

Edinburgh Centre for Commercial Law

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Taking the case to London – maybe it’s not over after all

Just over eleven years ago, in February 1998, I gave a lecture which I called “Taking the case to London – is it all over?”¹ It was prompted by a remark which my mother made to me at our Christmas dinner the previous year about the Scotland Bill. It seemed to her that devolution for Scotland would mean an end to the sending of appeals to the House of Lords, and that I was about to be put out of my job as one of the two Scots Law Lords. I had to confess that it had not occurred to me that I was about to be made redundant. On the contrary it had seemed to me the new jurisdiction that was to be given to the Judicial Committee of the Privy Council was likely to mean that we would have a whole lot more of new work to do. But I thought that she had raised a rather important point about where the process of devolution was going to take us which was worth examining.

So I devoted that lecture to a brief review of the history of Scottish appeals, the changes made in the nineteenth and twentieth centuries, the contribution made by the Scottish judges to the work of the House of Lords and some aspects of current practice. I suggested that there were good reasons for retaining the right of appeal to London which ought to weigh heavily with the Scottish Parliament. I then ended the lecture with these words:

¹ [1998] JR 135.

“There is one factor in all of this which I have left out of account. That is the spectre of reform of the House of Lords itself. That may bring the whole question of how the judicial work of the House should be handled under scrutiny. But that will be a matter for discussion on another day. Whatever my mother had in mind when she put her question to me last Christmas, it was not that. By next Christmas – who can tell? That may indeed be the topic of her conversation. It will take another lecture for me to provide the reply.”

As it happened, she did not raise the issue with again before her death a few years ago. But a number of things have happened since February 1998 which seem to me to make the subject of taking the case to London worth revisiting. This then is a long delayed sequel to my previous lecture.

I mentioned reform of the House of Lords. This was predictable. Indeed a bill for the removal of most of the hereditary peers was to follow very soon afterwards². But one thing that I had certainly not foreseen eleven years ago was the creation of a Supreme Court of the United Kingdom. There had been a lot of talk in London about the constitutional anomaly that was embodied in the position of the Lord Chancellor. He wore three hats at once: as a member of the Cabinet, as a judge and as the presiding officer in the House of Lords. His position as a judge, although rarely exercised³, was looking increasingly precarious following the enactment of the Human Rights Act 1998. The prospect of him ever again sitting with the Appellate Committee in the House of

² House of Lords Act 1999.

³ Lord Irvine of Lairg, who was Lord Chancellor from 3 May 1997 to 12 June 2003, sat only nine times.

Lords was becoming increasingly remote. But Lord Irvine of Lairg brushed aside these criticisms. As everyone knows, he was a very senior and influential member of the government, a confidante of Tony Blair and secure, it seemed, against any attempts to deprive him of any one, or indeed all, of these roles. As for the creation of a Supreme Court, this too had been a topic of conversation and some people of influence were known to be in favour of it. But Lord Irvine had let it be known that he was firmly against the idea. There was no prospect of its ever happening so long as he remained Lord Chancellor.

Then on Thursday 12 June 2003 everything changed. I need not go over the events of that day or the steps that followed that led up to the introduction of the Constitutional Reform Bill. They are fully and accurately set out in the introduction to the annotations to the 2005 Act in *Current Law Statutes*⁴. Suffice it to say that the Home Secretary, David Blunkett, proved to be a more valuable member of the Cabinet to the Prime Minister than Lord Irvine and he won the battle for power. Lord Falconer of Thoroton, the son of a highly respected Scottish solicitor Leslie Falconer WS, was invited to succeed Lord Irvine. The abolition of the office of Lord Chancellor and the removal of all serving judges from the House of Lords, which was what David Blunkett wanted to see, was instantly decided upon. Consultation papers were produced that summer, but the government's mind had been made up.

⁴ See also "From Appellate Committee to Supreme Court: A Narrative" in Blom-Cooper, Dickson and Drewry (eds) *The Judicial House of Lords 1876-2009* (Oxford, 2009).

Separation of the Law Lords from the process of legislation could have been achieved without any significant cost by changing the House's Standing Orders to confine serving Law Lords' right to participate in the business of the House to judicial work. In retrospect, as budgets are being cut right across the public sector, that might have been the wiser course. The House of Lords had conducted its appellate work very efficiently for many years at minimum extra cost. This was because most its facilities – all its corporate services such as accommodation, IT and security – were shared with other users of the House. It had a small dedicated staff headed by the Principal Clerk which had to be budgeted for. But the overheads were small, and the administration was conducted with a very light touch with the minimum of bureaucracy.

In those happy days, however, before the crash of 2008 which led to the current financial crisis, cost was not a relevant factor. Public perception was everything. There was to be a Supreme Court for the United Kingdom, and that was that. As Professor Chris Himsworth and Professor Alan Paterson remarked in their paper *A Supreme Court for the United Kingdom: views from the Northern Kingdom*⁵, the consultation paper on the Supreme Court was interesting not just for what it did say but also for what it did not. Respondents were not asked whether the government should replace the House of Lords. That was taken as a given. There were some other curious features too. The paper did not ask whether the new court should hear Scottish criminal appeals or, indeed, any Scottish appeals at all. The continuing impact of the Treaty of Union and the Claim of Right had gone unexplored. The consequence, said the Professors, was that the country

⁵ (2004) LS 99.

remained ignorant of what it would mean to create a genuinely new Supreme Court for the United Kingdom in the twenty-first century.

The Bill, when it was produced in February 2004, did address some of these issues. Although it was amended in some respects during its passage through Parliament, all the essential points survived scrutiny. They are now to be found in the Constitutional Reform Act 2005. Part 3 deals with the Supreme Court. Section 40(3) provides that an appeal lies to the Court from any order or judgment of a court in Scotland if an appeal lay from that court to the House of Lords at or immediately before the commencement of that section. This key provision tells us that the existing arrangements were to remain unchanged. There was to be no extension of the right of appeal to criminal cases and there was to be no change to the current position about leave to appeal. Section 40(3) has, of course, to be read with section 40(4)(b), which transferred the devolution jurisdiction from the Judicial Committee of the Privy Council to the Supreme Court of the United Kingdom.

Section 41, which was added at third reading in the House of Lords in December 2004, provides in subsection (1) that nothing in that Part of the Act was to affect the distinctions between the separate legal systems of the parts of the United Kingdom. Section 40(2) provides that a decision of the Supreme Court on appeal from any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as the decision of a court of that part of the United Kingdom. Thus the existing understanding as to the separate nature of the legal systems has been preserved. A decision in an English appeal

will be persuasive in the other two jurisdictions but not binding. Although I cannot claim direct responsibility for this amendment – the serving Lords of Appeal refrained from taking any part in the debates on this measure – I did tell the House of Commons Constitutional Affairs Committee that I had always looked on the House of Lords as a court which served Scotland in its own jurisdiction.⁶ That, too, is how I look on the UK Supreme Court – true to its name as a court of the United Kingdom, but conscious of its responsibility to apply the law of Scotland in Scots appeals. On 19 January 2005 the Scottish Parliament passed a Sewell motion approving the proposals in the Bill for the setting up of the Supreme Court. Thus the basic framework was set in place.

The passing of the Bill was, of course, only the first step. Life had to be breathed into this new institution. A place had to be found for it to sit, and a host of other arrangements had to be made before it could open for business. That, however, is all in the past. The UK Supreme Court began its life, together with the Judicial Committee of the Privy Council which had been relocated from its elegant premises in Downing Street, in the refurbished Middlesex Guildhall building in Parliament Square on 1 October 2009. Now, six months on, it is time to assess where we have got to and, in particular, where its future lies as regards Scots law.

As I have already indicated, the legislation does not suggest that there were to be any significant changes in the way the new court was to conduct its business. That, of course, was not how things were likely to work out in practice. The process of moving house was bound in itself to open up some of the existing practices to scrutiny. The Law Lords

⁶ Evidence to the Constitutional Affairs Committee, 2 December 2004 at Q 279.

themselves were conscious of this, and there were others who were determined that the opportunity should not be missed. A series of seminars were held at King's College London from January to May 2008 in which academics, judges and practitioners were invited to express views. Following a report on what had been achieved at those seminars, a conference was held in November 2008 at which the report was discussed before an invited audience which included the Lord President, the Lord Justice Clerk and the Dean of Faculty. There were meetings too with court users from all parts of the United Kingdom as part of the design process at which their views on various practical matters were sought and discussed. And the draft Supreme Court Rules went out for consultation as required by the statute. The product of these exercises was that we were equipped with a good deal of information as to what people thought was wrong with the old system and what they wanted to see in the new one. It was made clear throughout these various discussions however that decisions as to what procedural changes, if any, should be made would have to be left to the Justices.

The most significant force for change, as it turned out, is the fact that the Supreme Court has been released from the rules and conventions of the House of Lords and is free to develop them for itself. The rules and conventions of the House, which were always carefully observed by the Principal Clerk, gave dignity to our proceedings. But they also gave rise to that rather lazy feeling that characterises a society whose traditions depend on ceremony and the ever-watchful eye of officials who have been trained to ensure that they are adhered to – the feeling that, because everything has always been done this way, it must be right.

Those of you who were fortunate enough to visit us in the House of Lords, where we sat in Committee Room 1 on the east front of the Palace of Westminster overlooking the River Thames, will know what I mean. First, once you had found your way up there through the huge building, there was the long, very long, red-carpeted corridor. Close to the far end were the door-keepers, supremely and obviously in charge, immaculately turned out in white ties and morning dress, with magnificent gold badges on their chests. They marshalled the lawyers and others who had gathered outside the Committee Room into some sort of order as the time approached for the hearing to begin. Then the words “Their Lordships” were shouted out by the senior doorkeeper, and the Law Lords appeared from round a corner at the far end of the corridor. They were bowed to, one by one, as they entered the Committee Room by their own door before everyone else. And there they were, already seated, pens or pencils in hand and ready for the argument when eventually the door was thrown open, the word “Counsel” was shouted out – always a rather intimidating moment for counsel – and the lawyers, their clients and the public were admitted to their presence. From the very first the Law Lords had the advantage. And so it was at the end, when the words “Clear the Bar” were shouted out and everyone except the Law Lords had to clear out in a hurry, grabbing such of their belongings as they could get hold of before the door was closed and locked and the Law Lords were left in peace to discuss the case between themselves in private.

Judgments were given in the red and gold magnificence of the Chamber itself. Once again the Law Lords assembled first, the Mace was carried in and laid on the Woolsack

and a Bishop said prayers before the doors were opened, the word “Counsel” was shouted out by a doorkeeper and the public were admitted to observe the ceremony. After the case was called each of the noble and learned Law Lords rose in turn to deliver their speeches, and the motion that decided the case was put and voted on. In retrospect, it was quite impossible for anyone not familiar with the case to understand what was going on. The ceremony followed a pre-ordained pattern: always the Mace, because proceedings could not be conducted in the Chamber without it; always prayers, for the same reason; always the same formula when the motions were put and voted on; and the Law Lords invariably referring to each other as “my noble and learned friend” because that was how they were expected to address each other in the House. But no mention was made of what was actually being decided.

Today in the Supreme Court all that has gone, and with it much of the dignity. There are no long corridors in our building. We have an attendant who is robed, but no exquisitely attired, commanding doorkeepers. The courtrooms are designed for the convenience of the public. We admit the public to our courtrooms first, as they are larger and many more people attend than previously. Our visitors since last October have numbered about 800 to 900 a week – about ten times as many as we might see during a week in the House of Lords committee room – and the main tourist season has not yet started. Counsel have the advantage as they watch the Justices come in and take their seats. Some start speaking while the Justices are still struggling to locate the relevant papers among the bundles in front of them. They enjoy the advantage at the end too, as in the Supreme Court it is the Justices who clear out in a hurry when the hearing ends, grabbing such

papers as they can, and disappear into another room to discuss the case while counsel are left to pack up their belongings at their leisure. The Justices no longer refer to each other as “noble”, or “learned” or even “friends”. Revisionism – Puritanism, indeed – has extended to the way judgments are given too. No mace, no prayers, no motions put and voted on. They need not be given out in open court at all. If they are, an explanation is given of what the case is about so that members of the public can follow what is going on and press releases are given out to the media. In the House of Lords it was the Law Lords who came first. Everyone else was there, one felt, on sufferance. In the Supreme Court the reverse is true. Democracy has taken over. Access to the building is very simple. The public are made to feel that they are welcome and – as it is a public building – that in that sense it is their court.

So much for the atmosphere. What about the procedures? Some things were pre-ordained. Many were not. The statute tells us that the President is to make Rules with a view to securing that the court is accessible, fair and efficient and to ensure that the Rules are both simple and simply expressed⁷. These objectives are repeated in the Rules which say that unnecessary disputes over procedural matters are discouraged⁸, and the Rules themselves are indeed simple and accessible. But the process of making them, and of amending them too, is slow and rather too complicated. So many bodies must be consulted: the Lord Chancellor, the six professional bodies in the UK and such other bodies as represent persons likely to be affected by the Rules as the President considers it appropriate to consult. About 15 bodies fell within that general description – 21

⁷ Constitutional Reform Act 2005, section 45(3).

⁸ The Supreme Court Rules 2009 (SI 2009/1603); see rule 2(3).

consultees in all, whose submissions had to be studied and taken into account before the draft Order was prepared and laid before Parliament. So to make things easier, the Rules provide that the President may issue practice directions⁹. They can be kept under review and amended from time to time in the light of experience without having to go out every time to consultation. They provide practical guidance about the procedures that the court uses so that it can conduct its business as simply and efficiently as possible¹⁰. The system is administered with a light touch. If the hallmark of a successful system of procedure is that it leaves as little room for misunderstanding and dispute as possible, our system – to judge by the first six months – has passed that test. The Justices have not yet had to adjudicate on any dispute about what the Rules or practice directions mean or how they are to be applied in practice.

The Rules and practice directions are addressed to the parties and their professional representatives. Other aspects of practice which required attention were those that affect how the Justices themselves are organised. This is where the greatest revolution has taken place. In the House of Lords practice was largely in the hands of the Judicial Office. It has been described as a “cave of mystery”¹¹. The parliamentary status and trappings of the final appeal were its prerogative, and it had built up years of experience of how things were done. Here in the Supreme Court there was room for innovation. What should we call each other? Should we wear robes? What styles should we adopt when preparing our judgments? As we are no longer required to give speeches, should

⁹ Supreme Court Rules, rule 3(3).

¹⁰ For a convenient summary, see Court of Session Practice (Bloomsbury Professional, looseleaf), Division J, *Appeals to the Supreme Court*.

¹¹ L Blom-Cooper and G Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Oxford, 1972); *The Judicial House of Lords 1876-2009* (Oxford, 2009), p 30.

we join with each other in producing joint judgments or even single judgments in the name of the court? Should we sit in larger panels? To sit more than five was always difficult in the House of Lords, as this required us to move to another committee room which was not always available. In the Supreme Court we have the luxury of a large courtroom which has been specially designed to accommodate panels of up to nine Justices. So the old conventions need not apply. Should we alter our approach to giving permission to appeal? This is not a matter of concern to Scotland, as leave (as it is still called in the Court of Session Act) is not normally required for appeals from the Court of Session¹². But it is a matter of very real concern in the other two jurisdictions, which do not allow appeals to go to the Supreme Court without permission.

One might have expected these questions to present little difficulty to the Justices. But they are strong-minded people, and without any law or convention to guide them there was ample room for different views, ranging from the most conservative to the most liberal. For us to be let loose in such an unstructured world was an interesting social experience. In the end resolution of our differences has been arrived at by a process of evolution, discussion and compromise. We decided to retain the titles “Lord” and “Lady” for the time being, but we have become accustomed to referring to ourselves collectively as “Justices”. There will be a problem when the vacancy is filled in a few weeks time by the replacement for Lord Neuberger as he or she will not be a peer. We have yet to see how this can be resolved. One might have thought that those appointed from Scotland who are Senators will retain their judicial titles. The Lord Chancellor, Jack Straw, has told us that the practice of courtesy titles for appointment to the Court of

¹² Court of Session Act 1988, section 40.

Session relates to that jurisdiction alone. But what if they are sitting on Scots appeals? And what about Senators who sit with us as acting judges or on the supplementary panel?¹³ There are anomalies here that will not go away.

People felt very strongly about robes. There was never any desire to wear them every day. We had got used to sitting without robes in the House of Lords, and we sit in the same building now as members of the Judicial Committee of the Privy Council which is not a court and where robes are never worn. The question was whether there should be a robe for special occasions. There were some who said that, if robes were provided, they would refuse to wear them. But in the end, as it became clear that we would not be given a place at the State Opening of Parliament unless we were properly robed, the objections were withdrawn. Happily everyone was wearing their official robe at the opening ceremony. A team photograph of us, thus attired, was turned into a postcard. It proved to be a best seller in the Supreme Court gift shop.

Observers will have noticed some rather more important changes in our behaviour. No longer constrained by the rules of the House, we have been able to re-shape the way we deliver our judgments. In the House of Lords the reasons which each Law Lord produced when judgment was being given in the Chamber were referred to as speeches or opinions¹⁴ – rarely as judgments¹⁵, as they were sitting as members of a committee

¹³Constitutional Reform Act 2005, sections 38 and 39.

¹⁴The word “opinion”, which was used very frequently in the past, largely dropped out of use in recent years until it was revived by Lord Bingham of Cornhill in place of the word “speech” which he thought did not reflect the reality of what happened when judgments were being given by the House.

¹⁵ See, for example, Lord Shaw of Dunfermline in *William Warner’s Sons & Co v Midland Railway Co* [1918] 616, 624 and *Banbury v Bank of Montreal* [1918] AC 626, 694.

advising the House, not as Her Majesty's judges. Now, as the Justices are sitting in the Supreme Court as members of a court, they are referred to as judgments, not opinions – although the word “opinion” is still used in the Judicial Committee of the Privy Council when the Board is advising Her Majesty as to what her judgment should be. There have been several judgments delivered on behalf of the Court by one Justice¹⁶. There have been others where a Justice has been able to say at the start of his or her judgment that other Justices agree with it¹⁷. This makes it unnecessary for them to add a separate concurring judgment. And we have developed the practice of putting the leading judgment first. The others usually follow in order of seniority, with dissenting judgments at the end. This is more in keeping with the way other courts now behave, such as the Supreme Court of Canada, the High Court of Australia and the Court of Session too. But we have rejected suggestions that we should strive to arrive at a single judgment in all cases. We value our independence from each other, and our right to say what we believe in if we want to. There are, of course, cases where a single judgment is preferable. But if we wish to dissent or to express different reasons for arriving at an agreed conclusion then we are entitled to do this, and no one is actively discouraged from doing so. Lord Reid, who said that it was never wise for the House to have only one speech dealing with an important question of law, would have approved¹⁸.

We have been sitting more often in larger numbers. The default position is that we sit in panels of five. But our practice is to sit in panels of seven or nine if the Court is being

¹⁶ Eg *R (A) v B* [2009] UKSC 12; *R v Horncastle and others* [2009] UKSC 14; *Application by Guardian News and Media Ltd* [2010] UKSC 1.

¹⁷ Eg *In re Sigma Finance Corporation* [2009] UKSC 2; *Barratt Homes Ltd v Cymru Cyfyngedig (Welsh Water)* [2009] UKSC 13; *HM Treasury v Mohammed Jabar Ahmed* [2010] UKSC 2.

¹⁸ See *Broome v Cassell & Co* [1972] AC 1027, 1084-5.

asked to depart from a previous decision, or there is a possibility of its doing so, or if the case raises significant constitutional issues or for other reasons is of great public importance¹⁹. It has been suggested that we should always sit in these larger numbers. But this would be likely to reduce the number of cases we could hear each week, as we have to serve the needs of the Judicial Committee as well as those of the Supreme Court. A selective approach enables us to make the most efficient use of the resources that are available.

The selective approach raises questions as to which Justice should sit on which case. Courts which always sit en banc, such as the US Supreme Court, do not need to address this problem. Nor do courts whose function is limited to dealing with constitutional issues in which all its members have equal expertise. As we take all sorts of cases, we have to decide upon the membership of the panel for each case individually. It has been suggested that we should sit in rotation or that the Justices should be chosen for each case at random. But that approach would mean abandoning the convention that the two Scots Justices sit on all appeals from Scotland, if available. It would also risk depriving the panels of the assistance of those members of the Court who had expertise in the point at issue. One might end up with a criminal appeal from the Court of Appeal in England, for example, being heard by five Justices who had never sat in an English criminal court at all. So here too a selective approach is being adopted, as it was in the House of Lords, under the supervision of the President and the Deputy President. The result is that the

¹⁹ Eg *R v Horncastle and others* [2009] UKSC 14; *R (E) v Governing Body of JFS* [2009] UKSC 15; *Application by Guardian News and Media Ltd* [2010] UKSC 1; *HM Treasury v Mohammed Jabar Ahmed* [2010] UKSC 2.

Panel will include at least two Justices with experience in the area of the law that is the subject of the appeal.

What then of the future? The Court sits as a Supreme Court for the United Kingdom. The thistle forms part of the design of its seal, which was designed for us by Yvonne Holton, the Herald Painter to the Court of the Lord Lyon. It is a simple but elegant application of modern design to the historical concepts represented by the four floral emblems. It has played an important part in the design of the carpets and of the curtains. It is woven into the very fabric of the building. So far as the Court is concerned, Scotland is part of what it does and it is there to stay. But that proposition in itself raises all sorts of questions. Let me leave aside the issue of independence. It is very obvious what would happen if Scotland were to withdraw from the United Kingdom. Much more interesting is the question whether anything should be done with the Court's jurisdiction if Scotland continues to remain within it. The devolution issue jurisdiction, now transferred to the Supreme Court from the Judicial Committee, would have to remain. It is no secret that the way this jurisdiction is being exercised in criminal cases has not been welcomed by everyone in Edinburgh. Scotland has, after all, its own system of criminal justice and there is understandable concern that Scots criminal law may be corrupted if exposed to influences from England. But the Supreme Court has insisted that, as jurisdiction to deal with devolution issues was conferred on it by Parliament, it cannot be removed by procedural decisions taken in the High Court of Justiciary²⁰. The question which remains open relates to the final appellate jurisdiction in civil appeals.

²⁰ *McDonald v HM Advocate* 2008 SLT 993, paras 16-17, 49.

We now have the benefit of a report on this question ²¹ by Professor Neil Walker²² in response to a remit by the Cabinet Secretary of Justice in the Scottish Government. It was made available to the public on 22 January 2010. His mandate was to provide an overview of the historical development of the appellate jurisdiction in the Scottish legal system, to identify the established constitutional principles, to provide appropriate international comparisons, to appraise the features, benefits and disadvantages of the current arrangements and to assess options for future developments. As one would expect, the review is the product of excellent research and it is masterly in its presentation. In the light of constitutional developments during the past decade, a study of this kind was long overdue. It deserves careful reading. For the purposes of this lecture my comments are directed to its conclusions. They are of particular interest as one looks into the future.

In the final chapter of his report Professor Walker presents six models for reform. Model One is an autonomous Scottish appellate court system. It assumes independence, so it is not relevant to this lecture. An independent Scotland would no longer send appeals to the UK Supreme Court. Model Two contemplates the integration of Scottish appellate arrangements into a UK-wide appellate system. It has two variations. One assumes a unitary legal order, in which Scots law would lose its identity as a separate legal system – you can sense Professor Walker’s desire to leave no stone unturned. The other would remove the finality of appeal to the High Court of Justiciary and what some see as the apparent anomaly of the quite different treatment of civil and criminal appeals from

²¹ *Final Appellate Jurisdiction in the Scottish Legal System*, published by the Scottish Government (2010).

²² Regius Professor of Public law and the Law of Nature and Nations at Edinburgh University.

Scotland. Not surprisingly, Professor Walker expresses little enthusiasm for either variation²³. He suggests that our Union state, as presently constituted, would fare better under one or other of the remaining four models.

I think that I can leave aside Model Four, which assumes a Supreme Court with a Scottish Division or Chamber either for all Scottish cases or for distinct questions of Scots law. He appreciates that this would raise a number of practical problems and sees it as providing at best a partial answer to a larger question of jurisdictional boundaries²⁴. I can also leave aside Model Six, which assumes the Supreme Court as a United Kingdom Court of Justice with a reference jurisdiction akin to that of the Court of Justice of the European Union. He thinks that this avoids rather than answers some of the hardest questions²⁵. In any case I think that it is so far removed from current thinking about the Supreme Court south of the Border that, for the foreseeable future, the legislation that would be needed stands no chance of being promoted by the UK government. The most interesting models are Model Three, which would retain the existing system; and Model Five, which is described as a quasi-federal Supreme Court and would exercise a jurisdiction across the entire range of civil and criminal appeals. It assumes that Scottish appeals raising common UK issues would be heard by the UK Supreme Court, but that appeals which address distinct questions of Scots law would be dealt with by the indigenous Scottish courts and not be the subject of any further appeal. Professor Walker favours Model Five²⁶.

²³ Para 6.3, p 70.

²⁴ Para 6.8, p 76.

²⁵ Ibid, p 76.

²⁶ Ibid, pp 76-77.

Professor Walker says of Model Three, the existing system, that it has its attractions. He sees its conservative quality and informality as its major strengths and also its main weaknesses, as it does not address certain standing anomalies of the system and it cannot guarantee the long-term stability of its advantages²⁷. He refers to three factors which would be needed to give it stability. None of them, he says, can be guaranteed under the existing system. The three requirements that he identified are: (i) a healthy flow of good cases; (ii) Scottish judges continuing to be represented on the court; and (iii) non-Scottish colleagues making a serious contribution to Scots law. Let me say a word about each of them. They are, I think, closely related to each other. There is one other factor which he does not mention but which I think needs to be considered too. This is whether there should be a requirement for leave to appeal in all cases, not just for interlocutory judgments where there is no difference of opinion among the judges in the Inner House²⁸.

It is true that there needs to be a healthy flow of good cases. As for the flow, the number of civil appeals from the Court of Session is low in comparison with those from England and Wales. As not all appeals proceed to a hearing, the numbers are lower than the House of Lords website suggests²⁹. In 2007 the number heard from Scotland was 10, and there were 5 in 2008. But there were only 2 in 2009 and in 2001 there was only one. We had 5 on our list for the first six months of 2010, but one was withdrawn. Appeals that are heard from England and Wales and Northern Ireland typically number about 80 each year – and they are the ones that have been given permission. About three times that

²⁷ Ibid, para 6. 4, p 70; para 6.8, p 76.

²⁸ Court of Session Act 1988, section 40(1)(a).

²⁹ See Appendix IV to the Report.

number are refused permission. So the number of cases coming to the Supreme Court from Scotland is disproportionately low, bearing in mind our representation on the court: we have 2 Scots Justices out of 12. The cases from Scotland are not always of the highest quality either, although we have had two cases this month which certainly did reach that standard³⁰. Too often one feels that, if leave to appeal had been needed, they would not have reached us at all³¹. Of course, one must now include the devolution cases, which have increased the flow from Scotland. They do need leave³², so the ones that are not worth hearing – of which there are many – are weeded out. With that addition, we just about hold our own in comparison with the other two jurisdictions.

As for a requirement for leave to appeal in all cases, I have changed my mind since the debates on the Constitutional Reform Bill when I favoured leaving things as they are. There is no doubt that respect among the Justices for the quality of cases coming from Scotland suffers when undeserving cases come to the Supreme Court on appeal as of right. Furthermore, experience in the handling of applications for leave in devolution cases has persuaded me that, so long as there are two Scots Justices on the permission panel, there is no risk of the English Justices controlling the docket from Scotland. The devolution applications go before a panel of three, and the two Scottish Justices are always on that panel. The third Justice is normally the President. In practice he pays very close attention to the views of his Scottish colleagues. I would expect the same system to operate if leave were to be required for civil appeals from Scotland. But there

³⁰ *Inveresk Plc v Tullis Russell Papermakers Ltd* 2009 SC 663; *Farstad Supply AS v Enviroco Ltd* 2009 SC 489.

³¹ Eg *Cumbernauld and Kilsyth DC v Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 44; *Buchanan v Alba Diagnostics Ltd* 2004 SLT 255; *Wilson v Jaymarke Estates Ltd* 2007 SC(HL) 135.

³² Scotland Act 1998, Schedule 6, para 13.

would have to be one other change. At present the question whether or not leave should be given rests entirely with the Court of Session³³. That is acceptable for appeals in interlocutory cases, as is the system at present³⁴. But the principles that are enshrined in article 6(1) of the European Convention on Human Rights suggest that the last word should lie with the Supreme Court if the Court of Session were to refuse leave to appeal against its own final judgment.

It is also true that the quality of the Scots judges matters, as does their number. The Justices work as a team, and we cannot afford to have players from any jurisdiction who are not up to the job. Professor Walker suggests that the role and standing that Lord Rodger and I presently have is a circumstance that may not easily be repeated³⁵. I must be careful what I say, but I think that it is indeed open to question whether either of us would be where we are now – or, at least, would have got there anything like so early in our careers – under the judicial appointments system that now exists. I cannot imagine anyone being appointed direct from the Bar to be Lord President under the new system as I was, or after only ten and a half months in the Outer House as happened to Lord Rodger. Whether these were wise appointments is for others to judge. But there is no doubt that the experience that we both had in that office – seven years in my case, five in Lord Rodger's – gave us a great advantage when we moved to the House of Lords at a comparatively young age. And time and again we have benefitted from Lord Rodger's long experience as a Law Officer – experience which under the new system is now seen more as a disqualification for seeking judicial office than a good reason for doing so.

³³ Court of Session act 1988, section 40(1).

³⁴ See, for example, *McIntosh v British Railways Board* 1990 SC 339.

³⁵ Para 6.4, fn 27.

I have no doubt at all that in Scotland we have judges of the right quality. And we have an advantage over the English judges of being generalists rather than having, as in their case, become specialists in particular areas of law. As a result it is quite rare for us to come across an area of law that we have not encountered before – English property law being one of the rare examples. It has been said of the Scots Law Lords that they brought a broad and pragmatic or commonsensical approach to the law³⁶, and that their training and style may well be better adapted to a flexible method of the appellate process than that of English barristers³⁷. So, as team players on the Supreme Court, the Scots Justices have a quite lot to contribute to the working of the system as a whole. Moving people up the ladder quickly enough to make a real impact at that level is likely to be the problem. We need to find a way of doing this, if the tradition that saw Scottish judges appointed relatively early in their careers under the previous system like Lord Reid³⁸, Lord Fraser of Tullybelton³⁹ and Lord Keith of Kinkel⁴⁰ is to be continued.

As for numbers, it is really essential that there should continue to be two Justices from Scotland. The system of giving leave to appeal would weaken our position if there was only one. Two are obviously needed in appeals which raise issues of Scots law. Lord Bingham used to say in cases of that kind that, if the two Scots were agreed, who was he to stand in their way. Of course, we cannot assume that everyone would take that view,

³⁶ *The Judicial House of Lords 1876-2009*, ed Blom-Cooper and others (Oxford, 2009), p 289.

³⁷ R Stevens, *Law and Politics: The House of Lords as a Judicial Body* (London, 1979), p 269.

³⁸ Appointed direct to the House of Lords; served there for 26 years.

³⁹ Appointed in January 1975 after 11 years in the Court of Session, 2 of them in the Inner House; served in the House of Lords for 10 years.

⁴⁰ Appointed in January 1977 after 5 years in the Outer House; served in the House of Lords for 19 years.

and Lord Rodger and I do not always agree – a healthy sign you may well think: indeed we are quite careful to be seen to be independent of each other. But the presence of two Scots who have the respect of their colleagues is usually a pretty good safeguard against things going wrong.

As for the contribution by the English judges to Scots law, my experience is that they will willingly contribute to its development. Lord Neuberger's speech in *Moncrieff v Jamieson*⁴¹ about servitude rights of way is a good example. *Sharp v Thomson*⁴² is widely, and I think rightly, seen as an example of a tendency in the other direction that lies not far below the surface. After all, it is only to be expected that English judges will look at unfamiliar problems of Scots law through English eyes. I have the same experience as, when looking at an English problem, I sometimes try to get my bearings by asking myself how it would be viewed in Scotland. But clear and firm guidance from the Scottish judges who understand and can explain the points of law in issue usually holds the line. That is why the quality of the Scots judges and the respect in which they are held by their colleagues, and ensuring that there are two of them, matter so much.

What then about Model Five – the quasi-federal Supreme Court? This really is a step into the unknown. I can well understand the intellectual reasons for preferring this model rather than Model Three – neatness, balance, symmetry, the attractions of that Court dealing with a stream of UK law and so on. But I have concerns about how it would work out in practice. As Professor Walker recognises, the criteria for distinguishing

⁴¹ 2008 SC (HL) 1.

⁴² 1997 SC (HL) 66

purely Scots cases from common or federal cases would have to be specified⁴³. Plainly, this would require a change from the existing position under which most Scots appeals go to the Supreme Court as of right. A screening system similar to that which operates for criminal appeals in England and Wales and Northern Ireland might offer the best way forward. An appeal to the Supreme Court in criminal cases requires to be certified by the Court of Appeal. The certificate must state that the case raises a point of law of general public importance which ought to be considered by the Supreme Court.⁴⁴ It must also state what the point of law is that is certified, which is a valuable intellectual discipline⁴⁵. So to make this Model work one would need a certificate stating – if we were to adopt Professor Walker’s formula⁴⁶ – that the case raised matters common to more than one jurisdiction of the UK which remained unsettled between those jurisdictions, and then specifying what those matters were. But one has only to glance at this formula to see that preparing a certificate on these lines would be likely to be both contentious and difficult, at least until there was a settled body of law on the subject that could be turned to for guidance as to how the formula is to be applied in particular cases.

Then there is the question who is to have the last word as to whether or not the case should be certified. Under the English system unless there is a certificate there can be no appeal, and the last word on whether a certificate is to be issued lies with the Court of Appeal⁴⁷. There has been an increasing tendency in the Court of Appeal to say, in cases which raise an issue of general public importance, that they ought to be dealt with by the

⁴³ Ibid, para 6.6, p 72.

⁴⁴ Criminal Appeal Act 1968, section 33(2).

⁴⁵ *Jones v Director of Public Prosecutions* [1962] AC 635, 660, per Lord Reid.

⁴⁶ Para 6.6.

⁴⁷ *Gelberg v Miller* [1961] 1 WLR 459; Supreme Court Practice Direction 12, para 12.2.1.

judges of that court because they have the necessary expertise and not by the Supreme Court at all. In a recent case about the right to trial by a jury, which was plainly an issue of general public importance, it refused to certify⁴⁸. I doubt whether leaving the last word with the lower court on the question whether the case raised a federal issue as distinct from a question of Scots law would be satisfactory. I think that the last word as to whether there should be a certificate, under the Model Five system, would have to lie with the Supreme Court.

This highlights what is perhaps the most fundamental practical problem of all – whether the other two jurisdictions would agree to limiting their appeals in the same way and on the same conditions as those proposed for Scotland. That would be essential if a truly federal system were to be created. But as things are at present, if there is an unresolved issue of general public importance in England and Wales, it would not be too difficult to say that it affects more than one jurisdiction. After all, on most issues the law in Northern Ireland is the same as that in England. Its legal system is modelled on that for England and Wales, it shares the same common law and its legislation follows the English pattern. So the concept of re-designing the Supreme Court so that it can deal with federal issues only may be seen as rather pointless in those jurisdictions. This is an inevitable consequence of the unbalanced nature of our constitutional arrangements, which always gives rise to difficulty when one contemplates federalism. And giving the last word to the Supreme Court for the giving of certificates in criminal cases is unlikely to be welcomed by everybody.

⁴⁸ *R v Twomey and others* [2009] EWCA Crim1035; [2009] 2 Cr App R 25.

I have one other concern about Model Five. If the only appeals from Scotland are to be appeals which raise UK issues, will this not mean that the case for two Scots Justices on the Court will be unsustainable? The present requirement is that in making selections for the appointment of judges of the Supreme Court the commission which deals with these matters must ensure that between them the judges will have knowledge of and experience of practice in the law of each part of the United Kingdom⁴⁹. There is no statutory guarantee that there will be two from Scotland. The same formula as applied to Northern Ireland it is regarded as justifying only one, as its law shares so much with English law. The absence of a rule that there should be two Justices for Scotland was deliberate, as some people think that we are already over-represented and the government was keen not to provoke a debate on this issue. But there is strength in numbers, which has consequences in all sorts of ways for the way the court conducts its business. So I think that it would be unwise to provide excuses for reducing the size of our membership on the Supreme Court from that which we enjoy at present.

My preference therefore is for Model Three. You may say that this is just to take shelter in the system that I know and work with. But I believe that we get quite a good deal as things are. Taking the case to London, if properly used, is a source of strength for our legal system, not of weakness. The cross-fertilisation of ideas that comes with the exposure of cases from Scotland to judges of such a wide range of experience as one finds in London enriches the law on both sides of the Border. I do not believe that the system is perfect, as I hope I have made clear. There is a need to take a fresh look at the

⁴⁹ Constitutional Reform Act 2005, section 27(8).

question whether leave to appeal should be required in all cases. But I do think that what we have is worth hanging onto⁵⁰.

12 March 2010

Lord Hope of Craighead

⁵⁰ I am grateful to my judicial assistant Joseph Barrett for his help in preparing this lecture.