



HOUSE OF LORDS

Select Committee on the Constitution

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Constitutional Reform Act 2005

Report with Evidence

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Constitutional Reform Act 2005

INTRODUCTION

1. The Committee's terms of reference are "to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution." The scrutiny of public bills necessarily stops short of examining the constitutional effects of enacted legislation, but the second task of the Committee (to keep under review the operation of the constitution) plainly includes an oversight function in relation to the consequences of legislation leading to constitutional change, of which an outstanding example is the Constitutional Reform Act 2005 (CRA).
2. As Professor Vernon Bogdanor has pointed out,¹ the years since 1997 can be characterised "as a veritable era of constitutional reform." The reforms include the independence of the Bank of England; devolution; proportional representation for election of devolved bodies and for the European Parliament; the Human Rights Act; the Freedom of Information Act; and measures involving reform of the House of Lords.
3. The CRA continued that trend, by fundamentally altering the historic office of the Lord Chancellor and paving the way for the removal of the law lords from the House of Lords and the creation of a Supreme Court. It is a lengthy and complex measure whose introduction to and subsequent passage through Parliament was not without controversy. We have been greatly assisted in our understanding of the nature of the Act and its future implications by a paper written for us by Professor Anthony Bradley², our Legal Adviser. We believe that it would be consistent with our general practice of publishing reports for the information of the House in order to draw attention to matters affecting principal parts of the constitution, to give Professor Bradley's paper a wider readership. It is attached as Appendix 1.
4. While, as a Committee, we rigorously eschew consideration of the merits or otherwise of legislative proposals and only examine their constitutional significance, we believe that many will share the sentiments expressed in Professor Bradley's concluding paragraph, and especially his comment that "the changes made by the Act as they affect the judiciary should be seen as strengthening the integrity of the judicial system, not as weakening it."

¹ "Our New Constitution" (2004) 120 *Law Quarterly Review*, 242, 243.

² Emeritus Professor of Constitutional Law at Edinburgh University; barrister (Inner Temple); a Vice-President of the International Association of Constitutional Law; alternate UK member of the Council of Europe's Commission on Democracy and the Rule of Law; a Visiting Fellow at the Institute of European and Comparative Law, University of Oxford.

APPENDIX 1: THE PROCESS OF CONSTITUTIONAL CHANGE

1. As the Committee on the Constitution will know, legislation frequently has constitutional implications, some of which are intended, but some inadvertent. However, it is rare for an Act to proclaim by its title that its aim is to reform the constitution. In fact, the CRA's focus is narrower than its title suggests since it is concerned exclusively with the position of the courts and the judiciary in relation to the executive and Parliament, and with modifying the functions of the Lord Chancellor. The Act does not confer new jurisdiction on the courts; from this viewpoint it is less significant than the Human Rights Act 1998.
2. In one of its earliest reports, the Committee examined the process of constitutional change and published a flow-chart emanating from the then Lord Chancellor, Lord Irvine, to illustrate the process—in a somewhat idealised form.³ It is unnecessary to outline here the very different process through which the CRA passed, beginning with the Prime Minister's announcement of the abolition of the office of Lord Chancellor in the course of a Cabinet re-shuffle on 13 June 2003; there followed a consultation process from which were excluded the key decisions already taken by government, most notably the question of whether the office of Lord Chancellor should be retained or abolished. And when the Constitutional Reform Bill was published, the Government attempted without success to complete the legislative process within the 2003–04 session. Against the Government's wishes, the House's decision to send the Bill to a select committee ensured that the Bill received detailed examination.⁴ In fact, the select committee left many disputed questions unresolved. It would probably have found it easier to express a view on the disputed issues if the Government had not already committed itself to the contents of the Bill.
3. Constitutional change is always likely to have a political content. Here, the manner in which the legislative process was commenced made it more difficult than it would otherwise have been for the proposals to be considered on their merits. In the event, the details of the proposals were considered by the House, some more than once. The process in its earlier stages placed considerable pressure on the relationship between the Government and the judiciary in the person of the Lord Chief Justice. The preparation of the "concordat" between the Lord Chancellor and the Lord Chief Justice in January 2004 did much to alleviate this pressure. One important point made in the concordat (prepared on the assumption that the office of Lord Chancellor was to be abolished) was: "The key respective responsibilities of the Secretary of State and the Lord Chief Justice should be set out in statute, so as to provide clarity and transparency in their relationship".⁵ This aim remained equally valid when at a later date the Government accepted that the office of Lord Chancellor should be retained. A rather different approach

³ *Changing the Constitution: the Process of Constitutional Change* (HL Paper 60, 2001–02), Minutes of Evidence, page 11. The flow chart is reproduced as Appendix 2.

⁴ *Report of the Select Committee on the Constitutional Reform Bill* (HL Paper 125, 2003–04). For an account of the process by which the CRA was enacted, see Lord Windlesham, "The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change", part 1[2005] *Public Law* 806 and part 2 [2006] *Public Law* (forthcoming).

⁵ DCA, *Constitutional Reform: the Lord Chancellor's judiciary-related functions* (January 2004).

by the Government from the outset would have enabled the concordat to emerge in a calmer atmosphere.

4. While there are certainly conclusions to be drawn from the process followed on this occasion, that is a matter outside the scope of this paper, which summarises the main elements of the Act (paragraphs 5 to 40) before making some observations on these matters (paragraphs 41 to 55).

A: An outline of the Act

5. The Act is 315 pages long, and it contains 149 Sections (pages 1–69) and 18 Schedules (pages 70–315). The longest Schedule by far is Schedule 4 (over a hundred pages), which deals with the re-allocation of numerous statutory functions of the Lord Chancellor made necessary by the changes made in that office. Taken with the numerous amendments to existing legislation made by other schedules, this is an indication of the very far-reaching effects of the changes in the Lord Chancellor’s office, the creation of a new Supreme Court and other matters.
6. This outline of the Act is intended to be merely descriptive of the key provisions; some comments on the significance of the main provisions will be made in part B (below). In general, no mention will be made of provisions for Scotland or for Northern Ireland, although on some matters (particularly for Northern Ireland) the Act makes separate provision for these legal systems.

Commencement

7. A few provisions of the Act (in particular relating to the Speakership of the House of Lords) came into effect soon after the royal assent on 24 March 2005. It has been stated by the DCA that provisions “which deal with the non-judiciary related functions of the Lord Chancellor will commence during 2005 or early 2006”. The main provisions affecting the judiciary will commence on 3 April 2006—these include the new scheme for judicial appointments (the Judicial Appointments Commission and the Judicial Appointments and Conduct Ombudsman), the new scheme for complaints, the new status and functions of the Lord Chief Justice, and the abolition of the surviving judicial functions of the Lord Chancellor. Part 3, creating the Supreme Court, is proposed to commence in October 2008. However, by Section 148(4), this can happen only when the Lord Chancellor is satisfied that accommodation will be provided for the Supreme Court in accordance with approved plans; before the Lord Chancellor may approve these plans, he must after consulting the Law Lords then in office be satisfied that the proposed accommodation will be appropriate for the purposes of the Court (Section 148(5)).

Part 1: The rule of law

8. Part 1 of the Act contains only one Section, entitled, “The rule of law”. This provides that the Act “does not adversely affect (a) the existing constitutional principle of the rule of law; or (b) the Lord Chancellor’s existing constitutional role in relation to that principle”.

Part 2: Arrangements to modify the office of Lord Chancellor

9. By Section 2, a person may be appointed Lord Chancellor only if he appears to the Prime Minister to be “qualified by experience”; the experience in question is stated to include ministerial, parliamentary, judicial or legal experience and “other experience that the Prime Minister considers relevant”. The Lord Chancellor is not required to be a member of the House of Lords, nor to have legal qualifications or experience.
10. Section 3 is entitled, “Guarantee of continued judicial independence”. A duty is imposed on the Lord Chancellor, other Ministers and “all with responsibility for matters relating to the judiciary or otherwise to the administration of justice” to uphold the “continued independence of the judiciary”. Ministers must not seek to influence particular judicial decisions “through any special access to the judiciary”. The Lord Chancellor must “have regard to” the need to defend judicial independence, the need for the judiciary to have support necessary for them to exercise their functions, and the need for the public interest to be represented in matters relating to the judiciary and the administration of justice. For the purposes of these duties “the judiciary” is defined to include all courts in the United Kingdom and also international courts (such as the European Court of Justice at Luxembourg and the International War Crimes Tribunal).
11. By Section 5, the Lord Chief Justice (in respect of England and Wales) may “lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary or otherwise to the administration of justice”. A similar new power is conferred on the Lord President of the Court of Session in respect of such matters that are not within the devolved powers of the Scottish Parliament and Executive.
12. By Section 7, the Lord Chief Justice is declared to be President of the Courts of England and Wales and head of the Judiciary of England and Wales. As such, he is responsible (a) for representing the views of the judiciary to Parliament and to Ministers; (b) for maintaining arrangements for the welfare, training and guidance of the judiciary of England and Wales “within the resources made available by the Lord Chancellor”; and (c) for deploying the judiciary and the allocation of work within courts. The new status and functions of the Lord Chief Justice replace the former rule that the Lord Chancellor was President of the High Court, Court of Appeal and Crown Court of England and Wales.
13. Sections 8 and 9 create new senior judicial posts in the form of Head and Deputy Head of Criminal Justice and Head and Deputy Head of Family Justice. Except for the Head of Family Justice (this title will be assumed by the President of the Family Division of the High Court), the Lord Chief Justice has power (after consultation with the Lord Chancellor) to appoint judges from the Court of Appeal to these posts.
14. By Section 12 and Schedule 1, the power to make rules for matters such as the procedure of the courts is vested in the Lord Chief Justice, who may in general act only with the agreement of the Lord Chancellor and subject to annulment under a negative resolution of either House. By Section 13 and Schedule 2, a broadly similar power is vested in the Lord Chief Justice, acting with the agreement of the Lord Chancellor, to issue practice directions (that will normally be supplementary to the procedural rules), but with the difference that there is no provision for parliamentary scrutiny.

15. One part of the scheme of reform contained in the Act is to make new provision for judicial appointments, to replace powers that at present are vested in the Lord Chancellor (in the case of appointments below the High Court) or in the Queen on the advice of the Lord Chancellor. Since the Lord Chancellor will lose many of these functions, but judicial appointments are still to be made in the name of the Queen, the Queen will in future make these appointments (Section 14 and Schedule 3). The exercise of this formal power will in practice be subject (for the appointment of District Judges) to the recommendation of the Lord Chancellor and subject to the new tasks of selection of candidates placed on the Judicial Appointments Commission (see paragraphs 31–47 below).
16. One consequence of the changes in the office of Lord Chancellor is that it has been necessary to separate the functions that he exercised as a holder of senior judicial office from the functions that he exercised as a member of the Government with executive responsibilities for administering the machinery of justice. Some of these functions have simply been abolished (for example, the Lord Chancellor's duties as a judge under the Habeas Corpus Act 1679); many functions have transferred to the Lord Chief Justice; many other functions have been transferred to the Lord Chief Justice acting jointly or after consultation with the Lord Chancellor. The numerous amendments necessary to re-allocate the Lord Chancellor's functions are made by Section 15 and the 100 pages of Schedule 4.
17. Detailed provision is made for the rank-order by which other senior judges are to perform the functions of the Lord Chief Justice while the office is vacant or while its holder is incapacitated (Section 16).
18. Section 17 provides a new form of oath for the Lord Chancellor ("I ... will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible"). The Act enables the House of Lords to elect its own Speaker by replacing references to the Lord Chancellor in statutes such as the Parliamentary Publications Act 1840 and the Statutory Instruments Act 1946 with references to "the Speaker of the House of Lords" (Section 18 and Schedule 6).
19. In addition to the very lengthy Schedule 4, re-allocating the Lord Chancellor's statutory functions as mentioned above, power is delegated by Section 19 for the Lord Chancellor to make orders for the transfer, modification or abolition of his existing functions. When the House of Lords insisted on the retention of the office of Lord Chancellor, it did not want the office and its core functions to be subject to the power of the Prime Minister under the Ministers of the Crown Act 1975 to create new ministerial posts and departments and to transfer powers between ministers. Section 20 gives protection against this happening to the statutory functions of the Lord Chancellor set out in Schedule 7.

Part 3: The Supreme Court

20. This part of the Act will sever the present institutional link between the House of Lords, as a legislative chamber, and the judicial work of the 12 Lords of Appeal in Ordinary. By Section 23, at an indeterminate date in the future, there is to be a Supreme Court of the United Kingdom, comprising 12 judges (to be known as "Justices of the Supreme Court"), including a President and a Deputy President. The first members of the Supreme Court

will be the 12 persons who immediately before Section 23 comes into effect are then the Law Lords. The present legal qualifications for appointment (two years holding of high judicial office; or 15 years practice as a qualifying practitioner) are re-enacted (Section 25) but an entirely new method of selection will be created.

21. In outline, the recommendation for appointment will continue to be made to the Queen by the Prime Minister, but the Prime Minister's recommendation will be preceded by an elaborate process conducted by an ad hoc selection commission consisting of five members (see Schedule 8) being the President and Deputy President of the Supreme Court and representatives of the Judicial Appointments Commission for England and Wales and the equivalent bodies in Scotland and Northern Ireland. The selection process will include mandatory consultation with senior judges, the Lord Chancellor and the devolved executives (Section 27(2)). "Selection must be on merit" (Section 27(5)); the judges between them must have knowledge and experience of the law in each part of the United Kingdom (Section 27(8)); and the commission must have regard to guidance given by the Lord Chancellor as to matters to be taken into account (Section 27(9)). When the commission propose a name to the Lord Chancellor, he must undertake further consultation (Section 28(5)) and has then three options:
 - (a) to notify the name to the Prime Minister for the appointment to be made;
 - (b) to reject the name if he considers that the person is unsuitable;
 - (c) to require the commission to reconsider the selection if he considers that there is insufficient evidence on certain key matters (Section 29(2)).

After a rejection, the commission may not propose the name again, but after reconsideration the same name may be proposed again. In respect of any given vacancy, the Lord Chancellor has only one opportunity to reject, and only one opportunity to require reconsideration. If at the first two stages he uses these two opportunities, he must at the third stage notify the name then selected by the commission to the Prime Minister; but he may choose to notify to the Prime Minister the name of a selected person whom he had previously required to be reconsidered, provided that that person had not thereafter been rejected (Sections 29–31).

22. The tenure of a judge of the Supreme Court will be, as at present, that he holds office during good behaviour, but he may be removed on the address of both Houses of Parliament (Section 33). A judge will be able to retire or resign and there is procedure for declaring his office to be vacant if he is permanently disabled from performing his duties and is for the time being incapacitated from resigning (Section 36).
23. If necessary, judges in the Court of Appeal (and equivalent courts in Scotland and Northern Ireland) may be requested by the President of the Supreme Court to sit as acting judges, and so may members of a supplementary panel comprising persons who have recently held high judicial office and are under the age of 75 (Sections 38, 39).
24. The jurisdiction of the Supreme Court will in principle be the existing jurisdiction of the House of Lords, together with the jurisdiction to decide devolution issues that at present is exercised by the Judicial Committee of the

Privy Council (Section 40 and Schedule 9). It is declared that the creation of the Supreme Court is not “to affect the distinctions between the separate legal systems of the parts of the United Kingdom” (Section 41(1)).

25. For hearing appeals, the Supreme Court must consist of an uneven number of judges (at least three), of whom more than half are permanent judges and therefore less than half are acting judges (Section 42(1)). The Supreme Court will have power in dealing with any proceedings to seek the assistance of one or more specially qualified advisers (Section 44). The President will have power to make the Supreme Court Rules, governing practice and procedure, but only after a process of consultation with the Lord Chancellor and professional legal bodies. When the President has made these rules, they must be sent to the Lord Chancellor who may decide when they come into force and must include them in a statutory instrument subject to annulment under a resolution of either House.
26. The Supreme Court will not be bound by the legislation that prohibits photographs from being taken in court (Section 47).
27. The Supreme Court is to have a chief executive, appointed by the Lord Chancellor after consulting the President (Section 48(1)). The chief executive may exercise powers delegated to him by the President and must act in accordance with directions given to him by the President. The chief executive will determine the number of officers and staff of the Court with the agreement of the Lord Chancellor (Section 49(2)) and the Lord Chancellor must ensure that the Supreme Court is provided with adequate accommodation and other resources (Section 50). The chief executive must ensure that the Court’s resources are used to provide an efficient and effective system for supporting the work of the Court (Section 51).
28. The fees payable by litigants in respect of Supreme Court proceedings will be in accordance with a scale made by the Lord Chancellor, with the agreement of the Treasury (Section 52(1)). In determining the fees, and the provision for exemptions, reductions and remission of fees, the Lord Chancellor must have regard to the principle that access to the courts must not be denied (Section 52(3)).
29. The chief executive of the Supreme Court must each year prepare an annual report to be laid before Parliament by the Lord Chancellor (Section 54).
30. Because of the creation of the new Supreme Court, the existing statutory name for the High Court, Court of Appeal and Crown Court will be changed to “the Senior Courts of England and Wales” (Section 59(1)).

Part 4: Judicial Appointments and Discipline

31. This part of the Act creates a Judicial Appointments Commission to play the key role in making all judicial appointments in future (other than the Supreme Court). By Schedule 12, the Commission will consist of a lay chairman (“lay” means someone who has never held judicial office or been a practising lawyer), together with 14 other members, as follows:
 - 5 judges (1 from Court of Appeal, 1 from High Court, 1 from either Court of Appeal or High Court, 1 circuit judge, 1 district judge),
 - 2 practising lawyers,
 - 5 lay members,
 - 1 legal tribunal member, and

- 1 lay magistrate.

Serving civil servants are not eligible to be appointed. The Act will govern the appointment of some of the members—thus the Judges' Council will select the three senior judges on the Commission, and for some appointments to the Commission appointing panels are required. The vice-chairman of the Commission will be the senior judicial member. Appointments are limited in time to not more than 5 years and there is a 10 year maximum limit on membership. The Commission will appoint a chief executive, and may act through committees or by delegation of its staff, except for the selection of judges.

32. Sections 63–97 contain the general rules for the making of judicial appointments. Selection must be solely on merit (Section 63(2)) and no-one may be selected unless the selecting body is satisfied that he is of good character (Section 63(3)). These criteria are not defined in the Act. Subject to these criteria, the Commission “must have regard to the need to encourage diversity in the range of persons available for selection for appointments” (Section 64). Guidance on procedures and on the encouragement of diversity may be issued by the Lord Chancellor, after consultation with the Lord Chief Justice and subject to approval by resolution of each House (Sections 65, 66).
33. Separate rules for appointment apply according to certain levels of judge—namely (a) the selection of the Lord Chief Justice and heads of divisions (Sections 67–75); (b) Court of Appeal judges (Sections 76–84); (c) High Court judges and other holders of judicial office (Sections 85–94). So far as the more senior judges in (a) and (b) are concerned, a selection panel of four persons must be created whenever the Commission is requested by the Lord Chancellor to select a candidate for a specific post. The panel will in the case of the most senior appointments (category (a)) generally consist of a Supreme Court judge, the Lord Chief Justice or his nominee, the Chair of the Judicial Appointments Commission or his nominee, and a lay member of the Commission. Once the panel has selected someone for appointment, the name is transmitted to the Lord Chancellor and the procedure is thereafter similar to that described above for the appointment of Supreme Court judges, as regards the power of the Lord Chancellor to reject a selected name or to require reconsideration. In the case of High Court judges and other holders of judicial office, requests for appointment may relate to more than one appointment. The prescribed process at this level includes provision for the situation in which no candidates of sufficient merit have been identified and also provision for identifying persons that would be suitable for future selection (Sections 93, 94).
34. This part of the Act includes provision for complaints about the appointment process. This will be a statutory version of the present scheme (that exists under the Judicial Appointments Order in Council 2001) by which complaints may be made to the Commissioners for Judicial Appointments. The statutory post will be entitled “Judicial Appointments and Conduct Ombudsman” (Section 62, Schedule 13). The Ombudsman will be appointed by the Queen on the recommendation of the Lord Chancellor, and must never have been a judge or practising lawyer. Former service as a civil servant, an MP, or with the Judicial Appointments Commission must not be such as to make the person inappropriate for the office; and a high level of party political activities may prevent an appointment being made.

The appointment must be for a fixed period of not more than 5 years and no person may be the Ombudsman for more than 10 years.

35. Complaints about the appointment process may allege maladministration by the Judicial Appointments Commission or the Lord Chancellor's Department. They may be made only by a person who claims that he was adversely affected in the selection process by the maladministration (Section 99). Complaints made within 28 days after the matter complained of must be investigated by the Commission or the Department, as the case may be. This may lead to a further investigation by the Ombudsman. Other complaints about the appointment process may be made to the Ombudsman at any time. As with other ombudsmen, the main functions of the Ombudsman will be to investigate complaints within his remit, to report on his investigations (to the Lord Chancellor, the Judicial Appointments Commission and the complainant), and to make recommendations for any further action, including compensation.
36. Hitherto, apart from the provisions that exist for removing a judge from office, there has been no statutory basis for disciplinary procedures involving measures that are less extreme than removal. Chapter 3 of this Part of the Act authorises the creation of a disciplinary scheme applicable to the judiciary at its various levels. Its main provisions may be summarised in this way:
- (a) in the case of holders of judicial office (such as circuit judges) whom the Lord Chancellor has power to remove for inability or misbehaviour, the Lord Chancellor's power will be exercisable only after compliance with prescribed procedures (Section 108(1)) (this does not apply to High Court judges and above, who may be removed only by the Queen following an address of each House);
 - (b) in the case of all holders of judicial office (apart from judges of the new Supreme Court), the Lord Chief Justice will (with the agreement of the Lord Chancellor and after following agreed procedure) be authorised to give to a judge formal advice, or a formal warning or reprimand (and the Lord Chief Justice may also continue to act informally as at present, and may give general advice or warnings to judges) (Section 108(3));
 - (c) the Lord Chief Justice (with the agreement of the Lord Chancellor) will be able to suspend a person from judicial office who is subject to criminal proceedings, serving a sentence imposed in criminal proceedings, or has under certain circumstances been convicted of an offence (Section 108(4), (5));
 - (d) the Lord Chief Justice may (with the agreement of the Lord Chancellor) suspend a senior judge from office while he is subject to proceedings for an address for his removal in Parliament (Section 108(6)); he may suspend other holders of judicial office while they are under investigation for an offence (Section 108(7)).

The effect of suspension is that the judge who is suspended may not perform any of the functions of his office (Section 108(8)).

37. Hitherto, there has been no prescribed procedure for making complaints about the conduct of judges, although in recent years the Lord Chancellor has in fact received many such complaints and has dealt with these in various

ways, and with a varying degree of publicity. The Lord Chancellor has refused to investigate complaints about the decisions made by judges, taking the view that the individual affected will in most cases have a right to appeal against the decision. The absence of a formal complaints procedure is now to be made good by conferring powers on the Judicial Appointments and Conduct Ombudsman relating to discipline and complaints against judges. The initiative to approach the Ombudsman must be taken by an interested party—that is, either a complainant who is not satisfied with the action taken by the Lord Chancellor and/or the Lord Chief Justice, or a judge who has been disciplined and complains of the procedure used in his case. The complainant or the judge may apply to the Ombudsman to review the exercise of the disciplinary function, whether for procedural failure or some other maladministration (Section 110(1)). The Act specifies the circumstances in which the Ombudsman must carry out such a review. The review by the Ombudsman will involve the making of an investigation, the issuing of a report on the investigation, power to make recommendations (including the payment of compensation) and power to set aside a disciplinary finding where there has been maladministration that makes it unreliable (Section 111(5)).

Part 5: Judicial appointments and removals: Northern Ireland

38. (Not summarised)

Part 6: Other provisions relating to the judiciary

39. Judges have long been disqualified from membership of the Commons under the House of Commons Disqualification Act 1975. The disqualification under that Act did not apply to the Law Lords, since they were disqualified from the Commons by virtue of their life peerages. By Section 137, judges of the new Supreme Court will be disqualified from the House of Commons, and members of the House of Lords will be disqualified from sitting and voting in that House if they hold a judicial post that disqualifies them from the Commons. If therefore the existing Law Lords become judges of the new Supreme Court, they will until they retire from that Court be unable to sit or vote in the House of Lords. Once the Supreme Court has come into being, its judges will therefore be unable to take part in the proceedings of the House. This will apply also to the Lord Chief Justice or other senior judges on whom a life peerage has been conferred.
40. By Section 138 and Schedule 16, amendments are made to the legislation detailing the composition of the Judicial Committee of the Privy Council. While appeals to the Judicial Committee will continue to lie from the United Kingdom's remaining overseas territories and from Commonwealth states that have not abolished the right of appeal to London, the jurisdiction of the Judicial Committee will be much less than in recent years.

B: Observations on the Act

(i) The general nature of the constitutional changes

41. When the Act is fully in force, an important area of the unwritten constitution will have been largely replaced by a new legislative scheme. Such matters as the appointment of judges, the place of the Law Lords in Parliament, the role of the Lord Chancellor as a judge and his powers in

relation to the judiciary, the authority of the Lord Chief Justice as head of the judiciary, the disciplining of judges, and complaints against the judiciary, have hitherto all been subject to conventions and practices that have evolved over time. They will in future be governed by rules approved by Parliament. The passing of the Act reflects the view that these areas of the unwritten constitution would not have withstood the challenges to them likely to arise in the 21st century, and that the judiciary, and executive-judiciary relations, need in a modern democracy to be subject to greater openness and transparency.⁶ This does not guarantee that the new statutory scheme will work well. But it is certain that the new statute-based scheme will be supplemented by evolving conventions and practices: for example, what use will be made by the Lord Chief Justice of his power to lay written representations before Parliament? And, how will the two Houses respond to such representations when they are received? Similarly, although the office of Lord Chancellor is much changed by the Act, it will continue in being, charged with many functions affecting the judiciary and the courts. Future Prime Ministers could decide, despite the legislation, to appoint persons who would have fitted the model of Lord Chancellors in the late 20th century. But future Lord Chancellors may come from the House of Commons and need not be lawyers. If a new-style Lord Chancellor from the Commons is appointed, the provisions in the Act that require the Lord Chancellor to uphold the rule of law and foster judicial independence will be tested for their effect and durability.

42. From the constitutional viewpoint, the Act is notable for Section 1 (mentioned in paragraph 7 above) that seeks to ensure continuing respect for the rule of law. The rule of law was given wide currency by the 19th century jurist, A V Dicey.⁷ It is a concept that constitutional scholars⁸ and parliamentarians have found notoriously difficult to define at all closely. Section 1 states:

“This Act does not adversely affect (a) the **existing constitutional principle** of the rule of law; and (b) the Lord Chancellor’s **existing constitutional role** in relation to that principle...” (emphasis supplied)

The negative formulation of Section 1 (“does not adversely affect”) leaves room for much debate about what is meant by the “rule of law” and adds in a temporal dimension by use of the word “existing”.⁹ Section 1 is likely to feature in future parliamentary debates about controversial new measures proposed by the Government; it is less likely, but not impossible, that it will be invoked by litigants who seek judicial review of executive decisions made under new legislation. It is doubtful whether it could form the basis of a direct challenge to a failure by the Lord Chancellor to make his position known on a current issue.

⁶ See paragraph 4 above and the quotation from the concordat between the Lord Chancellor and the Lord Chief Justice.

⁷ A V Dicey, *Law of the Constitution*, 10th edn, 1959 (by ECS Wade), chap 4. For a well-known critique of Dicey’s approach, see W I Jennings, *The Law and the Constitution*, 5th edn, 1959, Appendix II.

⁸ See e.g. P Craig, “Formal and Substantial Conceptions of the Rule of Law: an Analytical Framework” [1997] *Public Law* 467. For an overview, see A W Bradley and KD Ewing, *Constitutional and Administrative Law*, 13th edn, 2003, chap 6.

⁹ Has the principle of the rule of law been unchanged throughout the 20th century? Has the role of the Lord Chancellor changed during the same period? And how, apart from Section 1, might the Constitutional Reform Act have adversely affected the principle?

43. Similar points can be made about Section 3 (paragraph 9 above), entitled “Guarantee of continued judicial independence”. Judicial independence is not such a diffuse concept as the rule of law, but it nonetheless is multi-faceted.¹⁰ It is notable that Section 3(1) imposes a positive duty that is not confined to the Lord Chancellor but extends also to all other Ministers and to all with responsibility for the justice system to “uphold the continued independence of the judiciary”. But does the negative duty placed by Section 3(5) on the Lord Chancellor and other Ministers not to “seek to influence particular judicial decisions through any special access to the judiciary” go far enough? Does it have any application to Ministers who publicly ask for judges to be tough on suspected terrorists, or who threaten the courts with the prospect of amending legislation if they do not give effect to government policy? How substantial is the duty placed by Section 3(6) on the Lord Chancellor to have regard to (a) the need to defend that independence ...”? And how, if at all, does the protection of judicial independence mesh with the statement in Section 1 of the Act safeguarding the principle of the rule of law—for example, with reference to proposals for legislation that seek to exclude judicial review of executive decisions, or to require the judges to accept as conclusive statements made by a Secretary of State? One possible answer is that legislation to exclude judicial review might breach the rule of law but would not conflict with judicial independence, since the judges remain independent decision-makers within the jurisdiction that survives to them.
44. Now that this Act is on the statute book, it may cause attention to be given to other areas of the unwritten constitution where it may be said (as with the judiciary) that the complex structure of common law rules and principles, conventions and political practice need a more open and transparent legal base if their legitimacy is to be maintained during the present century. These unwritten areas include prerogative powers (such as foreign relations, war and peace, treaty-making and passports), the civil service, the obligations of Ministers and parliamentary privilege.¹¹ If all such areas were to become the subject of legislation, the “unwritten” nature of the constitution would be much diminished.¹²

(ii) The appointment of judges

45. It is impossible to over-estimate the importance of the new scheme for appointing judges in Part 4 of the Act. Although in recent decades the use by Government of its patronage in making judicial appointments has been transformed, compared with the position in 1900 or 1950, the retention of this patronage by the Government would have maintained in being a ground for attack on the legitimacy of judicial appointments that would have been good neither for the executive nor for the judiciary. The scheme for the Judicial Appointments Commission to select the candidates is of greatest significance in relation to the senior judiciary, especially in view of the tasks placed on the higher courts by the Human Rights Act. It remains to be seen whether future Lord Chancellors will wish to make much use of their limited

¹⁰ Recent discussions of this subject include R Stevens, *The Independence of the Judiciary: the View from the Lord Chancellor's Office* (1993) and PH Russell and DM O'Brien, *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (2001).

¹¹ See the Report of the Joint Committee on Parliamentary Privilege (HL 43–I, HC 214–I, 1998–99).

¹² This point is developed by Vernon Bogdanor, in the article cited in note 1 above, at pp 246 and 249.

but significant power to reject or require reconsideration of a candidate selected by the Commission.

46. That said, the rule that all judicial appointments must be made on merit is a rule that is applied much more easily to appointments at the lower end of the judicial hierarchy (district judges and circuit judges) than to appointments at the higher end. The work of a judge in the Court of Appeal differs in important ways from the work of a High Court judge. The constitutional role of the new Supreme Court differs from that of the Court of Appeal. And the key posts of Lord Chief Justice and President of the Supreme Court carry burdens that go far beyond adjudicating. Will the elaborate provisions in the Act for the Judicial Appointments Commission and the selection procedures enable good decisions to be made? The Act cannot, and will not, exclude the need for subjective judgment to be exercised when the relative merits of candidates are being assessed.
47. One question about the rule that appointments are to be made on merit is raised by the duty of the Judicial Appointments Commission to have regard to the need to encourage diversity in the range of persons available for selection (Section 64). The performance of this duty is likely to be affected by the policies adopted by the Lord Chancellor for encouraging such diversity.¹³

(iii) The creation of the Supreme Court

48. The proposal for a new Supreme Court ran into difficulties during the legislative process that were largely caused by the Government's handling of the proposed reform, rather than by the case for reform itself. From a separation of powers viewpoint, there is a very strong case for making a clear distinction between the judicial work of the House of Lords and its legislative work. Certainly, there has long been an important distinction in practice between the two functions of the House, but openness and transparency have often been lacking. The greater the emphasis placed on judicial independence and the rule of law, the more difficult it is to justify the presence of senior judges in the legislature. A future reform of the composition of the House of Lords might well have made it necessary in any event to cut the link between membership of the Supreme Court and membership of the House.
49. Apart from accommodation for the Court, the questions that may be asked about Part 3 of the Act relate to the powers of the President, the position of chief executive, and the duties of the Lord Chancellor in relation to resources. In several respects, the Act has improved upon proposals in the Constitutional Reform Bill. But it remains to be seen whether the Act goes far enough in providing the Supreme Court with the institutional independence that it needs, in light of the direct impact that the Court's decisions may have on policies to which the Government attaches much political importance.¹⁴ It is probably a pointer to future decisions in cases of

¹³ See the Lord Chancellor's statement on the Judicial Diversity Programme, HL Deb., col WS 40, 13 July 2005.

¹⁴ Lord Woolf's initial reaction to the proposed Supreme Court was that we were running 'the risk of exchanging a first class appeal court for a second class supreme court'. There was this risk only if it could have been supposed that the Government was proposing a supreme court on the lines of the US Supreme Court or the Supreme Court of Canada.

exceptional significance that in December 2004, no less than nine Law Lords sat to decide the legality of indefinite detention without trial in the Belmarsh Prison case.¹⁵ Some reformers would still like to see the Supreme Court acquire duties of constitutional adjudication that are fully comparable with those placed on the US and Canadian Supreme Courts, and the High Court of Australia. However, there is no inexorable process that dictates that a Supreme Court must also be a constitutional court. There is certainly no basis for supposing that the present judiciary will seek a constitutional role greater than that which is assigned to them by the Human Rights Act.

(iv) The retention of the office of Lord Chancellor

50. The most significant change made to the Constitutional Reform Bill during its process through Parliament was the decision, against the wishes of the Government, to retain the office of Lord Chancellor. Part 2 of the Act is entitled, “Arrangements to modify the office of Lord Chancellor”. Although the modifications are considerable, and no return is possible to the former, rather uncertain position of the office, the Act leaves it open to future Prime Ministers to take the process of reform further by appointing a Lord Chancellor from the House of Commons or taking a step back towards the former position by appointing someone in the Gardiner/ Hailsham / Mackay / Irvine line of succession. Since there nothing in the Act to link the position of Lord Chancellor with the office of Secretary of State for Constitutional Affairs, a future Prime Minister could make changes in the DCA and in the duties of the Secretary of State, while leaving the position of Lord Chancellor in being, with statutory duties relating to the judiciary.

(v) Position of the Lord Chief Justice

51. The changes made in the office of Lord Chancellor will impact directly upon the Lord Chief Justice. It appears that the DCA do not intend to issue an updated version of the concordat agreed between Lord Woolf and Lord Falconer in January 2004,¹⁶ since its primary aim was to secure agreement of the judiciary to what the Government were intending to include in the Constitutional Reform Bill, and that aim was achieved. Some functions formerly exercised by the Lord Chancellor as head of the judiciary (for example, in relation to judicial discipline and dealing with complaints against judges) will in future be exercised jointly by, or after consultation between, the Lord Chief Justice and the Lord Chancellor. Other functions will be transferred to the Lord Chief Justice. Senior judges will need to take on administrative functions that hitherto have been carried on by the Lord Chancellor and his officials.¹⁷
52. The Act recognises the existence of a body known as the Judges’ Council, that was established by the Judicature Act 1873, lay dormant for many years, was abolished in 1981 and was re-created in 2002.¹⁸ It remains to be seen

¹⁵ See *A v Secretary of State* [2004] UKHL 56, [2005] 3 All ER 169.

¹⁶ As already stated in paragraph 4, above, the Concordat of January 2004 is drafted on the assumption that the office of Lord Chancellor would be replaced by that of Secretary of State.

¹⁷ Under the Concordat, senior judges are to serve as non-executive members of the board for the Unified Courts Agency and of the corporate board for the DCA.

¹⁸ See the informative article by Lord Justice Thomas, “The Judges’ Council”, [2005] *Public Law* 608. Under the 2005 Act, Schedule 12, para 7, the Judges’ Council will play a vital role in selecting the senior judges who are to be members of the Judicial Appointments Commission.

whether this Council will become a body representative of the entire judiciary, or will exercise as broad a range of functions as the Judicial Conference in the USA, that has been active for some 80 years. But under the new dispensation it will be necessary for there to be a clear structure within the judiciary that could, for instance, properly respond to government proposals for legislation affecting the judiciary. And support from such a body could strengthen the hand of the Lord Chief Justice in his dealings with government.

(vi) Judicial accountability

53. The effect of the Act in extending the duties of the Lord Chief Justice is likely to lead to calls for some form of judicial accountability to Parliament. While the Lord Chief Justice will be able to lay written statements before Parliament (Section 5), the Act does not require either House to respond to these statements, nor does it authorise either House to call for statements or evidence from the Lord Chief Justice. In fact, it is likely that select committees in both Houses (or a joint committee) may wish to inquire into aspects of the machinery of justice. The principle of judicial independence does not exclude certain forms of accountability to Parliament, but MPs should not expect the judges to be accountable to Parliament for the decisions that they make in cases coming before them.
54. This is not to argue against the new disciplinary procedures and the new arrangements for complaints against judges that are in the Act. So far as the statutory provisions go in introducing new means of securing accountability for judicial behaviour, they are not incompatible with judicial independence. They may help to improve the standing of the judges and the machinery of justice in terms of media and public opinion. It is however doubtful, by reason of the narrowly confined nature of his functions, whether the new Judicial Appointments and Conduct Ombudsman will be able to develop a high public profile.
55. Finally, the new interface between the judiciary and the Government will need time to develop. The federal courts in the USA have often been referred to as the “least dangerous branch”.¹⁹ Certainly the Government and Parliament have power to change the law and to embark on new policies in a way that the courts lack. The courts are ultimately dependent for their resources upon provision made by Government and Parliament. The judges are public servants, charged with duties that are in the interests of the public at large. **It is more important than ever that the courts should be able to do justice in an even-handed and impartial manner. Ministers and the Government in general should not seek to blame the judges when the courts make decisions that are adverse to the wishes or policies of the Government. The changes made by the Act as they affect the judiciary should be seen as strengthening the integrity of the judicial system, not as weakening it.**²⁰

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¹⁹ See *The Federalist* (1788), no 78 (Hamilton).

²⁰ See paras 34–35 above.

APPENDIX 2: EXTRACT FROM HL PAPER 60, SESSION 2001–02, FLOW CHART OF CONSIDERATION OF CONSTITUTIONAL REFORM ISSUES

