

# THE SUPREME COURT – ONE YEAR ON

## BRACON LAW LECTURE

EXETER UNIVERSITY 11 NOVEMBER 2010

### Introduction

1. When I was Master of the Rolls this University did me the great honour of conferring upon me the honorary degree of Doctor of Laws. I very much appreciated the honour and the degree ceremony was a very special day on a beautiful day in 2006. A memorable feature of the day was seeing a star at work in the person of the Chancellor of the University. Floella Benjamin, now of course Baroness Benjamin, is a consummate performer. She had everyone eating out of her hand, especially the students – and all without a note. I am afraid I do not have the confidence to speak without a note. But, notes or no notes, it is a great privilege to be asked to deliver this year's Bracton Law Lecture.

2. The lecture is not about Bracton but about the Supreme Court. However, I wonder how many of you know anything about Bracton. I knew very little. So I turned to Wikipedia. He lived between 1210 and 1268 and (as I am sure you all know) wrote *De Legibus et Consuetudinibus Angliae* (*The Laws and Customs of England*). In 1264 he was made Chancellor of Exeter Cathedral and was a famed Devonian jurist. However, enough of the 13<sup>th</sup>

century. I turn to my 21<sup>st</sup> century topic: The Supreme Court – one year on.

3. My first grandson Sam is nearly one year old – he will be one on 19<sup>th</sup> November. The Supreme Court is also about one year old, it was one on 1<sup>st</sup> October. They are both developing, but at different rates. I will not however bore you with Sam’s remarkable feats but will focus on the Supreme Court. I will try not to bore you too much. When at last I finish I would be pleased to try to answer any questions you may have.

4. On 2<sup>nd</sup> October this year The Economist published an article about the Supreme Court entitled “Cheap at the price” and headed “Britain’s new highest court has made few headlines. It matters all the same”. As we used to say in the Court of Appeal, “I agree and there is nothing I can usefully add”. However, the article began by saying:

“Lurking on a recently leaked list of quangos the deficit-cutting government supposedly wants to run its eye over is an unexpected name: that of the new Supreme Court.”

When I saw that it occurred to me that this might be a very short talk. It would be an obituary of an institution which died in its infancy, aged only one.

5. Fortunately, at any rate for those of us who rely upon the Supreme Court to keep going – in particular the Supreme Court Justices, like me – we can say

(like Mark Twain) that the report of its decease has proved exaggerated. On the contrary it is alive and well and even kicking.

### **The purpose of the Supreme Court**

6. It might fairly be asked: what on earth is the purpose of the Supreme Court? When it was first mooted in government circles in what were very odd circumstances which I shall recount in a moment, the immediate reaction of the members of the appellate committee of the House of Lords was rather why was such an institution necessary. I am sure that everyone here knows that until October last year, the final court of appeal in England and Wales, in Northern Ireland and, in civil cases, in Scotland was the House of Lords. In the 19<sup>th</sup> century and earlier the appeal was to the whole House but it gradually became obvious that an appeal to the whole House was both cumbersome and inappropriate – cumbersome because an appeal court of, say 50 or more people is scarcely practical; and inappropriate because it was appreciated that the final appellate court should comprise experienced judges (or at least lawyers) and not lay peers.

7. If anyone is interested in the judicial role of the House of Lords in earlier times, I would refer them to a published lecture given by the present Master of the Rolls, Lord Neuberger, to the British Friends of the Hebrew University on 2 December last year. By the mid-19<sup>th</sup> century, only those peers with legal experience would hear cases. In fact the last time a non-legal peer

cast a vote on an appeal before the Lords was 17 June 1834.<sup>1</sup> 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*.<sup>2</sup> Lord Selborne LC ignored his vote. According to Lord Neuberger, 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. See also on the history of all this, an article by David Pannick QC (Lord Pannick) published in *Public Law* in 2009 and entitled “‘Better that a horse should have a voice in the House [of Lords] than that a judge should’ (Jeremy Bentham): replacing the Law Lords with a Supreme Court”<sup>3</sup>

8. There followed a number of attempts at reform which are also described by Lord Neuberger. Finally, the position was regularised by the Appellate Jurisdiction Act 1876, which by section 2 expressly provided for appeals to the House of Lords. By section 5 no appeal could be heard by the House of Lords unless at least three of the following were present: the Lord Chancellor, Lords of Appeal in Ordinary appointed under the Act or other peers who held or had held high judicial office. The Lords of Appeal in Ordinary came to be known as law lords. They were the first life peers.

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<sup>1</sup> Bevan, *The Appellate Jurisdiction of the House of Lords II*, (1901) 17 LQR 357 at 369.

<sup>2</sup> (1883) 8 App. Cas. 354.

<sup>3</sup> PL 2009, Oct, 723-6.

9. Between 1876 and 1948 appeals were heard in the Chamber of the House of Lords. In 1948, as Lord Pannick explains in his article at p 728, the Chamber was extremely noisy because of repairs to war damage. So appeals were heard in a committee room by what became known as the appellate committee. Thereafter all appeals were heard by the appellate committee, occasionally in the Chamber but for the most part in a committee room. Judicial business thus no longer needed to give way to the legislative business of the House which was conducted in the Chamber. In 1960, the House of Lords agreed that two appellate committees could sit simultaneously. Judgments, which continued to be known as speeches, were still given in the Chamber. Indeed, until 1963, the entirety of the judicial reasoning was read out, sometimes (as Lord Pannick puts it) occupying hours of time. So the law lords existed from 1876 to July 2009. I am ashamed to say that there was only ever one lady law lord (if, which I doubt, that is the correct expression). That was of course Baroness Hale. There were twelve law lords. At any rate in recent years there were nine from England, two from Scotland and one from Northern Ireland. Although each law lord was a member of the House of Lords and thus was able to play a part in the legislative work of the House, including speaking on the floor of the House, voting and taking part in committees of the House, so far as I am aware nobody ever complained that they acted inappropriately or that they should not sit because of their legislative activities. In fact, in recent years a convention grew under which they did not take part in

political activities or debates; their interventions were ordinarily restricted to matters of law reform and the like.

10. It might have been thought that the application of President Truman's famous dictum that "If it ain't broke, don't fix it" would have led to the conclusion that there was no need to change the existing system and that good sense suggested that the best course was to let well alone. Many of those who were law lords when a proposed change was suggested certainly took that view. There were indeed some (no names no pack drill) whose attitude could best be described as "Over my dead body". How then was the Supreme Court born?

### **The birth of the Supreme Court**

11. I was not of course privy to the events which led to the birth of the Supreme Court, even if I was present at the birth itself. So I rely upon the account given by Lord Phillips, who is of course the President of the Supreme Court. I think of him as my Supreme Leader. He gave an account of the birth of the Supreme Court in his Gresham Lecture delivered on 8 June 2010, which I freely accept I have used in the preparation for this talk. The relevant facts are thus already in the public domain; so I am not revealing any confidences.

12. On 12 June 2003 the most senior judges in England and Wales (which did not include me) were on an away day, or more accurately two away days

and a sleepover (or two sleepovers), at Minster Lovell in the Cotswolds. Lord Phillips was the Master of the Rolls and Lord Woolf was the Lord Chief Justice. They and other senior members of the judiciary were present. So were senior civil servants in what was then the Lord Chancellor's Department. They were there to have a strategic discussion about the administration of justice.

13. As they were about to begin their discussions, word arrived of an announcement from Downing Street in these terms. The Lord Chancellor was to be abolished and replaced by a Secretary of State for Constitutional Affairs, who would have no judicial functions. The position had until then been that the Lord Chancellor was head of the judiciary and sat from time to time in the appellate committee of the House of Lords. He was also a member of the Cabinet and Speaker of the House of Lords. This was another part of Britain's unwritten constitution which did not entirely conform to the principle of the separation of powers espoused by writers like Locke and Montesquieu.

14. To return to the news arriving at Minster Lovell - Lord Irvine, who was the current Lord Chancellor, was standing down to be replaced by Lord Falconer, who would hold the office of Lord Chancellor, (as Lord Phillips has put it) as a kind of night watchman until its abolition, while at the same time being Secretary of State for Constitutional Affairs. There would be a Judicial Appointments Commission to select judges, which had previously been the role

of the Lord Chancellor. Last but not least, the law lords would be abolished and replaced by a Supreme Court.

15. As Lord Phillips put it in his Gresham lecture, no-one at Minster Lovell, who included senior civil servants, had had an inkling of these far-reaching changes. Not even the Queen had been informed. The shadow leader of the House of Lords, Lord Strathclyde described the proposed changes as ‘cobbled together on the back of an envelope’. For a long time it remained entirely unclear how the decision to make these constitutional changes had been made. It was not until 2009 that Lord Irvine, provoked by evidence given to the House of Lords Constitution Committee by Lord Turnbull, who had been Cabinet Secretary in 2003, put in writing a detailed account of what had occurred. He had not been consulted on the proposed changes. He only learned of them in the newspapers. Suffice it to say that his account was not consistent with that of Lord Turnbull. Lord Irvine’s account is contained in a memorandum put before the Constitution Committee.<sup>4</sup> It is of great interest and I commend it to you but there is no time to discuss it this evening. In any event Lord Irvine resigned.

16. Thereafter steps were taken to make the various reforms. It proved impossible to abolish the office of Lord Chancellor, if only because there were many statutory provisions conferring powers or imposing duties on the Lord

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<sup>4</sup> <http://www.parliament.uk/documents/upload/ConstLordIrvineofLairg.pdf>.



Chancellor. In a note handed to the Prime Minister by Lord Irvine on 10 June 2003 he said that there were about 5,000 references to the Lord Chancellor in primary and secondary legislation.

### **The purpose of the Supreme Court**

17. Preparations for the Supreme Court went ahead. With the Supreme Court has come an express recognition of the importance of the doctrine of the separation of powers. In his Gresham lecture Lord Phillips quoted this statement of the principle as stated by Lord Mustill judicially:

“It is a feature of the peculiarly British concept of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. 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.”<sup>5</sup>

18. Over the years there have been a number of suggestions that it was not satisfactory for the final court of appeal to be part of the legislature. One example is given by Lord Pannick in his article at p 723. Indeed, it is reflected in the title to his article. Jeremy Bentham did not approve of judges sitting in the House of Lords. It would be better, he wrote in 1790, if “a horse should have voice in that house, than that a judge should”. That was because “neighing in the house would not make a horse the worse for riding; but sitting and voting there makes a judge very much the worse for judging”. To put a

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<sup>5</sup> *R v Home Secretary, ex parte Fire Brigades Union* [1955] AC 513 at 567.

court in Parliament was to expect of a man the act of “judging under one name what he has been doing under another”. That imposes conflicts of interest on the judge and “your hope is that he will not be soiled by it”. Bentham concluded that “if this be wisdom, put your daughter to board in Drury Lane to teach her chastity”. Walter Bagehot made a similar point. As Lord Neuberger put it, 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”.

19. Again as noted by Lord Pannick at p 731, in 2002 Lord Bingham gave a lecture entitled “A New Supreme Court for the United Kingdom”. Lord Bingham said that, although the appellate committee had, for many years, been delivering high quality judgments, “the world has changed and institutions should change with it”. In Lord Bingham's opinion,

“the opportunity should be taken to reflect in institutional terms what is undoubtedly true in functional terms, that the Law Lords are judges not legislators and do not belong in a House to whose business they can make no more than a slight contribution”.

20. The purpose of the Supreme Court was to underline the independence of the judiciary. This is central to the operation of the rule of law, which is of the utmost importance to the working of a modern democracy. But what difference will it make? It can be said with force that the law lords were

fiercely independent and that their jurisprudence over the last 130 years or so is plain evidence of their commitment to the rule of law. Further, the jurisdiction of the Supreme Court is the same as that of the House of Lords and the judges are the same. So what is the point of it? Under the Constitutional Reform Act, at the moment when the powers of the Supreme Court were brought into force, that is on 1<sup>st</sup> October 2009, all the judges who were law lords on that day and who had not resigned became justices of the Supreme Court by operation of law. Only Lord Scott resigned. He did so because he had almost reached his retirement age of 75. So the other eleven law lords automatically became members of the Supreme Court. I had the privilege of being the first person to be appointed to the Supreme Court who had not been a law lord. It can be said with great force that the eleven were hardly likely to approach their judicial function after 1<sup>st</sup> October 2009 differently from the way they had done before, especially since their responsibilities were the same. Equally, the twelfth person, namely me, would hardly be likely to make any difference.

21. So has it all been a waste of time and money? Only time will tell. How long a time it will take to tell nobody knows. You will I am sure remember that when Chou en Lai was asked (I think some time in the 1950s) what he thought of the French Revolution, he replied: 'It is too early to say.'

22. The Supreme Court certainly cost a great deal. As you may know it is now in the building in Parliament Square opposite the Palace of Westminster.

It is essentially an Edwardian building which was converted into a building to house the Middlesex Town Hall in the very early years of the 20th century. It later became or included Middlesex Quarter Sessions and then the Middlesex Crown Court. I remember it as one of the gloomiest buildings in London. However, it has now been transformed, admittedly at the cost of nearly £60 million. It appears to have been in the nick of time because in the present climate it seems very unlikely that there will be similar capital expenditure on any legal project in the foreseeable future.

23. However, to my mind it has been a great success. The accommodation for the judges is very good indeed. It is an enormous improvement upon the conditions in which the law lords lived. Their accommodation was hugger mugger all on top of one another and reminded me of small studies for the least important schoolmasters in my old school. Now it is spacious. We have ample staff and a 21<sup>st</sup> century library. We have brilliant judicial assistants to help us and the courts are to my mind very successful. One can take up to nine justices and the other two can take five each. One of them is dedicated to the Judicial Committee of the Privy Council, in which we also sit.

24. So conditions are excellent. What difference does this make? Well, I like to think that a happy judge is a good judge. More importantly the present building gives the court a position which is obviously separate from Parliament. When Jack Straw, who was then Lord Chancellor, made a speech

at the opening of the court by the Queen in October last year, he said that the Supreme Court was well placed. If you stand with your back to the Supreme Court, you have justice behind you, you have God on your right in the form of Westminster Abbey, you have Mammon on your left in the form of HM Treasury and you have Parliament straight ahead. It shows plainly that the judicial arm of the state has arrived with a capital A.

25. This may be said to be merely cosmetic but it does seem to me that transparency is important. It is now very easy to come into the Supreme Court to see what we are up to. By contrast, it was really quite difficult to find Committee Room 1, where the law lords sat in the Palace of Westminster. So not many people went. Now we have significant numbers of visitors. We have television facilities and some 19,000 people apparently use our website each month. Our judgments are put on the website and press summaries are made available in every Supreme Court case. It is often said that justice must not only be done but be seen to be done. Now it can be seen to be done. We will have to leave it to our critics to say whether justice is in fact done. The Economist article to which I referred earlier says that ‘for the curious citizen, the Supreme Court is a distinct improvement on its murky forebear’.

26. As I said earlier, the powers of the court are the same as those of the appellate committee in the House of Lords. Only time will tell whether they will be exercised in a different way. It is important to note that the Supreme

Court is not a constitutional court. That is because we do not have a written constitution – at any rate yet. Perhaps one of these days we will. You may recall that Lord Bingham from time to time expressed the view that it would be desirable for the United Kingdom to have such a constitution. If it did, a constitutional court would be necessary in order to decide whether particular statutes passed by Parliament were constitutional. Until then (save perhaps in the most extreme circumstances which it is difficult to envisage occurring in practice) the courts, including the Supreme Court have no power to strike down statutes. Their role is to decide what statutes mean.

27. However, there are two areas in which the courts' decisions impact upon particular types of statute – both in a European context. The effect of the European Communities Act 1972 is to confer supremacy upon EC law. Thus, if a statute passed by Parliament is found to be incompatible with community law, it is the duty of the English courts, including the Supreme Court, so to decide and, if necessary to strike down the offending parts of the statute, which may mean the whole statute. A significant proportion of the cases before the Supreme Court in its first year have involved questions of community law. References to the European Court of Justice ('the ECJ') have I think become more common. Moreover, as I am sure you know, under EC law it is the duty of the final court of appeal in a Member State in some circumstances to refer a question of community law to the ECJ before finally deciding the appeal. Those circumstances are set out in Article 234(2) and (3) of the Treaty for the

Functioning of the EU ('the TFEU'), previously known as the Treaty of Rome. They are where the issue of EC law is necessary to the determination of the appeal and where the issue is not *acte éclairé* or *acte clair*. I expect this to be a growth area in the future. It is an important area because the ECJ has held in *Köbler v Austria* [2004] QB 848 that it is a breach of a Member State's obligations under the Treaty to hold that a point is *acte clair* when it is not.

28. The second area arises out of the Human Rights Act 1998. Under section 3 of that Act it is the duty of the court, if at all possible, to construe a statute consistently with the Act. If it is not possible, the court has a power to make a declaration of incompatibility under section 4. Such a declaration does not directly affect the rights of the parties but, when the Act was enacted, the Government assured Parliament that it would act on any such declaration by changing the law to make the relevant statute compatible. As is now well-known, there has been an explosion of human rights' cases over the last ten years. Many critical issues have been resolved by the House of Lords and the same is true of the first year in the life of the Supreme Court. Only time will tell whether, as the more fundamental questions are settled, there will be a reduction in the number of cases. I doubt it. The ingenuity of human rights lawyers knows no bounds.

29. Twenty or thirty years ago the diet of the House of Lords was very different. There was of course no Human Rights Act and the development of

EC law was in its infancy. The diet was much more focused on tax, property and commercial cases, all of which continue to play their part but to a lesser extent.

30. Public law cases have flourished in the House of Lords and continue to flourish in the Supreme Court. I agree with Lord Neuberger that, quite apart from issues under the Human Rights Act brought by way of judicial review, the growth of purely domestic judicial review since the 1960s has been almost explosive. Citizens are more aware of their rights than once they were and are ready, willing and able to challenge decisions of central and local government with ever increasing vigour. I expect judicial review to grow in the years to come and I expect the Supreme Court to play an important part in the development of administrative and public law.

31. I hope that it will play that part in a transparent and efficient way. In its first year the court has been examining its processes in order to see if they can be improved. In latter years the House of Lords sometimes sat in panels of more than five. That trend has continued and, indeed been extended, over the last year. There have been panels of seven and occasionally nine. In cases of real public importance, there is to my mind much to be said for sitting in larger numbers. In difficult cases there is legitimate scope for differing views and it is perhaps self-evident that a decision of nine is likely to be more representative of the views of the whole court than a decision of five. Moreover, we can all



think of cases in which the make up of the five dictated the result; where a decision of a panel comprising A,B,C,D and E would be likely to be different from, say, F,G,H,I and J or even A,D,H,I and K. That is no doubt the advantage of having a court in which everyone sits in every case, as for example the US Supreme Court. My own view is that in the longer term there is a case for having a smaller court, which takes fewer cases but on which all the justices sit.

32. There has also been some discussion in the last year on the question how to decide who should sit on a particular case. This is a topic all of its own which I will leave for another day.

33. Historically the House of Lords delivered speeches and not judgments. Although in recent years an appellate committee would occasionally deliver an opinion of the whole committee, it was not common. I can well understand that, if the judges were delivering speeches, it is not easy to have a joint speech. Now that the court is a court and only a court, there is no difficulty in having more single judgments of the court and, where the court is split, perhaps a majority judgment and a minority judgment. There is some evidence of a move in that direction already. In my opinion it is a desirable trend. Of course every justice is entitled to deliver a judgment of his or her own but it is to my mind very important that it should be clear what the true reason for (or *ratio decidendi* of) the case is. When I was in the Court of Appeal I spent many

happy hours pouring over the speeches of their lordships trying to work out what the *ratio* was. No doubt academics and counsel did (and do) the same. I would like to think that in the future the Supreme Court will do its utmost to ensure that the *ratio* is clear and to avoid concurring judgments which, on analysis, give different reasons for reaching the same conclusion or, at least to articulate the differences precisely. This is a very important point because one of the roles of the Supreme Court is to give guidance to the courts below, especially to judges of first instance. Perhaps the most obvious example of this is in the criminal context. Judges need to know what directions to give to the jury. Unsurprisingly they do not welcome having to wade through many judgments of the House of Lords or the Supreme Court before deciding what directions to give.

34. In conclusion we are I think hoping that the school report on the first year will be: 'Made a promising start but room for improvement'. In any event my own view is that the Supreme Court will make an extremely valuable contribution to the development of English law over the next 50 years. I see no reason why it should not do so with both clarity and responsibility. Precisely how it will achieve that only time will tell because, as Lord Neuberger, put it in his lecture, the only law in which one can have complete faith is the law of unintended consequences.

Lord Clarke of Stone cum Ebony