

THE SUPREME COURT

On 1 October 2009, the House of Lords was replaced by a new Supreme Court as the highest court within the English legal system

The House of Lords, as the upper chamber of parliament, continues to exist, but its membership has been reduced by the 12 Law Lords who previously sat there, and who now sit as justices in the new Supreme Court.

THE SEPARATION OF POWERS

The idea of the separation of powers, which can be traced back to ancient Greek political philosophy, is based on the existence of three distinct functions of government (the legislative, executive and judicial functions) and the conviction that these functions should be kept apart in order to prevent the centralisation of too much power.

- The legislature is the body within the constitution in which the power of making law is located. Under democratic constitutions the body will normally be elected. In the UK, Parliament is bicameral and is made of the House of Commons and the House of Lords. It is also worth stating that in countries with a written constitution and a strong separation of powers, there are limits to the power of the legislature to make law, in that it is not permissible for laws to be made which conflict with the rights provided under the constitution. If any such law is passed, it is open to challenge in the courts, which may strike it down as being unconstitutional. However, the UK has no written constitution as such and functions under the doctrine of *parliamentary sovereignty*. This effectively means that Parliament is not just the ultimate source of law, but it can make such law as it determines, which cannot be challenged in the courts as to its content. Even the Human Rights Act 1998, which introduced the European Convention of Human Rights and Fundamental Freedoms into UK law, maintains the doctrine of parliamentary sovereignty to the extent that the courts cannot declare primary legislation to be invalid on the grounds that it conflicts with the convention. Courts may issue a declaration of incompatibility, but such a declaration does not invalidate the legislation in question and any action to remedy the conflict must be undertaken by the legislature.
- The executive, as its name suggests, is the institution that executes the law, ie carries it into effect. It is essentially the government operating through the instrument of the state, such as the civil service and other state functionaries. In theory, the executive implements, rather than creates, the law and is subject to the scrutiny of the legislature and the judiciary.
- The judiciary's role is to decide issues in relation to the law of the state in which they are located. A corollary of this description is the conclusion that it is not the function of the judges to make law.

The fact that, before October 2009, the highest court in the UK was located in, and constituted part of, the country's legislative body was always considered at least somewhat anomalous. Such a situation was clearly contrary to any idea of the separation of powers and one that was not lost on Lord Falconer, the former Lord Chancellor, who in 2005 explained the need for reform thus:

The present position is no longer sustainable. It is surely not right that those responsible for interpreting the law should be able to have a hand in drafting it. The time has come for the UK's highest court to move out from under the shadow of the legislature.

The relevance of Lord Falconer's argument was given added power by the decision of the Scottish Court of Sessions, the equivalent of the Court of Appeal, in *Davidson v Scottish Ministers* (No 2) (2002). The case involved a challenge to a previous court decision, on the grounds of Article 6 of the ECHR, for the reason that one of the judges in the earlier case, the former Lord Advocate Lord Hardie, had spoken on the issue before the court while a member of the Scottish Assembly.

The Court of Sessions held that Lord Hardie should at least have declared his previous interest in the matter and that, in the light of his failure to do so, there was at least the real possibility of bias, and ordered the case to be retried.

The enormous historical change involved in remedying the unsustainable situation was brought about by the implementation of Part 2 of the Constitutional Reform Act 2005, which provided for the following:

- The establishment of the new independent Supreme Court, separate from the House of Lords with its own independent appointments system, its own staff and budget and its own building: Middlesex Guildhall. This new Supreme Court should not be confused with the old Supreme Court, which was the title previously given to the High Court and Court of Appeal. In future those courts will be known as the Senior Courts of England and Wales.
- The 12 judges of the Supreme Court are titled Justices of the Supreme Court and will no longer be allowed to sit as members of the House of Lords. As a matter of fact, all of the present members are life peers and as a result will be able to sit in the House of Lords on their retirement from their judicial office, but this may not always be the case in the future.
- The immediately previously serving Law Lords became the first Justices of the Supreme Court, and Lord Phillips, the former Lord Chief Justice, was appointed the first President of the Supreme Court. In fact, only 11 of the previous Lords of Appeal in Ordinary have taken positions as Justices of the Supreme Court, Lord Neuberger, instead, taking the position of Master of the Rolls in the Court of Appeal.

As has been stated above, in other constitutional systems, both civil, as in France, or common law, as in the US, not only is there a clear separation of powers between the judiciary, the executive and the legislature, but there is also a distinct Constitutional Court with the power to strike down legislation on the grounds of its being unconstitutional.

It has to be emphasised that the UK Supreme Court will not be in the nature of these other supreme courts, in that it will not be a constitutional court as such and it will not have the powers to strike down legislation. Consequently, although the proposed alterations clearly increase the appearance of the separation of powers, the doctrine of parliamentary sovereignty remains unchallenged.

It remains to be seen, however, whether under the changed circumstances of the contemporary constitution the Supreme Court, as the highest court in the land, will simply assume the previously limited role of the House of Lords, or whether it will, with the passage of time, assume new function and increased powers as are consonant with Supreme Courts in other jurisdictions. This issue arose in September 2009 when the former Law Lord, Lord Neuberger, who gave up his position in the House of Lords to become Master of the Rolls, spoke on a BBC radio programme expressing the opinion that the advent of the Supreme Court was not unproblematic. As he put it, 'the danger is that you muck around with a constitution like the British constitution at your peril because you do not know what the consequences of any change will be'. And that there was a real risk of 'judges arrogating to themselves greater power than they have at the moment'.

Former Lord Chancellor, Lord Falconer, also expressed the view that the Supreme Court 'will be bolder in vindicating both the freedoms of individuals and, coupled with that, being willing to take on the executive', but Lord Phillips the President of the Supreme Court was more conciliatory towards the executive expressing the view that, although he could not predict how the court would function in the future, he did not foresee it changing in the way suggested by Lord Neuberger.

The changes will make little practical difference to the student of law; the previous decisions and precedents of the former House of Lords will still be binding and the previous rules of law and procedure for hearing appeals from lower courts will continue to operate. Consequently, the shift from House of Lords to the Supreme Court should be seamless and unproblematic.

More information about the Supreme Court may be found at the court's own very informative website: www.supremecourt.gov.uk

Written by a member of the Paper F4 examining team