MASTER OF THE ROLLS

SIR ANTHONY CLARKE MR

THE LAW LORDS: A ROSE AS SWEET BY ANY OTHER NAME? REFLECTIONS ON THE NEW UNITED KINGDOM SUPREME COURT AND 21ST CENTURY CONSTITUTIONAL CHANGE

HERTFORDSHIRE UNIVERSITY

1 NOVEMBER 2007

Introduction

1. Good Evening. It is with great pleasure that I find myself addressing you today. Although the title of my talk focuses on the constitution in the 21st century, I thought I would begin with a little history, including a passing reference to Magna Carta and to what the Master of the Rolls does or is supposed to do. Before I begin I must pay tribute to John Sorabji who is responsible for all the good bits in this speech. I take full responsibility for all the bad bits.

Magna Carta

2. There is some relationship between the office of Master of the Rolls and Magna Carta because, as MR, I am chairman of the Magna Carta Trust. Magna Carta is said to be (and perhaps is) the origin of many of our fundamental rights and freedoms. Although, as we all know, King John was not a good man, he agreed to Magna Carta under pressure from the Barons. Some of its articles still have a wonderful ring about them. I especially like articles 39 and 40:

> "39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.
> 40. To no one will we sell, to no one deny right or justice."

3. These are fine principles but did you know that Magna Carta was not long lived. It was annulled in August 1215, with the permission of the Pope, on the basis that it had been agreed under duress. Perhaps that simply shows that AA Milne was right when he wrote that King John was not a good man.

Master of the Rolls

4. Contrary to one translation of the title cited in Megarry's *Miscellany at Law*, it has nothing to do with what can be bought in bakeries – the title was translated as '*Maitre des*

petits pains'1. The office of Master of the Rolls is the second oldest surviving judicial office in England and Wales; it is only exceeded in its antiquity by the office of Queen's Remembrancer, which is now, by and large, a purely ceremonial office. The first recorded holder of the office is reputed to be John de Kirkby in 1265. In 2015 therefore the office will celebrate its 750th anniversary. I am the 70th Master of the Rolls.

5. What does the Master of the Rolls actually do? As with most ancient offices its exact role has changed over the years and consequently is shrouded somewhat in mystery to most people, judges included. Its first formal mention in its present style can be found in an Act of Henry VII2, which no doubt happily, exempted the Master of the Rolls, amongst others, from forfeiting their offices if they failed to attend the King if he went to war in person.3 From the time of Edward I the Master of the Rolls' functions changed from being administrative to encompass a judicial role4, both dealing with judicial matters delegated by the sovereign and by, at least the time of Elizabeth I, assisting and advising the Lord Chancellor who was the sole judge in the High Court of Chancery, which had developed out of the King's Chancery "*as to the equity of the civil law, and what is conscience*".5 The Chancery Court was of course ultimately to be made famous, or rather infamous, by Dickens' accounts of its many faults in *Bleak House*.

6. With the advent of the Chancery Court the office of Master of the Rolls became a properly judicial one. I was surprised to learn on my appointment that his early archival functions are retained under various Acts of Parliament. I am, for instance, responsible for the enrolment of deeds poll, the custody and preservation of manorial documents, instruments of apportionment and the records of the Chancery of England.6 In addition to these responsibilities, as Master of the Rolls I am Chairman of the Lord Chancellor's Advisory Council which advises the National Archives in the selection of records to be preserved for posterity and in deciding which records shall be made public after 30 years.

[1] Megarry, *Miscellany at Law*, (1st Edition) (1986) (Stevens & Son) at 336 (Megarry)

[2] Spence, *The Equitable Jurisdiction* at 357

[3] 11 Henry VII, c. 18 (1494), cited in Megarry at 335

[4] Spence, *The Equitable Jurisdiction*, at 358

[5] Scrutton, in *Select Essays in Anglo-American Legal History*, Vol. 2 (1908) at 215; also see Spence, *The Equitable Jurisdiction*, at 358

[6] Under, respectively, *The Supreme Court Act 1981*, *The Law of Property Act 1922*, *The Tithe Act 1936* and the *Public Records Act 1958*.

[7] King, *Does the United Kingdom still have a constitution?*, (Sweet & Maxwell) (2001) at 39

[8] Act of Settlement 1701; De Smith & Brazier, *Constitutional and Administrative* Law, at 380

[9] Representation of the People (Equal Franchise) Act 1928

[10] European Communities Act 1972

[11] *The Governance of Britain*, Green Paper (July 2007) at 60

[12] Locke, *Two Treatises on Government*, at section 91; Montesquieu, *De L'Esprit des Lois*, Book XI, 6

[13] Bagehot, *The English Constitution*, at VI

[14] Section 9 of the Supreme Court of Judicature Act 1873 and section 5 of the Supreme Court of Judicature Act 1875

[15] Maitland, *The Constitutional History of England*, (1908) (1st Edition) (Cambridge University Press) at 135; section 96 of the Supreme Court of Judicature Act 1873.

[16] Sections 5 and 6 of the Supreme Court of Judicature Act 1873

[17] House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament: Report with evidence*, (HL Paper 151) at 7 para.1.

[18] House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament: Report with evidence*, (HL Paper 151) at 74 para. 12

[19] *The Governance of Britain: Judicial Appointments* (CM 7210) at 21 para 3.2

[20] E.g., Section73 – 75 Constitutional Reform Act 2005

[21] Section 96 Constitutional Reform Act 2005

[22] Section 64 (1) Constitutional Reform Act 2005

[23] Section 63 (2) Constitutional Reform Act 2005

[24] Section 26 – 31 Constitutional Reform Act 2005

[25] Bevan, *The Appellate Jurisdiction of the House of Lords I*, (1901) 17 LQR 155 at 162 and *The Appellate Jurisdiction of the House of Lords II*, (1901) 17 LQR 357

[26] Bevan, *ibid*, at 162; *27 Eliz. c. 8*.

[27] Bevan, *ibid*, at 166

[28] [2005] UKHL 56; [2006] 1 AC 262

[29] Bevan, *ibid*, at 186

[30] 2 Bro. Parl. Cas 211

[31] May 7, 1827, Hansard (2nd Ser.), 574, cited in Bevan, *ibid* at 369

[32] Bevan, *ibid* at 369

[33] Bevan, *ibid* at 369

[34] (1883) 8 App. Cas. 354

[35] Sections 5 and 6 of *Appellate Jurisdiction Act 1876*

[36] Maitland, *The Constitutional History of England*, at 473

[37] Dymond, *The Appellate Jurisdiction of the House of Lords* (March 2006) (House of Lords' Library Note) at 9

[38] *The House of Lords Act 1999*

[39] Quote taken from Ryan, *The House of Lords and the Shaping of The Supreme Court*, Northern Ireland Legal Quarterly (56, No 2) 135 at 146; Lord Steyn, *The Case for a Supreme Court*, (2002) 118 LQR 384

[40] Ryan, *ibid*, at 149 citing (2000) EHRR 289 at 21

[41] Ryan, *ibid*, at 150, citing Lord Lloyd, HL Official Report vol. 665 col. 56, 11 October 2004

[42] Ryan, *ibid* at 151, citing Lord Lloyd, HL Official Report vol. 665 col. 57, 11 October 2004

[43] Shakespeare, *Romeo & Juliet*

7. My principal role now is as president of the Civil Division of the Court of Appeal. When I became MR I gave up crime and now only do civil cases. They can be anything from immigration to commercial; so that they cover a very wide range indeed. Previously I specialised in shipping and commercial cases, whereas I now sometimes think that I am the living embodiment of the amateur gone mad. I have to rely on common sense and (of course) my colleagues. Common sense is not always the answer. Fortunately you may think we do not have the last word. You can appeal from us to the House of Lords. I will return to them in a moment but first, a word about the constitution.

The Constitution

8. The United Kingdom constitution, like the United Kingdom itself, has been a work in

progress since at least 1066. As Professor King puts it:

"*. . . the British constitution has grown up piecemeal over time, . . . there [has] never been a defining 'constitutional moment' in the UK, analogous to the Philadelphia convention of 1787 or the debates that led to Germany's Basic Law in 1949 . . .*"7

9. While we have only had piecemeal growth over time that is not to say that we have not experienced dramatic change. Since 1066 we have, for example, moved from monarchical government to a democratic government under a constitutional monarchy. We have moved from a small democratic franchise to a universal franchise. We have also moved from a position where the judiciary held their offices *durante bene placito* to one where they hold them *quamdiu se bene gesserint*: that is to say the senior judiciary have held office since the Act of Settlement 1701 '*during good behaviour*' rather than '*during our [that is to say the monarch's] pleasure*'8 The majority of these changes have come, often in the face of sustained opposition and after vigorous debate, during the period which stretched from the restoration of the monarchy in 1660 to the too-long delayed enfranchisement of women on a par with male enfranchisement in 1928.9 The major exception to the peaceful evolution of our constitution was of course the civil war and the replacement of the monarchy with the Protectorate. Interestingly, enough it was during this period that we experimented with a codified, written constitution – the *Instrument of Government*, which took effect on 15 December 1653. It was a short-lived document, which was replaced in 1657 by the '*Humble Petition and Advice.*' That too was short-lived, lasting no longer than Oliver and Richard Cromwells' Protectorates. Charles II's restoration in 1660 did more than simply restore the monarchy, it reintroduced our uncodified (i.e., unwritten) constitution.

10. Turning to our more recent history, apart from the UK's accession to the European Economic Community, as it then was, in 01 January 197310, the period since 1928 has generally been one of constitutional quiet (not to say *quietus*). All that changed however with the election of the Labour Government in May 1997, which ushered in what is arguably a period of sustained constitutional reform unseen since the Victorian era. In 1998 the Scotland Act and the Government of Wales Acts respectively created the Scottish Parliament and Welsh Assembly and devolved power from Westminster. Reform to the governance of Northern Ireland was made through the Northern Ireland Act 1998. 1998 also saw the incorporation of the European Convention on Human Rights into UK law by way of the Human Rights Act 1998 – which (according to the new green paper on Governance in Britain) may well now be supplemented by a Bill of Rights and Duties.11 These reforms were followed in 1999 by reform of the constitution of the House of Lords, by way of the House of Lords Act 1999, which removed all but 90 of the hereditary peers from their Lordships' House. If reform had stopped there constitutional historians and lawyers would have had more than enough to get their teeth into for many years to come.

11. Reform did not however stop there. On 12 June 2003 the Labour government announced, although perhaps not in these exact terms, that it was time that the UK introduced a constitutional settlement consistent with the views of Locke and Montesquieu.12 That is to say our constitutional settlement would be recast on lines consistent with the doctrine of the separation of powers.

12. Historically, the UK constitution has had what can perhaps be described as a troubled relationship with the idea of the separation of powers. It was understandable in 1066 for all power – legislative, executive and judicial to be concentrated in the hands of the monarch and the *Aula Regis* – the King's Court. It was perhaps less understandable in 2003 that some aspects of our constitution should still concentrated two or three limbs of the State in

one set of hands. A modern state, such as ours, might have been expected to have ironed out such kinks during its long constitutional history. It is more accurate to say that a State which has evolved over such a period of time, is perhaps more likely to retain a number of doctrinal anomalies.

13. As I am sure you are aware, by constitutional anomalies I refer to the position of the Lord Chancellor and the Law Lords. I intend to focus on the Law Lords today, although before doing so I should say a little about the Lord Chancellor. His position used to present somewhat of a problem because it concentrated in the hands of a single individual a judicial role, as head of the judiciary, a legislative role as a member of and speaker of the House of Lords and an executive role as a cabinet minister. Rather than separation of powers the role represented an absolute fusion of powers. As Bagehot put it:

"*The whole office of the Lord Chancellor is a heap of anomalies. He is a judge, and it is contrary to obvious principle that any part of administration should be entrusted to a judge; it is of very grave moment that the administration of justice should be kept clear of any sinister temptations. Yet the Lord Chancellor, our chief judge, sits in the Cabinet, and makes party speeches in the Lords.*" 13

14. The Lord Chancellor was historically not the only judge to have been in this position; nor indeed the only member of the cabinet. If I had been the Master of the Rolls in, say, 1850 I could have held judicial office as a member of the House of Commons. Famously, Sir John Trevor, who was Master of the Rolls from 1685 – 1689 and then again from 1693 – 1717 not only sat as a member of the House of Commons but also held the position of Speaker of that House: he thus combined a judicial and legislative role. Interestingly, he was removed as Speaker and as a Member of Parliament in 1695 for corruptly accepting bribes from the Corporation of London. He remained as Master of the Rolls however; his corruption, unusually you might think, was not viewed as a bar to him continuing as a judge. Fortunately for me, the Master of the Rolls, along with all the other judges of the High Court and Court of Appeal, lost the right to sit as an MP in 1873.14 The business of being a judge is taxing enough on its own. I am sorry to tell you that in nearly 15 years on the Bench no one has offered me a bribe.

15. Strangely enough the office of Chancellor of the Exchequer, one of the great political offices of state, was also until the Judicature Act reforms of 1873 – 1875 also a cause of concern for the separation of powers. Whilst appointed as Chancellor of the Exchequer he was also a judge of the old common law Court of Exchequer. New Chancellors would until 1873 sit at least once, on appointment, as a judge in the court.15

16. The office of Chancellor of the Exchequer is, like that of Lord Chancellor, a politically appointed office. The 1873 -1875 reforms swept away, as the swept away the Master of the Rolls' potential legislative role, its judicial functions. However those reforms left the Lord Chancellor's tripartite role untouched. On the contrary they could in fact be said to have increased it, as those reforms could be said to have entrenched the anomalous nature of the Lord Chancellor's role by giving statutory force to his position of head of judiciary.16

17. So things continued until 2003, when the government decided to rectify the anomaly. It did not stop with the Lord Chancellor though. The government seized the day and decided it would, as I mentioned earlier, effect wider constitutional reform. In broad outline there were three aspects to the government's proposed reforms: the abolition of the office of Lord

Chancellor and the transfer of its functions to other offices; the creation of a Judicial Appointments Commission; and finally, the abolition of the judicial function of the House of Lords and its replacement with a separate and new United Kingdom Supreme Court. The continued presence of the Lords of Appeal in Ordinary – in ordinary parlance, the Law Lords – in the House of Lords was thus to be brought to an end.

18. All aspects of the proposed reforms, after much debate, were enacted in 2005 in the *Constitutional Reform Act 2005*. Some modifications of the original intention had been incorporated along the way. The Lord Chancellorship, for instance, was not abolished. This was because it dawned on the government that, since (as someone pointed out to them) there were over 1400 statutory provisions conferring powers or imposing duties on the Lord Chancellor. As a result he was un-abolished, his office was retained and is now combined with the office of the Secretary of State for Justice. In addition a new office of Speaker of the House of Lords was created and all the Lord Chancellor's judicial functions were transferred to the Lord Chief Justice, who is now the Head of the Judiciary for England and Wales. These reforms have, as acknowledged by the Constitutional Select Committee significantly changed the character of the relationships between the '*three arms of government – the executive, the legislature and the judiciary.*' A relationship which, as the committee rightly noted, must be a constructive one because it is '*essential to the effective maintenance of the constitution and the rule of law.*'17 As I am sure you know, that relationship has undergone further change recently with the creation of the Ministry of Justice on 09 May 2007. The MOJ was born out of the merger of the Department of Constitutional Affairs and part of the Home Office. We are all, judiciary and government alike, still getting to grips with these changes and the changed nature of our relationship. It will no doubt take time for those changes to fully bed in. They will undoubtedly do so, just as our constitutional arrangements have stabilised following every previous period of reform. In her evidence to the Constitutional Select Committee, Professor Malleson said this:

"*The structural changes in the law made by the [Constitutional Reform Act] will in time be supplemented by new working relationships, understandings and conventions, the foundations for which are already being laid.*"18

19. I am sure that Professor Malleson is right and that our constitution will be all the stronger for it. The same can be said for the second of the three changes wrought by the 2005 Act: judicial appointments, as area which may be subject to further reform in light of the recent government discussion paper: *The Governance of Britain: Judicial Appointments*. Whether further change is necessary or beneficial is something which will no doubt be carefully debated over the future months. I look forward to that debate.

20. For most of our history though senior judicial appointments have been carried out by the Queen on the advice and recommendation of the Lord Chancellor (or in some cases the Prime Minister). He arrived at his recommendation by way of confidential discussions with the senior judiciary. This process was not without criticism, the most prominent of which was that '*new judges tended to be selected in the image of the sitting judiciary and that talented people were excluded without good reason.*'19 The 2005 Act changed all that and created a Judicial Appointments Commission ('JAC'), which commenced work in April 2006. We now have a system where judicial positions are advertised and potential candidates are selected through patently fair and open competitions. The idea is that, where once there was darkness now there is or will be light. Once selected the JAC forwards the name of the recommended candidate to the Lord Chancellor who can either accept or reject the candidate or ask the JAC to reconsider its selection.20 Further consideration will take place if the latter two options are taken. Ultimately though, one candidate's name will be

accepted and then either appointed or recommended for appointment.21

21. The fundamental criterion for selection for appointment is merit, although there is also an obligation on the Appointments Commission to take account of '*the need to encourage diversity in the range of persons available for appointments.*'22 The important point here is that the need is to encourage diversity in the range of individual available for appointment, not simply to encourage diversity in appointments made. Merit is the true and '*sole*' criterion for appointment.23 Encouraging diversity in the range of applicants is however, in my view, of fundamental importance. Increasing the pool from which candidates can be selected promotes merits-based appointment. It is better to choose the best candidate from the widest pool than to choose the best candidate from a narrow pool. It is better to be first in a field of one hundred than first in a field of one. Increasing the size of the pool of candidates for judicial office can only be of benefit to the strength of the Bench. I am confident that, as time progresses, we will see a judicial bench made up of the most meritorious candidates, irrespective of their background – legal or otherwise, gender, ethnicity and so on.

22. Until very recently the new appointments process did not apply to the appointment of Law Lords. It did not because the provisions in the 2005 Act relating to the Law Lords are not yet in force.24 However on 08 October 2007 Jack Straw announced that he would voluntarily use the statutory process for judicial appointments in respect of any future appointments that need to be made prior to the coming into force of the statutory regime. Why are the provisions in respect of the Law Lords not yet in force? The answer to that question lies in an examination of the third limb of the 2005 Act's reforms: the removal of the Law Lords from the House of Lords and the creation of a Supreme Court for the United Kingdom. It is to that which I now turn.

23. The judicial jurisdiction of the House of Lords stems back, as does so much of our constitutional framework, to the medieval period of English history.25 It arose at a time when Enlightenment ideas, such as the separation of powers, were far away beyond a very distant horizon. Initially the House of Lords had both an original jurisdiction, over for instance trials of peers, and an appellate jurisdiction in respect of the common law courts. The Parliamentary Rolls show, for instance, in the 50th year of Edward III's reign the House of Lord's hearing an appeal by way of writ of error from the Court of King's Bench. A statute from the reign of Elizabeth I, which established, or perhaps re-established, the Court of Exchequer Chamber – one of the predecessors of England and Wales' present Court of Appeal – acknowledged the Lords' jurisdiction to hear such appeals.26 Its jurisdiction to hear appeals from the Chancery Court, from the Lord Chancellor, would not be confirmed until the reign of Charles I.27 It is its appellate jurisdiction for which it has become most famous and, in my mind, deservedly well-respected across the world.

24. It is one thing to obtain jurisdiction to hear appeals it is another to carry them out. The manner in which the House of Lords has heard appeals has changed considerably over the course of history. At the present time appeals to the House of Lords are usually heard by constitutions of five individuals, although they can sit in larger constitutions on appeals of particular significance – such as R (Jackson) v The Attorney-General, which raised issues of constitutional importance, when nine Law Lords formed the constitution.28 The individuals eligible to form such constitutions: are life peers appointed under the Appellate Jurisdiction Act 1876, who are the Law Lords proper – all of whom will have held high judicial office before such an appointment; retired law lords under the age of 75; and other members of the House of Lords who have held high judicial office, such as: the Lord Chief Justice; former Lord Chancellors or former Court of Appeal judges, such as Lady Butler-

Sloss, who have been appointed to the peerage.

25. You will no doubt have noticed that all those eligible to sit on appeals in the House of Lords today hold or have held some form of high judicial office. Non-legal peers cannot sit on appeals to the House of Lords. This was not always the case.

26. Historically, appeals to the Lords were appeals to the House of Lords itself; to the '*entire body of the peers*'.29 They could be, and often were therefore decided by any number of peers; none of whom had any legal experience. A startling example of this happening is given in the matter of *The Bishop of London v Ffytche*.30 This case arose in 1783 from a dispute as to an episcopal benefice which the Bishop of London refused to institute in favour of a presentee. He did so on the basis that a bond given by the presentee to his patron was void for illegality.

27. Both the Court of Common Pleas and the Court of King's Bench upheld the legality of the bond. A final appeal was heard by the Lords. As was the practise at the time the Lords sought the opinion of the judges before passing judgment. Of the eight judges consulted seven held that the validity of the bonds was settled law; they thus concurred with the judgments given by the two common law courts. On the appeal thirty eight votes were cast in the Lords. The Lords overturned the decisions of the courts, and ignored the almost unanimous opinion of the judges consulted, by nineteen votes to eighteen. Of the nineteen votes which upheld the Bishop of London's case, thirteen were cast by Lords Spiritual – that is to say by Bishops who sat in the Lords. Whatever else this might tell us it certainly tells us that the notion that a tribunal must be impartial and independent had not taken proper root in the 1780s.

28. Such instances declined over time. By the 19th Century it was unusual for the entire body of peers to take part in appeals. In 1827 however the right of non-legal peers to hear and determine appeals was vigorously defended by Lord Holland, one of the leading parliamentarians of the day. In his view it was "*the duty of every man in that House as a Lord of Parliament to sit and insist in the hearing of appeals.*"31 Hie view did not prevail and non-legal involvement in appeals continued to decline.

29. According to Bevan in his magisterial account of the appellate jurisdiction of the Lords, the last time non-legal peers decided an appeal was 17 June 1834. Bevan does not however tell us the name of the case.32 By 1844 it was firmly established that non-legal peers while they could lawfully sit on and give judgment in appeals to the Lords should by convention not do so. This followed a request from Lord Lyndhurst, the Lord Chancellor, that '*those who had not heard the arguments*' should decline from voting.33 The last attempt by a non-legal peer to vote on an appeal occurred in 1883, when Lord Denman, who was the son of a former Lord Chief Justice but not himself a lawyer, cast his vote.34 His vote on the appeal in *Bradlaugh v Clarke* was however ignored by Lord Selborne LC.

30. From that time by Parliamentary convention non-legal peers have not taken any part in appeals to the Lords. In 1876 with the enactment of the *Appellate Jurisdiction Act*, which created the Law Lords as they are today and also ensured that the House of Lords appellate jurisdiction would not be abolished (as it was to be by way of *section 20* of the *Supreme Court of Judicature Act 1873*), the House of Lords as a judicial body became what it is today.

31. It is important to note however that despite the creation of a specific body of legal peers within the House of Lords and the requirement that a minimum number of them are required to form a valid appellate constitution35, it is only by convention that non-legal peers do not exercise a vote on appeals. As the great constitutional and legal historian F. W. Maitland makes clear in *The Constitutional History of England* it is only a constitutional not a legal rule that non-legal peers do not vote on judicial appeals.36 In theory, and if the constitutional rule or convention were set aside or ignored, non-legal peers could, if Maitland is correct, still validly vote on appeals. Any attempt to do so would no doubt be ignored just as Lord Denman's attempt to vote was ignored. There would however seem to be no legal (as opposed to constitutional) basis to such a Nelsonian turning of a blind eye.

32. From 1876 to 2005 the appellate jurisdiction of the Lords had a settled form, during this time its judgments have helped to frame the common law both in England and influence its development in the wider common law world. The only significant change in the manner in which it exercised its jurisdiction came about in 1948.37 In that year due to noise caused by workmen repairing war damage to the Houses of Parliament, the Law Lords ceased to hear appeals in the main body of the Lords' chamber itself. Appeals from that time have consequently been heard in one of the House of Lords' committee rooms. The fact that the Law Lords have since then been referred to as the 'appellate committee' of the House of Lords actually refers to the venue in which they hear appeals and not to their constitutional status. Judgments are still however given in the Lords' chamber. A particularly curious feature of appeals to the House of Lords is that their Lordships sit in ordinary suits, whereas counsel wear court dress, which means a short wig in the committee room but a full-bottomed wig for any hearing in the house itself. I did feel a little absurd dressed in my own full-bottomed wig when I appeared before their Lordships.

33. So things continued until 2003 when the government decided that with the dawn of a new millennium the United Kingdom constitution needed to be dusted down and, as it has been at numerous times in the past, updated. Significant reform of the political makeup of the House of Lords had already taken place in 1999 when the majority of hereditary peers were removed from the House.38 Perhaps more reform would be on the way if only agreement could be reached on what it might be.

34. Subsequent reform of the Law Lords was logically the next step and was advocated by the government for a number of reasons. First, and most obviously, it was advanced as part of the government's general commitment to modernise the constitution. Reform would separate England and Wales' highest appellate court from government by legally separating the Law Lords from Parliament. The separation would cut two ways: first, it would remove the Law Lords from Parliament, where they could at present take part in Lords' debates and vote on proposed legislation. Judges would no longer be legislators. Although it should be noted that since June 2000 the Law Lords had acted under, what has been described as a self-denying ordinance setting out when it would be constitutionally inappropriate for them to take part in legislative proceedings in the House of Lords. Secondly, legislators would no longer be judges. Lord Steyn, who was himself a Law Lord at the time, argued strongly that separating the Law Lords from Parliament and the creation of a new supreme court would '*serve as a public constitutional badge of judicial neutrality and independence.*'39

35. Little if anything was said about the need to provide a clear legal separation between the Law Lords and parliament in order to answer Maitland's point that legally there was nothing to stop lay peers voting on appeals. However, this perhaps underlay the principled stance to reform taken by the government. It certainly seems implicit in the government's

fears that the presence of the Law Lords in Parliament might give the impression that they were not an independent and impartial tribunal, as required by *Article 6 (1) of the European Convention on Human Rights*. There was much debate as to whether the government's fears on this point were sustainable in light of Strasbourg jurisprudence, with the Human Rights Committee concluding that while "*Article 6 did not per se require the removal of the Law Lords, it was nevertheless (the case) that a free-standing Supreme Court "would make it much less likely that violations of Article 6 (1) will occur in practice.*"'40

36. Critics of reform argued that there was simply no need to remove the Law Lords – no doubt on the simple principle that, if it ain't broke don't fix it. Nobody, it was argued, believed that the present situation was one which called into question the Law Lords' independence or impartiality. As Lord Lloyd of Berwick, a former Law Lord no one doubted that the Law Lords were "*completely independent.*"41 In respect of the government's argument that the reform was based on the principle of separation of powers, Lord Lloyd pointed out that "*the separation of powers is not part of our constitution.*"42

37. With respect to Lord Lloyd's argument, it seems to me to miss the government's point. Its argument was not that separation of powers was part of the UK constitution but that, as far as the judiciary's relationship with the executive and the legislature was concerned, it ought to be. The proposed reform was not predicated on the present state of the constitution but on whether it should more closely conform to the principle of separation of powers in future.

38. Notwithstanding the fact that both sides of the argument had merit, the reforms were finally enacted on 24 March 2005 when the Constitutional Reform Act 2005 received the Royal Assent. The provisions in respect of the Law Lords are not as yet in force however and they continue to form part of the House of Lords. They are not in force because as yet a new Supreme Court building is not ready for them to move into. It is anticipated that the building will be ready in early 2009. The building chosen is the Middlesex Guildhall, which until now has been in use as a Crown, that is to say criminal, Court. It sits opposite the Houses of Parliament and Westminster Abbey. The Law Lords are effectively, and prosaically, therefore moving across the road.

39. Perhaps I may be allowed to add in parenthesis that in my humble opinion it is a very great shame that the government could not find the will or the money to build a new 21st century Supreme court as a temple to the rule of law for the foreseeable future. The conversion of a gloomy mock-gothic building built in about 1908 seems to me to be no substitute, however well it is converted.

40. When the Guildhall has been suitably renovated and the Law Lords have taken up residence they will formally cease to be Lords of Appeal in Ordinary and will become the first Justices of the Supreme Court of the United Kingdom. From that date they will neither hear appeals in the House of Lords nor will they be able to sit and vote in the House of Lords while they hold office as Supreme Court Justices (section 137 of the 2005 Act). It should not be thought however that because the Law Lords are changing their name, their location and their relationship with Parliament that their jurisdiction will also change. They will not take on the role played by other Supreme Courts around the world. They will acquire no new constitutional powers to strike down legislation. The new court will simply have all the powers and jurisdiction of what will then be its statutory predecessor, the House of Lords. Equally it should not be thought the quality of judgments stemming from

the new Supreme Court will differ from that of the House of Lords: the same judges will sit in the new court. The appointment process for new Supreme Court justices might be by way of a Judicial Appointments Commission, rather than through the old system of soundings taken by the Lord Chancellor, but it cannot be suggested or understood that this new appointment system will reduce the calibre of appointments.

Conclusion

41. The reform of the Law Lords and creation of the new UK Supreme Court is in some ways one of the most significant constitutional reforms of recent years. As such however it can be seen as just one more step down a long road which began in England in the Middle Ages with the separation of the common law courts from the *Aula Regis* or King's Council. That constitutional development and reform in England and Wales, and later in the United Kingdom, has been long, continuous and Fabian. It is one of the great strengths of our constitution. This latest step will in my mind only serve to increase the respect in which the Law Lords – the Supreme Court to be – is rightly held both here and around the world. I leave you with one thought, borrowed as I am sure you will all recognise from Shakespeare: "*. . . that which we call a rose by any other name would smell as sweet.*"43 What is true for roses is, I am sure, just as true for Law Lords.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Communications Office.