

Ten-year anniversary lecture series Lessons from our first ten years

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The Court is celebrating its 10th anniversary this year and I have found at least 10 causes for celebration in what has been achieved over those 10 years. But, as with many causes for celebration, each is tinged with a little cause for regret. So the regrets may give the Court something to ponder over the next 10 years.

1. We are not in the House of Lords

Frederic Reynolds QC has recently published an entertaining book entitled *High Principle, Low Politics and the Emergence of the Supreme Court*. The low politics were the battle to reform the Lord Chancellor's Department, seen by the Prime Minister and others in government as an antiquated obstacle to the proper management and reform of the criminal justice system. This led to the surprise announcement on 12 June 2003 that the office of Lord Chancellor was to be abolished and a new Supreme Court and Judicial Appointments Commission were to be established – a surprise not only to the then Lord Chancellor but also to the senior judiciary and civil servants who were meeting in conference somewhere in the Home Counties.

But the argument for the top court in the United Kingdom leaving the House of Lords was always one of high principle, whose principal advocate was the Senior Law Lord, Lord Bingham. For him, it was a simple matter. Judges should not be legislators. The difference between the two should be clear. Judges should not be taking up space in a legislature to whose business they could make only a slight contribution. It later became clear that the cases which sometimes come before the court involve constitutional questions about the relations between government and Parliament, between the UK Parliament and other Parliaments, and even between the two Houses of Parliament. How could Members of the UK Parliament be appropriate judges of such matters?

There were also practical reasons. The Law Lords took up a lot of space that the legislators needed, yet they did not have enough space of their own: it was only because Lord Saville was permanently engaged in the Bloody Sunday Inquiry that each Law Lord was able to have a room of respectable size. But such practical issues led to the first of the regrets about leaving. The new Court would have to look after itself – its building, its IT, its security and all the myriad matters for which any organization has to cater. Previously these had been done and paid for by Parliament, which can vote itself the resources it needs without going through the normal departmental spending round. Once separated from Parliament, the Court's funding would have to come through the departmental budgeting process. It took time to establish that, although the Court's bid has formally to be channeled through the Ministry of Justice, the Court is responsible for working out what it needs and how it spends its resources. **A related concern was that the staff would be civil servants** rather than employed by Parliament.


Another regret still felt by some that, when the Law Lords were Members of Parliament, the Parliamentarians regarded them as 'one of us' and were less inclined to criticize their decisions. Now that the Court is a separate institution, there is less understanding of what it does, the Justices are not 'one of us', and there may be a greater willingness to criticize them. This could be true of the House of Lords, but I doubt whether the same reticence ever affected the House of Commons. But the message from this concern is the need for the Court to foster the best possible relations with both Houses of Parliament, and in particular with the relevant committees, and to do whatever it can to promote as good an understanding as possible of its work, of the difference between law and politics, and of the importance of the Court's place in the Constitution.

2. We are in this beautiful building

Of course, it is also probable that some of the Law Lords rather enjoyed the grandeur of the House of Lords and were sorry to leave the red carpet. But my impression is that they were soon won over by the beauty of this building. It always was a beautiful building, with a wealth of fine wood and stone carving, stained glass and wooden paneling, light fittings and door furniture. But the beauty had become obscured by the clutter inevitable in a building which housed seven busy Crown courts, with their associated jury rooms, cells, and essential offices. Some Law Lords had unhappy


memories of their appearances here in their early days at the Bar. Some found it hard to imagine what could be done with the building.


But the vision and ingenuity of the architects and the artists commissioned to adorn the refurbished building have made the most of all the good things that were here before and transformed it into a bright, beautiful, open, and **transparent place – symbolic** of how the Court tries to conduct its work. It is – for most - a joy to work here and most also find it a joy to visit. The artists did us proud, with the designs for the Court’s seal, the carpets, the manifestations on glass and the many words carved in and around the Court. It could not be better situated, on a square which houses all four elements of the Constitution - Parliament, the Government, the Supreme Court, and the Royal Peculiar of Westminster Abbey.

So are there any regrets? The refurbishment was not perfectly executed, but most of the problems have now been resolved. My main regret is that it was a requirement of the Court’s being given planning permission to convert the building that it continue to house the Middlesex collection of portraits. There are some very positive things about this – it is good to keep alive the memory of the county of Middlesex even though when this building was built it was not actually in Middlesex. And some of the portraits are first rate - what other court has a portrait by Gainsborough and another by Reynolds in a Chippendale frame and several others of the first rank (my personal favorite is Samuel Hone’s portrait of Sir John Fielding, the ‘blind beak’)? But what other modern court is obliged to cover its walls with portraits of dead white men (and one brown man – an Indian Judge who regularly sat in the Judicial Committee of the Privy Council in the 1930s)? What message does that send to all the young women and members of ethnic minorities who have joined or are hoping to join the legal profession or to all the litigants whose cases are heard here or to the members of the public who visit us? It is a pleasure therefore that the Court is making an important start towards redressing the balance with the exciting new artwork by Catherine Yass, marking 100 years of women in law, to be unveiled on Monday 16 December. 



3. We have attracted some wonderful staff

The Court has been blessed with two amazing Chief Executives. The first was Jenny Rowe, who had the difficult task of setting up the Court, establishing its staffing and funding structures, thinking of

everything that needed to be done to make a new institution – from the large matter of budgeting arrangements to the small matter of staff uniforms, Justices’ robes and badges. She was succeeded by Mark Ormerod, who inherited an organization in good shape but has been doing his best to put it into even better shape and to foster a real community spirit. He has had to preside over the arrangements for the two most challenging cases the Court has heard – and both he and the whole staff are to be congratulated  thanked for the way they all pulled together to make it all run smoothly in the face of the public and media clamour.


Some **parts of the organization came with us from the House of Lords**. Any court needs a **registry, a listing officer and a Registrar**, to organize its case load and handle all the documents. We have been fortunate that **Louise di Mambro has been with us throughout the ten years** – as have some of our **other staff**. The move from the House of Lords meant that there was room for more Judicial Assistants to support the work of the Justices and the complement is now 12, **so that each Justice can have his or her own assistant**. There are also, of course, the PAs who manage our lives and our correspondence. 

But, as I mentioned, in this Court, all sorts of other things had to be done which were done for us in the House of Lords, so we needed a Director of Corporate Services, first William Arnold and now Sam Clark, with their finance and personnel teams. The Court now has its own communications team, front of house staff, library and information services, and its very own IT systems. It was a great achievement to separate these from the Ministry of Justice and **establish ourselves independently of government and the Courts and Tribunals Service**. And last but not least, I should pay tribute to our wonderful security staff, who are so friendly and helpful to our visitors.

An early regret was that, as the staff are civil servants, it was necessary to clarify that their duty and loyalty was to the Court and ultimately to its President  who is statutorily responsible for running the Court although delegates this to the Chief Executive - and not to the Ministry of Justice and its Ministers. That too was eventually resolved. Now the main regret is when much valued staff decide that they have to move on. In such a small organization there are limited opportunities for advancement so it is no surprise that good people look for promotion elsewhere. The challenge is to keep as many as we can and to attract other good people to take the place of those who decide to go. 


4. We have begun to sit in other parts of the UK


It is impossible to join the Court without being conscious that it is the Supreme Court for the whole United Kingdom. The most striking illustration of this recently was in the cases brought by Mrs Miller in England and by Joanna Cherry MP and others in Scotland. The English and Scottish courts had reached diametrically opposed and irreconcilable conclusions which had to be resolved by a Court which has jurisdiction over both. My predecessor, Lord Neuberger, established the practice of taking the Court to sit in the other parts of the United Kingdom. We began by sitting in Edinburgh for a week in 2017, then last year we went to Belfast and this year we have been to Cardiff. We received a warm welcome from them all. It has deepened our understanding of the distinct legal communities and cultures in each part of the UK, as well as the different laws which we have to interpret.

Here the regret is that we have so far only managed one excursion a year. It is a complicated and expensive operation. Somewhere suitable has to be found for the Court to sit, **which is not in one of the local courts.** There have to be facilities for live-streaming the hearings, which we usually have to take with us. There is also the transport and accommodation of the Justices, the few members of staff who come with them, and all their papers and equipment. It would be good if the Court could manage to visit the other parts of the United Kingdom more often and excellent if it could also visit the more far flung parts of England which often feel neglected by the institutions based in London – the South West and the North spring readily to mind. **The Court is there to serve them all.** 

5. We have developed our own working practices


There are several aspects to this. We have our own style of hearings. These are not quite the same as in the House of Lords. We are still on the same level as the advocates, as in the House of Lords, and not ‘half-way up the wall’. But we sit round a notional elliptical table, rather than in a horseshoe facing a bar behind which the advocates sit. We are not harangued from a central podium. We still do not robe, as in the House of Lords. But counsel robed in the House of Lords and when we moved there was some debate about how we could persuade them not to do so. The default is still that they robe, but as long as they all agree, they are free not to do so and they mostly do not.


Our hearings are definitely getting shorter. In 2009-10, 53 judgments were given; while most hearings took one or two days, there were 11 of those 53 which took three or four days and only 12 which took one day; the average was over two days. In 2018-19, there were 60 judgments; only four of the hearings lasted more than two days and 38 took only one day; the average has dropped to under one and a half days. We still like the hearing to be long enough to enable counsel to make their case. I would be surprised if there were support for going down to half an hour each side, or one hour each side, as is the norm in the Supreme Courts of the United States and Canada respectively. A visiting Federal Judge from the United States described our proceedings as ‘leisurely’ (pronounced ‘leisurely’), but we don’t think them so. 

But while our hearings are getting shorter, we are sitting in larger panels much more often than we did in the House of Lords. One reason for this – perhaps the main reason – is that we can do so whenever we want. We have three court rooms available to us and one of them caters easily for nine and can, at a pinch, hold 11. In the House of Lords we had to compete for a larger committee room, or the Moses room, with the Parliamentarians who also wanted a bigger room. But there have been wide variations in our use of larger panels – initially popular in Lord Phillips’ day, initially less popular in Lord Neuberger’s day but becoming more so, and less popular in recent years. This could say something about the frequency with which appropriate cases have come before us; or it could say something about a regrettable lack of consistency in applying our criteria. The benefit of a larger panel is that it apparently reduces the risk of a narrowly split decision and increases the authority of the result because more Justices have agreed to it. The disadvantage is that it can take a great deal longer to reach a conclusion and in some cases, where the bench is divided, it can produce very lengthy judgments. 

We have our own style of judgments. This is perhaps the most obvious change from the House of Lords. We deliver three versions of our decisions. The main and only authoritative one is the judgment itself. This no longer consists of a collection of notional speeches in the House of Lords in support of the motion ‘that the report of the appellate committee be agreed to’. This habit proved difficult to shake off – in the first year, the number of concurring judgments was remarkable. However, we have now developed a firm practice of having a leading judgment giving the majority view. This usually has a single author but we can now have joint judgments by more than one

Justice. Peak years for joint judgments were 2014 and 2015. There have been fewer since then but there have been more Justices involved in those joint judgments – sometimes three or more rather than just two. The aim is to have a clear ratio decidendi which everyone can understand. Separate concurrences are of course allowed, but separate stand-alone judgments reaching the same result for slightly different reasons – as used to be quite common in the House of Lords and in the early days in this Court - are not encouraged. Ideally, a concurrence should be a footnote, adding a perspective which may not have found its way into the main judgment. Justices are of course free to dissent and sometimes do so jointly. Our unanimity rate has fluctuated over the years, with peak dissenting year being 2011, but from 1 October 2009 to 30 September 2019 our unanimity rate has been almost 80%.


As well as the judgment itself, we publish a deadpan two page summary – called a press summary but it is not a press notice aimed at catching the attention of the media. The hope is that if the media – or anyone else – is interested they will read the summary and be more likely to report the decision accurately than they might otherwise be. And the author of the lead judgment now gives an even shorter summary in open court on the day the judgment is published. This is live-streamed and also appears on our YouTube channel. The aim is to explain the decision in a way which anyone can understand – an aim which is more challenging in some cases than in others. 

Is there anything to regret? I am sure that the court can continue to develop and refine its working practices. It is important that the work is shared out fairly, with each Justice getting a fair share of the most challenging cases on which to sit, and a fair share of the leading judgments to write. Some judgments take a regrettably long time to produce, but this is usually because the Court is divided and efforts are being made to reconcile the differences. Another cause for regret could be our productivity. This remains respectable. There are different ways to measure it but the simplest is to count the number of judgments published in any one calendar year. In the 10 calendar years from 2010 to 2019, the court ranged from a low of 58 judgments in 2010 to a high of 82 judgments in 2017, but the figure was normally in the sixties. In the calendar years from 2000 to 2009, the House of Lords ranged from 50 in 2002 to 74 in 2008, and the figure was mostly in the fifties 


However, this gives a misleading impression. The same judges sit in the Judicial Committee of the Privy Council. There has been a very noticeable dropping off in the number of cases coming before

the Judicial Committee. In the calendar years from 2000 to 2009, the number of judgments published ranged from 48 (including two devolution cases) in 2005 to an extraordinary high of 88 in 2003, but it was mostly in the high fifties or sixties. In the calendar years from 2010 to 2019, since moving into this building, the number of judgments published has ranged from 32 in 2013 to 48 in 2015 and is normally in the forties. Some countries have left the jurisdiction, but this would not be enough to account for the fall. There must be other explanations as well.

6. Our hearings are live-streamed


It is odd that we were not televised in the House of Lords where everything else is. But from the start it was provided that the ban on photography or filming in court would not apply to the Supreme Court (Constitutional Reform Act 2005, s 47). The court rooms were set up with their own cameras. They are operated by the Court's own operators in accordance with the Court's own rules. This is very different from allowing the media into the court room with their own cameras. The Court soon introduced live-streaming but now also offers a catch-up service. It is very useful to us to be able to go back and watch a hearing to check some point, let alone to those with a professional or academic interest in a particular case, or even to the general public. It was hugely important both in the first Miller case in 2017 (*R (Miller) v Secretary of State for Exiting the European Union*) [2017] UKSC 5, [2018] AC 61, and in the Miller/Cherry cases this year (*R (Miller) v Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41, [2019] 3 WLR 589). Viewers could understand that we were not having a political debate about the pros and cons of leaving the European Union. We were having a serious legal debate about important constitutional issues concerning the allocation of powers between government and Parliament. 

Are there any regrets? Some were afraid that the advocates might grandstand for the cameras. That has not been a problem. In high profile cases in the House of Lords, counsel would often have a first five minutes of script with some purple prose which they hoped that the media would pick up before they got down to the less colourful legal argument. That still happens. But it is rare to have a whole speech which seems designed for public consumption rather than to persuade the court. I can only think of one recent example.


However, I do regret the focus on the brooch which I was wearing when delivering the summary in the Miller/Cherry case. Regular viewers know that I often wear a brooch – usually a creature – to liven up our normally quite sober dress but that it has no obvious connection to the matter in hand. Unlike Madeleine Albright, I am not trying to send a message (*Read My Pins, Stories from a Diplomat's Jewel Box*, Melcher India). There was no hidden message in the brooch I wore that day, but perhaps I should have foreseen that the public and the media would look for one 


7. We are hugely more accessible to the public

Live-streaming is of course part of our becoming more accessible to everyone. When the Law Lords were in the House of Lords, it took great determination or inside knowledge to find the way past the police, some armed with sub-machine guns, through security and up to the committee corridor. If you found your way to committee room number one, there was not much room for onlookers and it was very uncomfortable (let alone having to look at a horrible painting of the death of King Harold which hung behind the Law Lords). Not many people knew that they could do this. It is now much easier to walk in from Parliament Square – there is the inviting signboard outside and friendly security staff. There is a reception desk telling visitors what is going on, there is an information sheet about each case being heard that day and there are also self-guided tours. People can just pop into court for a while and then pop out again when they find the proceedings too mystifying or too boring.


So what is there to regret? First, that many people still do not know this. They are surprised to be told that they can turn up at court and come into a hearing if there is room on the public benches – and there almost always is. Second, that this includes many lawyers and law students, who one might think should know better. So we need to make this even clearer. 

8. We have a mission to inform scholars and students about the Court and the justice system

To this end, we have developed a programme of outreach to schools, colleges and universities. We offer 12 moots  per year presided over by a Justice. Others can organize their moots here too. We have many visits from school and student parties – they can be shown round the building, sit in on a


hearing, and often meet a Justice too. We also have an ‘Ask a Justice’ programme for schools too far away to visit – they send in questions and a Justice spends half an hour answering them over Skype or Facetime. All the Justices go out and about talking to schools and Universities, professional bodies and other groups. It is expected of them. 

It is striking how well even primary school children can engage with the court. Like almost everyone else, they have a view of the justice system taken from television court room dramas. But when they are shown that the law is about wider issues of **justice, fairness and equality** than that, they can easily get the point. I have been amazed by several such visits – including one from a project called *History Rocks!* for East End primary school children and another from our local primary school to read them the book about Judge Brenda.


Are there any regrets? I wish that we could do more but we have to give priority to the judging job. The greatest regret is the difficulty in getting to places which are not within easy reach of London. It is so tempting to go to the major London Colleges, and to Oxford and Cambridge, where we have close connections  we need to get away from the metro-bubble and reach a much wider variety of institutions. This leads into what has been a major preoccupation of mine since I became a Judge.

9. We are becoming more diverse

When I joined the House of Lords in January 2004, I was different from the other Law Lords in several ways: I was the only woman, the only state educated, the only career academic, and the only poor folks’ lawyer. Three of these have now changed: we have three women, three state educated Justices, and three from the Family Division. But this is all very recent. There has been a huge turnover in Justices since I became President in September 2017. By June 2020, all the Justices from England and Wales will have changed in the less than three years since then: three in 2017, three in 2018-9, and three next year.

That in itself is a cause for regret: change is good but too much change is not so good  it was the inevitable effect of the statutory retirement age for Justices and other Judges. Are there other regrets? I am still different from my fellow Justices in two related ways: I am currently the only one to have made a career in academia and the public service rather than as a practising barrister; I am

the only one to have been employed all my working life. So I am particularly pleased that, although the gender balance is going to decline after I retire in January 2020, the non-traditional professional background is going to be maintained when Professor Burrows joins the Court in June.

But of course I am still the same as most of my fellow Justices in two ways: I am white and I went to Oxbridge. There is still work to be done, on ethnicity, and on educational and professional background, as well as gender. One cause for concern is that the percentage of women counsel instructed to appear in the Supreme Court was only 21% in 2009-2010 and 27% in 2018-19. Most of these were juniors. In 2009-10, a woman advocate addressed the court in only 17 of the 53 hearings; in 2018-2019, a woman advocate addressed the court in only 19 of the hearings. This is scarcely an improvement. There was no case in those years in which counsel were all women, whereas there were many cases in which they were all men. We need there to be more women appearing before the Court for there to be more women sitting on the Court. 

As President I have chaired the Commission recommending the most recent six appointments – this is half the court. So I shall be taking a keen interest in how they all work out. But I am not expecting any regrets.

10. We have become even more of a constitutional court than we were in the House of Lords

There are two reasons for this. The Court's role and jurisdiction have not changed – except in one respect. There is no risk of our turning into the sort of Supreme Court which can strike down Acts of the sovereign UK Parliament. However, when legislative and executive powers were devolved to Scotland, Northern Ireland and (eventually) Wales from 1998, issues about whether the devolved legislatures and governments had acted within or exceeded their devolved powers were sent to the Judicial Committee of the Privy Council. The thinking was that the major battles would be between the United Kingdom Parliament and the devolved legislatures. It would therefore be unsuitable to have a committee of the United Kingdom Parliament adjudicate upon them. Once the top court became separate from Parliament, it was obvious that the Supreme Court should undertake this role.

Even before that, it was becoming obvious that the appellate committee could be asked to adjudicate upon constitutional issues which it was not appropriate for members of the House of Lords to decide. In the case of *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, the issue was whether the Hunting Act 2004 was a valid Act of Parliament. The background was the battle between the House of Lords and the House of Commons over home rule for Ireland and the disestablishment of the Church in Wales. The last straw was when the House of Lords defeated Lloyd George's 'People's Budget' in 1910. The Parliament Act 1911 provided that a Bill could receive Royal Assent and become an Act of Parliament without the consent of the House of Lords – as long as it had been passed by the House of Commons in three successive sessions and two years had elapsed between its second reading in the first session and its passing the House of Commons in the third. The Parliament Act 1949 reduced this to two sessions and one year. This was passed under 1911 Act procedure (interestingly, the length of the sessions was manipulated to make this possible). In *Jackson*, it was argued that a legislature consisting only of the House of Commons and the monarch was a delegate of the true legislature consisting of the House of Commons, House of Lords and monarch. Delegates cannot enhance their own powers unless expressly authorized to do so. The Law Lords rejected that argument. But how could it be appropriate for a court consisting of members of the House of Lords to adjudicate on such a dispute between the House of Commons and the House of Lords? Two of the three judges who heard the case in the Court of Appeal were also members of the House of Lords. All the judges who heard it in the House of Lords were by definition members. There was no-one else to do it.

Jackson was a harbinger of other constitutional cases to come. Each President of the Supreme Court has presided over at least one major case. Lord Phillips had *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 – the issue was whether MPs' claims for their expenses were 'proceedings in Parliament' and thus exempt from judicial scrutiny under article 9 of the Bill of Rights 1689. The case concerned members of the House of Commons but a member of the House of Lords who was also facing prosecution intervened. How could it be appropriate for members of either House of Parliament to judge?

Lord Neuberger had *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 – the issue was whether it was within the prerogative powers of government, to make and unmake any treaty, to give notice of withdrawal from the European Union when – it was then

wrongly assumed – that notice could not be unilaterally withdrawn and would inevitably lead to a fundamental change in UK law – something which only Parliament can do?

And during my tenure we have had *R (Miller) v Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41, [2019] 3 WLR 589 – the issue was whether it was within the prerogative power of the government to advise Her Majesty the Queen to prorogue Parliament in such a way as to suspend the operation of Parliament for five out of the eight weeks remaining before the deadline for leaving the European Union. The Divisional Court in England and Wales decided that this was a non-justiciable question. The Court of Session in Scotland decided, not only that it was justiciable, but also that it was an unlawful exercise of power and that Parliament had not been validly prorogued. They could not both be right. There is only one Parliament. Either it had been prorogued or it had not.

This illustrates: first, the importance of having a Supreme Court for the whole United Kingdom to resolve such conflicts; and second, that it would be wholly inappropriate for Members of Parliament – whether the Commons or the Lords – to be deciding such cases; and third, that for as long as such cases may arise, there is a need for an independent and impartial judiciary to determine constitutional limits of governmental power. This has been the role of the courts for centuries. It is as important now as it was in the 17th century. **All Ministers of the Crown have a statutory duty, under section 3 of the Constitutional Reform Act, to uphold the independence of the judiciary.** This Court is the embodiment of that independence and I am confident that it will remain so in the years to come.