MASTER OF THE ROLLS

LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS

THE SUPREME COURT: IS THE HOUSE OF LORDS 'LOSING PART OF ITSELF'?

THE YOUNG LEGAL GROUP OF THE BRITISH FRIENDS OF THE HEBREW UNIVERSITY LECTURE

2 DECEMBER 2009

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(1) Introduction

1. It is a pleasure to be here this evening and to have been invited to talk about the Supreme Court. Some might say that it is a subject on which I have said too much already; that you can have too much of a good thing. It would be a short lecture tonight if I took their advice. You might feel rather short-changed – or rather relieved. At any rate, having been a barrister for many years, I will stick to my brief, and, hopefully, won't leave you feeling short-changed.

2. On 28 July 2009, the Lords of Appeal in Ordinary gathered in the Chamber of the House of Lords for the last time after 136 years to give judgments. They were Lords because they were members of the House; they were of Appeal because they were judges of the UK's final court of appeal; they were in ordinary because they were full-time and paid. As they heard appeals

not as a court in the normal sense, but as a committee of the House of Lords, they did not give judgments, but gave speeches (mercifully brief and very summary speeches), and then voted on whether to allow or dismiss the six appeals they were ruling on that day. Some of us (not me – I had got there too late to be involved) had been party to the decision to end our traditional and picturesque role. So it must have been his macabre sense of humour which prompted our estimable clerk, Brendan Keith, to arrange for the very last appeal on which we were to pronounce to be about assisted suicide. And now having been sacrificed on the altar of change, the Law Lords spring back to life, like so many phoenixes out of their own ashes, as Supreme Court Justices.

3. Is the House of Lords 'losing part of itself'? Is it, in the Supreme Court, losing a daughter or gaining a son? Or have the Law Lords simply transmogrified themselves into Supreme Court Justices, indistinguishable in everything but name, robes, logo and location? Have they simply leapt across Parliament Square – appropriately for this seasonal period, were they simply twelve lords a-leaping? I know Judges can't help reformulating issues which the lawyers put before them, but I would suggest that perhaps the question is not so much whether the House of Lords is losing part of itself. It is more a question of whether the old phoenix had features which the new phoenix lacks. In addressing that question, I want to start by considering the historical context, the more than 800-year run-up to the recent reform. I will then examine some of the constitutional issues that may arise in the future, and then conclude.

4. I turn then to the run-up to reform. Before doing so however I should thank John Sorabji for all his help in providing the best bits in tonight's lecture.

(2) The Run-up to Reform

5. For centuries, the British constitution has been the product of incremental, evolutionary change. As Professor Vernon Bogdanor has recently pointed out in his recent book, *The New British Constitution*, there has been no point in time when it has had to signify a 'fresh start'. There has been no time when a new, codified, written constitution has had to be introduced to mark '*the occasion on which the state is constituted.*'[1] We have had no Independence Day or Bastille Day moment. There have been points when we could have taken the view that the British state was constituted, 1707, 1801 or 1921, for instance, but we have not done so. We have taken the pragmatic view that the changes effected on those dates – the union between England and Scotland, the union with Ireland and the creation of Eire – did not to launch a brand new ship of state. On the contrary, these '*constitutional moments*'[2] as Bogdanor describes them, have simply been understood as effecting changes to the ship of state, which has been sailing, except for a brief republican interlude from 1649 – 1660, since 1066 and all that.

6. The judicial jurisdiction of the House of Lords was part of this ever-evolving constitution, and it had long been subject to the same evolutionary forces that have operated on our state and constitution as a whole. The story begins with the Normans with what Bevan, in his magisterial review of the historical development of our judicial House of Lords, described as the idea – still central to our constitution – that '*all jurisdiction . . . is derived from the Crown*'[3].

7. The House of Lords itself can be traced back in one form or another to about 1164, although it appears to properly begin 120 years later in the age of Edward 1.[4] Its judicial capacity

[1] Bogdanor, *The New British Constitution*, (Hart) (2009) at 11.
[2] Bogdanor, *ibid*.
[3] Bevan, *The Appellate Jurisdiction of the House of Lords I*, (1901) 17 LQR 155 at 155.
[4] Bevan, *ibid* at 160 – 162.

began then also. Indeed, as Bevan explains, the judicial function was the actual basis for the House of Lords taking on a definitive form. He said this,

"*The completion of the work of separating off a definite body of peers of the realm from the rest of the community may be referred to the statute 15 Edward III* [1342], *providing that no peer should be condemned to the loss of his temporal possessions, or to arrest or imprisonment, unless by verdict of his peers in parliament. By this Act the peers of parliament separated themselves from the great body of the king's tenants-in-chiefs, who before were their peers to judge them, and became a privileged and exclusive order . . Appeals which were used to be heard by the joint body of the magnates and [King's] council indifferently came in time to be treated as appeals to the peers. . .*"[5]

The Lords then had both original and appellate jurisdiction. The original jurisdiction, trial by peers rather than trial by jury, for members of the House of Lords, remained in place until it was swept away the Criminal Justice Act 1948. The last time a peer exercised their right to be tried before their peers was 1935 – not so long ago in legal terms – when the 26th Baron de Clifford was tried for vehicular manslaughter. He was acquitted. It was an aspect which appealed to writers and film-makers, as those of you familiar with Dennis Price and Alec Guinness in Ealing Studios' *Kind Hearts and Coronets*, and with Lord Peter Wimsey in Dorothy L Sayers's *Clouds of Witness*.

8. By 1335, the whole body of Peers could hear appeals; although they did so with the advice of the judges. By 1377, it was established that it could entertain appeals from the Court of King's Bench, and, by 1587, appeals from all the common law courts were capable of being heard by it.[6] Owing to the pre-eminence of the Lord Chancellor, from whom appeals were either by way of rehearing or by petition to the King, their Lordships did not gain appellate jurisdiction over the High Court of Chancery, until about 1630.[7] So, over a period of more than 400 years, the House of Lords had acquired the judicial jurisdiction it would, with later

[5] Bevan, *ibid* at 163.
[6] Bevan, *ibid* at 162 – 164.
[7] Bevan, *ibid* at 166 – 167; David Lewis Jones, in Blom-Cooper et al (ed), *The Judicial House of Lords 1876 – 2009*, (2009) (OUP) at 3.

territorial additions (and later subtractions) in respect of Scotland and Ireland, enjoy until October 2009.

9. Despite acquiring a full judicial jurisdiction before 1640, it would take some time before parties appearing before the Lords universally adopted the high standards I enjoyed when sitting there. In 1646, John Lilburne, the famous leveller and early proponent of human rights, came before the judicial House of Lords on a charge of libelling the Earl of Manchester. Rather than stand quiet and respectful at the Bar of the Lords, Lilburne engaged in what was described as a '*frenzy of abuse*' aimed at the Peers, his judges. He then moved on to the more sophisticated, and quieter, form of protest: he stuck his fingers in his ears in order to avoid hearing the charges laid against him. I don't know whether their Lordships returned the favour when it came time for his submissions. Hear no evil did him no good. He was fined £4,000, sentenced to seven years in the Tower of London and banned from public office for life.[8]

10. Lilburne would have found himself before the entire body of the Peers. All Lords were Law Lords then. By the mid-19th century, only those peers with legal experience would hear cases. In time. In fact the last time a non-legal peer cast a vote on an appeal before the Lords was 17 June 1834.[9] The last time one attempted to do so was 1883, when Lord Denman, son of the first Baron Denman, Lord Chief Justice, attempted to cast his vote on the appeal in *Bradlaugh v Clarke*.[10] Lord Selborne LC ignored his vote. That was about the time when the Duke of Devonshire was supposed to have dreamt that he was addressing the House of Lords, and then woke up and found that he was.

[8] Bevan, *ibid* at 167.
[9] Bevan, *The Appellate Jurisdiction of the House of Lords II*, (1901) 17 LQR 357 at 369.
[10] (1883) 8 App. Cas. 354.

11. The late 19th Century was important for other reasons: reform was the order of the day. An Appellate Jurisdiction Bill was drafted, which was intended to permit the appointment of four life and two salaried judicial officers in the House of Lords, but it came and went in 1856. In 1870 another Appellate Jurisdiction Bill came and went. It would have created a Judicial Committee of the Lords distinct from the main body of peers.[11]

12. Gladstone had more success, at least initially, when he embarked on reform in 1873. He managed to steer a provision through Parliament which abolished the judicial House of Lords in 1873 - section 20 of the Supreme Court of Judicature Act 1873. The new Supreme Court of Judicature of England and Wales it created was to be just that, a Supreme Court - for England and Wales at least. But before the 1873 Act came into force, there was a general election, and the new Prime Minister, Disraeli, rushed through a new Act, which suspended the date on which this aspect of 1873 Act came into effect. The suspension remained in place until the very day on which another new Act came into force: the Appellate Jurisdiction Act 1876.

13. This brief overview shows that nothing, not even the House of Lords, is ever static; that evolution is a constant; that reform is always with us. Even though reform is not always to the taste of the judiciary – it was Mr Justice Astbury who said "Reform! Reform! Don't talk to me about reform. Aren't things bad enough already?" But, as Karl Popper put it, the solutions we arrive at are only ever contingent. When something is and has long been done a certain way, then we should not think, because of the shadow of tradition that is the way it must always be done. The judicial House of Lords may have been hallowed in time and almost sanctified by tradition's shadow but it was not always as it was. Gradual, even organic, change was a constant throughout its life; reform was ever present.

[11] David Lewis Jones, in Blom-Cooper et al (ed), *ibid* at 11 – 12; Steele in Blom-Cooper et al (ed), *ibid* at 13ff.

14. To an extent, therefore, the latest step in the form of the creation of the new Supreme Court is merely another step along the same road; it may involve a change of building, a change of style, but the Supreme Court is what our judicial House of Lords was in all but name. In the great scheme of things, it was no great or sudden change. Walter Bagehot, the great constitutional writer, thinker and analyst of the high Victorian era, and certainly no revolutionary, wrote that the top British court "ought to be a great conspicuous tribunal", and that it "ought not to be hidden beneath the robes of a legislative assembly". So, viewed in the context of many centuries of history, i.e. in the long run, future constitutional thinkers may well conclude that, in many ways, the creation of the Supreme Court was no more than another step in a 900 year history.

15. But, as John Maynard Keynes famously said, in the long run, we are all dead. The shorter perspective, the view through the other end of the telescope, is equally valid – more immediate, more relevant to those alive today, and perhaps more controllable. Some people looking at matters with that perspective may question the way in which the decision was taken, and the cost involved in the change, especially when balanced against the perceived benefit and the financial strains on the courts generally. I have already been quoted on the radio, and do not propose to repeat what I said. Those people who are interested in this aspect will no doubt read Lord Irvine's recently published account of events[12] if they have not already done so. Compared with the Victorian approach which engendered considerable debate amongst government and opposition (and then opposition and government), a number of Bills before Parliament, and two Acts of Parliament it was a novel approach to constitutional reform.

[12] http://www.parliament.uk/documents/upload/ConstLordIrvineofLairg.pdf.

16. But, it can fairly be said that, unlike those Victorian attempts, it worked. That the method used to bring about reform was not exactly ideal does not however detract from its product. The creation of the new Supreme Court plainly has a point, and the new Court building has been impressively and attractively fitted out, and the new Justices make up a very impressive and appropriate top court. Its creation is the 21st Century version of the 19th Century's abolition and restoration of the House of Lords; except we had abolition and regeneration in a newer form – interestingly, a form more obviously and clearly consistent with the separation of powers. The Law Lords were, in substance if not in form, consistent with Montesquieu's doctrine of separation of powers, but I think what impelled the change, which had failed in the 19th century, was Human Rights.

17. The 1998 Act has had an extraordinary effect on English, indeed UK, law, and on our judges and, indeed, our legislators. This is scarcely surprising. Since 1951, the Strasbourg Court has been developing our law in all sorts of areas because of the impact of the Convention, while domestic judges and lawyers were either blissfully unaware of these developments or were relegated to being frustrated spectators. Then, in 2000, almost half a century later, our legal and constitutional system has the freedoms of the Convention grafted on to it. It is scarcely surprising that the fifty year backlog of pent up Human Rights issues and points should have led to a flood of cases, articles, parliamentary reports and the like. And, whether one agrees with it or not, it is unsurprising that this should quickly lead to a court of law being part of the legislature should be regarded as a constitutional impropriety, at least by the more purist or literalist public lawyers.

18. From a personal point of view it would have been very exciting and a great privilege to have been one of the first twelve Supreme Court Justices. Indeed, it is what I expected to become in due course, when I became a Law Lord in 2007 – two years after the Constitutional

Reform Act received Royal Assent. But it was, at least to me, and albeit only by a fairly short head, even more exciting and an equally great privilege to become the Master of the Rolls - a great privilege, but a daunting one at that. One of the reasons why it would have been interesting to go to the Supreme Court is to be part of the developing new court; as it is, I shall have to watch those developments from outside, but, whether inside or outside, one can ask what the developments might be. It is to that which I now turn.

(3) Constitutional Issues for the Future

19. It is the Human Rights Act which provides a useful starting point for considering the possible constitutional consequences of the creation of the new Supreme Court. The message from Lord Falconer, the Lord Chancellor at the time of the Constitutional Reform Act 2005 and the message of the 2005 Act is clear: the creation of the new Court was not intended to make any changes in the powers of the UK's top court. They were to be neither increased nor decreased: the Supreme Court is to have the entire jurisdiction that the judicial House of Lords had prior to October 2009. So there was plainly no intention to create a Constitutional Court; that is to say one that can carry out constitutional judicial review of legislative action, as opposed to executive action. So, it is not intended that the new court should be able to strike down legislation on the ground of unconstitutionality.

20. After 35 years in the legal world, there is only one piece of legislation in which I have complete faith, and that is the law: the law of unintended consequences. Adam Smith, the great philosopher and economist, was well versed in it. As he said in *The Wealth of Nations*, economic agents may act based on the intention only to further their own interest, but they will '*in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.*'[13] The invisible hand is not, of course, limited to economic activity.

[13] Smith, *An Inquiry into the Nature And Causes of the Wealth of Nations*, (1776), Book IV, chapter II, *Of systems of political economy*, (http://www.adamsmith.org/smith/won-b4-c2.htm).

21. In this case, the founding of the Court must be seen in its context. Thanks to the Human Rights Act coming into force, the courts have had the right, indeed the duty, to declare statutes incompatible; indeed, thanks to section 3, judges have had the right, even the duty, to rewrite statutes to comply with their idea of what they should mean so as to comply with the Convention, rather than to interpret those statutes so as to comply with what Parliament at the time. Indeed, since the *Factortame* cases in the 1990s, that other European aspect of our government, EU law, has meant that Judges have a duty effectively to override legislation when it does not comply with EU law. So the very forces which gave such a vital supporting wind to the creation of the Supreme Court, have already given the judges of this country their first taste of what it is to be a constitutional court.

22. But it can be said that the domestic wind has been blowing in that direction too, and for nearly half a century with increasing force. The growth of purely domestic judicial review since the 1960s has been almost explosive. This is partly due to the increasing power of the executive, but it is also attributable to a change of culture: the greater scrutiny of government action by the judiciary over the past 50 years is mirrored by the more critical attitude to governmental decisions and policies which has developed in the media over that period. And, of course, it has long been the case that secondary legislation, in particular statutory instruments, has been susceptible to judicial review –even wholesale quashing – when they are *ultra vires*. And then there is the welter of legislation which is being produced by Parliament, much of it, through no fault of the parliamentary draftsmen, poorly drafted and not always fully thought out. This has tended to require the courts to adopt a freer, more flexible, approach to the interpretation of primary legislation. All these factors form part of the background, the climate, what Lord Wilberforce would have called the matrix of facts, in which the new court was conceived, and now is growing up.

23. In the light of this climate, I have expressed the concern that one unintended consequence of the Supreme Court's creation might be the eventual emergence of a constitutional court; that it would in time consider that it had, like other Supreme Court's, had the power to review the legality of law, to declare Acts of Parliament unconstitutional. Might we see a UK Supreme Court at some time in the future have its own *Marbury v Madison* moment, with a future Supreme Court President declaring like US Chief Justice Marshall, that a particular law was '*repugnant to the constitution*' and therefore no law at all.[14] Let me be clear I am not saying that this will or that it should happen. I am saying it may happen. Many eminent people, Lord Phillips and Lord Bingham among them, say that it won't, and they may well be right.

24. So the question is not will the Supreme Court change, but could it, and, in particular, is it more likely to do so than the Law Lords were? Section 40(5) of the Constitutional Reform Act 2005 could imply a power to review the constitutionality of statutes. It provides that the Supreme Court '*has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment.*' What if the question is whether an Act of Parliament is contrary to a fundamental right, a constitutional right? It might, I suppose, be argued that this provides more than the US Constitution does as a guide as to whether constitutional judicial review lies within the ambit of the Supreme Court.

25. I readily accept that, to the great majority of lawyers and constitutional experts in this country, this would currently seem to be a far-fetched argument for at least two reasons. First, as I have mentioned, Parliament's intention in creating the Supreme Court was not to create a Constitutional Court, but to give proper effect to the separation of powers. Separation of powers does not necessarily entail constitutional review. Secondly, countries

[14] 5 US 137 (1803) at 180.

that have written, codified constitutions have tended to provide explicitly for constitutional review. The US is exceptional in this, as it does not. Nowhere in the US Constitution is it provided that the US Supreme Court can review the constitutionality of legislation. Yet, in deciding *Marbury v Madison* the US Supreme Court said that the US Constitution implied that power. On the face of it, it might be said that was implicit in the US Constitution might well be implicit in our Constitutional Reform Act.

26. But, there is a structural difference between the US and UK which militates against the inference that ours could legitimately draw Chief Justice Marshall's inference. The United States has a codified, written constitution which sets the limits of the US Congress's and the US President's powers. Having set the limits of power, it is a simple and logical step to imply a power whereby those limits can be policed. If the constitution provides for the possibility that Congress could act beyond its powers, some power must exist to regulate such acts and declare them to be ultra vires. It was an easy step, and the right step for the US Supreme Court to declare that it must act in accordance with the Constitution when the question arises whether a legislative act is in conformity with that very Constitution. That is the United States' position.

27. Here we have parliamentary sovereignty, where as Lord Mustill put it "*Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.*"[15] Parliament is not, as the US Congress is, legally or constitutionally limited in its legislative capacity, although it might well be limited politically. In the absence of a written, codified constitution limiting

[15] [1995] 2 AC 513 at 597.

Parliament's competence it is difficult to see how our Supreme Court could draw the *Marbury* inference.

28. The US Constitution was the product of much discussion and debate, most notably the Federalist Papers, written by Madison, Hamilton and Jay which formed the most important feature. Hamilton set out the nature of the Constitutional judicial power in Federalist Paper No. 78, where he dealt in detail with the judicial power to review and strike down legislation that was inconsistent with the Constitution. In a state where power is derived from, in Hamilton's words, a limited constitution, it falls to the courts to ensure that the legislature acts within the framework provided by the constitution: the fundamental law.

29. The central point is this. The nature of the US Constitution was the cause of much debate, discussion and political controversy at the time it was being drafted and ratified. The role of the courts and the power Chief Justice Marshall would find for the Supreme Court in *Marbury* was a matter of record and consideration. No similar constitutional debate has taken place in the UK. It is difficult therefore to see how the UK Supreme Court could take draw the *Marbury* inference in the absence of what would have to be our version of Federalist Paper No. 78 and the debate that surrounded it. It is difficult therefore to see the basis on which we could, absent the discovery that the judicial House of Lords always had such a power, find a power to engage in constitutional judicial review.

30. It may be that in the future we will have to enter into a debate about such a power. But it seems to me that if the UK Supreme Court is to go beyond what Conor Gearty has described as the '*shrewdly drafted*'[16] Human Rights Act – a shrewd compromise because it leaves the courts to decide whether Acts of Parliament are compatible with Convention rights but leaves the policy decision whether to change the law in light of such declarations in

[16] Gearty, ***Civil Liberties,*** (Clarendon) (2007) at 23 – 24.

Parliament's hands – there will need to be a considered constitutional debate. There will, because the consequences of such a radical recasting of our constitution would raise other questions. It would, for instance, require a written, codified constitution. One which limited the power of Parliament and the executive, just as the US Constitution does in America.

31. It would also, for instance, raise the question whether Supreme Court judges ought properly to be subject to confirmation by one of the Houses of Parliament, as US Supreme Court judges are subject to Senate confirmation. It would raise the question whether as a country we would be content to settle for the real risk of politicisation of the senior judiciary this might bring. One of the great strengths of our judiciary historically has been its lack of political colour. Would we want a written constitution and all it entails? Would we be happy or wise to risk politicising our judiciary by drawing it into the arena of policy and politics? If we want these things surely they are a matter for considered debate, a Royal Commission on the Constitution, for instance, and public debate. Any such Commission and public debate ought however, properly consider both the intended and unintended consequences of any reform.

32. All of that is however for a possible future and for our latter-day Madisons, Hamiltons and Jays. Possible futures aside what practical changes might we see to our benefit from the Supreme Court's creation? It is to that I turn in looking at the relationship between the Supreme Court and the UK's three legal jurisdictions.

(4) Conclusion

33. So where does all this leave me on the question I posed at the beginning? Has the House of Lords lost a daughter or gained a son or being even-handed, lost a son or gained a daughter?

34. It seems to me that it has without question, and notwithstanding the nature of its creation, gained a son. A modern democracy committed to the rule of law needs to demonstrate its commitment to separation of powers. It needs to show exactly how its Supreme Court is independent of the legislature. Form is as important as substance in this regard. When that form brings with it the possibility of developments in the practical approach by the court to appeals, it brings with it the prospect of substantive improvement too. And what of the unintended consequences? We are all aware of what those might be and, as they say, forewarned is forearmed. A future forearmed is a future avoided or embraced, but only consciously and deliberately and, I think, only after proper democratic debate.

35. The creation of the Supreme Court has also upped the profile of the Judges, and may help raise the profile of civil law, which of course most of its cases concern. Whether we are in politics, law, the media, or just ordinary members of society, we need to appreciate the importance of access to justice for all, whether that is criminal, family or civil justice. We hear much about national education and national health, but if the government does not perform its traditional core duties of ensuring the rule of law at home and the defence of the realm, all the best aspirations of society and of the individuals it comprises are of little value. As both Lord Judge and Lord Clarke have recently noted, if we fail to properly provide access to justice we face the prospect of undermining a claim to be a civilised society and run the risk of seeing the criminal courts swamped by individuals who, through an inability to obtain proper access to the courts, have taken matters into their own hands. The Supreme Court stands as a symbol of our belief in the rule of law. Symbols are powerful things. But they must be matched by acts and deeds.

36. Thank you.

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