Ireland Act 1998)
- *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42 (concerning the compatibility or otherwise of the Rwanda asylum processing scheme with the UK's international obligations)

Devolution cases

- *Martin and Miller v HM Advocate* [2010] UKSC 10 (on the scheme of reserved matters and protected enactments in the Scotland Act)
- *Cadder v HM Advocate* [2010] UKSC 43 (on admissibility of evidence in Scottish criminal proceedings obtained without a solicitor present)
- *Axa General Insurance v Lord Advocate* [2011] UKSC 46 (on the nature and extent of the powers of a devolved legislature and amenability to judicial review)
- *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 (on the role of "purpose" in relation to whether legislation "relates to reserved matters")
- *Moohan v Lord Advocate* [2014] UKSC 67 (on prisoners voting rights in the Scottish independence referendum)

- *Christian Institute v Lord Advocate* [2016] UKSC 51 (concerning the competence of the Named Person's scheme in the Children and Young People (Scotland) Act 2014)
- *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76 (concerning the competence of the Scottish Parliament to legislate for minimum alcohol pricing)
- *Attorney General NI's Reference (No. 2)* [2019] UKSC 1 (connected to the Court of Appeal case in Buick, concerned with the authority of Northern Ireland Departments to act when no functioning Executive is in place)
- *Lord Advocate's Reference* [2022] UKSC 31 (concerning the potential legislative competence of a draft Scottish Independence Referendum Bill, if introduced)

Devolution bill references

The following bills agreed to by a devolved legislature were referred to the UK Supreme Court, prior to Royal Assent, to test legislative competence:

Referred bills of the National Assembly for Wales/Senedd Cymru

- Damages (Asbestos-related Conditions) Bill (Northern Ireland)[145]
- Local Government Byelaws (Wales) Bill (in [2012] UKSC 53)
- Agriculture Sector (Wales) Bill (in [2014] UKSC 43)
- Recovery of Medical Costs for Asbestos Diseases (Wales) Bill (in [2015] UKSC 3)[146]
- Law Derived from the European Union (Wales) Bill[147]

Referred bills of the Scottish Parliament

- UK Withdrawal from the European Union (Legal Continuity) Bill (in [2018] UKSC 64)
- United Nations Convention on the Rights of the Child (Incorporation) Bill (in [2021] UKSC 42)
- European Charter of Local Self-Government (Incorporation) Bill (also in [2021] UKSC 42)

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145 This reference was withdrawn, the bill became an Act, and its legality was considered as part of the post-enactment Scottish case of *Axa General Insurance v Lord Advocate* (mentioned above).

146 Unlike all other bill references, this Bill was referred to the Supreme Court by a devolved law officer (the Counsel General for Wales), rather than a UK Government law officer.

147 The Attorney General's reference in this case was withdrawn by the UK Government after an Intergovernmental Agreement was reached with the Welsh Government. Under that agreement, the Bill was granted Royal Assent but was shortly thereafter be repealed.

Referred bills of the Northern Ireland Assembly

- Abortion Services (Safe Access Zones) (Northern Ireland) Bill (in [2022] UKSC 32)

5.2 Calls for reform

At the time that the Constitutional Reform Act 2005 was passed, there remained some opposition to the creation of the UK Supreme Court.[148]

Since then, there have been occasional calls from think tanks, especially from Policy Exchange's Judicial Power Project, to revisit the arrangement created by the 2005 Act. In a 2019 report, Professor Richard Ekins suggested the terminology of "Supreme Court" ran a risk of causing the justices to "mistake [their] constitutional position in relation to the Houses of Parliament."[149] He indicated that he was sympathetic to a restoration of the Appellate Committee of the House of Lords.[150]

An "Upper Court of Appeal"

In a subsequent 2020 report, Derrick Wyatt QC and Professor Richard Ekins explored the possibility of replacing or renaming the UK Supreme Court, calling it instead either a "Final" or "Upper" Court of Appeal.[151] The other structural reforms in Wyatt's proposals, they suggested, would "temper the risk of excessive judicial activism at the final stage of the UK appellate process."[152]

Wyatt's proposal was, essentially, to do away with having a permanent set of judges that sit exclusively on the apex court. Instead, more territorial appellate judges would be appointed. Territorial appellate judges would then be selected, alongside a supplementary panel of retired judges, to sit on individual cases in the new apex court. This "broadening of the judicial base" would, Wyatt argued, better avail the apex court of judicial expertise, increase its diversity and would contribute to a more shared "ethos" and "general outlook" among the senior judiciary.[153]

148 See Section 3.2 above.

149 This was a critical reference to the Supreme Court's decision in the prorogation case of Miller/Cherry. Ekins disagreed with the Court, which had said that prorogation was not a proceeding in Parliament and therefore did not attract protection of Article 9 of the Bill of Rights [1688].

150 Richard Ekins, Protecting the Constitution: How and why Parliament should limit judicial power, Policy Exchange, December 2019, p20.

151 Derrick Wyatt and Richard Ekins, Reforming the Supreme Court, Policy Exchange, July 2020, p9.

152 As above, pp9-11.

153 Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 17 March 2021, Q7.

Supreme Court leadership reaction to possible reform

Proposals of the kind just described have attracted criticism from the current President of the Supreme Court, Lord Reed. In evidence to the House of Lords Constitution Committee in 2021, he said that he could not identify any benefits from changing the name of the UK Supreme Court or reducing the number of permanent justices that sit on it:

> On the contrary, what is being talked about is a quite deliberate downgrading and undermining of the most prestigious common law court in the world. That would be an act of national self-harm, which could only reduce respect for this country as a bastion of the rule of law and weaken the UK as an international centre for legal services.[154]

He went on to describe the argument that the name of the Court had any meaningful impact on its decision-making as "idiotic" and suggested that any name change would be "widely perceived as an act of spite". He concluded:

> There is nothing that the Supreme Court has decided that the old Appellate Committee of the House of Lords would not have decided.[155]

On the question of relying on territorial judges instead of permanent justices, he pointed out that there is considerable flexibility already available to the Court, and of which it regularly avails itself:

> As to the second idea that, effectively, we have ad hoc assemblages of judges rather than a permanent body of 12 justices, this would also be an own goal… there is, at present, no legal limit to the number of judges who can sit on the Supreme Court. There are 12 permanent justices, but the president can invite as many other senior judges to sit on the court as he likes. I have been exercising that power with some regularity over the last few months, but it is peripheral to the working of the court. I only have one visiting judge at a time, and only in a proportion of the cases we hear. That is not because we need their expertise—we are not short of expertise—but rather to give them experience of the court from the inside, to break down barriers and, perhaps, to encourage people to think about applying to us.[156]

It is much more common for members of the senior territorial judiciary to preside over cases in the Judicial Committee of the Privy Council (mainly Commonwealth appeals) than it is for them to preside over (domestic) UK Supreme Court cases. See Tables 6-8 in this paper's Annex.

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154 As above.

155 As above.

156 Constitution Committee, Annual evidence session with the President and Deputy President of the Supreme Court, 17 March 2021, Q7.

6 Former arrangement with the Hong Kong Court of Final Appeal

Following the formation of the Hong Kong Special Administrative Region in 1997, the Judicial Committee of the Privy Council's (JCPC) jurisdiction in relation to Hong Kong ended. In its place, the Hong Kong Court of Final Appeal (HKCFA) was created.

In accordance with the law of Hong Kong, the HKCFA has a varied membership. Until late March 2022, the Court had 20 judges.

- There were four permanent appointees, including the Chief Justice and three other justices.
- There were then sixteen other judges appointed on renewable fixed-terms.

Four of the fixed-term appointees were from Hong Kong, but 12 others were judges who serve or had served predominantly in other common law jurisdictions. The HKCFA, at that time, included judges otherwise or previously based in the UK, Australia and Canada. In the past, it has also included justices from New Zealand.

6.1 UK judges serving on the Hong Kong Court (1997-2022)

The involvement of active UK judges in the work of the HKCFA was underpinned by an agreement reached in September 1997. The then Lord Chancellor, Lord Irvine of Lairg and the then Chief Justice of Hong Kong announced that two serving Law Lords would sit on the court, as part of the UK's continuing commitment to safeguarding the rule of law in Hong Kong.

Since the creation of the UK Supreme Court in 2009, this arrangement continued, but with two sitting justices of the Supreme Court supporting judicial business. Whenever a current UK justice sat on the HKCFA, a fee would be paid directly to the Supreme Court. Additionally, several retired UK judges served the HKCFA independently of that arrangement.

Of the (then) 12 judges from non-Hong Kong jurisdictions, eight previously served as a Law Lord and/or Justice of the UK Supreme Court:

- two, Lord Reed of Allermuir and Lord Hodge, were and are serving justices of the UK Supreme Court (the President and Deputy President);
- a further five previously served as Justices of the UK Supreme Court, having since retired (of which two are former Presidents);[157]
- one UK judge, Lord Hoffmann, retired as a Law Lord in 2009.

6.2 The Hong Kong National Security Law

In 2020, the Chinese Government introduced a new National Security law in Hong Kong. Widely understood as being a response to pro-democracy protests in the Special Administrative Region, the law criminalises acts of secession, subversion, terrorism and collusion with foreign or external forces.

It also establishes a Beijing-led security office in Hong Kong and a law enforcement panel, neither of which would fall under the control of the Special Administrative Region. The Hong Kong Chief Executive also now has powers to appoint judges to hear national security cases, and Beijing law will take priority over Hong Kong law in the event of any conflict.

This law provoked considerable concern within and outwith Hong Kong. It raised questions about the continued cooperation of non-Hong Kong judges with its justice system. The UK Government has said the law is a "clear and serious" violation of the Joint Declaration that underpinned the handover of Hong Kong to China in 1997.[158] The Government has taken other measures in response to it, including suspending its extradition treaty with Hong Kong and offering a dedicated visa scheme for Hong Kong nationals wishing to come to the UK.

6.3 Impact of the new law on judicial cooperation

Lord Reed's July 2020 statement

Following the passage of the National Security Law, the President of the UK Supreme Court issued a statement in July 2020. He said:

> The new security law contains a number of provisions which give rise to concerns. Its effect will depend upon how it is applied in practice. That remains to be seen. Undoubtedly, the judges of the Court of Final Appeal will do their utmost to uphold the guarantee in Article 85 of the Hong Kong Basic Law that

[157] Lord Neuberger of Abbotsbury, Lord Phillips of Matravers, Lord Walker of Gestingthorpe, Lord Collins of Mapesbury and Lord Sumption.

[158] HC Deb 1 July 2020 c329.

> 'the Courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference.'
>
> ... The Supreme Court supports the judges of Hong Kong in their commitment to safeguard judicial independence and the rule of law. It will continue to assess the position in Hong Kong as it develops, in discussion with the UK Government. Whether judges of the Supreme Court can continue to serve as judges in Hong Kong will depend on whether such service remains compatible with judicial independence and the rule of law.[159]

Lord Reed's August 2021 statement

A further statement was made in August 2021, in which Lord Reed said he had been monitoring and assessing developments in Hong Kong with the Foreign Secretary and the Lord Chancellor:

> Together, we have been reviewing the operation of the agreement under which UK judges have served there since 1997 in the light of those developments.
>
> At this time, our shared assessment is that the judiciary in Hong Kong continues to act largely independently of government and their decisions continue to be consistent with the rule of law.
>
> There also continues to be widespread support amongst the legal community in Hong Kong for the participation of UK and other overseas judges in the work of the Hong Kong Court of Final Appeal
>
> Under these circumstances, Lord Hodge and I remain engaged in the Court of Final Appeal with the full support of the Foreign Secretary and the Lord Chancellor.
>
> I am scheduled to sit from 31 August to 3 September and Lord Hodge is scheduled to sit before the end of 2021.
>
> I will continue to assess the position in Hong Kong as it develops, in discussion with the UK Government.[160]

Lord Reed and Lord Hodge resign as non-permanent judges

By 30 March 2022, the position had changed. Lord Reed announced that he and Lord Hodge had "submittted [their] resignations as non-permanent judges of the HKCFA with immediate effect". Lord Reed added:

> The judges of the Supreme Court and its predecessor, the Appellate Committee of the House of Lords, have sat on the Hong Kong Court of Final Appeal (HKCFA) for many years in fulfilment of the obligations undertaken by the government towards Hong Kong in 1997. They have done so with the support of

159 UK Supreme Court, Role of UK judges on the Hong Kong Court of Final Appeal, 17 July 2020.

160 UK Supreme Court, Role of UK judges on the Hong Kong Court of Final Appeal - update, 27 August 2021.

> the government, and in the light of the government's assessment that their participation in the HKCFA was in the UK's national interests.
>
> However, since the introduction of the Hong Kong national security law in 2020, this position has become increasingly finely balanced.
>
> The courts in Hong Kong continue to be internationally respected for their commitment to the rule of law. Nevertheless, I have concluded, in agreement with the government, that the judges of the Supreme Court cannot continue to sit in Hong Kong without appearing to endorse an administration which has departed from values of political freedom, and freedom of expression, to which the Justices of the Supreme Court are deeply committed.[161]

Other international judges remain on the Court

Six overseas non-permanent judges on the HKCFA, who have all retired from judicial office in the UK or Australia, remain in post as of October 2024. The remaining former UK judges are Lord Hoffmann and Lord Neuberger.

At the time that the UK Supreme Court itself discontinued its arrangement with the HKCFA, the South China Morning Post reported a joint statement from five of the six UK judges then remaining on the HKCFA. The joint statement said:

> At a critical time in the history of Hong Kong, it is more than ever important to support the work of its appellate courts in their task of maintaining the rule of law and reviewing the acts of the executive...
>
> While we will continue to monitor developments, we believe that our continued participation in the work of the Court of Final Appeal is in the interest of the people of Hong Kong. We shall therefore continue to sit on the court.[162]

Since that statement, three of those five judges have stepped down from the court. In June 2024, both Lord Sumption and Lord Collins stepped back, citing concerns about the rule of law and the political situation in Hong Kong. Subsequently, in September 2024, Lord Phillips stepped down from the court, citing "personal, not political" reasons.[163]

Lord Neuberger has been criticised for his continued involvement in the work of the court. This followed, in particular, a decision to uphold the criminal conviction of Hong Kong pro-democracy activist, Jimmy Lai.[164]

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161 UK Supreme Court, Role of UK Supreme Court judges on the Hong Kong Court of Final Appeal – update, 30 March 2022.

162 Chris Lau and Tony Cheung, At least eight out of 10 remaining overseas judges at Hong Kong's highest court to stay on, South China Post, 31 March 2022. The late Lord Walker of Gestingthorpe was not involved in the joint statement, but did not serve again, in any case, on health grounds.

163 The Independent, Third British judge quits top Hong Kong court amid China-imposed crackdown on dissent, 30 September 2024.

164 The Independent, British judge upholds conviction against Hong Kong activist Jimmy Lai despite link to prisoner rights charity, 13 August 2024.

Annex: Justices and Law Lords

Table 1: Current Justices of the Supreme Court
As of October 2024

Justice	Previous role(s)	Date appointed	Length of service	Mandatory retirement date
Lord Reed of Allermuir*	Inner House Judge (Scot)	6 February 2012 (justice) 7 June 2018 (Deputy President) 13 January 2020 (President)	12 years (justice) 1.5 years (Deputy President) 4.5 years (President)	7 September 2031
Lord Hodge	Outer House Judge (Scot)	1 October 2013 (justice) 27 January 2020 (Deputy President)	11 years (justice) 4 years (Deputy President)	19 May 2028
Lord Briggs of Westbourne	Court of Appeal Judge (E&W)	2 October 2017	7 years	23 December 2029
Lord Sales	Court of Appeal Judge (E&W)	11 January 2019	5.5 years	11 February 2037
Lord Hamblen of Kersey	Court of Appeal Judge (E&W)	13 January 2020	4.5 years	23 September 2032
Lord Leggatt	Court of Appeal Judge (E&W)	21 April 2020	4 years	12 November 2032
Lord Burrows	University Professor (Oxford)	2 June 2020	4 years	17 April 2032
Lord Stephens of Creevyloughgare	Court of Appeal Judge (NI)	1 October 2020	4 years	28 December 2029
Lady Rose of Colmworth	Court of Appeal Judge (E&W)	13 April 2021	3.5 years	13 April 2035
Lord Lloyd-Jones**	Court of Appeal Judge (E&W)	2 October 2017 (first) 30 August 2022 (second)	4 years 2 years (6 years in total)	13 January 2027
Lord Richards of Camberwell	Court of Appeal Judge (E&W)	3 October 2022	2 years	9 June 2026
Lady Simler	Court of Appeal Judge (E&W)	14 November 2023	<1 year	17 September 2038

* Granted a Life Peerage on becoming President but presently disqualified under the House of Lords (Reform) Act 2014
** Reappointed after a vacancy following the increase in the mandatory age of judicial retirement from 70 to 75

Table 2: The original 12 justices of the UK Supreme Court

Justice	Previous role(s)	Supreme Court dates of service	Length of service	Reason left office
Lord Phillips of Worth Matravers*	Senior Law Lord (2008-09) Lord Chief Justice (E&W) (2005-08) Master of the Rolls (E&W) (2000-05) Law Lord (1999-2000)	Oct 2009 - Sept 2012 (President)	3 years	Retirement
Lord Hope of Craighead*	Second Senior Law Lord (2009) Law Lord (1996-2009) Lord President (S) (1989-1996)	Oct 2009 - June 2013 (Deputy President)	3 years	Retirement
Lord Saville of Newdigate*	Law Lord (1997-2009) Court of Appeal Judge (E&W) (1994-97)	Oct 2009 - Sept 2010	1 year	Retirement
Lord Rodger of Earlsferry*	Law Lord (2001-09) Lord President (S) (1996-2001)	Oct 2009 - June 2011	1 year	Died in office
Lady Hale of Richmond*	Law Lord (2003-09) Court of Appeal Judge (E&W) (1999-2003)	Oct 2009 - Jan 2020 (justice) June 2013 - Sept 2017 (Deputy President)	10 years	Retirement
Lord Walker of Gestingthorpe*	Law Lord (2002-09) Court of Appeal Judge (E&W) (1997-2002)	Oct 2009 - Mar 2013	3 years	Retirement
Lord Brown of Eaton-under-Heywood*	Law Lord (2004-09)	Oct 2009 - April 2012	2 years	Retirement
Lord Mance*	Law Lord (2005-09) Court of Appeal Judge (E&W) (1999-2005)	Oct 2009 - June 2018 Sept 2017 - June 2018 (Deputy President)	8 years	Retirement
Lord Kerr of Tonaghmore*	Law Lord (2009) Lord Chief Justice (NI) (2004-09)	Oct 2009 - 30 Sept 2020	11 years	Retirement
Lord Collins of Mapesbury*	Law Lord (2009) Court of Appeal Judge (2007-09)	Oct 2009 - May 2011	1 year	Retirement
Lord Clarke of Stone-cum-Ebony**	Master of the Rolls (2005-2009) Court of Appeal Judge (1998-2005)	Oct 2009 - Sept 2017	8 years	Retirement
Lord Dyson***	Deputy Head Civil Justice (E&W) (2003-06) Court of Appeal Judge (E&W) (2001-10)	Apr 2010 - Oct 2012	2 years	Appointed Master of the Rolls

* Former Law Lord, retaining life membership of the House of Lords under the Appellate Jurisdiction Act 1876

** First direct appointee to the UK Supreme Court, already held a Peerage under the Life Peerages Act 1958

*** First non-life Peer to be a UK Supreme Court justice

Table 3: Other former justices of the UK Supreme Court

Justice	Previous role(s)	Supreme Court dates of service	Length of service	Reason left office
Lord Wilson of Culworth	Court of Appeal Judge (E&W) (2005-11)	May 2011 - May 2020	8 years	Retirement
Lord Sumption	Barrister - Queen's Counsel (1986-2012)	Jan 2012 - Dec 2018	6.5 years	Retirement
Lord Carnwath of Notting Hill	Court of Appeal Judge (E&W) (2002-12)	Apr 2012 - Mar 2020	7.5 years	Retirement
Lord Neuberger of Abbotsbury*	Master of the Rolls (E&W) (2009-12) Law Lord (2007-09) Court of Appeal Judge (E&W) (2004-07)	Oct 2012 - Sept 2017 (President)	4.5 years	Retirement
Lord Hughes of Ombersley	Vice President Criminal Division (2009-13) Court of Appeal Judge (E&W) (2006-13)	Apr 2013 - Aug 2018	5 years	Retirement
Lord Toulson	Court of Appeal Judge (E&W) (2006-13)	Apr 2013 - Sept 2016	3 years	Retirement
Lady Black of Derwent	Court of Appeal Judge (E&W) (2010-17)	Oct 2017 - Jan 2021	3 years	Retirement
Lady Arden of Hesswall	Court of Appeal Judge (E&W) (2000-18)	Oct 2018 - Jan 2022	3 years	Retirement
Lord Kitchin	Court of Appeal Judge (E&W) (2011-18)	Oct 2018 - Sept 2023	5.5 years	Retirement

* Former Law Lord, retaining life membership of the House of Lords under the Appellate Jurisdiction Act 1876

Table 4: Law Lords appointed 1990-2009

Name of Law Lord	Dates of Service	Length of service	Reason left office
Lord Browne-Wilkinson	1991-2000	18 years	Retirement
Lord Mustill	1992-1997	5 years	Retirement
Lord Slynn of Hadley	1992-2002	10 years	Retirement
Lord Woolf	1992-1996	3 years	Appointed Master of the Rolls
Lord Lloyd of Berwick	1993-1998	5 years	Retirement
Lord Nolan	1994-1998	4 years	Retirement
Lord Nicholls of Birkenhead	1994-2007	12 years	Retirement
Lord Steyn	1995-2005	20 years	Retirement
Lord Hoffmann	1995-2009	14 years	Retirement
Lord Cooke of Thorndon (NZ)**	1996-2001	5 years	Retirement
Lord Hope of Craighead (S)*	1996-2009	13 years	2005 Act
Lord Clyde (S)	1996-2001	4 years	Retirement
Lord Hutton (NI)	1997-2004	7 years	Retirement
Lord Saville of Newdigate	1997-2009	12 years	2005 Act
Lord Hobhouse of Woodborough	1998-2004	5 years	Retirement
Lord Millett	1998-2004	5 years	Retirement
Lord Phillips of Worth Matravers	1999-2000 then 2008-09	2 years	Appointed Master of the Rolls then 2005 Act
Lord Bingham of Cornhill*	2000-2008	8 years	Retirement
Lord Scott of Foscote	2000-2009	9 years	Retirement
Lord Rodger of Earlsferry (S)*	2001-2009	8 years	2005 Act
Lord Walker of Gestingthorpe	2002-2009	7 years	2005 Act
Lady Hale of Richmond	2004-2009	5 years	2005 Act
Lord Carswell (NI)	2004-2009	4 years	2005 Act
Lord Brown of Eaton-under-Heywood	2004-2009	5 years	2005 Act
Lord Mance	2005-2009	4 years	2005 Act
Lord Neuberger of Abbotsbury	2007-2009	2 years	Appointed Master of the Rolls
Lord Collins of Mapesbury	2009	Less than 1 year	2005 Act
Lord Kerr of Tonaghmore (NI)	2009	Less than 1 year	2005 Act

*Life Peerage conferred in a different capacity under the Life Peerages Act 1958 prior to becoming a Law Lord

** Previously served as President of the Court of Appeal of New Zealand

Table 5: Members of the UK Supreme Court Supplementary Panel

As of October 2024

Name of judge	When added	Term ended/ends
Lord Collins	May 2011	May 2016
Lord Gill*	August 2015	February 2017
Lord Hamilton*	July 2015	June 2017
Lord Dyson	October 2016	July 2018
Lord Toulson	September 2016	June 2017
Lord Neuberger of Abbotsbury	September 2017	September 2022
Lord Clarke	October 2017	May 2018
Lord Thomas of Cwmgiedd*	June 2018	October 2022
Lord Sumption	December 2018	January 2021
Lord Hughes of Ombersley	August 2018	August 2023
Lady Black of Derwent	January 2021	January 2026
Sir Declan Morgan*	November 2021	November 2026
Lord Lloyd-Jones**	January 2022	August 2022
Lord Burnett of Maldon*	October 2023	October 2028
Lord Kitchen	October 2023	October 2028

* Never a permanent Supreme Court justice

** Reappointed as a Supreme Court Justice

Bold denotes current members of the Supplementary Panel

Table 6: England and Wales senior judges in the UKSC and JCPC (since 2020)

Name of judge	Role	Cases	Year
Lord Thomas of Cwmgiedd	Former Lord Chief Justice (E&W)	*Betamax Ltd v State Trading Corporation (Mauritius)*	2021
	UKSC Supp. Panel (2018-22)		
Lord Burnett of Maldon	Lord Chief Justice (E&W)	*R (A) v Secretary of State for the Home Department*	2021
	UKSC Supp. Panel (since Oct 2023)	*R (Imam) v London Borough of Croydon*	2023
Sir Keith Lindblom	Senior President of Tribunals	*Silly Creek Estate and Marina Co Ltd v Attorney General Turks and Caicos Islands*	2021
Sir Geoffrey Vos	Master of the Rolls	*Convoy Collateral Ltd v Broad Idea (British Virgin Islands)*	2021
Sir Adrian Fulford	Court of Appeal (until Oct 2022)	*Anderson v HM Attorney General (Isle of Man)*	2021
Sir Nicholas Patten	Court of Appeal (until Aug 2020)	*Equity Trust (Jersey) Ltd v Halabi (Jersey) and ITG Ltd and others v Fort Trustees Limited (Guernsey)*	2021-22
		Enal v Singh and others (Trinidad & Tobago)	2022
Sir David Richards	Court of Appeal (until Jun 2021)*	*Equity Trust (Jersey) Ltd v Halabi (Jersey) and ITG Ltd and others v Fort Trustees Limited (Guernsey)*	2021-22
		Grand View Private Trust Co Ltd and another v Wen-Young Wong and others (Bermuda)	2022
Dame Julia Macur	Court of Appeal	*Maharaj and others v The State (Trinidad and Tobago)*	2021
		Maynard v The King (St Christopher and Nevis)	2024
Dame Eleanor King	Court of Appeal	*Integrity Commission v Kikivarakis (official liquidator TCI Bank Ltd) (Turks and Caicos Islands)*	2021

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Name of judge	Role	Cases	Year
Dame Victoria Sharp	President of the King's Bench	*Attorney General for Bermuda v Ferguson and Others*	2021
		Day and another v Government of the Cayman Islands and others	2021
Sir Nigel Davis	Court of Appeal	*Chandler v The State (No 2) (Trinidad and Tobago)*	2021-22
Sir Timothy Holroyde	Court of Appeal	*Boodram v Attorney General of Trinidad and Tobago*	2021-22
		Mohamad Jiaved Ruhumatally v The State and another (Mauritius)	2024
Dame Nicola Davies	Court of Appeal	*Dr Kongsheik Achong Low v Brian Lezama (Trinidad and Tobago)*	2022
Dame Katherine Thirlwall	Court of Appeal	*Ennismore Consulting Ltd v Fenris Consulting Ltd (Cayman Islands)*	2022
Sir David Bean	Court of Appeal	*Lescene Edwards v The Queen (Jamaica)*	2022
Sir Julian Flaux	Court of Appeal	*Gol Linhas Aereas S.A v MatlinPatterson Global Opportunities Partners (Cayman) II L.P. and others (Cayman Islands)*	2022
Dame Geraldine Andrews	Court of Appeal	*Kwok Kin Kwok v Yao Juan (British Virgin Islands)*	2022
Dame Ingrid Simler	Court of Appeal (until Nov 2023)*	*Douglas Ngumi v The Attorney General of The Bahamas and 3 others*	2023
Sir Kim Lewison	Court of Appeal	*Alphamix Ltd v The District Council of Riviere du Rempart (Mauritius)*	2023
Sir Rabinder Singh	Court of Appeal	*Attorney General of Trinidad and Tobago v Vijay Maharaj*	2023

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Sir Nicholas Underhill	Court of Appeal	*Stanford Asset Holdings Ltd and another v AfrAsia Bank Ltd (Mauritius)*	2023
Dame Sue Carr	Court of Appeal	*Surendra Dayal v Pravind Kumar Jugnauth and 7 others (Mauritius)*	2023
	Lady Chief Justice (from Oct 2023)	*DPP v Durham also called Bouye (deceased) (Trinidad and Tobago)*	2024

* Subsequently became UK Supreme Court justice

Table 7: Scottish senior judges in the UKSC and JCPC (since 2020)

Name of judge	Role	Cases	Year
Lord Carloway	Lord President of the Court of Session	*Balhousie Holdings v HMRC Commissioners*	2021
		Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill	2022
		Paul and another v Royal Wolverhampton NHS Trust	2023-24
Lady Dorian	Lord Justice Clerk	*Hinds and others v DPP (Jamaica)*	2021
Lord Pentland	Senator of the College of Justice	*Gulf View Medical Centre Ltd v Tesheira (Trinidad & Tobago)*	2022
Lord Malcolm	Senator of the College of Justice	*Smith and another v Attorney General of Trinidad & Tobago and others*	2022
Lord Woolman	Senator of the College of Justice (until May 2023)	*Dorsey McPhee v Colina Insurance Ltd (Bahamas)*	2022-23

Table 8: NI senior judges in the UKSC and JCPC (since 2020)

Name of judge	Role	Cases	Year
Sir Declan Morgan	Lord Chief Justice of Northern Ireland (retired September 2021)	*Sanambar v Secretary of State for the Home Departmentv*	2021
	UKSC Supplementary Panel (since November 2021)	*R v Maughan (Northern Ireland)*	2022
		Jack Austin Warner v Attorney General of Trinidad and Tobago	2022
		Tafari Morrison v The King (Jamaica)	2023
		R (Wang and another) v Secretary of State for the Home Department	2023
Sir Bernard McCloskey	Lord Justice of Appeal (NI)	*Commissioner of Prisons and another v Seepersad and another (Trinidad and Tobago)*	2021
Dame Siobhan Keegan	Lady Chief Justice of Northern Ireland	*R (Coughlan) v Minister for the Cabinet Office*	2022
		In the matter of H-W (Children)	2022
		Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill	2022
		In The Matter of an Application by Rosaleen Dalton for Judicial Review (Northern Ireland)	2022-23
		CAO v Secretary of State for the Home Department (Northern Ireland) - judgment pending	2024
Sir Mark Horner	Lord Justice of Appeal (NI)	*Attorney General v Shannon Tyreck Rolle and others (Bahamas)*	2023

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