

## **Should the Law Lords have left the House of Lords?**

**Michael Ryle Lecture 2018**

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**Lady Hale, President of The Supreme Court**

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Until 2009, the top court in the UK was a committee of the House of Lords. Its judges were the Lord Chancellor, other peers who had held high judicial office and the Lords of Appeal in Ordinary, the first life peers, appointed under the Appellate Jurisdiction Act 1876. The Law Lords did not join the procession of bewigged and berobed members of the judiciary of England and Wales at the service in Westminster Abbey to mark the opening of the legal year. They attended as members of the House of Lords, along with former Lord Chancellors and Law Lords, and in morning dress (or in my case, a smart suit and a cute hat, to show that there was one woman amongst them). In 2009, all that changed. The Law Lords became the Supreme Court of the United Kingdom. We joined the procession wearing our brand new black and gold robes but no wigs (though in my case a Henry VIII bonnet). Was that a step forward or a step back? What has changed and what has stayed the same?

The case for reform advanced by the senior Law Lord, Lord Bingham, was simple. The institutional structure should reflect the practical reality. We were a court and should be seen to be such. The public and people from overseas should not be misled into thinking that we are also legislators. We ‘do not belong in a House to whose business we can make no more than a slight contribution’ (Constitution Unit Spring Lecture, ‘A New Supreme Court for the United Kingdom’, 2002, p 8). The Law Lords had agreed in 2000 that they would not take part in Parliamentary business where there was strong party-political controversy. They would also bear in mind the risk of disqualifying themselves from sitting on a subsequent case if they had expressed an opinion about the subject-matter of legislation. This meant that the two Law Lords who voted on the Hunting Bill could not take part in any of the three fascinating cases we had about it. Not only that, we took up a lot of space. I had a whole room to myself whereas four other peers (including Lord Norton of Louth) had to share the identical room next to me. They may

well have been sorry to see us go as people. As Lord Wallace of Saltaire put it in the short farewell debate, ‘we don’t want to lose you, but we think you ought to go’. But they were not sorry to get their hands on the space which we and the judicial office occupied. Yet we too did not have enough space. There were not enough rooms for each of the 12 Law Lords to have his or her own office. We shared four secretaries and four research assistants because there was no room for any more. And above all, we only had first call on one committee room, which was only large enough for five judges.

Of course, our leaving was not uncontroversial. There was a strong element of ‘if it ain’t broke, don’t fix it’. The role of the Lord Chancellor, as Head of the Judiciary, Government Minister and Speaker of the House of Lords, was anomalous but what harm did it do in practice? Lord Chancellor Irvine had already said that he would not sit ‘in any case concerning legislation in the passage of which he had been directly involved nor in any case where the interests of the executive were directly engaged’ (HL *Hansard*, 23 February 2000, col WA 33). This covers quite a high proportion of our cases these days. His successor Lord Falconer never sat at all. There were all sorts of advantages in our being in Parliament. This was not just the richness of the surroundings, the great variety of interesting people we might meet, or the relative cheapness of the catering. Some very serious points were made.

First, we were not dependent on a Government department for our resources but on Parliament, which has a direct line to the consolidated fund. We were now going to cost a lot more, because we could no longer rely on the building, personnel, library and IT services provided in Parliament. Would it really enhance our independence if our finances had to come, not from Parliament, but through the departmental budgeting process, especially if linked to the Ministry of Justice, where the courts are squeezed between the demands for legal services and the demands of the prisons and probation services? It took a lot of work in the early days to make it clear that we are a separate accounting body, with our own budget, separate from that of the Ministry of Justice, that they will transmit our bid without amendment to the Treasury, and that they have no control over what we need and how we spend it.

Second, while we were in Parliament, might not Parliamentarians think it impolite to be too critical of our decisions? Once we were on the outside, would they feel freer to criticise us? Would this be an even greater risk, now that the law requires us to scrutinise, not only the actions of government, but also the legislation passed by Parliament?

Third, where would we, and the whole justice system be, without the Lord Chancellor to speak up for us at the heart of Government? Perhaps only in the United Kingdom could it be thought that the best guarantee of the independence of the judiciary was that the head of the judiciary, responsible for all judicial appointments and the administration of justice, was also a member of the government. But we have had an unfortunate example of the member of the government charged with upholding the rule of law and the independence of the judiciary not coming to the defence of the judges as quickly or as firmly as many thought should have happened.

Despite all this, I was a supporter of the move, because it seemed to me that, not only were the Law Lords changing, but so was the House of Lords itself. As Lord Hope has pointed out, when he became a Law Lord in 1996, there were still large numbers of hereditary peers. Many of them played little part in day to day business, but they could still be called upon to attend on key issues. Now most of them have gone, and the appointed life peers are in the ascendancy. The House has become much more politically balanced. The power of the whips is much less than in 'the other place' and there are a great many hard working cross benchers who take no party whip. But there was a sense of greater political legitimacy. And it showed. The more effective the Lords were getting at their Parliamentary role, the less appropriate it was for us to be there at all.

Even some sceptics were persuaded by the famous case of *R (Jackson) v Attorney General* [2005] UKHL 56, [2005] 3 WLR 733. The issue was whether the Hunting Act 2004 was a valid Act of Parliament. We were not concerned with the merits of banning hunting wild animals with dogs. We were solely concerned with whether Acts of Parliament could be passed using the procedure laid down in the Parliament Act 1911 as amended by the Parliament Act 1949.

The 1911 Act was passed by both Lords and Commons in the usual way but the Lords only agreed to it at the last minute to escape what was then seen as a worse fate - the creation of enough new peers, then perforce hereditary, to get a majority for it. It provided that if a Bill passed through the Commons in three successive sessions, and was rejected three times by the Lords, it would be presented to the King and become an Act of Parliament on receiving the royal assent, as long as two years had elapsed between its second reading in the first of those three sessions and the date of passing the Commons in the third session.

The Parliament Act 1949 reduced the timetable in the 1911 Act from three sessions to two and the minimum delay from two years to one. It was passed under the 1911 Act procedure. So the argument was that the 1911 Act had delegated the power of Parliament as lawfully constituted – King, Lords and Commons – to the King and Commons alone. It is a general principle that a delegate cannot use his delegated powers to enlarge those powers unless expressly authorised to do so. He cannot pull himself up by his own bootstraps. Thus, it was said, the 1949 amendments were invalid and the four Acts which had been passed using the amended procedure, including the Hunting Act, were also invalid.

All nine Law Lords rejected that argument. But how could it be appropriate for nine members of the House of Lords to pass judgment upon the respective powers of Commons and Lords – especially when the subject matter was hotly contested between them? The two Law Lords who had actually voted on the Hunting Bill did not sit on the case. But all of us could have taken part in the passage of the Bill had we wanted to do so. All of us were members of the House of Lords. Were we not being judges in our own cause? The Attorney General did not object to our hearing the case but had he done so it would have been hard to see an answer. Had not the time come to separate the judiciary from the legislature?

Various other models for a Supreme Court were floated before we were set up by the Constitutional Reform Act 2005. Lord Bingham's preference was for the minimalist option: 'a supreme court severed from the legislature, established as a court in its own right, re-named and appropriately re-housed, properly equipped and resourced and

affording facilities for litigants, judges and staff such as, in most countries in the world, are taken for granted.’ Otherwise, it was to be business very much as usual. And that is what we have got.

The Supreme Court has brought, not only the negative benefits of taking us out of Parliament, but the positive benefits of having our own premises, our own staff and our own facilities for doing our own thing. Our building is not as grand as the Palace of Westminster, but it is just as beautiful. It was opened in 1913 as the headquarters of Middlesex County Council, with the usual accoutrements of a large council chamber and two courts, for the quarter and petty sessions, committee rooms and council offices. It was also one of the last flowerings of the gothic revival, Pevsner calls it art nouveau gothic. It has an abundance of exuberant decoration – stone carving, wood carving, stained glass, light fittings and door furniture, all of the period and all of a piece. We have kept all that while clearing away the clutter of decades and creating a light and bright building with the sort of courtrooms in which to do our sort of business. We could not be better situated – opposite Parliament, flanked by the Treasury to represent the Government and Westminster Abbey to represent God and the Queen. Ideally, the square should be renamed Constitution Square.

The Judicial Committee of the Privy Council also left its purpose-built premises at No 9 Downing Street and now shares the Supreme Court building. It has always shared the same judges. We try to keep the institutions separate, by covering up the Supreme Court emblem with a special rug when the Privy Council is sitting and flying the flag of the country from which the appeal comes. It used, of course, to be the final court of appeal for the whole British empire. But most of the empire left on or after gaining their independence. We still have the Crown Dependencies, the few remaining British Overseas Territories, and some independent countries, such as Mauritius, Trinidad and Tobago, Jamaica and the Bahamas who for a variety of reasons are still with us. The people of Antigua and Barbuda, and Grenada, have just voted to stay.

We are also a great deal more open and accessible than we used to be. It is much easier to get into our building than it is to the Houses of Parliament. We are not guarded by armed police officers. We try to be friendly and accessible to students and interested

visitors of all kinds. People just pop in to see what we are about. We have an exhibition space and a café on the lower ground floor. We have an education programme to help school and college students understand what we do and how we do it. This includes a ‘skype a justice’ programme for schools which are too far away to visit. We welcome tour parties of all kinds.

Our website is a great improvement on its Parliamentary predecessor. Our proceedings are also more accessible. Not only can anyone come and watch. They can also watch us live on line and access our archive of earlier hearings on-line. No doubt few people will really want to spend much time watching our hearings, because arguments on points of law are not exactly Perry Mason or Rumpole of the Bailey. But when we deliver our judgments we also do a short oral summary in the courtroom which is available on our you-tube channel and occasionally hits the wider media – as the ‘gay cake’ case did.

But has this changed the sort of court we are? With one exception, our jurisdiction remains the same as it was in the House of Lords: we hear civil and criminal appeals from England, Wales and Northern Ireland, and civil appeals from Scotland. Cases can only come to us with the permission, either of the court from which they come, or from us. Usually the lower court leaves the decision to us. As Lord Bingham put it, we ‘dine a la carte’. We have adopted exactly the same criterion as we did in the House of Lords:

“Permission to appeal is granted for applications which raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the case will already have been the subject of judicial decision and may have already been reviewed on appeal.”

(i) It must be an arguable point of law. If the law is clear it is not usually for us. It is not our role to correct the misapplication of settled law. Even if we think the Court of Appeal reached the wrong result in a particular case we will not give leave if we think the

law is clear (*R (Eastaway) v Secretary of State for Trade and Industry* [2000] 1 WLR 2222, per Lord Bingham at p 2228).

(ii) It should be a point of importance not just to the parties but to the wider public. In the past there may have been a tendency to take a case simply because there was an enormous sum of money involved. But this does not necessarily make it a case for us, if it is only of concern to the parties to the case.

(iii) It should be a suitable case in which to decide the point. There may be all sorts of reasons why it could be an important point but this is not the case in which to decide it. For example, the problem facing the individual litigant may already have been solved; or the merits may be so strong, one way or another, that there is a risk of their distorting the result; or there may be an important point sitting in there, but none of the parties have spotted it.

This does not mean that we get to decide all the important points of law. People do not bring lawsuits because an important point of law needs deciding. They bring them to get a result. Usually the law is clear enough but the facts or how the law will be applied to the facts are not. Litigation is always risky. And it is disgracefully expensive. So litigants will make a cost benefit analysis before they even begin. If they lose at first instance, they will do the same before appealing for the first time. And the same again before launching a second appeal. At any point in a civil case it is open to the parties to settle. So a point which was probably wrongly decided in the Court of Appeal may never get to us because the parties settle out of court, or the loser cannot afford or does not wish to take it further.

But the character of cases coming before us has undoubtedly changed in recent decades – not just since the creation of the Supreme Court. There are three main reasons for this. First, since the 1970s, there has been an explosion in judicial review of administrative action. Second, under the European Communities Act 1972, we not only have a duty of ‘conforming interpretation’ – to interpret legislation consistently with European Union law – we also have a duty to disregard legislation of all kinds which is inconsistent with

directly effective EU law. Third, under the Human Rights Act 1998, we also have a duty of conforming interpretation; we cannot strike down provisions in an Act of the UK Parliament which are incompatible with the convention rights; but we can make a declaration that they are incompatible. And in deciding whether there is an incompatibility, either in a legislative provision, or in the actions of a public authority, we often have a duty to balance the rights of the individual against the interests of the public. All three of these developments can bring us into conflict with the other institutions of government in a way which was not so apparent decades ago. I think that that enhances the need for us to be seen to be physically as well as intellectually separate from both Parliament and government.

The one jurisdiction which did change when we moved was “devolution” – that is, issues about whether the devolved governments and legislatures in Scotland, Wales and Northern Ireland have exceeded their powers. It was thought that these would often be disputes about the demarcation lines between the UK Parliament and the devolved Parliaments and so should not be determined by a committee of the UK Parliament. So they were given to the Judicial Committee of the Privy Council (despite the fact that it was the same people sitting in the same place). But once we had a Supreme Court, that was obviously the place where such cases should go.

The actions of the devolved institutions could be outside their powers either because they have acted in a way which is incompatible with the rights set out in the European Convention on Human Rights or with European Union law, or because they have legislated for something which relates to a subject matter which is reserved to the United Kingdom Parliament, or because they have legislated to modify certain specified Acts of the UK Parliament or rules of law.

The question can come to us in two ways. Normally it comes through a real, concrete case. The deed is done and a real person – or company- complains that it was outside the scope of the devolved powers. An example was the Scotch Whisky Association's challenge to the Scottish Act providing for minimum unit pricing of alcohol, on the ground that it was contrary to European Union law. In this way, some aspects of Scottish criminal procedure have come before us as devolution or compatibility issues, even



though we have no ordinary jurisdiction in Scottish criminal cases. And the results have not been popular in some quarters in Scotland. This is ex post facto concrete review.

But it can also come to us by way of ex ante abstract review unrelated to a real case. The Law Officers can refer Bills which have been passed by the devolved Parliaments but before they receive Royal Assent, for us to rule on whether they are within scope. Until this year, we had had three references relating to Bills passed by the Welsh Assembly and one relating to a Bill passed by the Northern Ireland Assembly, which was withdrawn, but none from Scotland despite the large volume of Scottish legislation.

But this year we have had our first reference of a Bill passed by the Scottish Parliament. In March this year, the Scottish Parliament passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill and the Attorney General for England and Wales and the Advocate General for Scotland referred it to us. By the time we heard the arguments, the UK Parliament had passed the European Union (Withdrawal) Act 2018, which adds that Act to the list of those which the Scottish Parliament cannot modify. So the first question is whether we should judge the Scottish Bill at the time that it was passed or at the time when it will receive royal assent. And the second question is what difference, if any, that makes. We hope to give judgment before Christmas.

This jurisdiction obviously makes us look more and more like a constitutional court – albeit not on the continental lines, of a court which is separate from the ordinary courts of the law, but on the model of other Supreme Courts in the Anglo-American common law world. The most famous model of such a Supreme Court, known throughout the world, is the Supreme Court of the United States. But there are similar courts in Canada and throughout the common law world. In a federal constitution, it stands to reason that some court must rule on demarcation disputes between the powers of the State legislatures and the powers of the Federal Parliament. It does not follow that they can rule upon the constitutionality of Acts of the Federal Parliament. But in 1803 the US Supreme Court ruled that it could do so (in *Marbury v Madison* 5 US 137 (1803)), and other Constitutions have followed suit, sometimes expressly. In a written Constitution, there are usually also entrenched human rights which the legislatures cannot take away

without special procedures. The task of a Supreme Court is to strike down laws which do so.

But we have no written Constitution. The UK Parliament is sovereign. So there can be no question of a UK Supreme Court striking down the Acts of the UK Parliament, except to the extent that Parliament itself has given us power to do so. In their different ways, both the European Communities Act 1972 and the Human Rights Act 1998 do give us - and the lower courts – the power to rule on the constitutionality of Acts of Parliament. But that is because Parliament has said so, not because we have. And what Parliament has given us, Parliament can take away.

This more visible role raises more acutely than in the past the question of who should sit to hear which cases. At present we usually sit in panels of five. This means that one panel can sit in the Supreme Court and another in the Privy Council or two panels can sit in the Supreme Court. But we do sit at least seven if we are being asked to depart from a previous decision of the House of Lords or Supreme Court and nine if we have to reconcile conflicting decisions at that or Privy Council level. We also sit seven or nine on particularly important or interesting cases. We have done this much more often since we moved from the House of Lords. One of the reasons is simple: because we can do so whenever we want. We do not have to persuade the House authorities that we have a need for a larger committee room. We have a court room which can (at a pinch) take all of us. We have only sat once *en banc* – that is all the then serving Justices. That was in the case of *R (Miller) v Secretary of State for exiting the European Union* [2017] UKSC 5, [2018] AC 61, when all 11 of us sat (fortunately, we had a vacancy, for otherwise one of the 12 would have had to be dropped, as our statute requires us to sit an uneven number).

Many, perhaps most, other Supreme Courts sit *en banc*. Certainly, the nine in both the US and Canada do so, as do the seven in the High Court of Australia. This does not eliminate the risk of five/four or four/three decisions, although apparently it is reduced. It does eliminate the risk that the selection of the particular panel to hear the case may affect the result. We don't accept that any of us is sufficiently predictable when deciding these hard cases for us to be able to say that if X and Y had sat rather than A and B the result would have been different. But others may well think so.

I am often asked how it is decided how many should sit and who they should be. There is some evidence that in the olden days the Lord Chancellor saw it as his right – possibly even his duty – to ensure that the right people sat on certain cases. This would be unacceptable today. The listing is done in the registry and the provisional allocation of judges to the panels is agreed with the President and Deputy President in what is known as the ‘horses for courses’ meeting. The aim is to have those with the most relevant expertise together with some randomly chosen others. We are all expected to be able to turn our legal minds to anything. I do not think that either the judicial office or the two seniors give any thought to the likely outcome of the case if X sits instead of Y.

This would be solved by having us all – or at least nine of us - sit. It would also increase the authority of the result. If all or most of the top judges in the country have given the case their best shot then perhaps it is the best that can be done. But it would reduce the number of cases we could take.

It would also shift the focus to the appointments process. In other parts of the world, it clearly increases the desire of the politicians who make the appointments to fill the court with people of their own political persuasion. That does not happen here. We did not have political appointments to the Law Lords for many decades before the move to the new Court. Now we have an independent selection Commission, convened *ad hoc* for each vacancy, or group of vacancies, consisting of the President, representatives of the appointments commissions of England and Wales, Scotland and Northern Ireland, and a senior UK Judge, from the part of the UK from which the vacancy arises. As a UK court, we are required to have at least one Justice with experience of the law and practice in each part of the UK. Traditionally, and at present, we have two from Scotland and one from Northern Ireland, but there may well come a time when we also have to have one from Wales. The selection commission conducts the appointments process and puts up one name to the Lord Chancellor, who may either accept, reject or ask the Commission to think again.

It will be obvious from everything that I have said that I am convinced that we should have left the House of Lords and that both institutions are better off as a result. But that does not mean that we should ignore one another. We should have frequent, friendly contacts such as this, so that we can all get to know and to understand one another better, and all feel that we have an interest in what the other branches of government do.