JUSTICE 2 COMMITTEE

Tuesday 9 March 2004
(*Afternoon*)

Session 2

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CONTENTS

Tuesday 9 March 2004

JUSTICE 2 COMMITTEE
9th Meeting 2004, Session 2

CONVENER

*Miss Annabel Goldie (West of Scotland) (Con)

DEPUTY CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

COMMITTEE MEMBERS

Jackie Baillie (Dumbarton) (Lab)
*Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Mike Pringle (Edinburgh South) (LD)
*Nicola Sturgeon (Glasgow) (SNP)

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Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Michael Matheson (Central Scotland) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Lord Cullen of Whitekirk (Lord President)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 2

Scottish Parliament

Justice 2 Committee

Tuesday 9 March 2004

(*Afternoon*)

[THE CONVENER *opened the meeting at 15:00*]

Constitutional Reform Bill

The Convener (Miss Annabel Goldie): Good afternoon everyone and welcome to the ninth meeting this year of the Justice 2 Committee. Our only agenda item is the Constitutional Reform Bill.

In connection with that, it is my particular pleasure to welcome the Lord President the Lord Cullen of Whitekirk and his legal secretary, Mr Ruaraidh Macniven. On behalf of the committee, I can tell Lord Cullen that we are very pleased to have him with us this afternoon. We appreciate that his attendance is perhaps unusual, but we value his presence all the more for that. The significance of the Constitutional Reform Bill for Scots law is obvious to us all, so the opportunity to be able to ask questions of Lord Cullen is very welcome to every one of us.

We are aware that events have slightly engulfed us, given yesterday's debate in the House of Lords. We know that you participated in that debate, so we are particularly appreciative that you have made your way back to Edinburgh to attend this meeting. Do you wish to say a few words about the debate, or do you prefer that we just proceed to questions?

Lord Cullen of Whitekirk (Lord President): I am not sure that I can say very much about the debate. As members will realise, several conflicting issues had to be resolved in the course of yesterday's debate. I will try to put the matter in a nutshell.

It was fairly plain that there was general support for the provisions for an English judicial appointments commission. There was also a perceived need to deal with the vacuum that was created by the intention to abolish the post of Lord Chancellor. On the other hand, it was considered that the matters concerning the supreme court were better considered on a long-term basis.

There was perhaps a conflict between the need to take a longer view on matters such as the supreme court—which need to be considered very carefully because they concern the constitution—and, on the other hand, the need to deal with the situation created by the proposed abolition of the post of Lord Chancellor.

That was perhaps the problem that the Lord Chief Justice faced. He took the view that it was not possible to go back to the situation before last June, when the Government in effect elected to abolish the post of Lord Chancellor. He had to work with that situation. Consequently, he took the view that, on balance, it was better that the bill should proceed in the ordinary way. The other view, which perhaps arose from the way in which the matter had been handled, was that it was better that the bill should go to a select committee. I understand that that view eventually prevailed.

That was the issue in a nutshell.

The Convener: I am grateful for that helpful introduction.

I have one or two general questions to begin with. Your original response to the Department for Constitutional Affairs consultation said that it would be preferable to retain the existing arrangements. Is that still your view, or has the case for change made some progress?

Lord Cullen: I still hold that view. Let me briefly indicate what that view is based on.

The first question is whether there is a need for such a change. One consideration is that the existing arrangements work perfectly well. As a practical matter, everybody knows that the lords of appeal are not, so to speak, contaminated by the fact that they work in the same building as parliamentarians. The functions of the lords of appeal are discharged quite separately in a different part of the building.

As has been said many times, if one wanted to design a legal system, one would not design the system that we currently have. However, what we have is the result of an accumulation of experience, conventions and practice over many years. Therefore, the question is: what is the need for change? Of course, there is a perfectly respectable academic argument for the proposed separation, but the question is whether the argument is more than academic. It is argued that the public would expect it to be more than that, but many ask whether we know what the public think or want. The expression "double perception" is used to refer to the Government's perception of the public's perception. The challenge has been thrown out to find evidence that the public think that the proposed change should be made. I have gone beyond my remit in talking about the public, rather than about my views. However, I am certainly concerned about whether there is a need for change.

The second point is about what is involved in making the change. There will be undeniable

losses. I am impressed by what I understand is the lords of appeal's contribution to the Parliament's work, both in the chamber and in committees. That is a significant element to take into account. In addition, there is the question of financial costs, which currently seem to be open-ended. According to the bill's explanatory notes, the estimated cost for the supreme court building ranges from £1.6 million to £6.5 million, which is a wide range. We all know how building costs can sometimes get beyond original expectations.

Further, there is the question of the cost of running the supreme court. As I understand it, the administration costs will be addressed by significantly increasing the fees charged in the House of Lords and, according to the bill's explanatory notes, it is also proposed to fund the administration costs from fees paid by litigants at lower levels throughout the United Kingdom. That will be done regardless of whether they have any prospect of their case going to a final court of appeal. Some litigants may be unable to go to a final court of appeal because their case is not the sort of case that can be appealed to such a court; and if a litigant's case can go to such a court, it may be refused leave to do so. That problem arises both in England and in Scotland.

The funding for the supreme court's administration costs may not work out as proposed. However, the problem is that, when there is so much uncertainty about how much the supreme court will cost, where its location will be fixed and who will pay for it all, the proposal acquires an air of uncertainty. We should not be on the threshold of something fundamental, which is meant to last for years, in a complete state of uncertainty. Therefore, those are formidable points. I am saying more than was in my original submission to the Department for Constitutional Affairs, because what I read in the bill's explanatory notes and heard in Parliament adds to the problem of uncertainty. Such matters would concern anybody in any part of the United Kingdom, but I have other reservations that concern Scotland alone and I will elaborate on them if the committee wants me to do so.

The Convener: Thank you. That is helpful. On a broad front, is it your impression that the nature of the beast that will be created is different from the nature of the beast that is there just now?

Lord Cullen: Yes, that must be so. What we are talking about is a UK court. The full implications of that have not yet appeared and perhaps will not appear unless and until the supreme court is in operation. However, as far as we can see, the supreme court is intended to be, and to be considered as, a UK court. Currently, we have a sort of UK court in the sense of the Judicial Committee of the Privy Council dealing with devolution issues. Obviously, that has a Scottish connection in so far as a case has a devolution issue. Those are usually criminal cases, but include civil cases to some extent. However, as the House of Lords presently functions, and as it has functioned for many centuries, it is not a UK court at all. It operates sometimes as a Scottish court and sometimes as an English court. It is important that it be considered in that way, because it is operating in relation to two different and separate legal systems. It is, or it ought to be, well recognised that what is decided in one jurisdiction does not rule in the other. A House of Lords decision in a Scottish case cannot rule in the English jurisdiction and vice versa. You might ask why that is so. To answer that we have to go back to the act of union and the separation of the two legal systems, which was guaranteed to last for all time coming. That is the system that we have had and it has worked pretty well over the years.

I am of course conscious that, from time to time, House of Lords judges, particularly those from an English background, have been encouraged to think that what is good for England must be good for Scotland. That was the case particularly in the 19th century. I have no doubt that that view needs robust treatment, but that is why we have Scottish judges in the House of Lords, to ensure that the Scottish view is understood before any judgment is arrived at. In the sense that I have just described, what is new would be different from what we have got.

The Convener: That would explain your fairly public concern that we could see an erosion of Scots law.

Lord Cullen: That is what I had in mind and it applies not only in civil appeals, because in the Judicial Committee of the Privy Council, there is the unusual situation whereby a body consisting only partly of Scottish judges has to come to terms with Scots criminal law. I do not mean that it has to solve questions of criminal law, but it has to have an understanding of it as the background to dealing with devolution issues.

Nicola Sturgeon (Glasgow) (SNP): In your response to the consultation document, which you submitted in November last year, you observed that there was a live question as to whether there should be an appeal beyond the Court of Session. Do you think that the debate around that question has been aired sufficiently in Scotland, that both sides have been considered properly and that what has emerged in the bill is a considered conclusion?

Lord Cullen: I am not sure that I can answer that question fully, because I do not know everything about all that has gone on. I have not followed every word that has been said in the

Parliament. I was present at an academic debate—I think that you were also present—at the University of Edinburgh, which was extremely useful in considering the range of possibilities.

From a public point of view and in terms of public consultation, the matter has not been aired properly, which was one of my concerns. When the consultation paper was published in the late summer of last year, the Government stated what was to happen as a matter of policy, rather than as a constitutional question, which was an extraordinary situation. Those who responded to the paper were invited to say, "Well, given that this is the Government's policy, what is the name of the court to be and what is the name of the judges to be?" That was resented widely and the resentment was all too evident yesterday in the debate in the House of Lords. I do not think that the matter has been ventilated fully in public.

Nicola Sturgeon: I hope that you are able to answer this question. In your view, what would be the advantages and disadvantages to Scots law and the Scottish legal system if the Court of Session were the final court of appeal?

15:15

Lord Cullen: I am conscious that there are arguments on either side of that question. I think that I speak for my colleagues when I say that I favour the status quo. First, one has to remember that a number of things are common to England and Scotland. A certain amount of statute law, such as taxation law, is similar. We now have questions of human rights that are the same on both sides of the border, at least in terms of the articles.

Also, a final court of appeal is useful in resolving questions of conflict in which there is some genuine difference of view about how a certain question should be resolved. Further, it is a useful means by which questions of general legal policy can be worked out in an atmosphere that is dedicated to the future of the law and how it might develop.

It also enables a first-hand comparison to be made between the laws of two countries. No doubt, nowadays, every court in the United Kingdom is used to cases from other jurisdictions being cited. However, the House of Lords is in the peculiar position of being able to make a first-hand comparison because it includes representatives from England and Scotland, each of whom brings with them their own accumulated background in a system with regard to how a certain problem can be tackled from the point of view of the law of each side respectively.

It is quite important that, if there is a final court of appeal, Scotland should have representation in it. It is quite noticeable how Scots have not hesitated to draw on their own experience in participating in decisions in the House of Lords. It is quite useful for people to be able to feed off each other's legal experience.

Those are some of the reasons that would make me in favour of the status quo.

Karen Whitefield (Airdrie and Shotts) (Lab): In answering Nicola Sturgeon's question, you might already have answered a question that I wanted to ask. At present, the court of appeal for Scottish civil cases is the House of Lords. What do you consider to be the main benefits of that? What benefits do you believe would need to be protected if we were to have a supreme court?

Lord Cullen: On the benefit of having anything going to what we might refer to as London, what I have said to Nicola Sturgeon covers what I would say to you. However, if we are to have a supreme court—whether we like it or not, so to speak—it is important that we make quite clear right from the start the basis on which it would proceed with regard to its differing jurisdictions. What concerns me at the moment is that, in the relevant section of the Constitutional Reform Bill, all that is to be said about the two jurisdictions can be found in three numbered clauses.

In the first, clause 31(1), the court is referred to as a "superior court of record", which is not a term that we know in Scotland. That clause is followed by a subsection dealing with England and a subsection dealing with Scotland. Effectively, that part of the bill says simply that the supreme court will take over the jurisdiction that the House of Lords inherited under the Appellate Jurisdiction Act 1876.

On the face of it, that might look all right. However, what concerns me is that we are talking about a new kind of court. This is a United Kingdom court. I think that it needs to be spelled out quite expressly that a decision in an appeal coming from England will not be determinative of Scots law—which is to say that it will not have the ability to overrule a decision in a Scottish case—and vice versa. Furthermore, it needs to be stressed that, in discharging its functions, the supreme court should respect the continued separate existence and identity of the two legal systems. However, as I pointed out when I was speaking yesterday, nothing is said about that in the bill, despite some sort of assurances that the Lord Chancellor and the Secretary of State for Constitutional Affairs gave some weeks ago and again yesterday.

Karen Whitefield: Apart from saying that the supreme court would be a new institution, which needs to be reflected from the start, how would you respond to those who would suggest that the

current arrangements reflect the uniqueness of Scots law and the difference between it and English law and that, although nothing has been explicitly written down about that, we have been able to protect Scots law for the past 300 years?

Lord Cullen: I would say that we have managed. From time to time, judges have made it perfectly plain what the separation of the two systems means. I was thinking yesterday about a passage from what was said by a Lord Chancellor in the 19th century. He was addressing the House of Lords in a Scottish appeal. He said:

"we are sitting here as the Court of Session in Scotland, to decide as that court ought to decide, and … we are bound not to apply our English principles, and our English doctrines".

That is the theory of it. From time to time, particularly in the 19th century, there was a tendency for English judges to import matters from English law into Scottish cases. There will always be that risk. However, I consider that, if we move into an area where a court is labelled a United Kingdom court, there will perhaps be a greater tendency for that to happen. That is why I seek specific guarantees, so that, long after ministerial assurances have been forgotten, there is something fundamental governing the matter in statute, to which you can point.

The Convener: I know that Nicola Sturgeon wants to come in on this point, but I would like to clarify two technical points. You referred to the definition:

"The Supreme Court is a superior court of record."

I must confess that I wrote beside that, "What does this mean?" Is there an accepted meaning to that phrase?

Lord Cullen: Perhaps Mr Macniven could guide you on that, as I think that I asked him to look into the matter. I think that that means that it is a court that has the power to deal with matters of contempt of its orders. I cannot explain to you why it is thought necessary to put that into the bill. I understand that all the superior or senior English courts are termed in statute as superior courts of record. The supreme court is being treated in the same way. In the past, that expression has been used for a number of courts that had United Kingdom responsibilities, such as the restrictive practices court. I would not say that that phrase is completely unknown in Scotland, although it is certainly not familiar. It may not actually mean a great deal.

I think that the word "record" is to do with the substance on which decisions used to be written: parchment, paper or something of that sort. However, that is one of the mysteries of English law that I will not pretend to be able to unravel. I am certainly not giving expert evidence on the matter.

The Convener: I am very grateful to you for trying to cast some light on it—although the corner is still less than well illuminated. The other technical point that I wished to ask you about relates to an important issue that was raised by Karen Whitefield. If a flexible working practice that has governed the appellate functions of civil cases in Scotland for over three centuries without reference to any statutory framework is replaced with a statutory framework, is there a technical implication? Is there a danger that, unless matters are expressly stated in the proposed statute, there may be omissions?

Lord Cullen: That is a fair point, and that is perhaps one way of expressing my own concerns. Because so much before was unwritten and was dependent on implications and convention, then how much of the past should we be bringing with us if we are moving into a different context with an exclusively statutory basis? It is very difficult to tell.

That is why you might need to reduce the matter to writing. I have seen that already in the way in which the Lord Chancellor and the Lord Chief Justice have worked out the arrangements for appointing judges. The previous conventions were unwritten—there was practically nothing. However, a concordat on the subject occupies numerous pages. That demonstrates that, if you move into a statutory system under which there must be rules, you really have to be clear that everything is covered. Otherwise, there is a danger that you will not be achieving the intended purpose.

Nicola Sturgeon: I return to an issue that Karen Whitefield raised. You have clearly expressed the view that decisions of a supreme court should be binding only on the jurisdiction from which the appeal came. Would you want that general rule to apply in all cases—even, for example, cases arising from UK-wide statutes?

Lord Cullen: One would apply that rule as a matter of common sense. If that is the technical rule, it should be the rule. However, if a court in Scotland found itself considering a decision that rested completely on a point in a taxing statute made by a court of similar standing in England, and if it was quite impossible to see that there was any distinction as to the law, although technically the decision would be only persuasive, it would effectively be authoritative.

Nicola Sturgeon: But the general rule would be as you have described, and it would be a matter for Scottish courts to decide.

Lord Cullen: Yes.

Nicola Sturgeon: Are there any other House of Lords conventions that you would wish to see transported into the Constitutional Reform Bill? For example, I understand that there is a convention that non-Scottish law lords do not issue opinions

on matters of Scottish common law. Is that something that you would want to see preserved, either as a convention or in statute?

Lord Cullen: I do not think that that is something that you could put into the statute. I think that you would simply have to leave the justices of the as-yet-hypothetical supreme court to work out their own practices. It might very well be that they would find it more sensible to let the Scots judges take the lead when it was a question depending on Scots common law.

Maureen Macmillan (Highlands and Islands) (Lab): I want to recap a little. You say that you are content with the status quo but, if we are to have a supreme court, you are not convinced that the philosophy of the present set-up would necessarily transfer and you are therefore worried about the protection of Scots law.

I note what you said in the House of Lords yesterday—at least, it is what I read in *The Herald* and *The Scotsman*; I take it, of course, that everything they say is true. You said, for example:

"My concern is that this proposal, as it is expressed, will mean a gradual erosion of the difference".

You also said that

"decisions of a … Supreme Court would be of binding effect only within the particular jurisdiction from which the appeal arises",—[*Official Report, House of Lords*, 8 March 2004; Vol 658, c 1074.]

and that the bill should state that.

Am I to understand that a fairly small amendment to the bill would satisfy you? Should there perhaps be an amendment to include the very words, "Decisions of the supreme court should have binding effect only within the jurisdiction that they serve"?

Lord Cullen: You understand, of course, that yesterday's business was the second reading of the bill, which is confined to matters of principle. I therefore approached the matter by looking at the implications of what was there before us. If you asked me to assume that there is to be a supreme court, my position would be to say that that should happen only if the necessary safeguards are in place. I think that such an amendment would be comparatively straightforward, and I do not understand why there should be any difficulty.

Maureen Macmillan: Do you feel that it would have to be in the bill and that guidance from the minister would not be sufficient?

Lord Cullen: It would certainly not be. I cannot disguise the fact that even what I have spoken of might not be sufficient. However, if we are to embark on such an enterprise and if it has to happen, I would like at least the minimum safeguards.

Maureen Macmillan: It could be as simple as one line in the bill.

Lord Cullen: If it were left to me, it might be more than one sentence, but it is not a complicated issue.

Mike Pringle (Edinburgh South) (LD): I want to explore what you think about the cases that go to the House of Lords at the moment. In the absence of a requirement to seek leave to appeal, do you think that the cases currently coming before the House of Lords are appropriate, or do you think that there should be some sort of change?

Lord Cullen: On balance, we have taken the view that matters should remain as they are. It is certainly the case that, from time to time in the past, the checks that should have prevented certain cases going to the House of Lords perhaps did not operate as they should have done. Members know what the checks are. Before a case goes to the House of Lords, the petition for that purpose must be signed by counsel. In the past, there were a number of cases that should not have gone there; I dare say that that may happen from time to time. If the rules are operated properly it should not happen, although one can never guarantee that. The only consolation is that the number of cases that go to the House of Lords is comparatively small. If it is a problem, it is not a large one.

15:30

Nicola Sturgeon: My next question may take us back somewhat in the discussion. I return to whether civil appeals should go beyond the Court of Session. Often that debate is polarised. People express the view either that the status quo should remain or that civil appeals should rest in Scotland. Do you see any argument for a third way, which would involve only certain types of cases being appealable to the proposed supreme court? I refer to appeals arising from UK-wide statutes or in areas where the common law in Scotland and in England are substantially the same.

Lord Cullen: I do not deny that there are certain attractions in that and that there is a case for drawing the line in such a way. The only problem is that we might fall foul of our existing constitution and the basis on which Scotland is joined to England: the act of union, taken together with the claim of right. I do not know what solution the member proposes to that problem.

Mike Pringle: Lord Cullen has already referred to judges in the House of Lords giving decisions. The present convention is that non-Scottish judges do not deliver speeches in Scottish cases. If the new supreme court is established, how will the system work? We have talked about the need for

procedure to be laid down in statute. Would the convention of 300 years continue? Would there be an agreement among the judges that only Scottish judges would give decisions in Scottish cases?

Lord Cullen: The tendency would be along the lines that the member has described. I am not sure whether matters are quite as absolute as he suggests, but an English judge would be reluctant to become involved in discharging an opinion that was declaratory of Scots common law. Existing practice should continue into the new system. Does that answer the member's question?

Mike Pringle: You said that existing practice should continue.

Lord Cullen: It will continue, because the reluctance of English judges to discharge opinions declaratory of Scots common law will be the same.

Maureen Macmillan: I would like to discuss the proposed transfer of devolution issues from the Judicial Committee of the Privy Council to the supreme court. Do you have any concerns about that?

Lord Cullen: The issue is largely covered by what I have already said. The Judicial Committee of the Privy Council is a United Kingdom court, so to that extent it matches a supreme court. However, devolution questions arise in a very odd way, especially in relation to crime. The members of the Judicial Committee of the Privy Council are not concerned with Scots criminal law or criminal procedure, but to resolve devolution issues, they must become involved in examining it. English judges who have worked in the English system all their working lives will have no familiarity with the law and procedure that are being discussed.

It was certainly perceived in the past as something of an anomaly—I think that Lord Bingham of Cornhill described it as an anomaly—that English judges could become involved to that limited extent in the consideration of matters of Scottish criminal law and procedure. In such a situation, it might be hard to avoid some form of English influence. That influence might become rather more pronounced if there is a move to a supreme court system, in which the work might well tend to be done more and more by English judges. By that I mean that there might be fewer opportunities to draw in judges with a Scottish background.

Maureen Macmillan: If the Judicial Committee of the Privy Council's role were to be transferred to the proposed supreme court, how would we guard against the situation that you describe?

Lord Cullen: Your question reflects one of the reasons why I have reservations about the proposal, as I said earlier.

Maureen Macmillan: Would there be any way in which we might guard against that situation, after the proposal became a fait accompli?

Lord Cullen: We could do so only by qualifying the bill's contents in the way that I described earlier. I realise that that might not be fully effective.

Maureen Macmillan: Should something be inserted in the bill?

Lord Cullen: There should be a clear statement of respect for the separate identities of the two systems.

Maureen Macmillan: Thank you. That is useful.

Lord Bonomy recommended that acts of the Lord Advocate in relation to his functions as a prosecutor should not be included in the list of devolution issues. I am not quite sure why he made that recommendation. Perhaps you might explain what Lord Bonomy had in mind and tell us whether you agree with him.

Lord Cullen: You would need to read Lord Bonomy's report, but he indicated that such issues caused delays at various stages, perhaps at trial and appeal levels. There is a view that that was an unforeseen consequence of the Scotland Act 1998—it was never foreseen that the provisions about vires would strike at the actions of the Lord Advocate. However, those who are interested in raising that type of challenge have quite frequently taken the opportunity to do so. I think that Lord Bonomy and a number of his colleagues considered that that was an unfortunate development and hoped that the situation might be changed. In my response to the consultation paper last November, I referred to the matter and raised the question whether attention might be given to that as well as to the proposals for a supreme court. However, I do not detect any enthusiasm on the part of the UK Government to take up the matter.

Nicola Sturgeon: On the composition of the proposed supreme court, you have made a number of comments in the past about the number of judges there should be and how many of them should be Scottish. A commitment appears to have been given that the current situation, whereby there are always two Scottish law lords, will be carried into the arrangements for the proposed supreme court. Would you like the bill expressly to include that safeguard?

Lord Cullen: The short answer to your question is yes.

Nicola Sturgeon: For the record, will you expand on that and give your general views on the appropriate number of supreme court justices and Scottish judges?

Lord Cullen: There is something to be said for the view that when a new court, such as the proposed supreme court, is being set up, every effort should be made to ensure that the court's work will be done by the permanent complement, to ensure that consistency is established from the beginning. I do not think that that could be done without increasing the complement beyond the present 12. The letter that I wrote on behalf of judges suggested an increase in the complement to 15 judges, and I think that the Law Society of Scotland took the same view, solely on the basis that that would mean that there would be a third Scottish judge in the supreme court. The downside of that is the fact that it would mean one fewer talented Scotsman working in Scotland. Nevertheless, that would be one way of approaching the issue.

The alternative would be to ensure that, when a Scottish case came before the supreme court, especially one regarding devolution issues, every effort was made to ensure that a third Scot was there by bringing an ad hoc judge into play. Under the bill, there is provision for acting judges of one or other of two categories. One way or the other, there ought to be three Scottish judges dealing with a case that comes from Scotland. The panel would normally consist of five judges.

Nicola Sturgeon: That answers my next question. Having three Scottish judges there would enable there to be a majority of Scottish judges on any panel.

Mike Pringle: Lord Cullen says that another good Scots judge would be taken away. What impact would that have on the law in Scotland? I presume that these judges will be permanently at the supreme court.

Lord Cullen: Yes, if they join the complement, they will be there permanently. It would be normal to think that the person would be drawn from one of the members of the existing Court of Session bench.

Mike Pringle: I hope that that is the assumption.

Lord Cullen: In the bill, the qualifications for appointment are drawn much more widely than that, but that particular vision does not attract me in the slightest. Joining the complement should be a matter of promotion and, inevitably, the promotion will be from the ranks of the Court of Session judges, although I appreciate that that would mean the loss to Scotland of one more talented Scotsman, as I said a moment ago.

Mike Pringle: Will that have an effect on the law in Scotland?

Lord Cullen: It simply means that the system will need to feed a larger number than at present. It is not disastrous. It depends on the situation.

Karen Whitefield: In responding to Nicola Sturgeon, you mentioned that you believed that it would be important for the judges who make up the panel to be permanent. You are also on record as saying that you have some concerns about the proposal that other judges might be called in on a non-permanent basis. What are the main disadvantages of the proposal in the bill?

Lord Cullen: Which proposal are you talking about?

Karen Whitefield: The proposal that the supreme court could operate with both a permanent and a non-permanent membership.

Lord Cullen: As I said earlier, I advanced the view—and I still think that there is merit in it—that the court should contrive to do as much work as possible through its permanent membership. That has implications for how big the court will be, which leads us back into the discussion that we had a moment ago about its having a membership of 15 rather than 12 judges.

Karen Whitefield: Would there ever be a case for using the expertise of somebody who was not part of the permanent complement?

Lord Cullen: I have no difficulty with that. Of course, if somebody was seen to be highly suitable, I would have nothing against that happening when appropriate. All I am saying is that there is a great advantage in the court doing as much of its work as possible through its permanent membership. That does not prejudice the drawing in of somebody who is thought to be ideal to fill a specific position for a specific case.

Karen Whitefield: Are you content with the appointment process as it is outlined in the bill?

Lord Cullen: Are you talking about the appointment process for the supreme court?

Karen Whitefield: Yes.

15:45

Lord Cullen: I have not given the matter a great deal of thought. Clause 21 places a duty on the commission that will be appointed under clause 20 to provide a list for the minister that consists of

"at least 2 and at most 5 candidates".

Clause 21(5) says:

"The Minister must … decide which of the candidates on the list is most suitable for appointment, and … notify the Prime Minister of the name of that candidate."

We are talking of a minister—who might be called the Lord Chancellor's successor—who might have no legal background. He might be in the Cabinet, but the discussion yesterday suggests that he is likely to occupy a fairly low place in the general order of things in the Cabinet.

Yesterday, the question was raised whether that person would be in a position to decide for himself or herself who the most suitable candidate for appointment was. A difficulty is posed for the minister. It also seems to mean that although the choice is from a limited number of people—between two and five people—the executive will take the final decision. If the court is to have independence, that might not be a clear way of showing it. That clause may be amended in due course—I am not sure what will happen to it. As stated, it raises a question about how good the proposal is and whether it shows true independence from the executive or as much independence as is possible.

Karen Whitefield: Paragraphs (a) and (b) of clause 21(3) deal with drawing up the list of candidates. That is the responsibility of the ad hoc commission, which will have representation from the Judicial Appointments Board for Scotland to ensure that Scotland has a say and that our expertise is taken account of. It is hoped that that will address some of the concerns about independence. The commission will ascertain who the best people for the job are.

Lord Cullen: I understand that. However, the choice can be made only from those who are offered—whether the number of candidates is two, three, four or five—and a minister will decide whom to pick. It might be thought that the body that made the recommendation would be in the best position to say who was best for the job.

The Convener: Do I infer from your remarks that you see an anomaly? The rationale of the bill is to separate the political process from the judiciary, yet the executive seems to play a significant role in the appointment of judges.

Lord Cullen: Exactly. When an appointment is made, the executive must take responsibility for it. I have no doubt that that will always be the case when the executive makes appointments. What I do not find particularly attractive is the executive having the choice between those who are ultimately offered—the two, three, four or five candidates. What is the point of having a selection committee if its recommendation is not followed? How will the minister be in a better position to decide which is the better of two candidates? What does that mean? What influences will be brought to bear?

The Convener: You are not suggesting that big cases of claret will be involved.

Lord Cullen: I am not suggesting that.

The Convener: Clause 21(4) places a statutory obligation on the minister to consult once he has been presented with the commission's list of at least two and at most five candidates. Clause 21(6) goes on to say:

> "In making a decision under subsection (5) the Minister must take account of … any comments submitted under subsection (1)(b)",

which refers to comments from the commission, or comments from the consultation under clause 21(4) of

> "the senior judges … the First Minister in Scotland … the National Assembly for Wales, and … the First Minister and deputy First Minister in Northern Ireland".

I am puzzled by one thing. How does anyone know whether the minister has taken account of comments? What happens if the minister has not taken account of comments?

Lord Cullen: I share your difficulty: "take account of" means no more than consider. I am not sure how one would ever find out what happened, let alone enforce it, but there it is. The provision is fairly weak.

The Convener: Would it be a harsh interpretation of the clause to say that Scotland might be at a specific disadvantage compared with England? It seems to me that although the commission will contain a member from the Judicial Appointments Board for Scotland, that is it for Scottish input into the start of the appointment process. The Scottish interest will be reduced to either the First Minister or the senior judges making further comment. Is that the most robust protection for Scotland?

Lord Cullen: I doubt it. I find the provision rather strange because, if a vacancy came up because a current Scottish judge had retired, I am not sure what view could usefully be canvassed from other jurisdictions. However, there it is; it is slightly odd. [*Interruption.*]

The Convener: I will take members one at a time. Karen Whitefield is on the main line of questioning. If members want to come in with supplementaries, they should indicate that to me.

Mike Pringle: Surely the assumption must be that, if a Scottish judge retires, who will have been one of two or three, whatever happens, that position must be maintained, so a Scottish judge would have to be appointed to replace a Scottish judge.

Lord Cullen: Indeed. I was wondering why all the others should be involved in the consultation process. How would that help?

Mike Pringle: I share your concerns.

Nicola Sturgeon: I am well aware of the commitments that have been given, but it goes back to the question that I asked earlier about the commitment to Scottish judges being enshrined in law. If we go by the letter of the law, and one of the Scottish judges retires, there is no guarantee

that he or she will be replaced by another Scottish judge.

Lord Cullen: That is a fair point.

Maureen Macmillan: I want to know about the parallel to what you were saying about the perception that somehow Scottish ministers might pack the benches. You do not believe that there are any grounds for the perception that the House of Lords, as the court of appeal, is too close to government, but it is the same thing. You seem to be saying that there is nothing wrong with the House of Lords as the court of appeal; it has worked well and is above suspicion. However, you are casting suspicion on the method of appointing judges that is proposed in the bill. It is a double-sided penny.

Lord Cullen: The difficulty is that when the process is reduced to writing for the first time, we become aware of the problems and gaps. We do not know how the existing system works because it is not reduced to writing; it is all based on convention. As soon as we write it down, we create, or become aware of, problems.

Maureen Macmillan: We become aware of the anomalies. There are anomalies in the position of the House of Lords.

Lord Cullen: I would not say that there are anomalies. The convention works after a fashion and it has worked reasonably well over the years.

The Convener: I do not think that anyone has asked this specific question: do you have any reservations about the current system for appointing lords ordinary in the House of Lords?

Lord Cullen: No.

Karen Whitefield: I want to pick up on a couple of the points that you have made. You said that if the commission was choosing a Scottish nomination for the supreme court panel, there would be no need for members from anywhere other than Scotland to be included. Do you agree that not only people from the Judicial Appointments Board for Scotland would be able to judge whether a person satisfies the criteria that we would be looking for? Perhaps a bit of outside expertise would not be such a bad thing.

Lord Cullen: I am not arguing against that at all, but I think that those from outside could make a limited contribution because of a lack of familiarity of the system in which people have grown up and exercised their careers.

Karen Whitefield: If the system of appointments is as open and as transparent as possible, that should help to ensure that there cannot be political interference. Irrespective of which political party is the party of Government, as long as the minister fulfils the obligations that the bill will place on them and as long as the system is open, transparent and can be challenged, it should ensure that anybody who is appointed can do the job.

Lord Cullen: I will not argue with the point about openness. I simply wonder how we will achieve openness given that, under clause 21(5), the minister will decide who is the most suitable person.

Karen Whitefield: One could say that of every public appointment.

The Convener: To be absolutely clear, Lord Cullen, do your reservations about the appointments structure encompass both the composition of the commission and the procedure for the selection of candidates?

Lord Cullen: I have expressed reservations about clause 21(5). Beyond that, all I have done is express a degree of scepticism about how much the other persons who will be involved—the members of the commission and those who are consulted—will be able to bring to the decision. I am not saying that I am against the system; just that I am doubtful about how much those people can bring to it.

Colin Fox (Lothians) (SSP): I turn to the more prosaic matter of the administration of the supreme court. Under the bill, the Secretary of State for Constitutional Affairs will be responsible for finding a building, recruiting staff and setting up the administrative systems but, as the House of Commons Constitutional Affairs Committee highlighted, there might be a conflict between that role and the close proximity to administering the courts in England and Wales. Do you have a view on that? Are you happy with the parts of the bill that relate to the administration of the supreme court?

Lord Cullen: In my response to the consultation, I expressed reservations about the supreme court being funded by the Department for Constitutional Affairs. That remains my view.

Colin Fox: Do you have a view about the location of the supreme court?

Lord Cullen: I am not sure whether you are asking whether the court should be able to move or whether I have an ideal site in London in mind. I have nothing to propose with regard to the site in London, but I note that it is envisaged that the court might move around, which would be excellent if it could be arranged.

Colin Fox: Do you mean that the court should move around the whole of Britain? Do you envisage the court being in Edinburgh from time to time?

Lord Cullen: I do not mean every possible place in Britain, but Edinburgh, London and perhaps somewhere in Wales.

16:00

Mike Pringle: To follow on from that, do you not think that the court should be in Scotland permanently?

Also, at the end of your submission, you do not seem to be entirely content with the term "supreme court". You say:

"in view of my remarks on paragraph 18, the title "Supreme Court" does not seem to be appropriate."

Do you have a view on what else we might call it?

Lord Cullen: I do not know how to answer that question, because it is a difficult matter. The title might cause confusion as people might think that it is another kind of supreme court. What we have is simply a packaging together of the existing jurisdictions, which have been transported along the road, so to speak, to a different place. Sticking the label "supreme court" on it does not achieve a great deal. I am afraid that I cannot give you a suitable alternative. Do you have one to suggest to me?

Mike Pringle: I do not. I am not sure that I like the term, because it somehow implies that it is taking on American aspects—that is my concern.

Lord Cullen: Indeed.

Mike Pringle: What about a permanent location in Edinburgh for the supreme court? Perhaps it could be situated in the building that we are in at the moment, which is next door to the High Court.

Lord Cullen: I have not had it surveyed yet. I could not tell you. It might well be.

The Convener: Do you think that the general proposals for administration, funding and location compound the perception that it will be an English court?

Lord Cullen: That is one of the reasons why there was resistance to the court being funded by the Department for Constitutional Affairs. One must be acutely aware of sensitivities of that sort; if the court is to exist, it must be seen to be, and genuinely act as, a UK court.

The Convener: As members have no further questions, do you wish to make any concluding observations?

Lord Cullen: I do not think so, except to thank you for giving me the opportunity to speak on these matters. I am glad that you have not asked me anything that I felt was difficult to answer on the ground of propriety.

The Convener: On behalf of the committee, I thank you for coming before us. We have all found it a most helpful and interesting experience.

This is the only item on the agenda and there are no intimations to make to members about forthcoming meetings, except to say that the agenda and papers for the next meeting will be circulated in due course. I thank members for their attendance.

Meeting closed at 16:03.

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