Reforming the Supreme Court

Derrick Wyatt QC and Richard Ekins

Foreword by Rt Hon. the Lord Thomas of Cwmgiedd

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Policy Exchange

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Published by
Policy Exchange, 8 – 10 Great George Street, Westminster, London SW1P 3AE

www.policyexchange.org.uk

ISBN: 978-1-913459-35-2

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Foreword

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Lord Chief Justice of England and Wales 2013-2017

It is a pleasure to introduce the paper written by Professor Wyatt on which Professor Ekins has eloquently commented. Each is a very important contribution to the debate now with us as to the future of the Supreme Court. The approach of Professor Wyatt, although remaining neutral on the issue of whether the Supreme Court has become, in the short hand phrase, "too activist", is to consider the issues and to propose radical change to the structure of the final appellate process. He suggests a Final Court of Appeal constituted not by a separate Supreme Court but by members of the Courts of Appeal of the constituent jurisdictions of the UK who would exercise that jurisdiction by sitting for part of their time in panels that determined final appeals.

Recalling as best I can the discussions in 2003-5 triggered by the decision to reform the office of Lord Chancellor, it was not generally anticipated at the time of the enactment of the Constitutional Reform Act 2005 that the law lords, if moved to their own premises as Supreme Court Judges and away from Parliament, would see their role as different; it was a reform to improve perception not to change substance. However one clear effect of the move has been to isolate the judges from Parliament during a time when the constitution of the UK has undergone a series of uncoordinated changes and the focus of final appellate work has shifted towards judicial review, fundamental rights and devolution.

There are, however, other questions which have emerged which Professor Wyatt seeks to identify and then challenge received thinking by addressing them in a different way. The questions are highly relevant. Would constituting such a Final Court of Appeal improve diversity? Would it strengthen the Union by refining the issues of representation of the constituent nations brought into focus by the recommendation for the Welsh Government Commission which I chaired? Would the judges who made the final decisions have a different perspective as a result of continuing to benefit from the experience of day to day issues in the justice systems which are a prominent feature of the work of the national Courts of Appeal? Would such a reform provide a greater range of expertise in, for example, criminal cases? Would it encourage the retention of the more experienced senior judges who retire early from the national appellate courts? Would there be a better understanding of social, political and

constitutional perspectives? Would the prospect of judgments being scrutinised by fellow judges exercising an appellate function encourage self-restraint and improve accountability (a concept little discussed in 2003-5)?

There are some who wish this debate to "go away". That is not, in my view, a tenable position as these papers cover issues that need debate. It would be much better if those who see the structure created in 2005 as having produced a system that is well suited to the UK respond. Experience shows that these issues are best debated and addressed by considering the answers to the serious questions raised and whether proposals for pragmatic reform are needed or not; and, if they are, would proposals not be best made if made by those who understand the core values of a system of justice and wish to see them upheld?

Should the UK Supreme Court be abolished?

Derrick Wyatt QC

The UK Supreme Court has come under fire from some lawyers for what might broadly be described as being "too activist", and examples of this activism have included the judgment of the Supreme Court on the triggering of Article 50 TEU in *Miller/Dos Santos*,[1] and that on the prorogation of Parliament on the advice of Prime Minister Boris Johnson in *Miller/Cherry*.[2] Just to be clear about it, the charge against the Supreme Court is that it has been guilty of creative legal accounting. It has taken upon itself the role of policy-driven law reformer rather than analyst and legal interpreter, and in so doing, it has distorted the balance which should be maintained between Government and Parliament on the one hand, and the court system, on the other.

Needless to say, the Supreme Court itself does not see things this way, and nor do many lawyers. They would see the evolution and reform of UK law as part and parcel of the judicial role in general, and of the UK Supreme Court in particular, and they would endorse the judgments referred to above as examples of the process of evolution of the UK Constitution, which has, since at least the 17th century, involved ensuring compliance by the executive with the law, and thereby with the rule of law.

Both the above narratives are political narratives as well as legal narratives. Distinguishing between the legitimate role of the courts in the evolution of the common law, including its constitutional elements, and abuse of that role by prioritising judicial policy-making over legal principle, is not straightforward, and cannot be straightforward, in a legal system in which a substantial body of the law is judge-made law, and in which it is an acknowledged role of the courts to adapt that law to changing circumstances.

Rather than taking sides in this debate (I do not subscribe completely to either of the narratives outlined above but I do accept that each is partly right), I shall explore the possibility that the final stage of the appellate process might be reformed in a way which might mitigate the negative tendencies identified by critics, while at the same time leaving intact the role of the judiciary as a whole in interpreting and applying the law, and thereby upholding the rule of law in the UK.

Professor Ekins has proposed that steps should be taken to temper

1. [2017] UKSC 5
2. *Miller/Cherry* [2019] UKSC 41

the Supreme Court's "emerging sense of mission", which he regards as including the role of "constitutional court" and "guardian of the constitution".[3] He regards this emerging sense of mission as being attributable, in part at least, to the title given to it as the Supreme Court, and to its replacement of the Appellate Committee of the House of Lords. He says "…the Supreme Court's institutional separation from Parliament and the symbolism of its name and developing public profile may be significant" in this context. The remedial steps proposed by Professor Ekins include renaming the Supreme Court as the Upper Court of Appeal. Ideally, he would also propose returning to the status quo ante, with an Appellate Committee of the House of Lords being the final court of appeal in the UK, but he does not regard this as being practicable.[4]

I agree with Professor Ekins that if there is a problem with the judicial approach of the UK Supreme Court, it may in part be attributed to the fact that it sees itself as a constitutional court, and as guardian of the Constitution, but I would add that it is part of the judicial responsibility of every court in the United Kingdom to uphold our Constitution, and the role of all superior courts to make an appropriate contribution to the evolution of that Constitution. If there is a problem with the judicial approach of the UK Supreme Court, I think it is its willingness on occasion to decide cases on policy grounds, without disclosing an adequate or convincing legal basis. In this respect, I do not believe that the approach of the Supreme Court differs significantly from that of the Judicial Committee of the House of Lords before it.

A text book example of a policy decision lacking a convincing legal basis is to be found in the speeches of the majority in the *Anisminic* case in 1968,[5] in which the House of Lords "interpreted" a statutory provision in a way which deprived it of any practical application, and in effect removed it from the statute book.

The House of Lords always assumed that part of its judicial task was to police the boundaries and evolution of the UK Constitution. If the *Anisminic* case is to be justified, it is on the basis that the Law Lords applied constitutional principles of access to justice and the rule of law, rather than simply interpreted a statute. If the controversial prorogation judgment of the Supreme Court in *Miller/Cherry* is thought to read like the pronouncement of a constitutional court with a sense of mission, it is as well to bear in mind that the seeds of that ruling were sown by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* in 1985.[6] If the Supreme Court had never been created, the *Miller/Cherry* ruling might well have been handed down by the Judicial Committee of the House of Lords. I cannot of course be sure about that; there are few certainties in this debate.

I doubt that any sense of constitutional mission on the part of the Supreme Court, nor any propensity to fulfil that mission by excessive judicial activism, can be blamed on its institutional separation from Parliament, nor on its title as Supreme Court of the United Kingdom. I do believe that any excessive judicial activism on its part is linked to its

3. Richard Ekins, *Protecting the Constitution* (Policy Exchange, 2019), pp. 19, 20.
4. Richard Ekins, *Protecting the Constitution* (Policy Exchange, 2019), p. 20.
5. [1969] 2 AC 147
6. [1985] AC 374.

freedom to decide cases without accountability to any further court of appeal. Such a freedom is of course enjoyed by all final courts of appeal, and such a freedom is capable of inculcating an excessive sense of self-belief, and a sense of entitlement to do whatever they want with the law, in judges who no longer benefit from the regular and salutary experience of scrutiny and possible correction of their judgments by their fellow judges. To put it simply, (and in terms which would certainly be understood by the present Prime Minister), sitting atop the judicial pecking order in any system may foster a certain degree of institutional *hubris*, and even if *nemesis* in the form of corrective legislation may in some systems always be said to be to hand, in truth in the UK such corrective legislation has been rare. I also believe that any excessive judicial activism on the part of the Supreme Court is linked to the fact that it comprises a relatively small elite corps of judges distinguished by title and by composition from the rest of the UK judiciary. If I am right in my analysis, and if it is sought to reduce the risk and incidence of excessive judicial activism, then renaming the Supreme Court as the Upper Court of Appeal, or something similar, would be unlikely of itself to make any significant change in the judicial approach of our final court of appeal.

While I have said that I do not subscribe fully to either of the narratives outlined at the beginning of this essay, I do think that both the House of Lords and the UK Supreme Court have on occasion reached decisions they would have not reached, if, say, they had respected conventional principles of statutory interpretation, or had allowed Ministers reasonable leeway to exercise statutory or common law powers for political reasons. I do think that a change of name of the Supreme Court, such as that suggested by Professor Ekins, might serve to counter any impression that the final court of appeal is intended to be an elite corps of judges, with an ethos separate and distinct from that of the rest of the judiciary. I am sure that such a change would not in any way undermine the independence of the judiciary, nor the rule of law in the United Kingdom. My reservation about it is that it might not adequately address the tendency of a final court of appeal, perhaps any final court of appeal, from time to time, to put policy before principle in the adjudication process, and to endorse outcomes which conventional legal reasoning would struggle to sustain.

I would tentatively suggest a structural reform which I believe would temper the risk of excessive judicial activism at the final stage of the UK appellate process. My suggestion is to abolish the UK Supreme Court and have its functions (and those of the Judicial Committee of the Privy Council) carried out by panels of five or more judges assigned on a case by case basis from judges in the Court of Appeal of England and Wales, the Court of Appeal of Northern Ireland, and the Inner House of the Court of Session. The final court of appeal might indeed be named the Upper Court of Appeal, or perhaps the UK Final Court of Appeal; I comment further on nomenclature below. Its premises could in London be those presently occupied by the UK Supreme Court, and it could continue and develop its practice of sitting outside London in appropriate cases, in Belfast, Cardiff

and Edinburgh. But the panels of judges who would sit in the Final Court of Appeal would be judges who also continued to sit in their respective courts of appeal in England and Wales, Northern Ireland and Scotland. Judges would not normally be assigned to such a panel before serving two years as an appeal court judge. To compensate for the ineligibility of those serving their first two years in appellate judicial office, there could be a supplementary panel of retired appeal court judges who had not yet reached the age of 75. The numbers of judges appointed to the various courts of appeal would be appropriately increased to take account of the extra judicial responsibilities of the appellate judiciary as a whole, with perhaps another nine judges being appointed to the Court of Appeal of England and Wales, two to the Inner House of the Court of Session, and one to the Court of Appeal of Northern Ireland. All the judges of the various courts of appeal eligible to sit on panels of the Final Court of Appeal would be both judges of their respective courts of appeal, and of the UK Final Court of Appeal, and their judicial titles would reflect this. This new combined judicial office would provide a fitting final step in the career path of judges in the three UK jurisdictions, and hopefully contribute to the willingness of appellate judges to continue in post until retirement. While I would not wish to be dogmatic about the title to be awarded to those participating at the final stage of the UK appellate process, my preference would be for Judge, or Justice, of the UK Final Court of Appeal. That title would make it clear to the UK public, and indeed to judges in foreign countries, or of international courts, that its holder held judicial office in the highest court in the United Kingdom.

Supreme Court judges holding office when the new system was introduced would be entitled to join the ranks of the various courts of appeal, and thereby the new UK Final Court of Appeal, without any loss of remuneration or pension rights. It would be disingenuous to suggest that such a change in role would be likely to be their preferred option, but retention of their services would be highly desirable. The reform which is advocated is designed to address a structural weakness in our present judicial system; it does not imply criticism of the abilities of Supreme Court judges, past or present. Retention of the services of existing Supreme Court judges as members of the appeal courts of the three jurisdictions, and their membership of the new UK Final Court of Appeal, would be of great value in itself to those courts, and would help to ensure the smoothest possible transition for the new system.

The result of the above change would be to broaden the judicial base of the final court of appeal, and to ensure that all judges sitting at the final stage of appeal were also judges deciding cases at the level below that final stage, and so remained accustomed to the discipline of writing judgments which would be subject to the scrutiny of their fellow judges. This would I believe militate against the final court of appeal being, or being seen to be, a judicial policy making centre independent of government or parliament, with perhaps a corresponding sense of entitlement to rebalance the constitutional order of things as it thought fit.

Broadening the judicial base of the final court of appeal would make a valuable contribution to the diversity of the final court of appeal, in terms of gender balance, BAME representation, and perhaps socio-economic background too. Taking as a measure the current composition of the Supreme Court, and the appellate courts of England and Wales, Scotland and Northern Ireland, implementation of the proposal under discussion would dramatically increase the number of women hearing cases in the final court of appeal, and for the first time a BAME judge would hear cases in that court. There would also be a contribution to diversity of a rather different kind: an unprecedented number of judges from Scotland and Northern Ireland would hear cases at the final appeal stage.

There is a risk that a small corps of judges hearing appeals at the final appellate stage might become detached, or appear to become detached, from the range of views and general outlook of the rest of the judiciary. Broadening the judicial base of the UK final court of appeal would tend to ensure that the judges of that court shared, and were seen to share, the ethos of the appellate judiciary as a whole.

It might be objected that I am proposing structural reform of the final appeal stage of the UK judicial system because of features of that system which are to be found in numerous legal systems around the world. Am I saying that all systems which have a final court of appeal comprising a relatively small elite corps of judges, distinguished by rank and composition from the rest of that country's judiciary, are structurally defective, and should be reformed in the way I suggest? Not quite, and not necessarily. But in countries whose systems do have the characteristics I have just mentioned, debates about excessive judicial activism are the norm rather than the exception. And in such systems, a common antidote to such judicial activism, whether by way of deterrent, or of ensuring political balance on the bench, is the involvement of politicians in the process of judicial selection. This latter feature is lacking from the UK system, and I consider that to be a strength of the UK system. Appointing judges on legal merit alone demonstrates the faith of all concerned that judges will decide their cases on legal merit alone, and justifies in my mind a proposal to change the present arrangements for final appeals, which nudges the Supreme Court in the direction of judicial activism, to a system in which a more broadly based final court of appeal would fulfil its role under different conditions, and with perhaps a somewhat different perception of its own role in our constitutional system.

The result of the reform under discussion would, I believe, be a final court of appeal as proficient and credible as the courts of appeal which today enjoy such deservedly high standing in our UK legal system, and which, in practice, already act as final courts of appeal in the great majority of cases which come before them.

This reform might be said to increase the risk of inconsistency between different panels comprising the Upper Court of Appeal, unless safeguards were adopted to mitigate this risk. One safeguard would be the ability to select panels of more than five judges, as is possible at present. Another

safeguard might be a stronger presumption that judgments of the Final Court of Appeal would not depart from their previous judgments, nor from those of the House or Lords or the Supreme Court. That said, the possibility of inconsistency should not be exaggerated. It was present when the House of Lords was the final court of appeal, and it is present under current arrangements. It is inherent in a system in which different panels of the final court of appeal hear appeals, and in which there is a regular turnover in the membership of the final court of appeal. My own inclination is that the risk of inconsistency between judgments of the final court of appeal under the system I suggest would continue to be acceptably low.

The overall quality of our superior judges is high, and in the various UK courts of appeal it is extremely high. Supreme Court Justices, with the occasional individual exception, do not stand head and shoulders above the judges serving in the various appeal courts in which they themselves (in virtually all cases) served prior to their elevation to the Supreme Court. They are first among equals, rather than a class apart. I have already noted that for practical purposes the courts of appeal in England and Wales, Scotland and Northern Ireland, are the final courts of appeal for the great majority of cases which come before them, and it would be difficult to deny that the appellate judiciary as a whole is qualified to hear and determine final appeals on points of law. For these reasons, I do not believe that the reform I am suggesting would be detrimental to the overall quality of judgments at the final stage of appeal. Nor do I believe that it would undermine the normal process of evolution of the common law, including the principles of administrative and constitutional law, nor undermine the role of the judiciary as a whole in upholding the rule of law.

Abolishing the Supreme Court: some questions and comments

Richard Ekins

In my recent paper, *Protecting the Constitution: How and why Parliament should limit judicial power*, I proposed, inter alia, that the Supreme Court should be renamed the Upper Court of Appeal in order to help temper the Court's emerging sense of mission and self-appointment as *the* guardian of the constitution. Professor Wyatt QC argues that while my proposal would have the virtue of not in any way compromising judicial independence or the rule of law it might not be adequate to address the problem. He proposes a more far-reaching reform – abolishing the Supreme Court, returning its members to the Court of Appeal of England & Wales, Court of Appeal of Northern Ireland, and Inner House of the Court of Session in Scotland, as appropriate. The Supreme Court's jurisdiction would instead be exercised by panels of five or more judges from those appellate courts.

One might term such panels the Upper Court of Appeal, although on balance Professor Wyatt prefers UK Final Court of Appeal,[7] but crucially the judges in question would continue to sit in the Court of Appeal (or Inner House). Professor Wyatt reasons that this would address the problem that a final appellate court's freedom to decide cases without accountability to any further court may inculcate a sense of excessive self-belief and entitlement to do whatever they want with the law. His proposal would mean that there simply was no permanent set of judges who might form such bad habits: each and every appellate judge would remain used to the discipline of writing judgments which would be subject to the scrutiny of their fellow judges.

This is an intriguing and imaginative proposal. Its merits turn partly on the dynamics and recent history of "judicial activism", including the relationship between the Appellate Committee of the House of Lords and the Supreme Court, and partly on the point of final appellate jurisdiction.

It is not quite right to say that I have said restoring the jurisdiction of the Appellate Committee would be ideal. There is, I said in my recent paper, a case to be made for such restoration, which Parliament might properly consider. But a more practical, less politically controversial, course of action is likely to be to amend the Constitutional Reform Act 2005, renaming the Supreme Court to address misunderstanding about its role in our constitutional order and, importantly, specifying in terms

7. In writing *Protecting the Constitution*, my initial proposal had been that the Supreme Court should be renamed the Final Court of Appeal. I settled on Upper Court of Appeal instead on the grounds that this name was relatively less grandiose. Obviously, whatever term is chosen, the court would continue to exercise final appellate jurisdiction, subject to legislative correction. (I did not consider the possible parallel with the title of the Hong Kong Court of Final Appeal, which may be an increasingly problematic example.)

that its responsibility is to adjudicate disputes according to law, not to guard the constitution. There is very clearly much continuity between the Appellate Committee of the House of Lords and the Supreme Court. But the fear that the creation of the latter might result in a change in judicial self-understanding, and in constitutional practice, was live at the time. Lord Neuberger, when Master of the Rolls, publicly articulated his concern that the Supreme Court might become a constitutional court, notwithstanding that Parliament had not intended as much.[8]

Professor Wyatt's discussion opens by reflecting on *Miller* (No 1) and *Cherry/Miller* (No 2). He goes on to say that he agrees with me "that if there is a problem with the judicial approach of the UK Supreme Court, it may in part be attributed to the fact that it sees itself as a constitutional court, and as guardian of the Constitution." However, he adds that it is part of the judicial responsibility to uphold our constitution and, for superior courts, to contribute to its evolution. The main problem, he suggests, is instead that the Supreme Court is sometimes willing "to decide cases on policy grounds, without disclosing an adequate or convincing legal basis". (This is the problem, I agree, but it arises, I say, partly because the Court increasingly misunderstands its constitutional role.) Importantly, however, he thinks this was just as true of the Appellate Committee of the House of Lords. He makes the point by way of the example of *Anisminic*, but also mentions *GCHQ*.

The rise of judicial power in the UK constitution, which Policy Exchange's Judicial Power Project addresses, certainly did not begin with the creation of the Supreme Court and indeed there was no certainty that the Court's name or public profile (separate building, website, logo, etc.) would inform its sense of mission. But this is not to say that it was prudent to create the Supreme Court or that the symbolism of its name, insofar as it evokes the United States Supreme Court rather than the High Court of years gone by, has not informed public perception or the Court's own self-understanding over time. That said, the enactment of the Human Rights Act 1998 seems to me much more important, in terms of judicial culture change, than the creation of the Supreme Court.

There are many judgments of the Appellate Committee of the House of Lords of which one can and should be highly critical (as well as many more of course that one should welcome). Like Professor Wyatt, I take a dim view of the majority's reasoning in *Anisminic*. However, Professor Wyatt holds out the possibility that *Anisminic* might be justified by an appeal to constitutional principle, partly because he takes the courts to have a general responsibility to uphold the constitution and to contribute to the evolution of the constitution. I would say that the courts play their part in the constitution first and foremost by upholding constitutional *law*, adjudicating disputes without fear or favour. They should certainly not change the law in ways that undermine the constitution; in some cases they may have to resolve uncertainties in the law, and should aim to do so in ways that support rather than subvert the constitution. While courts should be slow to conclude that Parliament intends to oust judicial review,

8. Lord Neuberger of Abbotsbury MR, "The Supreme Court: is the House of Lords 'Losing Part of Itself'?", The Young Legal Group of the British Friends of the Hebrew University Lecture, 2 December 2009

Anisminic cannot plausibly be defended on the grounds that constitutional principle justifies departure from legislative intent. Parliamentary sovereignty is legally fundamental and requires courts, like everyone else, to follow Acts of Parliament.[9]

I think, with respect, that Professor Wyatt overstates the extent to which the approach taken by the Supreme Court is effectively indistinguishable from the approach taken by the Appellate Committee, especially prior to the enactment of the Human Rights Act. The majority judgment in *Anisminic* is open to question, but does not openly challenge parliamentary sovereignty, as some judges did in *Jackson* in 2005[10] and in *Privacy International* in May last year.[11] Notwithstanding its hostility to ouster clauses, it is hard to imagine the Appellate Committee undercutting the Freedom of Information Act 2000, as the Supreme Court did in *R (Evans) v Attorney General*,[12] or second guessing the Lord Chancellor's discretion in relation to tribunal fees, as the Supreme Court did in *UNISON*.[13] And in particular, one might doubt whether the Appellate Committee of years past would ever even have contemplated quashing prorogation, a proceeding in Parliament protected by Article 9 of the Bill of Rights and a prerogative that has always been free from judicial control. As Professor Finnis demonstrates in his recent paper, the judgment in *GCHQ* only provides the seeds for the Supreme Court's unprecedented intervention if it is badly misconstrued.[14]

My point, to be clear, is not that the 2005/2009 institutional separation was transformative. The main drivers of the rise of judicial power have been (other) decisions made by Parliament and changes in the way many judges, lawyers and scholars understand the role of the courts.[15] But it is plausible to say that reposing appellate jurisdiction in a committee of the House of Lords (a committee of independent, professional judges!) may have helped, on the margins, limit excess. Nesting the UK's highest court within one House of Parliament made clear the centrality of Parliament in our constitutional tradition. The personal and political (small-p) connections between Law Lords and other peers, and ongoing exposure to the conduct of parliamentary government, is likely to have encouraged understanding of and respect for the dynamics of parliamentary democracy.[16] The relative austerity of the Appellate Committee's facilities and procedures may have been inconvenient, and perhaps untenable over time, but likely also encouraged a degree of humility. None of this is to detract from the central point made by Professor Wyatt, with which I broadly agree, viz. the misuse of judicial power may be a pathology for many final appellate courts, precisely because they are not subject to the discipline of being corrected on appeal. But it does suggest that the Appellate Committee may have been disciplined partly by its location within Parliament, a discipline to which the Supreme Court has not been subject. The Supreme Court's physical and institutional location isolates it from parliamentary government *and* from other judges and courts, which may tend to encourage an inflated sense of the Court's role.

The question for decision is not whether the creation of the Supreme Court was prudent. The question is whether the Supreme Court is

9. Richard Ekins, "Legislative Freedom in the United Kingdom" (2017) 133 *Law Quarterly Review* 582
10. *Jackson v Attorney General* [2005] UKHL 56; [2006] 1 AC 262
11. *Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22
12. [2015] UKSC 21; [2015] 1 AC 1787
13. [2017] UKSC 51
14. John Finnis, *The Law of the Constitution before the Court: Supplementary Notes on* The unconstitutionality of the Supreme Court's prorogation judgment (Policy Exchange, 2020), pp.16-17
15. See further Richard Ekins and Graham Gee, "Putting Judicial Power in its Place" (2017) 36 *University of Queensland Law Journal* 375
16. A point also made by Geoffrey Cox QC MP, Attorney General 2018-2020, in his foreword to Richard Ekins and Stephen Laws, *Mishandling the Law: Gerry Adams and the Supreme Court* (Policy Exchange, 2020), pp.5-6.

now disposed in some cases, certainly not all, to misuse its appellate jurisdiction, seeking to act as a kind of constitutional court. One obvious remedy for wrongful action on the part of the Supreme Court, as Professor Wyatt notes, is corrective legislation, reversing the judgment in question. I have argued for such legislation in response to *Evans*, *Cherry/Miller (No 2)*, and *Adams* amongst other cases.[17] But for a range of reasons, including shortage of parliamentary time and political capital and strategic (unsound) invocations of constitutional principle, this remedy may not always be forthcoming. Institutional reform of the Supreme Court – changing its name and specifying its proper function – would supplement other reform measures, including amendment of the Human Rights Act, and should be considered.

Professor Wyatt's proposal to abolish the Supreme Court is a bold institutional reform. It would be more constitutionally significant and therefore more politically challenging than my modest proposal to rename the Court. My initial view was that the proposal was too bold, that it might undermine an important feature of any legal system, which is a stable appellate hierarchy. An appellate hierarchy requires a highest court, whether Appellate Committee or Supreme Court or Upper Court of Appeal. The point is how to encourage that court to exercise its jurisdiction responsibly and, relatedly, what powers to confer upon the court. Parliament's fundamental authority to amend the legislation establishing this hierarchy is a vital safeguard. This authority was openly questioned by three Supreme Court judges in *Privacy International*, which confirms the need for its exercise.

Judicial self-discipline is vital. Whoever exercises judicial power, especially appellate judicial power, needs to avoid hubris, to hew close to settled law. Abolishing the Supreme Court would be a means to this end by (a) avoiding formation of a stable set of judges who would have a high public profile and an ongoing capacity to remake the law by way of a series of related judgments, and (b) making sure that each appellate judge was accustomed to the risk of being reversed on appeal by his or her colleagues. I think Professor Wyatt is right that his proposal would not result in a loss of judicial quality: there is no step change between Court of Appeal and Supreme Court judges. Perhaps the latter, under present arrangements, simply have more time to reflect.

Some might argue that returning Supreme Court justices to relevant Courts of Appeal is inconsistent with judicial independence, by failing to respect security of tenure. This objection should not be persuasive, I suggest, because it is a reform of the jurisdiction and institutional shape of the court, sharing its authority with a wider class of appellate judge (each of whom remains entirely secure in office) rather than a removal of Supreme Court justices from office. Indeed, one advantage of Professor Wyatt's proposal is that it would flatten judicial hierarchy, which would mean that promotion to the Supreme Court was not a final step in a judicial career. This might have advantages in terms of retention, as Professor Wyatt notes. More importantly, making promotion less of a feature of

17. *R v Adams (Northern Ireland)* [2020] UKSC 19

judicial service would tend to strengthen judicial independence. It would also, as he notes, greatly improve judicial diversity – in all senses – in final appellate adjudication.

The main line of objection might be that by removing a stable set of twelve judges from the apex of the judicial hierarchy the change would encourage inconsistency in adjudication. One answer, which Professor Wyatt rightly articulates, is that this risk is already built into our system, as with the Appellate Committee, because the apex court does not sit *en banc*. The two cases in which eleven Justices of the Supreme Court have sat together are not encouraging, especially when the second, *Cherry/Miller (No 2)*, resulted in a very surprising (alarming) show of unanimity.[18] The Supreme Court's existing practice in relation to panel size seems unstable and ad hoc. One can understand why, even if one regrets that, eleven justices were convened in the two Miller cases. Rather harder to understand are the assertions made in several cases that a panel of five (or seven) justices is inadequate to make a certain change in the law, viz. to recognise proportionality as a general ground of judicial review.[19] This assertion is flatly unfair to the parties who are entitled to a Supreme Court with jurisdiction to dispose of the case and betrays a law-making disposition.

The risk of inconsistency in final appellate adjudication raises a question about the point of final appellate jurisdiction. If the point is error correction by more senior judges, who jointly exercise a kind of coordinated control over the disposition of cases, then a strict hierarchy makes sense. But if the point is collegiate peer review, with some appellate judgments considered again by a larger panel of senior judges, then Professor Wyatt's proposal fits the bill. The existing Supreme Court, with changing panel sizes, perhaps equivocates between these two understandings.

Would Professor Wyatt's change be consistent with the spirit, if not the letter, of the devolutionary settlements? The Supreme Court is a UK institution and the Upper Court of Appeal would be likewise, made up of judges from appellate courts throughout the UK. One virtue of the proposal is that it would require a wider class of judges across the UK to work together, helping to strengthen a UK-wide judicial culture, rather than reserving such cooperation for a dozen apex judges.

However, one would clearly need a rule to ensure adequate judicial representation from different parts of the UK in relation at least to some types of appeal. This gives rise to a less grand, but more pressing, question about how – and by whom – panels would be selected for particular cases. Relatedly, one might ask whether panels should be formed with a view to judicial expertise or whether they should be formed simply on the grounds of availability, taking for granted that appellate judges are or should be capable of deciding any case before them. I would incline towards the latter view, which might help avoid creating, or extending, a problematic judicial discretion to select the composition of the judicial panel. Still, this is an important and difficult question.

Professor Wyatt speaks of panels of five or more, implying that in some

18. See Lord Brown of Eaton-under-Heywood, "In Praise of Dissenting Judgments", *Prospect*, 28 May 2020, although note that Lord Brown, having lamented the absence of dissenting judgments in *Cherry/Miller*, argues for reform of the Supreme Court such that it would have fewer members and would always sit *en banc*.

19. See for example *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 at [132], per Lord Neuberger; see also Daniel Clarry and Christopher Sargeant, "Judicial Panel Selection in the UK Supreme Court: Bigger Bench, More Authority?" *The UK Supreme Court Yearbook* Volume 7, Legal Year 2015-2016, pp. 1-16.

cases one might have larger panels. Perhaps, but this would seem to make imperative for some judge (or set of judges) to exercise discretion about panel size. There might be advantage in simply providing that the Upper Court of Appeal (or Final Court of Appeal) consists in panels of, say, six judges, who may overturn a decision below, only if or when there is a majority of four judges for this decision.

Replacing the Supreme Court with an Upper Court of Appeal made up of appellate judges from across the UK would be very similar to transferring the jurisdiction of the Supreme Court to the Judicial Committee of the Privy Council, for all appellate judges are Privy Councillors. The Judicial Committee of the Privy Council was the final appellate court in the UK relation to devolution until the Supreme Court began in 2009 and it remains the final appellate court for a number of Commonwealth members, Crown dependencies and British overseas territories (and for some narrow questions within the UK). At present, Supreme Court judges carry out the bulk of the Committee's work. If the Supreme Court was dissolved into the appellate courts below, the Judicial Committee might simply be authorised to take up that Court's appellate jurisdiction.

There are good reasons to consider restructuring the exercise of final appellate jurisdiction within the UK. Professor Wyatt's proposal to this end requires elaboration, of course, and my questions and comments are likewise tentative. But his proposal is, it seems to me, an attractive and interesting attempt to address some of the reasons why the Supreme Court may at times be inclined to misuse its jurisdiction. The proposal seems to me worthy of serious further consideration.

£10.00
ISBN: 978-1-913459-35-2

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