WELCOME TO THE UK SUPREME COURT?

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Lord of Appeal in Ordinary

Thursday 1 October 2009 does not seem a long way away `now. From time immemorial, 1 October has seen the start of the legal year, the judiciary of England and Wales have assembled to pray for guidance in Westminster Abbey and Westminster Cathedral, and the Lord Chancellor has entertained them all for 'breakfast' afterwards. The Law Lords do not join the procession of bewigged and robed members of the judiciary of England and Wales. They attend as members of the House of Lords, along with former Lord Chancellors and Law Lords, and in morning dress. What, we asked ourselves on October 1st this year, will happen next year? And what will we be wearing?

What is a Law Lord and what does she do?

The Law Lords is the name colloquially given to the Lords of Appeal in Ordinary. We are appointed under the Appellate Jurisdiction Act 1876 to do the judicial work of the House of Lords. In reality, we are the top court for the whole United Kingdom, hearing civil appeals from England, Wales, Scotland and Northern Ireland and criminal appeals from England, Wales, and Northern Ireland.

Technically, though, we are a committee of the upper House of Parliament. In the olden days, the Lord Chancellor would preside, Judges from the lower courts would attend to give their advice, and other peers, whether or not they were legally qualified

or had held high judicial office, were able to vote. The last time this happened was in 1834. And in Daniel O'Connell's case in 1844 the convention was firmly established that lay peers should not vote on the outcome of an appeal. But there were not always enough peers who had held high judicial office to provide a reliable service.

So, when the judicial system of England and Wales was thoroughly reformed in the 1870s, the plan was to abolish appeals to the House of Lords from England and Wales (though not from Ireland and Scotland). One tier of appeal was thought enough. But this was never implemented. Instead, the 1876 Act created the very first life peers who could be paid to do the judicial work of the House.

Until after the Second World War, appeals were still heard in the House of Lords chamber, before the ordinary Parliamentary business. But it is said that the workmen repairing the war damage to the Palace of Westminster made so much noise that the Law Lords moved to a committee room upstairs. We still give judgment in the chamber, in a pretend debate on the motion 'that the report of the appellate committee be agreed to'. But we always say 'content', even if those of us who dissented in the result do so through gritted teeth. The real business is done in the committee room, where appeals are heard and their outcome discussed after the doorkeepers have shouted 'clear the bar'. In practice, the sitting hours now overlapped with the ordinary business in the Chamber, which made it hard for the Lord Chancellor to take part in judicial business and for the Law Lords to take much part in the Parliamentary business.

There have always been some Law Lords who have played very little part in the Parliamentary business. But there were some who regularly did so, particularly on matters to do with the law and the legal system. Indeed it might reasonably be expected of them. Some, such as Lord Carson, formerly Sir Edward Carson of 'Ulster will fight and Ulster will be right' fame, had been highly controversial politicians in their time. Some, including the great Lord Reid, were members of Parliament before they became Law Lords. Others, such as my colleague, Lord Rodger of Earlsferry, have held ministerial office, in his case as Lord Advocate. Law Lords, both sitting and retired, have been much in demand for certain Parliamentary jobs, in particular chairing select committees scrutinising legislation.

Nowadays, however, there are some Law Lords, myself included, who have not even made a maiden speech. Those who do speak in the House do so only rarely and usually on issues such as the constitutional reforms themselves. The Law Lords adopted a self-denying ordinance which was read in the House by the Senior Law Lord, Lord Bingham of Cornhill, on 22 June 2000.[1] In summary, we are full members of the House with a right to take part in its business. But in deciding whether to participate or vote in a particular matter, we consider ourselves 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.'

But in the end it must be for the judgment of each individual Law Lord. Two of my colleagues, for example, voted against the Hunting Bill. This did not fall foul of the first principle, because there was a free vote in both Houses. But it did fall within the second: so neither of them sat on any of the three fascinating cases which we have since heard challenging the validity of the Hunting Act and the compatibility of its provisions with European Union and human rights law.

So we are now both physically and functionally largely separate from the House. But there is still great scope for misunderstanding. We frequently get lobbying letters urging us to vote one way or another in forthcoming debates. I reply explaining the principled and practical reasons why I play no part. But I recently got a reply to my reply urging me to vote against legislation 'in my judicial capacity'!

The case for reform

Questions about the Law Lords began to be raised as part of the major programme of constitutional change which was initiated by the Labour Government when elected in 1997. This was linked to the wider questions, of reform of the House of Lords generally, and reform of the position of the Lord Chancellor. There was nothing wrong with his dual role as Parliamentarian and Minister. In the UK constitution the Government and Parliament are inseparable rather than separated, although it was argued that such a heavy spending Minister ought to be answerable to the Commons which votes him the money. But his third role as Head of the Judiciary, responsible for its appointment, deployment and discipline, as well as being entitled to sit as a

judge in the highest court in the land, was increasingly questioned. Ironically, this became more apparent in the light of the guarantee of judicial independence in article 6 of the ECHR, which had been sponsored through Parliament by the Lord Chancellor, Lord Irvine, himself.

Lord Bingham declared his support for change in the Justice Annual Lecture in 2001, and went on to discuss proposals for 'A New Supreme Court for the United Kingdom' in the Constitution Unit Spring lecture in May 2002. Lord Steyn and Lord Phillips, then Master of the Rolls, had also given their support.[2] All in all, it is not surprising that the Government thought that establishing a Supreme Court to take over the role of the Law Lords would be relatively uncontroversial when they announced their famous package of constitutional reforms in June 2003.

The case for reform advanced by Lord Bingham was simple. The institutional structure should reflect the practical reality. We are a court and should be seen to be such. The public and people from overseas should not be misled into thinking that we are also legislators. We 'do not belong in a House to whose business we can make no more than a slight contribution'.[3] Furthermore, we take up space. There is not enough room for the Parliamentarians to do their job properly. They may well be sorry to see us go as people. The debate on the constitutional reforms in February 2004 certainly gave every impression that that was so. But they will not be sorry to get their hands on the space which we and the judicial office now occupy. Yet we too do not have enough space. There are not enough rooms for each of the 12 Law Lords to have his or her own office. We share four secretaries and four research assistants because there

is no room for any more. The House authorities are understandably more concerned with the needs of the legislators than of the judges.

Of course, it was not uncontroversial. There was a strong element of 'if it ain't broke, don't fix it'. Lord Chancellor Irvine had already said that he would not sit 'in any case concerning legislation in the passage of which he had been directly involved nor in any case where the interests of the executive were directly engaged'.[4] This covers quite a high proportion of our cases these days. His successor never sat. There are all sorts of advantages in staying in Parliament. This is not just the richness of the surroundings, the great variety of interesting people one may meet, and the cheapness of the catering. Two very serious points were made. First, we are not dependent on a Government department for our resources but on Parliament which has a direct line to the consolidated fund. Would it really enhance our independence if our finances had to come, not from Parliament, but through a departmental budget where the courts are squeezed between the demands for legal services and the demands of the prisons and probation services? Second, while we are in Parliament, may not Parliamentarians think it impolite to be too critical of our decisions? Once we are on the outside, will they feel freer to criticise us? Is this a greater risk, now that the law requires us to scrutinise, not only the actions of government, but also the legislation of Parliament?

This is now water under the bridge. The argument is over. I am a supporter because it seems to me that, not only are the Law Lords changing but so too is the House of Lords itself. As Lord Hope has recently pointed out (in this very Hall), when he became a Law Lord in 1997, there were still large numbers of hereditary peers. Many of them played little part in the day to day business, but they could still be called upon

to attend on key issues. Now most of them have gone, and the appointed life peers are in the ascendancy. The House is now much more politically balanced. The power of the whips is much less than in the other place and there are a great many hard working cross benchers who take no party whip. But there is a sense of greater political legitimacy. And it shows. I believe in an effective Upper House of Parliament, able to provide some moderate and thoughtful counter-balance to the power of a Lower House which is dominated by the Government of the day. The better the Lords gets at its Parliamentary role, it seems to me, the less appropriate it is for us to be there at all.

I am more than just a supporter, then, but a positive enthusiast for the new Court. It will bring, not only the negative benefits of taking us out of Parliament, but the positive benefits of having our own premises, our own staff and our own facilities for doing our own thing. We shall be moving across Parliament Square into the former Middlesex Guildhall. The location could not be more appropriate – opposite Parliament and flanked by the Treasury and Westminster Abbey. The building has many fans and many detractors but we are hoping to transform it from an overcrowded and somewhat oppressive Crown Court into a light, bright but dignified Supreme Court. We hope to be open and accessible to students and interested visitors of all kinds. We shall have an exhibition space and a café downstairs. We shall have an education programme to help school and college students understand what we do and how we do it. We shall we hope have a wonderful website with which to communicate our message to the world.

Models for a new Supreme Court

But if there is to be a new Supreme Court, what should it be like? The model of a Supreme Court which is known throughout the world is the Supreme Court of the United States. But there are similar courts in Canada and throughout the common law world. In a federal constitution, it stands to reason that they must rule on demarcation disputes between the powers of the State legislatures and the powers of the Federal Parliament. It does not follow that they can rule upon the constitutionality of Acts of the Federal Parliament. But in 1803 the US Supreme Court ruled that it could do so in *Marbury v Madison*,[5] and other Supreme Courts have followed suit. In some written Constitutions the power is expressly given.

But we have no written Constitution. The UK Parliament is sovereign. So there can be no question of a UK Supreme Court striking down the Acts of the UK Parliament, except to the extent that Parliament itself has given us power to do so. In their different ways, both the European Communities Act 1972 and the Human Rights Act 1998 do give us - and lower courts – the power to rule on the constitutionality of Acts of Parliament. But that is because Parliament has said so, not because we have. I do not foresee that we would ever be so arrogant as to invent such a power, save to the extent that Parliament itself had provided for this.

But several other ideas were floated before the Constitutional Reform Act 2005 was passed.

One was to combine the present jurisdiction of the House of Lords with the present jurisdiction of the Judicial Committee of the Privy Council. Both are now arguably equally anachronistic. Appeals lay to the Monarch from all over the Empire and the Judicial Committee humbly advised Her Majesty what to do. Originally there was a strong interest in maintaining the unity of the common law throughout the Empire. On independence, things changed. One by one the independent members of the Commonwealth dropped away, sometimes immediately, sometimes after a decent interval. New Zealand was the last of the 'old Commonwealth' countries to go. We are left with the Crown dependencies (Jersey, Guernsey and the Isle of Man), the remaining UK Overseas Territories (such as Bermuda, the British Virgin Islands, the Cayman Islands, the Falkland Islands and Gibraltar), and a few independent Commonwealth countries (principally the Bahamas, Jamaica, Trinidad and Tobago, and Mauritius). Some of these are now Republics but see the advantages of having a second tier appeal court which is far removed from the pressures of local life in a small society. There is still a strong school of thought to that effect in New Zealand.

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. By definition all these countries have written constitutions, most of them with constitutional Bills of Rights. So the Privy Council has to rule on whether even Parliamentary legislation is compatible with the Constitution.[6]

Currently the Privy Council also has jurisdiction over 'devolution issues' within the United Kingdom – that is, questions of whether the acts of the devolved institutions in Scotland, Wales and Northern Ireland are within the powers given to them by the UK

Parliament. These can arise either in actual cases or on questions referred by the UK or devolved authorities. So far only concrete Scottish cases have come our way and not many of those. Mainly they have raised human rights challenges to Acts of the Scottish Parliament or to actions of the Scottish executive. But in theory they could involve a major battle between the UK and the devolved institutions. It was thought that the devolved Parliaments would not like the UK Parliament ruling on the constitutionality of what they had done or wanted to do. The Judicial Committee of the Privy Council is not part of the UK Parliament, is used to deciding such issues, and can call upon Privy Councillors who are not members of the House of Lords to sit.

Retired Lords Justices of Appeal do so quite often. Judges from other jurisdictions do so from time to time – Dame Sian Elias from New Zealand was, for example, the first woman to sit in the Judicial Committee. So if it were felt that too many English should not be deciding a Scottish, Welsh or Irish devolution case, it would be possible to call upon a local privy councillor judge to join the panel.

With a Supreme Court separate from Parliament, the problem would not arise. So why not amalgamate the two, given that in practice the same judges sit in both courts? But this would require legislation in the Parliaments of all the countries from which the appeals to the Privy Council come and in some cases possibly a constitutional amendment. They might be very reluctant to agree to having their appeals dealt with by a UK court. So that was a non-starter. But in practice we shall be coming closer together. The Privy Council will be leaving its purpose built premises at No 9 Downing Street with the magnificent triple height committee room designed by Sir

John Soane (though later modified) and joining the Supreme Court in the former Middlesex Guildhall. This will give scope for some sharing of services and staff.

Another idea was to have a separate constitutional court for the UK along continental lines, to which government and other courts might refer constitutional questions. The problem with that idea is that, without a written Constitution, how would they identify what was a constitutional question? Also, it 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.

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 does have 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. They 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." Otherwise, it would be business very much as usual. And that is what we will get.

The new Supreme Court – how will it work?

(1) Jurisdiction

The new court will continue to hear civil and criminal appeals from England and Wales and Northern Ireland and civil appeals from Scotland. Criminal appeals are odd in two ways. Even in England and Wales and Northern Ireland, a criminal case cannot come to us unless the court whose decision is under challenge has certified that it raises a point of law of general public importance (when first enacted it had to be of 'exceptional' public importance). Is it really right that the court under challenge should be able in effect to veto a further appeal? And the Scots do not even have this possibility. Some may ask why the Scottish criminal defendants are limited to one tier of appeal while the English, Welsh and Irish enjoy two. A case can certainly be made for a right of appeal in criminal cases involving offences created by Acts of

Parliament which apply throughout the United Kingdom. Their interpretation should not be different from place to place. But politically any increase in the Scottish jurisdiction of the court would appear to be a non-starter.

However, the new court will take over devolution cases from the Privy Council. This will certainly enhance its role as a constitutional court and the fact that we will be able to call upon additional judges solves any personnel problem. In practice, both Scottish Law Lords (and often the Irish too) have sat on devolution cases without it being felt necessary to bring in another Scot. In practice also, the few devolution cases there have been have concerned the criminal justice system, although not the substance of Scottish criminal law.

(2) Choosing our cases

In civil cases, the Scots can appeal without the leave of either the Court of Session or the House of Lords. All other appeals require leave. The appeal courts in England and Wales and Northern Ireland can grant leave but rarely do so. As Lord Bingham once put it, 'The House of Lords dines a la carte'. There is much to be said for leaving it to us.

Petitions for leave are currently dealt with by committees of three Law Lords, usually on the papers but with the possibility of holding an oral hearing in doubtful cases. One committee may not know what the others are doing. And one committee may have particular likes or dislikes which others do not. But the committees are only formed to deal with six of seven cases at a time. Their composition changes for the next batch.

So there is considerable interchange. We get some idea of what other cases are competing for our attention. We may also get an overview of whether the national appeal courts have been tying themselves in knots trying to reconcile their own irreconcilable decisions or unwittingly arriving at inconsistent ones. We could take the opportunity of the new court to be more systematic about sharing information about applications for permission to appeal (as it will be called) and enabling anyone who wants to do so to express a view.

We do try to apply consistent criteria reasonably consistently. We try to develop a sense of what is currently a 'House of Lords point', in future a 'Supreme Court point'.

(3) What is a Supreme Court point?

The proposed Practice Direction on Permission to Appeal (para 3.3.3.) repeats the principle in the current Standing Orders of the House:

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

This means several things.

(i) It must be a point of law. If the law is clear it is not a House of Lords point. It has repeatedly been said that it is not our role to correct the misapplication of settled law. Even if we think the Court of Appeal reached the wrong result in a particular case we will not give leave if we think the law is clear.

(ii) It should be a point of importance not just to the parties but to the wider public. Sometimes there may be a tendency to take a case simply because there is an enormous sum of money involved. But if it is a one-off contract, or even a standard form contract which can readily be changed next time, the fact that a large sum of money may be involved does not necessarily make it a case for us.

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

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

because the parties settle out of court, or the loser cannot afford or does not wish to take it further. For similar reasons points which have troubled the Court of Appeal over many years may never get taken to the Lords. So there is always a random element about the cases where people want to come to us as well as about the cases which we decide to take.

But can we be more specific than the hallowed formula? Do the House of Lords cases in which I sat last term help?

Two were about extradition:

McKinnon v Government of the Unites States was about whether it was an abuse of the extradition process for the US prosecutors to offer an attractive plea bargain as an inducement to come quietly to face prosecution for hacking into US government computers.

Caldarelli v Court of Naples raised an important point on the interpretation of the provisions giving effect to the Framework decision on the European Arrest Warrant.

One was about another aspect of EU law:

Zalewska v Department for Social Development (Northern Ireland) was about whether it was disproportionate that a Polish woman who had worked here continuously for 12 months was unable to claim the benefits to which she would otherwise have been entitled because she had failed to register a change of job with the Home Office.

One was about another aspect of our treaty obligations but also of great public interest:

R (Corner House Research) v Director of the Serious Fraud Office was about the Director's decision to end his investigation into whether BAE systems had obtained contracts with Saudi Arabia by bribing foreign officials. Was it lawful for him to take into account threats by the Saudi Government to withdrawn security co-operation if he continued?

Three involved the European Convention on Human Rights:
R (Baiai) v SS for Home Department was a challenge to the requirement that persons subject to immigration control obtain Home Office permission before marrying here.

Re E (Northern Ireland) concerned the dispute at the Holy Cross primary school in Belfast when little girls were forced to run a gauntlet of abusers and worse while being taken to school. Had the police, when trying to protect their physical safety, failed to protect them from inhuman and degrading treatment contrary to article 3?

EM (Lebanon) v SS for Home Department was the first case in which we have held that the UK will be in breach of convention rights if it expels a person (in this case a mother and her 12 year old son) to a country where they face the risk of a flagrant breach of their article 8 rights to respect for their family life.

Another case concerning a different right to respect for family life was withdrawn at the last moment. In *Re A (Northern Ireland)*, a police officer from Iraq had come here on a training course and immediately applied for and been granted asylum because of the threats to his and his family's lives. His family were still in Iraq but had been denied entry to the UK because he had two wives and a child by each of them. What did the right of family reunification under the Refugee Convention require? The case was withdrawn because the Home Office offered them entry at the last minute.

All of the above cases concerned our obligations under international treaties to which the UK is party. Another case concerned a rather different international question. In *Obiang (President of Equatorial Guinea) and others v Logo Limited and others*, the appellant was trying to sue Simon Mann, his companies and his alleged co-conspirators for a conspiracy in England to overthrow a foreign government.

Only one case was about the interpretation of a UK statute but even that had an international flavour: what is the extent of the obligation on local social services authorities under the National Assistance Act 1948 to provide accommodation for asylum seekers who do not currently but might in the future require care and attention? This question would not have arisen had not the Government tried to withdraw all forms of support from certain asylum seekers and the resourceful Lord Pannick persuaded the Court of Appeal that the 1948 Act provided a safety net for them.

Added to these is the case, on which I did not sit, of the Chagos islanders seeking the right to return to the islands from which they were ejected in order that the US could build an air base on Diego Garcia.

There was another human rights case on which I did not sit, about the exclusion of street homeless from incapacity premium, and whether it was unjustifiably discriminatory.

This leaves only a handful of House of Lords cases last term about wholly domestic subjects, most of them in some way concerned with property law – landlord and tenant, proprietary estoppel and the rating of Mormon temples.

Apart from showing the enormous variety of what we do, these examples may give some idea of why we think that cases need to come to us: questions with obvious constitutional significance; EU law points where the law is unclear; big human rights issues; questions on UK wide legislation which ought to be interpreted in the same way throughout the UK; and cases on the ordinary law which affect large numbers of people and where the law has got itself into a mess. But no doubt there are other categories too. At present we do give a ground for refusing leave – but this is usually just to say that it does not fit the formula, not explaining why. One of the issues for the new court is whether we should try to explain ourselves more fully, not only when refusing leave but also when granting it.

(4) *Who should sit?*

At present we usually sit in panels of five. This means that one panel can sit in the House of Lords and another either in the Privy Council or two in the House of Lords. It allows for one of our number to be permanently engaged on the Bloody Sunday inquiry and for others to engage in good will visits to other courts and similar activities. But in the *Equatorial Guinea* case the panel was nine, and we also sat nine on the famous *Belmarsh* case, on the *Gentle* case and on two cases where it was necessary to resolve conflicting House of Lords or Privy Council decisions. We usually sit seven if we are being asked to overturn a previous House of Lords decision, although we did not do so in the lotto rapist case (*A v Hoare)*.

Many, perhaps most, other Supreme Courts sit *en banc*. Certainly the nine in both the US and Canada do so, as do the seven in the High Court of Australia. This does not eliminate the risk of five/four or four/three decisions, although apparently it is reduced. It does eliminate the risk that the selection of the particular panel to hear the case may affect the result. We can all think of cases in which the result would probably have been different if the panel had been different, although that raises interesting questions about how predictable the decision of any particular judge either is or should be. The listing is done in the judicial office and the allocation of judges to the panels is agreed with the two senior law lords in what is known as the 'horses for courses' meeting. The aim is to have those with the most relevant expertise together with some generalists. I cannot think that either the judicial office or the two seniors give any thought to the likely outcome of the case if X sits instead of Y. But even without sinister intent, the selection may affect the outcome.

This is solved by having us all – or at least nine of us - sit. It would also increase the authority of the result. If all or most of the top judges in the country have given the case their best shot then perhaps it is the best that can be done. But it would halve the number of cases we could take. It is hard enough narrowing them down now and would be much worse then. Which ones of the cases we did last term should we not have done? It would also shift the focus to the appointments process. In other parts of the world, it clearly increases the desire of the politicians who make the appointments to fill the court with people of their own political persuasion. That does not happen here. We have not had political appointments to the Law Lords for many decades and the risk is even less now that we are to have an independent Judicial Appointments Commission. But I doubt whether we shall change our practice of sitting in panels rather than en banc.

(5) *How should we give judgment?*

At present there are only two ways of giving judgment: either we each have to give an individual 'speech' even if it just agrees with some one else or we make a unanimous report from the committee. Other courts adopt the practice of a single plurality judgment, even if there are also dissents and 'footnote' assents. If we did the same, the result and the reasons for it would be clearer. But something would be lost: the individual voices of the individual judges. Some think that each judge should take responsibility for explaining his or her decision. Some think that judges with a distinctly different viewpoint, such as I often have, should be able to add that to the

mix. There are no easy answers but at least we shall be able to debate the issue in future.

Conclusion

But when all is said and done what is the justification for having a second tier of appeal at all? Is it the quality of the judges? Is it that five or more heads are better than two or three? Is it that we have rather more time for reading and reflection than does the Court of Appeal? Is it that the doctrine of precedent means that the Court of Appeal is bound by its own previous decisions; so a big and busy court has to try to reconcile the myriad of decisions made by other panels in the court? That is one reason why their judgments are often very long and full of references to previous cases, while ours can sometimes be much shorter. Is it the need to secure uniformity of approach, both throughout the UK on UK matters, and in our dealings with the outside world?

These all seem to me to be potentially very good reasons for having a second tier of appeal. We are not the final court of appeal because we are always right. We are right because we are final. But the proposal to move to a Supreme Court for the UK did not provoke loud calls for our abolition, at least south of the border. So someone must think that we are doing something useful.

[1] HL Hansard, 22 June 200, cols 418-420.

[2] Lord Steyn, 'The case for a Supreme Court' (2002) LQR 382; Lord Phillips in interviews in the Times, 22 May 2001, and Independent, 18 June 2002.

[3] Constitution Unit Spring Lecture, 'A New Supreme Court for the United Kingdom', 2002, p 8.

[4] HL Hansard, 23 February 2000, col WA 33.

[5] 5 US 137 (1803).

[6] Eg *Surratt v Attorney General for Trinidad and Tobago* [2007] 2 WLR 262; cf *Hinds v Attorney General* [1977] AC 195.