
The UK Supreme Court – A Fine New Vintage, or Just a Smart New Label on a Dusty Old Bottle?

By Gavin Drewry¹

Abstract

The machinery of UK governance, including many aspects of the legal system, has undergone a lot of important changes in the last decade or so. Some of these changes have been driven by 'New Public Management' ideas about the need to increase 'efficiency, effectiveness and economy', to sharpen public accountability and to improve the quality of customer service in the administration of justice - as has been happening with other parts of the public service sector. Some important reforms (notably devolution of functions to elected administrations in Scotland, Wales and Northern Ireland and the passing of the Human Rights Act 1998) have been parts of a wider political agenda of modernising Britain's antiquated 'unwritten' constitution. Some of the most senior judges themselves, a category of office holder once regarded as doctrinally opposed to any kind of radical change, have become articulate champions of reform and have carved out new, high profile managerial roles for themselves, as well as becoming markedly more 'activist' in the public law and human rights arena when sitting on the Bench.

One particularly important landmark in the long list of recent legal reform initiatives was the passing of the Constitutional Reform Act 2005 which (among other things) paved the way for the establishment of a United Kingdom Supreme Court. The new Court, which took over the appellate jurisdiction formerly exercised by the House of Lords, began work – in a location on the opposite side of Parliament Square from the Palace of Westminster – on 1 October 2009. The Judicial Committee of the Privy Council, staffed mainly by the same judges as those who sit in the Supreme Court but having a separate jurisdiction, has also moved into the same building. This article considers the background to and rationale of this development and reflects upon how radical a constitutional innovation it really is. It concludes by suggesting that, even though the new court has almost an identical jurisdiction to that of its predecessor, the adoption of the evocative appellation of a 'supreme court' may prove to be much more than a cosmetic exercise of relabeling.

'Supreme Court' – what's in a name?

The term 'Supreme Court' has a particular historic resonance with the institution that bears that name in the United States, and acts as custodian of the US Constitution through the judicial review of legislation. But what can be the role of a Supreme Court, in the United Kingdom - a country that still has no codified constitution and in which the primacy of Acts of Parliament remains strongly embedded in enduring notions of parliamentary sovereignty? Before looking at the nature, functions and prospective development of the UK's new Supreme Court, which was launched in 2009, let us begin with some scene-setting reflections on what any newly-created institution called a 'supreme court' might be expected to look like. Does international experience offer any relevant pointers?

The first formal usage of the name, 'supreme court' dates back to Article III of the US Constitution of 1787, which provided that: 'The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.'

Article VI affirmed that 'This Constitution and the Laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land.'

The succinct and deceptively low-key formulation in Article III was of course just a scene-setter to the well-known saga of how the US Supreme Court was to evolve into a powerful arena for resolving constitutional disputes, frequently concerning matters which are politically highly contentious and often involving Bill of Rights issues. Although Alexander

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Hamilton in *Federalist 58* had characterised the judiciary as guardians of the Constitution, the Founding Fathers who signed up to those apparently anodyne words at the Philadelphia Convention can surely have had little idea of what a potentially formidable constitutional weapon they had invented for posterity. Sixteen years later, the huge significance of this innovation began to manifest itself – with Chief Justice John Marshall, in *Marbury v Madison*, breathing life into the skeletal language of Articles III and VI, laying the foundations for judicial review of the constitutionality of legislation - and the eventual emergence of top judges as key actors in the American governmental process.²

The American model, as it grew towards maturity from its 18th century embryo, was destined subsequently to influence judicial developments in many other countries, particularly in the common law world. American influence on some of the new constitutions that emerged in the twentieth century, particularly in the aftermath of the Second World War was important in this context. Many of the new, independent nation states that were created by the collapse of the former European empires in the second half of the century gave birth to a proliferation of new constitutions, often featuring provisions designed to hold governments in check through some kind of judicial review. The collapse of the Soviet empire in the 1990s created yet more such new states with yet more constitutions and often ‘supreme courts’ and/or ‘constitutional courts’ of their own.

But of course the American version of a Supreme Court, influential though it has been, was far from being a universal template. Even the most cursory glance at the worldwide picture reveals huge variations in function, status and nomenclature both in the nature and configuration of top judicial institutions and in the arrangements for judicial review of constitutional issues. A current ‘wiki’ website³ listing national supreme courts includes 53 in Africa; 37 in the Americas (including six countries who have signed up to the Eastern Caribbean Supreme Court); 48 in Asia; 45 in Europe; 14 from Oceania; and five supranational supreme courts (the Eastern Caribbean Supreme Court; the European Court of Justice; the UN International Court of Justice; the UN International Criminal Court; and the UK’s Judicial Committee of the Privy Council.

A lot of the institutions listed are called supreme courts, but many are not. Some are high courts; others are (in the French tradition) courts of cassation. Some of the top courts have the word ‘constitutional’ in their title; but in many countries, particularly ones with civil/Roman law rather than common law jurisprudential inheritances, constitutional courts are quite separate and distinct from the supreme courts (however titled) at the apex of the ordinary court hierarchy - or hierarchies. The latter characteristic is another point of departure from the common law pattern: in some countries administrative law and/or criminal courts have their own hierarchies and appellate systems, separate from the trial and appellate courts dealing with civil litigation. So some of the countries listed in the above web site are shown as having three ‘supreme courts’. For instance, the entry for the Czech Republic includes a Constitutional Court and a Supreme Administrative Court, alongside the national Supreme Court. France has the Court of Cassation, the Council of State and the Constitutional Council – the latter not being, strictly speaking, a ‘court’ at all. Germany perhaps provides an even better illustration given the existence of several supreme courts at federal level for different fields of law (civil, administrative, criminal, labour, tax, etc) alongside the Federal Constitutional Court.

Some top courts have been modelled, explicitly or implicitly on the United States prototype, operating in a constitutional framework based on a separation of powers, and acting (in federal countries) as umpires in disputes about the respective powers of national and sub-national levels of government. But supreme courts are also to be found in unitary states and in former British colonies that retain variants of the ‘Westminster’ constitutional model, with a degree of fusion (rather than a strict separation) between the executive and legislative branches of government. Supreme courts, and the constitutionalist idea that over-mighty governments need to be kept in check by judicial review, are seen by many jurists and political theorists as bulwarks of liberal democracy. But, as the above-mentioned list indicates, supreme courts are also to be found in non-democratic polities – particularly in some countries in Asia and Africa - where free elections and party

² An interesting recent account of the debates surrounding the foundation of the US Supreme Court and of the subsequent development of judicial review can be found in L. Goldstone, *The Activist*, New York, Walker and Co., 2008.

³ http://wapedia.mobi/en/List_of_national_supreme_courts. The site admits to being ‘incomplete’. There are some particularly glaring omissions from the ‘supranational courts’ section, including the European Court of Human Rights and the Inter-American Court of Human Rights.

competition are almost or wholly non-existent and where Western ideals of judicial independence and the rule of law barely exist.

Cross-national comparison reveals a few obvious isomorphic clusters and over the years many countries (particularly ones in constitutional transition) have borrowed or inherited some of their ideas from elsewhere. But the overall picture is one of great diversity, reflecting the enormous variety of local histories, cultures, traditions and levels of economic and political development. So there was no common template, even within the common law world, that can have offered much guidance to the creators of a new 'Supreme Court' in the UK – even assuming that they might have been seeking such guidance. And, even though European law has had a significant recent and continuing impact on UK jurisprudence, the judicial systems of Britain's European neighbours can have provided even less inspiration. As one commentator has noted, in 2001 one French 'supreme court', the *cour de cassation*, decided 20,613 civil cases and 9,581 criminal cases; in the same year the UK House of Lords decided just 85 cases and four points of law.⁴ Clearly we are looking here at two completely different institutional species.

Judicial Review, in the absence of a Constitution?

And one further point should be borne in mind. A major *raison d'être* of the US Supreme Court is constitutional judicial review (though this only constitutes one part of its federal jurisdiction) – and the spread of this function, whether entrusted to supreme courts at the apex of a judicial hierarchy or to separate constitutional courts, has been a growth industry in the modern democratic world. Tom Ginsberg notes that, whereas before the Second World War (when of course the number of free-standing nation states was much smaller than it is today) very few constitutions provided for judicial review; at the time of his writing (c. 2007), 158 out of 191 constitutional systems included formal provision for constitutional review. By his calculation, 79 constitutions included provisions for constitutional courts or councils; 60 provided for judicial review by the ordinary courts or by supreme courts; while China, Burma and Vietnam entrusted the task of reviewing constitutionality to the legislature.⁵

A recent comparative study of constitutional courts adopts a definition of such courts as not meaning 'merely a court acting in constitutional mode by interpreting a constitution or determining a constitutional issue, but a *specialist* court having *only* "constitutional" jurisdiction.'⁶ Their analysis is therefore focussed on 'centralised' or 'European' systems in which the legal system is divided typically into two parts, one under the authority of a constitutional court, the other under the authority of a supreme court – 'the latter being finally responsible for all matters of judicial determination not falling within the jurisdiction of the constitutional court.' The prototype of such courts is generally taken to be that established in Austria in 1920, under the influence of Hans Kelsen.⁷ The definition expressly excludes the US Supreme Court and other systems that have emulated the 'American' model.

The UK Supreme Court is manifestly not and cannot be a constitutional court in the 'European' sense. Indeed, given the absence of a codified constitution in the UK – coupled with the traditional doctrine of parliamentary sovereignty - one might anticipate that the role of its new Supreme Court will never have anything to do with determining the constitutionality of executive or legislative actions in the manner of its US namesake. But we need to look a little more closely at this assumption in the light of recent experience before jumping unthinkingly to such a conclusion.

⁴ John Bell, 'Reflections on continental European Supreme Courts', *Legal Studies*, vol. 24, 2004, pp. 156-168, at p. 156. The meaning of the author's reference to 'points of law' is not clear from his text.

⁵ Tom Ginsburg, 'The Global Spread of Constitutional Review' in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds), *The Oxford Handbook of Law and Politics*, Oxford University Press, 2008, pp. 81-98, at p. 81 and footnote 1.

⁶ Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, London: Wildy, Simmonds and Hill, 2009, p. 3. See also Alex Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, 2000.

⁷ See Anna Gamper and Francesco Palermo, 'The Constitutional Court of Austria: Modern Profile of an Archetype of Constitutional Review', in Harding and Leyland, *op. cit.*, note 5 above, pp. 31-51.

Prehistory of the UK Supreme Court⁸

At the end of the 18th century, at the time when the newly liberated former American colonies were launching their new Constitution – retaining some aspects of their British and common law inheritance, but firmly rejecting many others – the British legal system had nothing resembling a Supreme Court. The judicial system was fragmented, slow and inaccessible to all but the very rich: the appellate system was virtually non-existent. However, at the apex of this ramshackle structure sat the House of Lords – the non-elected second chamber of Parliament, a feudal relic (though still powerful in those days) historically representing the interests of the great aristocratic landowners.

It should be noted that the judicial House of Lords was the final appellate court (in civil cases) not only for England, Wales and Ireland, but also for Scotland whose legal system is significantly different from that of the rest of the UK. The modern House of Lords, and now the UK Supreme Court retains this geographical jurisdiction (save that, since the partition of Ireland after the First World War, the Irish jurisdiction is confined to the North of the island, the Irish Republic having a quite separate judicial system).⁹ Subsequently, the House of Lords acquired an appellate role in criminal cases (excluding Scottish ones) – but in practice nearly all of its case-load has comprised civil matters.

The constitutionally anomalous feature of the judicial functions of the House of Lords was that, since feudal times until the abolition of its appellate jurisdiction in 2009, they remained part and parcel of the second chamber of the legislature. As Robert Stevens has observed:

By the thirteenth century, the development of the common law had led to the delegation of judicial work at the trial level (and by the Tudor period even to the establishment of a hierarchy of judicial appeals), but the idea that a final appeal from the regular courts lay to Parliament was not seriously questioned after the fourteenth century. Parliament recognized no subtle distinction among its judicial, executive, and legislative functions. As the laws and customs of Parliament had developed, the appellate function was seen as no more and no less a part of the work of the political sovereign [the King in Parliament] than those original (trial) aspects of its judicial work – impeachment and the hearing of felony charges against peers.¹⁰

Until the latter part of the nineteenth century, the appellate business of the House was effectively in the hands of a legally qualified Lord Chancellor (a senior ministerial member of the government), usually sitting with two non-legally qualified peers. Judicial sittings took place in the legislative chamber of the House and until the 1850s it was not unknown for other peers to wander in and out and sometimes try to ‘vote’ on the determination of appeals. With hindsight, this looks ludicrous – and even then there were critics who recognised its absurdity. The Victorian essayist, Walter Bagehot, writing in 1867, opined that: ‘the supreme court of the English people ought to be a great conspicuous tribunal, ought to rule all other courts, ought to have no competitor, ought to bring our law into unity, ought not to be hidden beneath the robes of a legislative assembly.’¹¹

However, even in Bagehot’s day, this aspect of the work of the House had increasingly been separated from the mainstream of political and legislative activity. This process was carried substantially forward, nine years later, by the passing of the Appellate Jurisdiction Act 1876. The rather complicated story surrounding these changes has been told elsewhere.¹² Suffice it to say, that the original plan (adopted by Gladstone’s Liberal Government) had been to abolish the Lords’ appellate jurisdiction altogether, and the Judicature Act of 1873 had begun that process – placing a newly created Court of Appeal at the apex of the UK civil courts. However, partly because of the objections of Scottish lawyers to the

⁸ Parts of this section and the section that follows it are adapted from Gavin Drewry, Louis Blom-Cooper and Charles Blake, *The Court of Appeal*, Hart Publishing, 2007, pp. 153-156

⁹ There was a provision in the Government of Ireland Act 1920 for appeals to the House of Lords from the courts of Northern Ireland in matters relating to the constitutionality of legislation passed by the devolved Northern Ireland legislature. This provision was subsequently repealed. See Louis Blom-Cooper and Gavin Drewry, *Final Appeal*, Oxford, Clarendon Press, 1972, p. 36.

¹⁰ Robert Stevens, *Law and Politics. The House of Lords as a Judicial Body, 1800-1976*. London, Weidenfeld and Nicolson, 1979, p. 6.

¹¹ Walter Bagehot, *The English Constitution*, London, Fontana Library, 1963, p. 147.

¹² Stevens, note 8, above. David Steele, ‘The Judicial House of Lords: Abolition and Restoration 1873-6’, in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876-2009*, Oxford University Press, 2009, ch. 2.

idea of appeals from their courts being decided by an exclusively English court, Disraeli's Conservative Government, that came to office in 1874, rescued the judicial House of Lords from oblivion. The 1876 Act (above) put the judicial function of the House onto a proper statutory footing and created the first life peers – judicially qualified Lords of Appeal in Ordinary – to hear appeals.

One relic of the previous steps towards abolition was to leave the Court of Appeal and the High Court with the rather misleading statutory title, 'the Supreme Court of Judicature'. Section 59 of the Constitutional Reform Act 2005 avoids any potential confusion between that body and the new UK Supreme Court by re-naming the High Court and the Court of Appeal as the Senior Court of England and Wales; their counterparts in Northern Ireland became the Court of Judicature (rather than the Supreme Court of Judicature) of Northern Ireland.

Genesis of the UK Supreme Court

And so, with various reforms to its workings along the way (e.g. the introduction in the 1930s of a requirement of obtaining leave to appeal in English civil appeals) the House of Lords continued in its rather strange role as the final appellate court – albeit with the judicial functions effectively detached from the legislative functions. In 1948, as an indirect consequence of wartime bomb damage to the Palace of Westminster, the House began to hold its judicial hearings in an Appellate Committee, away from the legislative chamber.¹³ Intermittent moves in the 20th century to reform the powers and functions of the second chamber for the most part ignored any reference to the judicial functions.

However, in 1997 Tony Blair's 'New Labour' Government embarked upon a series of steps to 'modernise' the constitution – including Parliament. In 2000, the report of a Royal Commission on Reform of the House of Lords (chaired by Lord Wakeham), quoted Bagehot's observation that 'no one, indeed, would venture *really* to place the judicial function in the chance majorities of a fluctuating assembly: it is so by a sleepy theory; it is not so in living fact.' But the Commission went on to note that the doctrine of separation of powers has never strictly applied in the United Kingdom, and concluded that 'there is no reason why the second chamber should not continue to exercise the judicial functions of the present House of Lords'.¹⁴ In its White Paper, responding to the Wakeham Report, the government – while cautiously in favour of modernising other aspects of the composition of the second chamber – declared itself to be 'committed to maintaining judicial membership within the House of Lords'.¹⁵

But the Blair Government's commitment to retaining the *status quo* proved to be short-lived. On 12 June 2003 there was press release from Downing Street (coinciding with Lord Irvine of Lairg's resignation as Lord Chancellor) announcing that the office of Lord Chancellor was to be abolished and replaced by a new office of Secretary of State for Constitutional Affairs; that there was to be a new judicial appointments commission for England and Wales; and that the judicial functions of the House of Lords would be transferred to a new UK supreme court.

The announcement came out of the blue – not least to Mr Blair's cabinet colleagues and to the judiciary, who, it transpired, had not been consulted.¹⁶ Consultation papers on the government's proposals were published by the newly established¹⁷ Department for Constitutional Affairs.¹⁸ The document concerning the proposed Supreme Court indicated one reason for the Government's change of mind, when it referred to the Human Rights Act and Article 6(1) of the European Convention on Human Rights, which now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so. So the

¹³ Blom-Cooper and Drewry, *op. cit.*, note 7, above, pp. 111-13.

¹⁴ Report of the Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534, 2000, para. 9.5.

¹⁵ *The House of Lords – Completing the Reform*, Cm 5291, 2001, para. 81.

¹⁶ See Andrew Le Sueur, 'New Labour's next (surprisingly quick) steps in constitutional reform', *Public Law*, 2003, pp. 368-77.

¹⁷ This Department replaced the Lord Chancellor's Department in June 2003. It was replaced by the Ministry of Justice (responsible mainly for the prison system and the courts) in May 2007.

¹⁸ *Constitutional Reform: A Supreme Court for the United Kingdom*, July 2003. There were separate consultation documents relating to the proposed independent judicial appointments commission and to the future of Queen's Counsel.

fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature.¹⁹

In the background of this concern were decisions of the Strasbourg court in *Procola v Luxembourg*²⁰ and, closer to home, *McGonnell v United Kingdom*²¹, which had strongly affirmed the need for 'objective impartiality' in judicial proceedings.

In the period between the Wakeham Report and the prime minister's announcement, Parliament had produced two divergent select committee reports on the subject. In a report published in February 2002, the House of Commons Select Committee on Public Administration, responding to the Government's white paper on reform, had supported the establishment of an independent Supreme Court.²² However, in December 2002, the Joint (i.e. Lords and Commons) Committee on House of Lords Reform had noted that opinion, including judicial opinion, was divided on the issue, and called for an independent inquiry into the judicial function of the Lords.²³

Continuing discussion and negotiation following the Blair announcement and the publication of the above-mentioned consultation exercises – accompanied by a fair amount of controversy, and some government compromises - culminated in the enactment of the Constitutional Reform Act 2005. The new Supreme Court came into operation in October 2009. It is located in refurbished crown court accommodation on the north side of Parliament Square, in the old Middlesex Guildhall.²⁴ The Law Lords in post at the time of the changeover retained their life peerages and their membership of the House of Lords, but subsequent appointees to the Supreme Court do not hold peerages by virtue of their membership of the Court.²⁵ Thus one of the first new Justices²⁶ to be appointed, in the summer of 2010, was Sir John Dyson, a former judge of the Court of Appeal of England and Wales: Sir John does not have a peerage, but in December 2010 he was granted honorific title of 'Lord' like that already given to senior judges in Scotland.

From House of Lords to Supreme Court – An Emerging Constitutional Role?

We have already noted that the constitutional role of the US Supreme Court is replicated in some countries (albeit with many local variations) but not in others. The absence in the UK of a codified constitution might be taken to mean that the UK Supreme Court simply cannot exercise a significant 'constitutional' role. However, there were some interesting trends in the subject-matter of appellate business in the House of Lords in the last few years of its existence that prompt us to take a more critical look at this assumption.

Back in the 1950s and '60s, more than 30 percent of all House of Lords appeals related to tax law tax litigation.²⁷ By the early 21st century, in the run-up to the transfer of its jurisdiction to the Supreme Court, the proportion of revenue appeals had dwindled to about 7 percent. But the shrinkage of the House's engagement in tax-related matters was offset by a substantial growth in the number of judicial review²⁸ and (since 2000, when the Human Rights Act 1998 came into effect) human rights appeals. In that earlier period there were only 14 appeals in the subject-categories of administrative and

¹⁹ *Ibid.*, para. 3. See Roger Masterman, 'A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence', 2004, *Public Law*, pp. 48-58.

²⁰ (1995) 22 EHRR. 193: concerned members of the Judicial Committee of Luxembourg's Conseil d'Etat, who had previously given a pre-legislative opinion on a legislative instrument that was at issue in an administrative law case.

²¹ (2000) 30 EHRR 289: concerned the Bailiff of Guernsey, who presided over the hearing of a planning appeal, having previously presided over the passage of the development plan on which the decision in question was based.

²² *The Second Chamber: Continuing the Reform*, HC 494, 2001-02

²³ *House of Lords Reform: First Report*, HL17, HC 171, 2002-03; this view was reiterated in the Committee's *Second Report*, HL 97, HC 668, 2002-03.

²⁴ An account of the history and architecture of the new Supreme Court building can be found in Chris Miele (ed), *The Supreme Court of the United Kingdom: History, Art, Architecture*, London: Merrell, 2010.

²⁵ But see the concerns expressed by Masterman, note 17 above.

²⁶ The first was Lord Clarke, appointed on 1 October 2009. But he already held membership of the House of Lords through being Master of the Rolls (head of the Civil Division of the Court of Appeal).

²⁷ Blom-Cooper and Drewry, *op. cit.*, note 7 above, p. 145, Table 11.

²⁸ In a UK context, 'judicial review' is confined to review of the legality or fairness of administrative action, rather than a review of constitutionality so central to the role of the US Supreme Court.

constitutional law, out of 349 appeals heard by the House in the period 1952-68 – just 4 percent. The *Judicial Statistics* for the two years, 2003 and 2004 (by which time the first human rights appeals under the 1998 Act were beginning to reach the House), showed that, of the 107 appeals determined, 21 were in the field of administrative law and 19 involved human rights – a percentage, adding the two categories together, of 37 percent.²⁹

And the growing volume of such business tells only part of the story. Many of the cases in these subject categories have been high profile events that brought the House of Lords into an unaccustomed media spotlight, and sometimes gave rise to interesting tensions between the Judiciary and the Executive. The landmark decision of a nine-judge (the usual number is five) House of Lords in December 2004, in a human rights case involving the detention of suspected Al-Qa'ida terrorists on the orders of the Home Secretary, exercising powers conferred by the Anti-terrorism, Crime and Security Act 2001, is just one of many instances that could be cited in this context.³⁰

David Blunkett, Labour's notoriously illiberal³¹ Home Secretary 2001-2004, and ministerially responsible for human rights-sensitive issues like prisons, immigration and asylum, frequently and angrily complained about the 'interference' of the courts in the decisions of elected government. In his post-resignation autobiography he wrote that: 'Bishops and judges are some of the best politicians in the world. They know how to manipulate the political process' and said that he was 'against the judiciary believing that they are another arm of government and that they can therefore say they dislike what parliament has done and overturn it.'³² His views received a good deal of support from the tabloid press. However, his successors, even when at the receiving-end of adverse rulings, have, in public at least, generally been more polite towards the courts – though ministerial criticisms (sometimes political knee-jerk reactions to misleading media headlines) have continued to be heard from time to time subsequently and there is a continuing debate, particularly among Conservative politicians, about the UK's future relationship with the ECHR and the Strasbourg Court.

In the transitional year, 2009, the 'top court' decided 62 cases – 45 by the Appellate Committee of the House of Lords and 17 by the new Supreme Court. Of the latter, 11 had been argued before the Lords of Appeal in the House of Lords and were carried over for judgment before the same judges, now rebranded as Justices, in the Supreme Court when it opened for business in the autumn. As in the recently preceding years, most of these cases were in public law (a broader category, of course, than constitutional law, but including several cases in the latter category). As Brice Dickson has observed:

As in other recent years, most of the cases decided by the top court involved issues of public law: of the 62 decisions in all, only 18 (13 by the House of Lords, 5 by the Supreme Court) could be described as private law cases, all the others being disputes about criminal law or procedure, judicial review applications, or human rights claims brought against public authorities. Some 15 of the cases (24%) were mainly concerned with European Convention rights, ten (16%) with criminal law or procedure (including three relating to extradition), eight (13%) with property law (including two on intellectual property law), five each (8%) with child law and employment law (the latter including three cases on discrimination), and four each (6.5%) with housing law, contract law and the law of negligence. There were only two cases involving tax law, one of which ... was abandoned.³³

If it was only a slight exaggeration to suggest that the House of Lords in the 1950s and '60s functioned substantially as a specialist tax tribunal, it is surely no more of an exaggeration to suggest that, by the time that its jurisdiction was transferred to the Supreme Court in 2009, it had become a court specialising substantially in public law cases – a

²⁹ Some caution must be exercised in comparing statistics in *Final Appeal* (note 7 above) with those in the *Judicial Statistics*, because they are compiled and presented somewhat differently.

³⁰ *A v Secretary of State for the Home Department* [2005] 3 All ER, 169.

³¹ In a radio interview he once famously attacked those who support civil liberties as 'airy fairy': '[Airy fairy libertarians: Attack of the muesli-eaters?](#)', *BBC*, 20 November 2001

³² David Blunkett, *The Blunkett Tapes: My Life in the Bear Pit*, London, Bloomsbury, 2006. Twenty-six Church of England Bishops sit in the House of Lords.

³³ Brice Dickson, 'The UK's Top Court in 2009', *New Law Journal*, 15 January 2010.

category that had featured hardly at all in the case-load of the House of Lords a generation earlier. Analysis of the cases decided in the first full year of the Supreme Court confirms that this interesting pattern has been maintained.³⁴

We should also note that appellants (other than ones appealing from the Scottish civil courts) required leave to appeal from the House of Lords itself³⁵ (as they now require permission to appeal to the Supreme Court). The criterion for the granting of leave was that in the opinion of the House the case raises 'an arguable point of law of general public importance which ought to be considered by the House at this time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.' So the process by which the House of Lords became a court substantially specialising in public law cases came about by choice of the Law Lords themselves. They apparently came increasingly to regard big judicial review and human rights cases as particularly suited to their role – while most other categories of case have tended to go no further than the Court of Appeal.

A New British Constitution?

In considering whether the Supreme Court – building upon recent trends in the House of Lords – might gradually be moving towards embracing some semblance of constitutional judicial review, we need also to bear in mind that the traditional interpretation of the British Constitution itself, built around the doctrine of parliamentary sovereignty, as expounded by Professor A.V. Dicey at the end of the 19th century, has not stood still in recent years. The very title of the piece of legislation establishing the Supreme Court, the Constitutional Reform Act 2005³⁶ bears testimony to this. If judicial review in the UK is beginning to acquire a 'constitutional' dimension this may be because wider changes in the British Constitution itself have facilitated and perhaps encouraged such a tendency. The establishment of the Supreme Court is an important constitutional landmark, and it would be surprising if the Court itself were to stand completely aside from the ongoing process of constitutional development.

One important area of change has been the growing engagement of the UK courts in the last few decades with European law – both in the European Union context and in the jurisprudence of the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998, which came into effect in 2000. With reference to the huge constitutional implications of EU law, this writer has commented elsewhere (in an article that originated in a paper delivered to this study group³⁷) on the significance of cases like *Factortame*,³⁸ *EOC*³⁹ and *Thoburn*⁴⁰ (the so-called 'metric martyrs' case) in signalling the growing willingness of the courts to qualify their traditional deference to parliamentary sovereignty when considering challenges to UK primary legislation that breaches European treaty obligations. In that context, reference was made to a judgement of Lord Justice Laws in the Court of Appeal in the *Thoburn* case as distinguishing between 'ordinary' statutes and 'constitutional' statutes:

In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA [European Communities Act 1972] clearly belongs in this family. It incorporated the whole corpus of substantive Community rights

³⁴ Sir Louis Blom-Cooper, Brice Dickson and Gavin Drewry, 'The First Year of the UK's Supreme Court', 2010, vol. 61, *Northern Ireland Legal Quarterly*, pp. 295-310.

³⁵ In theory, leave to appeal to the Lords could be granted by the Court of Appeal, but in recent years this very rarely happened. See Drewry, Blom-Cooper and Blake, *op. cit.*, (note 6, above) pp. 148-50.

³⁶ And a more recent piece of legislation, covering quite different 'constitutional' subject-matter, enacted in 2010, bears the title The Constitutional Reform and Governance Act.

³⁷ G. Drewry, 'The jurisprudence of British Euroscepticism: A strange banquet of fish and vegetables', *Utrecht Law Review*, 3(2), 2007, pp. 101-115.

³⁸ *R. v Secretary of State for Transport, ex p. Factortame Ltd.* [1991] 1 A.C. 603.

³⁹ *R v Secretary of State for Employment, ex parte Equal Opportunities Commission*, [1995] AC 1.

⁴⁰ *Thoburn v Sunderland City Council* [2002] 4 All ER 156.

and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute.⁴¹

The idea of some statutes being recognised by the courts as having a special 'constitutional' status, might go a bit further than some of the judges might feel comfortable with, but it does reflect the fact that, particularly when it comes to European law, some established constitutional certainties have become a little less certain.

One particularly vivid instance of the judicial House of Lords moving into constitutional territory (though in a non-EU-related case) was *Jackson v Attorney General*.⁴² This much discussed case⁴³ revolved around a challenge to the validity of the Hunting Act 2004, which had prohibited fox hunting with dogs. Because of political opposition to this legislation in the (legislative) House of Lords the Act had been forced through using the provisions of the Parliament Act 1949, which limits the power of the Lords to delay legislation that has been passed three times by the Commons to a period of one year. However, the 1949 Act itself had also been passed without the Lords' consent under the provisions of the Parliament Act 1911, section 2(1) of which had said that the Act could not be used to pass an Act to 'extend the maximum duration of Parliament beyond five years.' Among other things, the appellant argued that because legislation passed under the 1911 Act had not been passed by both Houses of Parliament it was, in effect, delegated legislation. It was also argued that Section 2(1) contained an unwritten provision based on the principle that a 'delegated' body cannot extend its own powers unless expressly granted the power to do so.

The case was argued exceptionally before a nine-judge House of Lords (it usually sat with five judges⁴⁴) which rejected the appellant's arguments and affirmed the validity of the Hunting Act. However, some of the Law Lords commented, *obiter*, that there might be some constitutional limits on what laws Parliament could pass. In particular, Lord Steyn (see below) said that because parliamentary sovereignty was a common law construct, created by the judges, the judges could also qualify its extent.

If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.⁴⁵

The enactment of the Human Rights Act 1998, incorporating the European Convention on Human Rights into UK law has, as we have already noted, provided further opportunities for the courts – particularly the UK's top appellate court - to address constitutional questions. The political scientist and constitutional historian, Vernon Bogdanor, has averred that 'the Human Rights Act makes the European Convention in effect part of the fundamental law of the land. It brings the modalities of legal argument into the politics of the British state.'⁴⁶ He goes on to quote from a public lecture given by the former Lord of Appeal, Lord Steyn,⁴⁷ in which he said that:

⁴¹ *Thoburn, ibid.*, at 185.

⁴² [2005] UKHL 56

⁴³ See in particular, J. Jowell, 'Parliamentary Sovereignty under the New Constitutional Hypothesis', 2006 *Public Law*, pp. 562–79; Alison L. Young, 'Hunting Sovereignty: *Jackson v Her Majesty's Attorney General*', 2006 *Public Law*, pp. 187-196; Tom Mullen, 'Reflections on *Jackson v Attorney General*: Questioning Sovereignty', 2007 *Legal Studies*, vol. 27, pp. 1-25

⁴⁴ The UK Supreme Court still sits in most cases in panels of five Justices, but seven and nine judge panels are not uncommon – particularly where the Court is reviewing a precedent set by one of its (or the House of Lords') previous decisions.

⁴⁵ [2005] UKHL 56, at para. 102.

⁴⁶ Vernon Bogdanor, *The New British Constitution*, Oxford, Hart Publishing, 2009, p. 64

⁴⁷ He sat as a judge in the House of Lords from 1995 to 2005.

'By the Human Rights Act Parliament transformed our country into a rights-based democracy. By the 1998 Act Parliament made the judiciary the guardians of the ethical values of our bill of rights.'⁴⁸

Lord Steyn defined 'a true constitutional state' as one which has 'a wholly separate and independent Supreme Court which is the ultimate guardian of the fundamental law of the community.' Bogdanor notes the novelty in UK experience of the idea of 'fundamental law' (cf. Lord Justice Laws, above) and suggests that Lord Steyn's reference to it is 'a first step on what may prove a long and tortuous journey to a codified constitution.'

In the end, Bogdanor himself, apparently having come quite close to advocating codification of the constitution, draws back from doing so, essentially because of what he sees as the absence of a consensus about what such a document should contain and which constitutional conventions should be justiciable and which not. At least one commentator has found this conclusion unconvincing and a bit of an anticlimax to what is, in other respects, a substantial and persuasive commentary.⁴⁹

Law and Administration – The New Public Management of the UK Supreme Court

Apart from the transfer to it of the 'devolution' jurisdiction (adjudicating on disputes about the powers of the devolved administrations in Scotland, Wales and Northern Ireland) formerly exercised by the Judicial Committee of the Privy Council, the Supreme Court has the same remit as its predecessor. So, in the first year of its existence, the substantive judicial work of the Court has pretty well carried on where the House of Lords left off. But the arrangements and processes by which it is managed are, in many respects, strikingly different.

The most obvious source of difference lies in the fact that, to borrow a phrase used by a distinguished former Clerk of the House of Lords Judicial Office, the work of the judicial House of Lords 'had to be filtered through the prism of parliamentary procedure.'⁵⁰ The essay from which this quotation is taken provides a fascinating account of the developing role of the Judicial Office since the late 19th century in supporting the appellate function in its rather incongruous parliamentary setting; and parts of the story, particularly some of the earlier parts, have a rather quaint flavour, reminiscent perhaps of some of the novels of Charles Dickens, set in the Victorian era. The Clerk of the Judicial Office and his staff were parliamentary officials rather than civil servants; the Registrar of the court was the Clerk of the Parliaments (the top official in the House of Lords); the procedures followed were governed both by the Practice Directions issued from time to time by the Law Lords and by the judicial Standing Orders of the House. Although, since the establishment of the Appellate Committee in 1948, judicial hearings had been detached from the general legislative business of the House of Lords, parliamentary protocols, and the vocabulary associated with them, were faithfully preserved – 'petitions' rather than 'applications', 'speeches' (rather than judgments) handed down in the chamber of the House. In recent years, quite a lot of significant changes had occurred to modernise the way in which judicial business was managed, as well as in the accommodation and resources available to the Law Lords, but at the point of transition to the Supreme Court, the final appeal court still retained much of the style and ambience of a parliamentary institution.

So, given that part of the rationale for establishing the UK Supreme Court was that the location of the final appeal within Parliament was increasingly seen to be constitutionally anomalous, it is not surprising to find that, while some judicial procedures remain much the same, and the scope of the jurisdiction is more or less identical, the status of the Court and the infrastructure that supports it are markedly different.

The Constitutional Reform Act 2005 specifies in some detail the qualifications and methods and terms of appointment of the Justices; it defines the jurisdiction of the Court, its composition for proceedings and its rules of practice and procedure. Sections 45 and 46 empower the President of the Court to make Supreme Court Rules, to be submitted to the Lord

⁴⁸ Lord Steyn, 'Laying the Foundation of Human Rights Law in the United Kingdom', lecture to the British Institute of International and Comparative Law, 10 June 2005.

⁴⁹ Jeffrey Jowell, review of Bogdanor's *The New British Constitution*, 2010 *Public Law*, pp. 624-8.

⁵⁰ James Vallance White, 'The Judicial Office' in Blom-Cooper, Dickson and Drewry, *op. cit.*, note 10 above, pp. 30-47.

Chancellor and subject to approval by statutory instrument. These Rules⁵¹, together with various Practice Directions⁵² have replaced the Civil, Criminal and Taxation Practice Directions and standing orders of the Appellate Committee of the House of Lords, and regulate how the Court conducts its judicial business.

The 2005 Act also puts the administration of the Court – which has the status of a ‘non-ministerial department’⁵³ - onto a statutory basis. Section 48 provides for a Chief Executive to be appointed by the Lord Chancellor, after consulting the President of the Court. The Chief Executive is subject to any directions given by the President, who may delegate to him or her any non-judicial functions of the Court and his responsibilities, set out in section 49, for the appointment of staff and officers – including the numbers of such personnel and their terms of appointment. The first Annual Report (below) confirms that the first President of the Court, Lord Phillips of Worth Matravers has chosen to delegate these functions. By section 51, the chief executive ‘must ensure that the Court’s resources are used to provide an efficient and effective system to support the Court in carrying on its business.’ Section 54 requires the Chief Executive to prepare an Annual Report at the end of each financial year. This of course is very much the modern language of public management – efficiency, effectiveness and economy - rather than that of parliamentary proceedings.

In January 2008, the then Lord Chancellor announced the appointment of Jenny Rowe as the first Chief Executive of the Court and its accounting officer, answerable for its budget to the House of Commons Public Accounts Committee. She is a career civil servant, who held several posts in the former Lord Chancellor’s Department and, immediately prior to her appointment as Chief Executive, was Director of Policy and Administration in the Office of the Attorney General. In the period before the Supreme Court opened for business, she divided her working life between the Judicial Office of the House of Lords and the Supreme Court implementation team in the Ministry of Justice, overseeing and managing the transition process. The first Annual Report, covering the first six months of the Supreme Court’s existence was published in July 2010 and can be found on the Court’s web site.⁵⁴

The report - particularly section 7 (‘corporate services’) and section 8 (‘management commentary’). – contains a wealth of interesting material on the management of the new Court and on the challenges that have faced the Chief Executive and her colleagues in the first few months. This can be read in conjunction with the useful organization chart of the administrative personnel of the court, also published on the Supreme Court’s web site,⁵⁵ which illustrates the bifurcation of functions below the level of the Chief Executive. On the one hand there are various support services of the kind found in most organisations, headed by a Director of Corporate Resources and covering such aspects as communications management, human resources, finance, records management and health and safety. And, on the other side of the organization chart, we find the legal and judicial support functions specific to the needs of a top court; these are headed by a legally qualified Registrar, and include listing, judicial assistants and the secretaries to the President and the Justices. The internal governance structure also includes a Management Board (with two Non-Executive Directors); an Audit Committee (chaired by one of the Non-Executive Directors, and including representatives from Scotland and Northern Ireland) and a Health and Safety Committee.

The Report indicates that the Court employed 38.4 FTE of staff, including seven judicial assistants on fixed-term contracts. Some staff (11 in total) transferred from the House of Lords, thus metamorphosing from parliamentary officials into civil servants; some came from the Ministry of Justice or from other government departments. Six staff, in addition, came with the Judicial Committee of the Privy Council, which transferred from 9 Downing Street. Although the

⁵¹ Supreme Court Rules, 2009, http://www.supremecourt.gov.uk/docs/uksc_rules_2009.pdf

⁵² Listed at <http://www.supremecourt.gov.uk/procedures/practice-directions.html>

⁵³ A device commonly used to emphasise the independence of a government function from political interference. Among many other examples of non ministerial departments are The Office of Parliamentary Counsel, the Treasury Solicitor’s Department, the Charity Commission, the Land Registry, HM Revenue and Customs and the Crown Prosecution Service.

⁵⁴ http://www.supremecourt.gov.uk/docs/ar_2009_10.pdf Rather curiously, although, by section 54(2) the Reports must be laid before ‘each House of Parliament’, the first such Report was published only as a House of Commons paper. At the time writing, the management of the Judicial Committee of the Privy Council remains constitutionally separate from that of the Supreme Court, and the Annual Report covers only the latter institution – though both courts occupy the same building and there is in practice a great deal of overlap between the management of the two courts.

⁵⁵ http://www.supremecourt.gov.uk/docs/hr_organogram.pdf

administration of the Court is not part of the Courts Service executive agency which manages the rest of the court system, its staff have initially adopted the pay and employment conditions of civil servants employed by the Ministry of Justice. The Report notes that, 'for some staff (who had been providing direct support to the Law Lords in the House of Lords) this involved a significant change to their terms and conditions and a new way of working.'

Having mentioned the status of the staff, we should note one paragraph of the Report that is of particular significance in relation to the public law functions that have featured so prominently in both the recent history of the Appellate Committee and, now, in the early work of the Supreme Court, as noted above. It reads as follows:

The justices regarded achieving tangible independence from both the Legislature and the Executive (in the shape of the Ministry of Justice) as a key constitutional objective. *This was particularly important because the Government is in practice a party in slightly more than half the cases in which an application is made or a hearing takes place before the Court.* The Chief Executive is therefore also an Accounting Officer in her own right, accountable directly to the House of Commons Public Accounts Committee. [italics supplied].

Thus the Court's status as a free-standing non-ministerial department, detached not only from its former parliamentary status but also from the Executive branch of government, clearly signals the fact that it is a very special part of the machinery of justice. The fact that its jurisdiction embraces the whole of the United Kingdom (a role inherited, of course, from its predecessor) further underlines its constitutional uniqueness. These were recurrent themes in the discussions leading up to the establishment of the Court, and the need both to maintain its constitutional independence (not least, from the Ministry of Justice) and to embrace all the countries of the United Kingdom are clear and robust subthemes of its first Annual Report.

The Report was published a few weeks after the May 2010 General Election, against the background of political statements suggesting that the new coalition Government was looking for public expenditure cuts of around 40% to alleviate the economic crisis. Under the heading, 'Principal risks and uncertainties' the Report suggests that 'the key risk facing the organization is that the current funding arrangement could be perceived as compromising the independence and effectiveness of the Court.' At the press conference to launch the Report, the Chief Executive was quoted as saying: 'as 62% of our costs are genuinely fixed, a 40% cut causes us some problems. We couldn't actually deal with any casework, in fact, with a 40% cut.' At the same press conference, Deputy President, Lord Hope, appeared to echo her sentiments: 'It's a quite different operation from what we had before [i.e. in the House of Lords]. It's one which can't be maintained without resources.'⁵⁶

The contents, and indeed the very existence, of the Annual Report, signals that the Supreme Court has begun its life as a twenty-first century institution, steeped in the businesslike culture of 'new public management' – effectiveness, efficiency and economy, etc. It was unlucky to have been born into a harsh world of economic crisis, where it faces similar challenges to the ones facing other parts of the public sector. It is hard to imagine that it will be stunted in its infancy by denial of necessary resources, though the Ministry of Justice, which has responsibility both for prisons and for the courts, seems to have admitted that as there is little scope for cutting the cost of running prisons, the main burden will have to fall on court administration and on publicly funded legal aid.⁵⁷ The outcome of these budgetary issues remain under discussion at the time of writing.

Some may regret the passing of an era in which the final appellate court was cocooned in the comfortable archaism of parliamentary procedure (and the protective blanket of unlimited parliamentary funding), while others will regard the advent of this modern Supreme Court as a positive and probably inevitable development. The effective working of the Court in the modern era of public management depends and will continue to depend on constructive partnership between the Justices and the administrators who provide them with essential backup. And this is increasingly true of courts throughout the developed world.

⁵⁶ 'Cuts "would close supreme court"', *The Guardian*, 30 July 2010.

⁵⁷ 'Clarke hopes pleas bargains will help balance books', *The Times*, 24 August 2010.

Conclusion

We have noted that Supreme Courts (whether or not they actually bear that name) around the world vary enormously in character and function – and the UK Supreme Court adds another variant to the picture of diversity. This new Court, having, at the time of writing, completed its first year, is in many respects not so very new at all – its Justices at the point of transition were the same Lords of Appeal who sat in the House of Lords; the Court's jurisdiction is more or less exactly the same as that of the House of Lords. The substance of its judicial work, building upon recent tendencies already becoming apparent in the House of Lords, has shifted markedly towards public law, with some high profile cases having a distinctly 'constitutional' flavor.

But when we look at the new Court from a public administration perspective some of the real differences become much more apparent. The constitutionally unsatisfactory anachronism of a top court being a parliamentary committee, administered in accordance with parliamentary standing orders, has given way to a modern, businesslike non-ministerial department, not only detached from Parliament, but also asserting – albeit with some difficulty, given recent and continuing cutbacks in departmental budgets - its distance from the Executive (the Ministry of Justice) and functioning very much as a UK-wide tribunal rather than as just an English one.

And then there is the name of the Institution. At one level the creation of an entity called a Supreme Court may be seen merely as a cosmetic 'relabeling' or perhaps as a 'rebranding' exercise, undertaken in response to growing recognition that continuing to situate the top court in Parliament is an anachronism, out of tune with the image of a modern legal system and out of line with even the most rudimentary interpretation of separation of powers. And once the decision had been taken in principle to extract the court from its parliamentary setting it needed a new name – and calling it a supreme court seemed an entirely logical step. Sitting as it does at the apex of the legal hierarchy (or hierarchies, if we take account of the non-English jurisdictions) a 'supreme court' is exactly what it is. And this international brand name seems, as our earlier brief survey of the worldwide scene would appear to confirm, to accommodate quite comfortably a very wide variety of different products.

But this writer has a hunch that the new name may turn out to be quite significant in the future development of the UK Supreme Court. Although the law and constitution of the United States have evolved in ways which bear very little resemblance to the pattern of British legal and constitutional history, the work and status of the US Supreme Court are key parts of the intellectual fabric of the common law world. Other developed and developing common law countries, such as Canada and Australia and, more recently, post-apartheid South Africa have top courts that exercise a significant role in constitutional judicial review.

The judicial House of Lords was an egregious constitutional oddity – a one-off in the amorphous universe of top courts. The UK Supreme Court has joined a fraternity of institutions with which it shares both a common name and a lot of characteristics – though not so far including responsibility for enforcing and interpreting a codified constitution. The arrival of such a constitution may still be a long way off but, even so, one can perhaps detect in the recent pattern of House of Lords and Supreme Court decisions, a growing appetite on the part of the Justices – encouraged by some continuing developments in EU and human rights law - to begin to get to grips with constitutional issues that previous generation of judges would have regarded as completely off limits.

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