Do we really need a Supreme Court?

Newcastle Law School – 25 November 2010

We live on the verge of an era of austerity. Substantial public funding reductions throughout the public sector over the next few years will leave its mark on the public funding of higher education in a way which touches everybody – from those who teach to those who learn. But higher education, which is the area to which you all belong, is not the only part of the public sector that is affected. No area of the public service can expect to be entirely immune from cuts in the funding that it needs from government. The court service is just as exposed to this process as anything else. Savings will have to be found by it to offset the effects of reduced funding. Some courts may have to be closed, there may have to be some reduction in the support services and there will, inevitably, be a reduction in the numbers of people who are employed to provide them.

The Supreme Court of the United Kingdom is now just over one year old. Despite its rather grand name, it is a very small institution in comparison with other branches of the court services in this country. By "this country" I, of course, mean the United Kingdom, not just England where we are now. This court is unique in that it exists to service, within one single organisation, appeals from each of the UK's three jurisdictions: England and Wales, Scotland and Northern Ireland. Each of these jurisdictions has its own court service and its own judiciary. The Supreme Court of the United Kingdom, by

definition, cannot be part of any of them. It has to stand on its own two feet. But its footprint, as a result, is really quite tiny. It has not had time to grow fat, as some areas of the public service did during the period when there seemed to be no shortage of money for anything and growth was the order of the day. Such savings as we can make without impairing our ability to function properly will seem modest in comparison with what others are being expected to achieve. This gives rise to a more fundamental question. If the institution cannot make further cuts without damage to its ability to function, what about the institution itself? Do we really need a UK Supreme Court at all?

The Supreme Court is, of course, a creature of statute. It owes its existence to an Act of Parliament – Part 3 of the Constitutional Reform Act 2005. So long as that existence continues it must be funded by the government. Indeed the Lord Chancellor is under a statutory duty to ensure that it has sufficient funds to enable it to do its job. He must provide it with such court-houses, offices and accommodation and such other resources as he thinks are appropriate for the Court to carry on its business[1]. So the question that I have just asked is, in that sense, an idle question. There has been no suggestion whatever that a repeal of the statutory basis for the court's existence is on the agenda. But that does not mean that the question is entirely meaningless. It is a question which is being asked in Scotland, as the Scottish Ministers have to contribute to the costs that the Lord Chancellor incurs in providing the Court with its resources[2]. Scotland is part of our Legal Union, as are Wales and Northern Ireland. Unlike the other parts, however, an appeal to

[1] Constitutional Reform Act 2005, section 50(1).
[2] Ibid, section 50(4).

the Supreme Court lies in civil cases only and in issues about devolution[3]. There has never been a right of appeal to London in criminal cases. So, if Scotland can say that it does not need the Supreme Court when it comes to crime, should civil cases and devolution issues be treated differently? And if Scotland could do without a Supreme Court altogether, might this be so for the other parts our Legal Union too? This is a question that we, the Justices of the Supreme Court, need to, and do, ask ourselves. After all, it costs money and takes time for an appeal to come to us, and almost always the case will already have been considered by the Court of Appeal. Does subjecting it to a further level of appeal really add value to the process?

Having put all these questions before you, I must set out a bit more of the background. You cannot be expected to answer them without knowing more about what we are, why we are where we are and what we do. To tell you something about this, the best thing for me to do is to begin at the beginning.

The Reform

The origin of the Supreme Court's jurisdiction is to be found in the appellate jurisdiction of the House of Lords[4]. Under the Norman kings each county had its county court, but they were notoriously corrupt, unjust and oppressive. So it was to the king that those who could not find justice anywhere else addressed their appeals. A system of royal courts was developed which later was to become the King's Bench, but the king retained

[3] Ibid, sections 40(3) and 40(4) and Schedule 9.
[4] For a detailed account of the history of the jurisdiction of the House of Lords, see Thomas Beven, *The Appellate Jurisdiction of the House of Lords* (1901) 17 LQR 155.

his residual judicial power. To begin with he had no definite body of advisers whom he could consult. But when Henry III came to the throne in 1216 he was still a minor. A regency was needed to run the country, so a council of advisers was created which became permanent when he attained majority. This was the origin of what we know today as the Privy Council. By this time there had been moves towards the setting up of an assembly of bishops, earls and greater barons. Edward I consolidated this process by bringing them together with his permanent council in all important matters of state as a great council of the realm. During the reign of Edward III the peers became separated off as a body distinct from the rest of the community. Appeals which previously had been heard by the council came in time to be treated as appeals to the peers in the House of Lords, and this right of appeal was finally acknowledged by statute during the reign of Elizabeth I. The House of Lords ceased to exist upon the institution of the Commonwealth in 1649, but it reappeared with renewed vigour upon the restoration of the monarchy in 1660. Prior to the Union of 1707 which created the United Kingdom of Great Britain there had been a right of appeal in civil cases in Scotland from the Court of Session to the Scots Parliament, so it was assumed when the Parliaments of England and Scotland were united that those cases could be taken on appeal to the House of Lords too. Union with Ireland brought that country within the system that applied to England and Wales, and Northern Ireland retained that system when the Irish Free State was established on 6 December 1922.

To begin with the appellate business of the House of Lords was handled by the House itself. This was not very satisfactory. Membership was, of course, given as of right to

peers under the hereditary system. Apart from serving and retired Lord Chancellors, there were very few lawyers and, as sitting for the hearing of appeals was unpopular, the House had to ballot lay members to get them to attend. But under the Appellate Jurisdiction Act 1876, after much discussion as to whether a separate supreme court should be created, life peerages were given to members of the judiciary so that they could sit in the House as Law Lords and conduct the appellate business there on its behalf. This greatly improved the system, as the whole process was now in the hands of professional judges. Their numbers were gradually increased from two to twelve. It became the convention for two of the Law Lords to be appointed from Scotland so that Scots appeals could be handled by a panel some of whose members were familiar with Scots law and practice. Latterly it became the convention that one of the Law Lords should have knowledge and experience of the law and practice of Northern Ireland.

There was one flaw in the system, however. As members of the House, the Law Lords were entitled to take part in the ordinary business of the House just like any other peer. This meant they could take part in the legislative process and, although they were careful not to involve themselves in political issues, some of them did just that and did so quite frequently. Nobody thought that there was anything wrong with this, provided they confined themselves to legal issues, until it became fashionable to subject the independence of the judiciary to public scrutiny. Ensuring judicial independence became even more important after the passing of the Human Rights Act 1998, as article 6 of the European Convention on Human Rights gives to everyone the right in the determination of his civil rights or of any criminal charge against him to a fair and public hearing before

an independent and impartial tribunal. Several senior judges argued that this situation could not be allowed to continue and that the system should be reformed by the setting up of a supreme court outside the Palace of Westminster. So it was that in June 2003 the government announced that the appellate jurisdiction of the House of Lords was to be transferred to a new Supreme Court of the United Kingdom and that the Law Lords were to be disqualified from taking any part in the proceedings of the House.

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 of Lords 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 of 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. There was a consultation paper on the Supreme Court, but it was interesting as much for what it did say as for what it did not. Respondents were not asked whether the government should replace the appellate 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 consequence, some said, was that the country remained ignorant of what it would mean to create a genuinely new Supreme Court for the United Kingdom in the twenty-first century.

The Constitutional Reform 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. Its key provisions tell us that, while there was to be a change of place and a change of name and a new system of appointing Justices of the Supreme Court, the existing arrangements for the handling of appeals were to remain unchanged and 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. 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 elegant premises where it sat in Downing Street, in a newly refurbished Middlesex Guildhall building in Parliament Square on 1 October 2009. The Judicial Committee deals with appeals from the British overseas territories, the Isle of Man, the Channel Islands and a few independent states within the Commonwealth. For the most part those who sat on it to hear appeals were serving Law Lords, whose functions were being

transferred to the Justices of the Supreme Court. It made sense for both of the institutions on which the Justices sit to be located in the same building.

The concept of a Supreme Court is not an entirely easy one to grasp in our legal system. Until now we have had supreme courts both in England and Wales, Northern Ireland and in Scotland that were not, in the strict sense, supreme at all as their decisions could be appealed to the House of Lords. The supreme court for England and Wales was given the title "the Supreme Court" by statute[5]. In ringing tones it was declared by the Supreme Court of Judicature Act 1925 that "there shall be a Supreme Court of Judicature of England consisting of His Majesty's High Court of Justice and His Majesty's Court of Appeal, with such jurisdiction as is conferred on those Courts respectively by this Act." That title had to be changed to make way for the newcomer – the words "Senior Courts" replacing "Supreme Court"[6]. Unusually, the short title of the Act itself – formerly, the Supreme Court Act 1981 – had to be given a new name too. The Supreme Court of Judicature of Northern Ireland, as it was previously called, has also been re-named, by deleting the word "Supreme"[7]. Substituting the word "Senior" for "Supreme" is not a particularly happy choice of language. It suggests a kind of demotion from the previous status, which is entirely unwarranted. The Scots have been more fortunate. It has been the practice there for well over a century to refer to the Court of Session and the High Court of Justiciary collectively as the "Supreme Courts", although only the supreme criminal court, the High Court of Justiciary, is supreme in the strict sense of the word as

[5] See the Supreme Court of Judicature Act 1873; the Supreme Court of Judicature (Consolidation) Act 1925; Supreme Court Act 1981, section 1.
[6] Constitutional Reform Act 2005, section 59(1).
[7] Ibid, section 59(2).

its decisions – except on devolution issues – are declared by statute to be final and conclusive and not subject review by any court whatsoever[8]. But those words were not set out in any statute. There was nothing to amend, so the practice of referring to those courts as the supreme courts in Scotland lives on there as if nothing had happened.

The fact is that the words "Supreme Court" are used to describe a variety of courts at different levels. It is commonly used in various states in the Commonwealth such as The Bahamas to describe first instance courts of superior jurisdiction. Its Supreme Court resides below the Court of Appeal in the judicial hierarchy. At the other extreme there are courts that are undoubtedly supreme, such as the Supreme Court of Canada. But the word "Supreme" is not used to describe courts at that level in the judicial hierarchy everywhere. Its equivalent in Australia is called the High Court of Australia. The most supreme court of all, of course, is the Supreme Court of the United States. It occupies a central place under the Constitution which does not appear to be matched precisely anywhere else, and which could certainly not be matched in this country.

In our case the decision to call the new court the Supreme Court was not set in stone at the outset. It is just that no-one could think of a better name for it. But it was necessary to make it clear to everyone that it was not to be modelled on the US Supreme Court – that it was just a change of name, not a change of functions or jurisdiction. The creation of a genuinely new Supreme Court, as the commentators described it, would have been a much greater undertaking than was ever likely to appeal to the government. It would have had to begin with a genuinely open-ended consultation process. But there was no

[8] Criminal Procedure (Scotland) Act 1995, section 124(2).

inclination to go down that road. The guiding principle was that of separation of the judicial from the legislative process, and the aim was to achieve this as simply and as quickly as possible. A Royal Commission would have been the way to deal with it, if there had been a genuine desire to create something new. The situation would, of course, have been quite different if we had been contemplating a written constitution. But in our un-codified constitutional system there is no obvious place for a court of that kind. It is hardly surprising that the opportunity of re-writing the extent of the court's jurisdiction was not taken. The political aim could be achieved without it. A change of place and of name was all that was required.

That all having been said, and despite the desire to change as little as possible, the move – paradoxically, perhaps – has turned out to be one of great constitutional importance. It has created something that is new. The fact that it has separated the tribunal of last resort from Parliament is not just a means of ironing out a constitutional wrinkle. It has changed the public's perception of what that tribunal stands for. The very fact that these decisions are now being issued in the name of a court – of the Supreme Court indeed – does seem to have given them an added authority. Transparency has lifted the veil which always hung over decisions of the House of Lords, as most people had no idea of how its decisions were taken – if they were aware of them at all. I do not think that the Justices have changed their perception of their relationship with the other organs of government. But under our system the law – public law in particular, which plays a key role in supervising decisions taken by the executive – is never settled. The boundaries between what can and cannot be done are constantly being tested on all sides. That was as true

when the appellate jurisdiction resided in the House of Lords as it is today. But each adjustment that is made, however slight, is now that much more conspicuous.

Rules and Conventions

Although the aim seemed to be, in the interests of simplicity, to change as little as possible, it was never in prospect that Justices in the new court would behave in exactly the same way as they had done in the House of Lords. It was quite difficult, while the plans for the move were being discussed, to anticipate what was going to happen. To some extent this was because it would have been unwise to try to decide more than we needed to at that stage. The most significant force for change, as it has turned out, was the fact that the Supreme Court was released from the many rules and conventions of the House of Lords and the Justices were free to develop new rules and conventions for themselves. The rules and conventions of the House, always carefully observed by the Clerk to the Judicial Office, gave dignity to the proceedings. But they also gave rise to something that characterises any 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 that way, it must be right.

If you had been fortunate enough to visit us in the House of Lords, where we sat in a committee room in the Palace of Westminster overlooking the River Thames, you would have seen what I mean. First, once you had found your way there through the huge building, there was a long, very long, red-carpeted corridor. Close to the far end were two 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 there 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. Then the word "Counsel" was shouted out by a doorkeeper and the counsel 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 the subject matter of what was actually being decided.

Today in the Supreme Court all that has gone and, it has to be confessed, much of the dignity. There are no long corridors in our building. We have an attendant who is suitably robed, friendly and approachable, but there are 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 700 to 800 a week – about ten times as many as we might see during a good week in the House of Lords committee room. Counsel have the advantage as they watch the Justices come in and take their seats. 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.

That is not all. The Justices no longer refer to each other as "noble", or "learned" or even "friends". Revisionism has extended to the way judgments are given too. No mace, no prayers, no motions put and voted on. When judgments are given an explanation of what the case is about is read out by one of the Justices so that members of the public can

follow what is going on. This is available for broadcasting on radio and television, 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 – to appreciate that in that sense it is their court. Many students come to visit us. If you can find time, and the money, to travel to London you too would be very welcome there.

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 officials in the Judicial Office. 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 we join with each other in producing joint judgments or even single judgments in the name of the court? As we can no longer refer to what we have written as speeches, what should we call them? 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 a larger committee room which was not always available. In the Supreme Court we have the luxury of a courtroom, Court 1, 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, which is an essential requirement for all appeals except for civil appeals from Scotland?

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" instead of calling ourselves "Justice X or "Justice Y", although we have become accustomed to referring to ourselves collectively as "Justices".[9] People felt very strongly about robes. There was never any desire to wear them every day as it the practice in other courts. 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 has proved to be a best seller in the Supreme Court gift shop.

[9] Section 23(6) of the Constitutional Reform Act 2005 provides that the judges other than the President and the Deputy President are to be styled "Justices of the Supreme Court".

There have been 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 our judgments are delivered. In the House of Lords the reasons which each Law Lord produced when judgment was being given in the Chamber, always in strict order of seniority as you will see if you study its judgments in the Appeal Cases, were usually referred to as speeches. Now, as Justices are sitting in a court as members of the Supreme Court, we refer to what we have written 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. We are scrupulous in our choice of language in these matters.

Several judgments have been delivered on behalf of the Court by one Justice[10]. 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 it[11]. This makes it unnecessary for those who agree 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[12]. 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 in Scotland 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

[10] Eg *Application by Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 WLR 325.
[11] Eg *In re Sigma Finance Corporation* [2009] UKSC 2, [2010] 1 All ER 571.
[12] Eg *R(E) v Governing Body of JFS and others* [2009] UKSC 15, [2010] 2 WLR 153.

agreed conclusion then we are entitled to do this, and no one is actively discouraged from doing so. This was the tradition in the House of Lords. Lord Reid was of the view that it was never wise for the House to have only one speech dealing with an important question of law. Too many speeches can make it find to find a ratio for the decision, however, so we try not to be extravagant in the use of this prerogative.

We have been sitting more often in larger numbers. The default position is that we sit in panels of five, which was almost always the case in the House of Lords. But our practice is to sit in panels of seven or nine if the Court is being 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 importance[13]. 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. It usually sits in panels of five, and there are only twelve of us. A selective approach enables to 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

[13] Seven in *R v Horncastle* [2009] UKSC 14, [2010] 47; *Application by Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 WLR 325; *A v HM Treasury* [2010] UKSC 2, [2010] 2 WLR 378; nine in *R(E) v Governing Body of JFS and others* [2009] UKSC 15, [201] 2 WLR 153; *Norris v Government of United States* [2010] UKSC 9, [2010] 2 WLR 572.

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

Are we needed?

Let me return then, to the questions that I posed at the outset. Do we really need a UK Supreme Court at all? Does subjecting a case to a further level of appeal really add value to the process?

Our type of appellate structure is common in other legal systems. That, of course, is not a reason why we should also have a second appeal. But it does suggest that other systems see value in the additional tier of appellate court, and it should cause us to question any suggestion that it provides us with no benefit. When New Zealand was considering whether to abandon the appeal to the Privy Council which it previously enjoyed, it had to consider whether to provide a domestic replacement for the right of appeal which would

be lost. The expense of having to take their appeals to London was thought to have deprived many litigants of the value of having important points of law determined by means of a second appeal. So when the link with the Privy Council was broken in 2004, a new Supreme Court was established in order to retain that level of appellate jurisdiction. What benefits did the New Zealanders see in this system? The key to working this out lies in thinking about the types of case we hear and the nature of the judicial process.

We do not see it as our function simply to act as a further court of appeal, substituting our opinion of the case from that reached in the court below. There has to be something more than that. Virtually all cases which we hear require permission to appeal to have been granted[14], so we exercise a close control over the cases with which we hear. Our function is not simply one of correcting an error in the application of the law by the lower courts to the facts of the individual case. If that was all the Supreme Court was doing, it might legitimately be said – in most cases at least – that there was no value in allowing more than one appeal. The costs of litigation suggest that a line has to be drawn somewhere. In 1985 Lord Roskill was at pains to dispel the view that the refusal of leave to appeal indicated the House of Lords' implied approval of the decision which it was sought to appeal. Refusal of leave, he said, did not imply that the judgments below were thought to be right, just as granting of leave did not suggest that they were thought to be wrong[15]. The role of a second level appeal court such as the Supreme Court is broader than error correction.

[14] Scottish private law cases as an exception, but even here there is a control: a case must be certified as suitable for appeal by two advocates.
[15] *In re Wilson* [1985] AC 750, 756.

This does not mean that the case must be one of constitutional importance for it to be given permission. If it is, then it will indeed fall within the required category as in the case of the former MPs accused of offences in relation to their claims for expenses who sought to rely on parliamentary privilege as a bar to the criminal process[16]. But our jurisdiction is much more far-reaching than that. We take all sorts of cases, as anything that has passed through the Court of Appeal's criminal and civil divisions can come to us with permission. But to pass the test they must raise an issue that is wider than the matters that are of concern to the parties themselves. That is the question we ask ourselves when considering whether permission should be given: is there an issue of general public importance about the current state of the law that needs to be addressed, as in the recent case which raised questions about the weight to be given to an ante-nuptial marriage contract[17]? And the way we resolve these issues makes law. As Lord Bingham has explained, "the inescapable fact is that [judges] do have to make choices, and unless superseded by Act of Parliament their choice determines what the law shall be."[18] The Supreme Court's role, therefore, is, cautiously of course, and carefully, to develop the law. We control what constitutes precedent and we supervise its application.

There are benefits too in the fact that we sit in larger panels than is usual in the Court of Appeal, and in the spread of specialist judicial expertise among our membership. And we are an entirely separate institution from the court systems for the jurisdictions in England

[16] *Chaytor and others v The Queen* [2010] UKSC ...
[17] *Radmacher v Granatino* [2010] UKSC 42, [2010] 3 WLR 1367.
[18] Lord Bingham of Cornhill, *The Judges: Active or Passive*, The Maccabaean Lecture in Jurisprudence (2006) 139 Proceedings of the British Academy 50, 63.

and Wales, Scotland and Northern Ireland. There is a geographical separation – even in England and Wales, as the Law Courts in the Strand for that jurisdiction are well beyond easy walking distance. There is a distinct feel to the court, due to the presence of justices from Scotland and Northern Ireland. This helps to create an independent frame of mind when we are dealing with appeals, wherever they come from. It all contributes to the atmosphere of critical analysis. Cases of general public importance are usually very well researched and argued by counsel, and we are very well served by a team of judicial assistants who work with us for a year at an early stage in their professional careers and bring with them the practical knowledge and enthusiasm that we need to keep us in touch with reality. This encourages us to produce judgments that move the law on where it is in need of explanation or development. The fact that cases have already been considered by two courts below as opposed to one means that the legal issues have been refined by the time they reach us. The arguments have been distilled; propositions made, tested and rejected if they are false; consequences thought through. Law is, after all, a very challenging discipline. It taxes even the best of minds. Speaking for myself, I find it very useful, when considering an appeal, to have the benefit of the views not of one court but of two, and of counsel's pleadings also, so that I can engage with the arguments on each side. It helps me grapple much more quickly and, I trust, more effectively, with the points of an appeal.

Do we ever get things wrong? I hope that we have moved on from the state of affairs in the 1930s which led a despairing Scottish judge, when confronted by a decision of the House of Lords with which he disagreed, to say with more than a touch of sarcasm[19]:

> "The House of Lords has a perfect legal mind. Learned Lords may come and go, but the House of Lords never makes a mistake. That the House of Lords should make a mistake is just as unthinkable as that Colonel Bogey should be bunkered twice and take 8 to the hole. Occasionally to some of us two decisions of the House of Lords may seem inconsistent. But that is only a seeming. It is our frail vision that is at fault."

I do not think any of us today regards ourselves as infallible. But there is no doubt that our decisions carry with them an authority which is not matched by any other court in our country. That is a heavy responsibility. It is with that in mind that we examine each case very closely as we go about our business and, as we say at the end of every hearing, we take time to consider our decisions.

I invite you to conclude, therefore, that a second tier of appeal is worth retaining. It performs a different function from a first level of appeal, and there are good reasons for thinking that this function is a valuable one. And I hope you will agree, from what I have said, that the Supreme Court is well placed to discharge it.[20]

25 November 2010 Lord Hope of Craighead

[19] Lord Sands, in *Assessor for Glasgow v Collie* 1932 SC 304, 312.
[20] I am grateful to my judicial assistant, Peter Webster, for his help in the preparation of this lecture.