

What is the United Kingdom Supreme Court for?

Macfadyen Lecture 2019, Edinburgh

Lady Hale, President of the Supreme Court

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It is such an honour to be here to commemorate the prodigious work of Lord Macfadyen. My colleague Lord Reed remembers that during his time as principal commercial judge, he was so prolific that an edition of the Scots Law Times consisted entirely of judgments which he had delivered. My former and much-lamented colleague, Lord Rodger, Lord President at the time, suggested that it should be renamed the Macfadyen Law Times. In 2004 he was voted Scotland's most respected judge in a light-hearted poll of the Bar. In 2006 he was diagnosed with cancer, but nevertheless managed to return to work, and in the last year of his life delivered more than 20 judgments (I don't plan to do that in my last year of sitting, although hopefully cancer free). It is such a pleasure to be able to honour his memory today.

This year we celebrate the 10th anniversary of the opening of the Supreme Court of the United Kingdom. The impetus was the Human Rights Act 1998, which turned the rights contained in the European Convention on Human Rights into rights in the domestic law of the United Kingdom. One of those was the right, in article 6, to have both criminal charges and civil rights and responsibilities determined by an 'independent and impartial tribunal established by law'. How could that be reconciled with the role of the Lord Chancellor, who was not only a senior member of the government, but also head of the judiciary of England and Wales and, more importantly for Scotland and Northern Ireland, the senior judge in the highest court in the land, the appellate committee of the House of Lords? Indeed, could the article 6 right be reconciled with the existence of that highest court as a committee of the Upper House of the legislature? Thus, it is not surprising that the move to set up a Supreme Court for the United Kingdom, visibly separate from both the executive and the legislature, sprang up in the early years of this century, strongly supported by Lord Bingham of Cornhill, who had taken up office as senior Law Lord in 2000. But this time, as far as I can recall, there was no serious move to abolish the jurisdiction altogether and leave each part of the United Kingdom to their own single tier of appeal. This is in stark contrast to earlier episodes in our history.

The first was in the 1870s.¹ In 1869, a Royal Commission under Lord Cairns (who had been Lord Chancellor in Disraeli's conservative government) recommended the wholesale reform of the chaotic legal system in England and Wales (hereafter England, with apologies to Wales). This would bring together the jurisdictions previously exercised by the courts of Chancery, Queen's Bench, Exchequer and Common Pleas, and Probate, Divorce and Admiralty. There would be a single Supreme Court. This would consist of a High Court, split into three divisions, representing the former Chancery, common law and civilian courts, and a single Court of Appeal, to which there would be a right of appeal in every case. This rationalisation was long overdue. But there had also been great dissatisfaction with the role of both the House of Lords, as final court of appeal for all parts of the United Kingdom, and the Judicial Committee of the Privy Council, as final court of appeal for the rest of the British Empire. The dissatisfaction was mainly caused by the lack of professional judges, which led to long delays, and by tying the judicial work of the House of Lords to the Parliamentary time-table and procedures.

So, the work of the Royal Commission was supplemented in 1872 by the report of a Select Committee set up to consider the judicial role of the House of Lords and the Judicial Committee of the Privy Council. This recommended combining the two in a new body consisting of the Lord Chancellor and four professional salaried judges. These would be known as Lords of Appeal and would be both life peers and privy councillors.

However, the Gladstone's liberal government was then in power, and the Judicature Bill introduced by Lord Chancellor Selborne in 1873 not only implemented the Royal Commission's recommendations but abolished English appeals to the House of Lords altogether. It also paved the way for Scottish and Irish appeals to go to the new Court of Appeal, by allowing Scottish and Irish lawyers to become appeal judges. And it gave power to the Crown to refer Privy Council appeals to the new court. Prime Minister Gladstone stirred up a 'celtic hornets' nest' by insisting that Scottish and Irish appeals should also go to the new court, but this was fiercely resisted in the House of Lords. The upshot was that there would no right of appeal to the House of Lords from England and Wales, while it remained from Scotland and Ireland. The Act was passed in August 1873 and was due to come into force in November 1874.

¹¹ This account is largely taken from Robert Stevens' magnum opus, *Law and Politics: The House of Lords as a Judicial Body 1800 – 1976*, Weidenfeld and Nicholson, 1979; see also "The Final Appeal: Reform of the House of Lords and Privy Council 1867-1876" (1964) 80 *LQR* 343.

Then there was a change of government and Lord Cairns was once again Lord Chancellor. He pushed a Bill through the Lords which would have sent Irish and Scottish appeals, as well as colonial and ecclesiastical appeals, to the new Court of Appeal, now grandiosely renamed the 'Imperial Court of Appeal'. This provoked opposition both from Scotland and from Ireland. But at the last minute, the Bill was dropped in the Commons, though not for that reason, and another Bill, postponing the coming into effect of the 1873 Act until November 1875, was passed. A Committee for Preserving the House of Lords was established. After an unsuccessful attempt to get the Bill passed in the next session, the sections of the 1873 Act providing that appeals from England and Wales to the House of Lords would cease in November 1875 were postponed until November 1876, and in fact they were never brought into force.

Instead, the Appellate Jurisdiction Act 1876 restored the House of Lords as the final court of appeal for the whole United Kingdom. But to give an impression of the separation of powers, petitions were to be addressed to the Queen in Parliament, judicial sittings were no longer tied to the legislative sittings of the House, and (most important of all) salaried Lords of Appeal in Ordinary were created, chosen from judges of the senior courts or from members of the bars of England, Scotland and Ireland of at least 15 years' standing.² Those qualifications remain to this day. Peers who were holders or former holders of 'high judicial office' were also entitled to sit.

There was much amusement in their Lordships' house when I was sworn in as a Law Lord, 'for so long as she shall well behave herself therein' – but this stems from the 1876 Act, under which Law Lords were to be peers during their tenure of office, which they were to hold *quamdiu se bene gesserint*, the guarantee of judicial independence dating back (in England) to the Act of Settlement of 1701. In fact, their Lordships found the early Law Lords so useful that the Appellate Jurisdiction Act 1887 (section 2) turned their peerages into life peerages rather than peerages during tenure of office, so I suppose that I should have sworn a double oath, one for the office of Law Lord and one for the life peerage!

Thus, was the jurisdiction of the House of Lords preserved by the skin of its teeth – and that had much more to do with preserving and protecting the House of Lords as a branch of the legislature than with protecting and preserving their status as the highest court in the land.

² Professor Alan Paterson tells me that Disraeli regarded the post of Lord of Appeal in Ordinary as "an appointment to make a Scotsman's mouth water", the salary being £6000; however, the first two Scotsmen offered the job, Lord President Inglis and Lord Justice-Clerk Moncrieff, turned it down: AA Paterson, "Scottish Lords of Appeal, 1876-1988" 1988 *The Juridical Review* 235, at 238.

However, I can't help thinking that it was extraordinarily tactless of the English Lord Chancellors (actually Cairns was an Ulsterman) to contemplate transferring Scottish appeals to what would have been seen as, in essence, an English court. The Scots had, almost from the first, been enthusiastic users of the House of Lords and it remained 'predominantly a Scottish court'.³ In 1870, of the 51 cases heard, 19 came from England, 31 from Scotland and 1 from Ireland.

After the preservation of the appellate jurisdiction of the House of Lords in 1876, there were three important changes affecting appeals from England and Wales before the creation of the Supreme Court in 2009. The first was the establishment of the Court of Criminal Appeal by the Criminal Appeal Act 1907. Previously there had been only very limited appeals in criminal cases and this provided for defendants' appeals on points of law, fact or mixed fact and law. It also provided for either side to appeal from the Court of Criminal Appeal to the House of Lords, but only if the Attorney General certified that the case involved a point of law of exceptional public importance and that it was in the public interest that a further appeal be brought. The certification role is now played by the Court of Appeal itself and the test is 'general' rather than 'exceptional' public importance. But this means that we can hear criminal appeals from England, Wales and Northern Ireland, but not from Scotland.

The second change was the imposition of a leave requirement by the Administration of Justice (Appeals) Act 1934, in place of the absolute right of appeal which had previously existed in civil cases. Leave could be given either by the Court of Appeal or by the House itself and the convention soon developed that the Court of Appeal would only rarely give leave. The House of Lords, as Lord Bingham put it, dined *a la carte*. Standing Orders provided that leave would be given if the case raised 'an arguable point of law of general public importance which ought to be heard by the House at that time bearing in mind that the matter will already have been the subject of judicial decision and may already have been reviewed on appeal'. These criteria have been adopted by the Supreme Court (Supreme Court Practice Direction 3.3.3.).

Until a requirement of permission to appeal against final judgments was introduced in Scottish cases, Scottish appeals could be brought if two counsel certified that the case was suitable, and Lord Hope's view was that they did not have to apply the same criterion that the House did. In England, there seem to have been two reasons for introducing the leave requirement. The first was over-work, not in the House of Lords, but in the Privy Council, where the Law Lords also

³ Robert Stevens, *loc cit*, p 347.

sat. But the measure was supported by, for example, Lord Atkin, who thought that it would prevent rich corporations and powerful government departments from terrorising litigants with threats of appeal. This is certainly a fear I had when sitting in the Court of Appeal in the days when there was still an appeal as of right if the case was worth £5000 or more.

The third change was the introduction of 'leapfrog' appeals by section 12 of the Administration of Justice Act 1969. A civil case can leapfrog the Court of Appeal and come straight to us if the High Court judge or Divisional Court certifies that the criteria exist. Originally, these were that the case involved a point of law of general public importance and either (a) it involved a question of statutory interpretation which had been fully argued and discussed in the High Court or (b) that the High Court was bound by a fully considered decision of the Court of Appeal or House of Lords in previous proceedings. Those conditions have recently been expanded to include cases involving matters of national importance, or where the result is so significant that a hearing in the Supreme Court is justified, or where the benefits of an early hearing by the Supreme Court outweigh the benefits of consideration by the Court of Appeal. Leave of the Supreme Court is also required, so we can decline to take the case until the Court of Appeal has considered it.

The most obvious examples are where there is a binding House of Lords decision on a human rights matter, the correctness of which has been called in question by a later decision in the European Court of Human Rights, as in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831. Another is *Willers v Joyce* [2016] UKSC 43, [2018] AC 779, where a decision of the Privy Council that there does exist a tort of malicious prosecution of a civil claim was thought to be incompatible with a House of Lords' decision (that the tort did not extend to the malicious prosecution of disciplinary proceedings). And an example under the new, expanded criteria is *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, the 'big Brexit case'.

All three developments have served to emphasise that the role of the apex court is not to correct errors in the application of the law by the courts below. That is the role of first tier appeal courts. Rather, it is to resolve difficult points of law to which the answer is not clear and which matter to a great many people other than the parties to the case.

By 2000, two other developments had led to the increasing separation of the Law Lords from the Parliamentary business of the House. One was the establishment of the appellate committee,

sitting not in the House of Lords' chamber but in a committee room upstairs on the committee corridor. The usual reason given for this is that the noise and dust created when the Palace of Westminster was being rebuilt after the Second World War was such that the Law Lords could not stand sitting in the chamber. But another reason may have been that the pressure of legislative business in the post war era was such that judicial and Parliamentary business might have to be heard at the same time. This undoubtedly had an effect upon the amount of time the Lord Chancellor could devote to judicial business.

But the Law Lords remained full members of the House and were entitled to play a full part in Parliamentary business if they so chose. They did so increasingly rarely and usually on issues of legal or constitutional significance. Some, like me, did not even make a maiden speech. The position was summed up in a statement read in the House by the Senior Law Lord, Lord Bingham of Cornhill, in June 2000 (HL Hansard, 22 June 2000, cols 418-420). In deciding whether to participate or vote in a matter, the Law Lords considered themselves bound by two principles:

‘first, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal in the House.’

Two Law Lords ‘rendered themselves ineligible’ to sit on the three fascinating cases we had about the Hunting Act 2004 because they had voted against it.

This functional separation made it easier to contemplate the transfer of the Lords' jurisdiction to a new Supreme Court. It was also beginning to become apparent that there might be cases which it was quite inappropriate to resolve in a court consisting of a committee of the upper House of Parliament. The great case of *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 challenged the Hunting Act 2004 on the ground that it was not a valid Act of Parliament. The Parliament Act 1911 had provided that a Bill might receive the Royal Assent and become an Act of Parliament even if it did not have the assent of the House of Lords, provided that certain conditions were fulfilled. The Parliament Act 1949 relaxed those conditions, thus making it easier to pass an Act without the Lords' consent. The 1949 Act was passed under the 1911 Act

procedure, without the Lords' consent. The Hunting Act was passed under the procedure as amended by the 1949 Act. It was argued that the 1949 Act was not a valid Act of Parliament because a Parliament consisting only of the Commons and the Queen could not expand its own powers. Clearly, in any ordinary world, a court consisting of members of the House of Lords could not properly resolve what was essentially an argument between the Lords and the Commons. Fortunately, the Attorney-General recognised that he had no choice.

But amid the realisation that things could not stay as they were, there seem to have been none of the calls for abolition that there had been in the 1870s. I wonder why that was? I can think of at least two reasons. The first is that the legal landscape has changed dramatically since then. In the 1870s, there were far fewer public general Acts of Parliament and subordinate legislation applying to the whole United Kingdom. The need for consistent interpretation would have been much less apparent. There was nothing of the constitutional significance of the Human Rights Act. There was no democratic devolution. And there was no European Union law. The second is that the concerns in the 1870s seem to have been mainly practical ones. Both top courts had too few Judges – salaried Judges were introduced into the Privy Council in 1871 but not into the House of Lords until the 1876 Act - and might therefore build up significant backlogs. Appeals cost money and led to delay – indeed they might be deliberately used as a delaying device.

But the later developments – introducing professional salaried Judges and a requirement for leave to appeal - had gone a long way to addressing those problems, although not eliminating them. There were some rather more muted calls for abolition as late as the 1960s – but this was rather on the ground of dissatisfaction with the quality of some of their Lordships' decisions than with the concept of a second appeal as such.⁴ By the 21st century, the debate had turned, not to whether we should have a second-tier appeal court at all, but to what form a new institution should take. There were several suggestions.

The first was to revive the old idea of combining the jurisdiction of the House of Lords with the jurisdiction of the Judicial Committee of the Privy Council. One by one, most of the independent members of the Commonwealth had left the Privy Council, sometimes immediately, sometimes after a decent interval. We are left with the Crown dependencies (Jersey, Guernsey

⁴ E.g. Rupert Cross, 'Three-tier or Two-tier: Are the Judicial Functions of the House of Lords Really Necessary?' [1962] *The Law Society's Gazette* 587; in December 1962, JUSTICE held a conference on improving civil and criminal procedure, at which the jurisdiction of the House of Lords was discussed.

and the Isle of Man), the remaining UK Overseas Territories (such as Bermuda, the British Virgin Islands, the Cayman Islands, the Turks and Caicos Islands, the Falkland Islands and Gibraltar), who have no choice, and a few independent Commonwealth countries (principally the Bahamas, Jamaica, Trinidad and Tobago, and Mauritius). Some of these are now Republics but have retained the Privy Council as their final court of appeal – either for the positive reason that they see the advantages of having a second-tier appeal court which is far removed from the pressures of local life in a small community or for the more negative reason that it requires a constitutional amendment to make the change and in some places this is hard to achieve.

The Privy Council is used to acting, not only as a second tier of appeal in ordinary civil and criminal cases, but also as a constitutional court. All these countries have written constitutions, most of them with constitutional Bills of Rights. So, the Privy Council is used to ruling on constitutional questions. The Privy Council was also initially given the jurisdiction to resolve issues arising under the devolution settlements with Scotland, Wales and Northern Ireland, because it was thought inappropriate that battles between the UK Parliament and the devolved institutions should be resolved by a committee of the UK Parliament. Why it was thought appropriate that battles between the UK government and the devolved institutions should be resolved by a court which sat in Downing Street is a mystery. Imagine how it would have looked in Scotland if our recent reference on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill had been heard in a building next door to No 10.

But with a Supreme Court separate from Parliament, why not amalgamate the two, given that in practice the same judges sit in both courts? This would have required legislation in the Parliaments of all the countries from which the appeals to the Privy Council come and, in some cases, a constitutional amendment. They might well be reluctant to agree to having their appeals dealt with by a UK court. So that was a non-starter. But in practice we have come closer together. The Privy Council has left its purpose-built premises at No 9 Downing Street with the magnificent triple height committee room originally designed by Sir John Soane – I dread to think what has happened to it now - and is now in the same building as the Supreme Court. But we do our best to emphasise that we are separate institutions – a court room dedicated to Privy Council work, where we fly the flag of the country from which the appeal comes, a separate website and logo, and even a Privy Council rug.

Another idea was to have a separate constitutional court for the UK along continental lines. There are several variations. Some can only rule before the event upon the constitutionality of proposed legislation. Some can also rule after the event. Some do not have exclusive jurisdiction in constitutional questions, because the ordinary courts have also to rule upon them if they arise in ordinary cases. Some do have exclusive jurisdiction, so such questions must be referred to them. The advantage, of course, is that the court can have special expertise in constitutional and human rights questions. It does not have to trouble itself with the ordinary law. And it can have a special composition – nominated by Parliament - which gives it a greater democratic legitimacy to challenge the legislation passed by Parliament.

But the whole idea is alien to our traditional notion of the rule of law – that the same law applies to all, so that constitutional principles, including the control of the executive, arise out of the ordinary law of the land applied to the facts of real cases in the ordinary courts of the land rather than in some special jurisdiction. More importantly, as we do not have a written constitution, it would be hard to determine what is and is not a constitutional question.

A third idea was that a Supreme Court might operate on similar lines to the European Court of Justice in Luxembourg – setting UK wide standards in the interpretation and application of UK law by answering questions referred to it by the appeal courts in the three jurisdictions and then sending the case back to be decided by them. It might also decide cases where the governments of the UK were in dispute with one another or where European Law required that a UK statute be disregarded.

This was only a variant of the constitutional court idea. It would have had the advantage of respecting the sensitivities of the different nations making up the Union. If that applies to the European Union, why should it not also apply to the nations which make up the United Kingdom? But common law courts do not like deciding cases in a vacuum. We want not only to decide the broad principles but also to apply them to the facts of the particular case and arrive at a result. If that means that the statement of principle is limited to what is needed to determine the particular case, then some might think this a good thing, although others may think that it results in unnecessarily cautious rulings or rulings which are overly influenced by the merits of the particular factual scenario presented.

Not surprisingly, therefore, Lord Bingham did not warm to any of these alternative ideas. His 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.’⁵

Otherwise, it would be business very much as usual. And so, it has been, except that devolution issues have been transferred from the Privy Council to the Supreme Court where they rightly belong.

The question still remains. What is the purpose of having a Supreme Court for the whole United Kingdom? Can the inevitable extra expense and delay caused by having a second (or occasionally third) tier of appeal be justified? Do the benefits outweigh the disadvantages?

In my view, they clearly do (but I would say that, wouldn't I?). The Supreme Court fulfils at least three important functions. The first and most important, although not the most numerous in our case load, is as a constitutional court for the United Kingdom. We are not, of course, a constitutional court in the sense that we can strike down provisions in an Act of the UK Parliament. We can only do that to the extent that Parliament has given us the power and duty to do so. This it did with the European Communities Act 1972, but what Parliament has given us Parliament can take away, as it is about to do. But we are a constitutional court in other ways.

The first, and most obvious, is our role in relation to devolution. This is an unusual role for us, because devolution issues can come before us in two ways. The most common is on an appeal which comes up to us from the courts of the country concerned. Until last year, all the Scottish devolution cases had come up on appeal, in cases such as *Martin v Most* [2010] UKSC 10, 2016 SC (UKSC) 40, *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153. and *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76, 2018 SC (UKSC) 94. But, as you know, the devolution statutes all contain a procedure whereby the law officers of each part of the United Kingdom can refer Bills to us after they have passed all their stages in the Parliament or

⁵ ‘A New Supreme Court for the United Kingdom’, Constitution Unit Spring lecture, May 2002.

Assembly but before they receive the Royal Assent, for us to rule on whether they are within the legislative competence of the legislature concerned. We have had three references from Wales, one from Northern Ireland which was withdrawn, and one from Scotland. The law officers can also refer other devolution issues to us, either if they arise in the course of litigation, as the Attorney General for Northern Ireland did in the ‘gay cake’ case, or even if they do not, as the Attorney General for Northern Ireland has done in relation to the powers of civil servants to take decisions which would be taken by Ministers if Northern Ireland had a functioning executive.

But there are other constitutional aspects to our role too. We have to rule on classic constitutional issues such as the respective powers of government and Parliament in relation to our leaving the European Union. The *Miller* case (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61) took us right back to the 17th century battles between the King and Parliament. In the end the principle was agreed: while the government can make and unmake treaties, only Parliament can change the law. The issue was whether Parliament had already authorised the government to bring about a change in the law when it passed the European Communities Act in 1972. That was a question of statutory construction on which members of the court understandably differed. But it was another illustration, like the *Jackson* case, of why the Court should not be a committee of Parliament: this time, the battle was not between the two Houses of Parliament but between Parliament and the government.

The Human Rights Act respects the sovereignty of Parliament but enshrines the Convention rights in UK law. This means that, unless there is a provision in an Act of Parliament which prevents us, we have to do our best to respect and enforce the Convention rights. If there is such a provision, the most we can do is make a declaration of incompatibility. This leaves the decision up to Parliament and the government. But so far, they have always acted to put things right. This is clearly a constitutional function.

Much of our public law work is seeking to ensure that government and other public authorities keep within the powers that Parliament has given them and use those powers for the purposes for which they have been given. That too is a constitutional function and it can involve some very large questions of constitutional principle. For example, could the Lord Chancellor use the powers which he has been given by Parliament to charge fees for applications to employment tribunals in such a way as to undermine the constitutional right of access to justice (*R (Unison) v*

Lord Chancellor [2017] UKSC 51, [2017] 3 WLR 409)? That is an application of the principle of legality – fundamental rights cannot be taken away by powers phrased in very general terms. But we are currently also considering whether access to the High Court to challenge the decisions of the Investigatory Powers Tribunal has been or can be taken away by the particular statutory language used, which is remarkably like that in the great case of *Anisminic v Foreign Compensation Commission* [2019] 2 AC 147.

It could of course be said that, important though these issues are, they could just as well be resolved in the courts of each part of the United Kingdom. There are at least two answers to this, and they point to the other two roles that a UK Supreme Court can perform.

The second role is to provide an authoritative interpretation of law which applies throughout the United Kingdom. Great swathes of the modern law are contained in legislation of UK-wide application – immigration and asylum law, extradition, social security law and much of tax law being the obvious examples. Clearly, these must have a uniform interpretation throughout the United Kingdom. The Supreme Court can resolve differences in interpretation which have arisen between the courts in different parts of the UK. But even if no differences have arisen, it should be clear that an interpretation given by the Supreme Court in a case coming from one part of the United Kingdom should also be binding in other parts of the United Kingdom. Otherwise discrepancies may well arise. But the same might not apply to an interpretation given in the Court of Appeal of another part of the United Kingdom, which would no doubt be regarded as persuasive rather than binding.

There are other areas of the law where it is accepted that the law should be the same throughout the United Kingdom, the law of negligence being the most obvious example. And even if there are differences, there is value in having a court which has jurisdiction over and knowledge of all three jurisdictions having a look at it. Such a court, with representation from each part of the UK, ought to be best placed to consider whether or not there are good reasons for the discrepancy.

This leads me on to our third role, about which I feel a little embarrassed. Because we hear only a small number of cases, compared with the courts of appeal, we can devote more resources to them than those courts can. We can spend more time on each case. We can think about them more deeply. We can discuss them more thoroughly. We can bring at least five minds to bear

upon the issue. We sit in panels which change for every case. They are made up of Justices with a variety of legal expertise and experience. We do not allocate the judgment writing in advance. Each member of the panel is expected to play a full part in the decision-making process. At least these days (Lord Diplock's days may have been different) no one Justice should dominate the discussion. We can expect more of the advocates who present the arguments to us. We also quite often have the benefit of public interest interventions which can give us a different perspective on the case. We can engage in research if we feel that some points have not been fully covered.

Alongside these advantages, we do not face some of the problems faced by the courts of appeal. They hear a large number of cases, they sit in divisions and they are generally bound by previous decisions of the same court. They undoubtedly run the risk of decisions which are inconsistent or at least hard to reconcile. A great deal of effort has to go into trying to reconcile and deduce principles from earlier decisions. They do not have the luxury of being able to stand back and ask whether those decisions are right in principle, as we can.

In short, we are set up as a court for the resolution of difficult issues of principle. An important aspect of our role is the responsible and principled development of the common law. We have the luxury of having the resources of people and processes to enable us to do this.

So, all of those seem to me to be very good reasons why we have a Supreme Court for the whole United Kingdom. There was, of course, some fear when we were set up that we might get ideas above our station. For example, it was put to me by Clive Soley MP in the House of Commons Constitutional Affairs committee and also put to Lord Bingham by Ross Cranston MP (as he then was) that, respectively, the US Supreme Court and the High Court of Australia got bolder when they moved into their own prestigious accommodation. Lord Bingham was able to say that the theory did not work, because the High Court of Australia could not be described as an activist court.

Well it all depends what you mean by 'bolder'. If you mean that we shall start to misunderstand our constitutional role, and aggregate to ourselves the powers of a Supreme Court under a written Constitution, then there is no danger of that. If you mean that we are now better placed and better equipped to perform the constitutional role that we undoubtedly do have, then I hope that we are. The institution has gained a visibility and with it a strength that it did not have when it was hidden from view in the House of Lords. But it has also had to go through an

extraordinary and unprecedented turnover of Justices in recent years. It will be a remarkable challenge of leadership for me and my successor to encourage the court to maintain and develop the ethos which has gone before.

Just one thought. In England and Wales, when the Supreme Court was created, the previous Supreme Court, that is, the High Court and Court of Appeal, were renamed the ‘senior courts’ of England and Wales. Meanwhile, the Court of Session and High Court of Justiciary remain the Supreme Courts of Scotland. ‘What’s in a name?’ as the great Lord Rodger of Earlsferry once famously said (*In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, para 63)? ‘A lot’, as he also said.