SUPREME COURT UK: RADICAL CHANGE OR BUSINESS AS USUAL?

In 1873, when the Appellate Committee of the House of Lords was reinstated as the final court of appeal for the United Kingdom, Joseph Bazalgette was busy overseeing the final stages of his monumental project to eradicate 'The Great Stink' by providing central London with 83 miles of underground brick sewers. Quite apart from eliminating the smell, the sewer network produced the unintended consequence of alleviating the city from its deadly and frequent cholera epidemics. And like Bazalgette's Victorian masterpiece, the creation of the Supreme Court UK may also be subject to that most immemorial of laws: the law of unintended consequences. As Lord Neuberger of Abbotsbury has conjectured, with the visible independence and enhanced transparency of the Supreme Court, might come a more constitutionally interventionist judiciary. Yet although the eradication of cholera was unarguably benign, the extent to which an emboldened Supreme Court would be serendipitous is a matter of opinion and degree. While some would welcome judges strengthening the protection of citizens' rights against potentially authoritarian laws, others would stress the need for the judiciary strictly to respect the enactments of our democratic institutions. Wherever one draws the line, however, it is clear from existing jurisprudence that, far from being emasculated and submissive, the highest court in the land has been self-confidently assertive for some time. Indeed, if the Justices of the new Supreme Court continue this judicial activism, it will be less the result of moving across Parliament Square into the old Middlesex Guildhall and more the natural development of a constitutional trend long in the making.

The suggestion that an Act of Parliament might be overruled by the courts if it was 'repugnant' or 'against common right or reason' was entertained by Chief Justice Coke as early as *Dr Bonham's Case* in 1610. Fast-forward to modern times and similar sentiments remain. In the case of *Anisminic* the House of Lords disobeyed an express 'ouster clause' of an Act of Parliament. In the 2004 'Belmarsh' case, Lord Hoffmann adjudged that despite an anti-terrorism statute which seemed permissive, the

indefinite detention of the appellants was incompatible with our constitution. The point is that the judiciary has proved quite unafraid of constitutional innovation in the past, and any future developments by the Supreme Court must be placed firmly in this evolutionary, jurisprudential context.

The fact that substance has preceded form does not mean that other radical changes will not occur. Lord Phillips of Worth Matravers, the first President of the Supreme Court, has made clear his preference for the majority to deliver single judgments rather than the individual 'opinions' of judges whose reasoning is often divergent and, consequently, confusing for litigants. But by pressurising the Justices to compromise on their legal reasoning, the potential number of avenues for continued reform into the future will be minimised. Many cherished developments in English law (several judgments by Lord Denning spring readily to mind) result from one mind's reasoning whose weight and good sense become apparent in time and whose principles become adopted. In this sense, although Lord Phillips' change might itself be something new, its consequences will suppress radical change rather than enable it.

Of course, such a change might just as well have been adopted by the House of Lords, and the same can be said of many of the changes now being enjoyed by the new Supreme Court. Yes, there is greater transparency resulting from broadcasted hearings, the publication of press summaries about pending and decided cases, and an improved court website with better access to documents; a 21st Century version, if you like, of England's earliest purpose-built courts which lacked an end wall in order that the public could assemble and watch the King's justice being done. And yes, the efficiency of proceedings might be enhanced with the implementation of tighter controls on the amount and content of oral argument; controls which might nonetheless prove repressive of Ciceronian advocacy. Yet all of this would have been perfectly compatible with the old set-up. And the changes

which flow inherently from the nature of Middlesex Guildhall itself – the café, the much improved ease of access for the public – are positive for sure, but emphatically do not justify the 'radical' label.

More profound are the constitutional implications of removing our senior judges from the House of Lords and placing them in their own court-house, thereby ensuring a clinical and transparent separation of powers. Physical separation, however, by no means guarantees the separation of power itself. In some cases it may even lessen it – a glance across the Atlantic reveals that the Justices of the US Supreme Court, who sit in splendid isolation from the executive and legislature, are in fact the product of Presidential nomination and Senatorial confirmation. It is not inconceivable that as more attention is lavished upon our own Supreme Court Justices, so there will be a move towards politicising their appointments. While such a shift would indeed be radical – radically retrograde – it is too speculative to be persuasive.

In the 18th Century, Viscount Bolingbroke insisted that 'the safety of the whole depends upon the balance of the parts'. The removal of the law lords from Parliament has not drastically changed the balance. Indeed, if there has been any meaningful change at all then it is for the worse – that the law lords can no longer apply their considerable experience to scrutinise legislation means that the executive's ability to ram through laws has been eased. It is interesting to note that in 2003, when the Government sought to end jury trials in fraud cases, several law lords, including Lord Woolf, spoke out and voted against the Bill.

Despite these slightly weakened constitutional checks and balances, and the aforementioned cosmetic improvements, the introduction of a Supreme Court UK has been decidedly underwhelming and far from radical. The principles upon which our top judges decide appeals remain unchanged, for which reason their business has and will continue as before.