

LEGISLATURES AND THE COURTS:

THE IMPORTANCE OF PLACE

Philip Norton

ABSTRACT: Institutions of the state are studied primarily in terms of behaviour, powers and outputs. Little attention has been paid to their location and how this affects relationships between them. This article examines the effects of location through a study of the highest domestic court in the United Kingdom moving from the Palace of Westminster to a separate building across the road from the Parliament. It examines the perceived benefits of the court and Parliament sharing the same space and the consequences of separation. The move from within the Palace of Westminster has effected a shift in judicial-legislative relations from one of respective autonomy to one of democratic dialogue.

KEYWORDS: Courts, Dicey, House of Lords, judiciary, legislatures, law lords, location, models of judicial-legislative relations, MPs, Palace of Westminster, peers, Supreme Court.

Introduction

In this article, we address the importance of place in terms of affecting the relationship between organs of the state, in this case principally legislatures and the courts. The importance of place here refers not to the place of the institution in constitutional terms, but to physical location.

Scholars analyse institutions as formal entities, fulfilling particular tasks and enjoying relationships with other bodies. These relationships encompass the formal and the informal. The formal is the principal focus of scholarly analysis, not least because it is usually visible and quantifiable. Works address behaviour, powers and outputs. Informal relationships are less visible and quantifiable, but nonetheless important. There may be informal contact with members of other bodies. There may be informal contact between members of the same institution. How members meet informally may facilitate socialisation into the institution, information exchange, and lobbying. Such interactions may help develop or reinforce the autonomy of the body.¹ However, relationships may be affected by the physical location of each entity. That location is observable – each body has its principal or sole physical site (a court or parliament building) – but its relevance may be difficult to discern, both in terms of consequences for the relationship between the different organs of the state and between those organs and the citizen.

Place may be important simply in terms of occupying a recognised site. Here, design as much as a single location is of significance. Buildings are variously designed to impress. They may acquire an iconic status: the Palace of Westminster and No 10 Downing Street in the UK, for example, and the Capitol Building, the White House, and the Supreme Court building in the USA. As buildings, they may serve to build popular recognition, but also some degree of pride. Others may not acquire the same status. In part, this may be a factor of location. The split location of the European Parliament – plenary sessions in Strasbourg, committee meetings in Brussels (though

with the capacity for plenary sessions there as well) – may militate against popular visual recognition. There is no one obvious image of the Parliament to compete with the image of either the Palace of Westminster or the Capital Building.

The importance of symbolism in terms of buildings is also reflected in two recent developments. One is in the UK, where there are proposals for members of both Houses of Parliament to leave the Palace of Westminster for several years while the Palace undergoes a major programme of restoration and renewal.² The temporary locations proposed for the two Houses are not likely to achieve the same iconic status as the Palace of Westminster and at a more practical level are likely to affect how members do their work. Of relevance to our thesis as to place, the split sites may also affect the relationship between the two chambers, not least the extent and nature of contact between the members.

The other is in the USA, where in 2010 the decision was taken, for security reasons, not to allow members of the public to enter the US Supreme Court through the main doors at the top of the steps to the building. Instead, they were to use doors at the ground level. Two Justices, Breyer and Ginsburg, argued against the decision. Justice Breyer announced that he was not aware of any Supreme Court in the world that had closed its main entrance to the public. The design of the entrance and steps extended beyond design and function, he said. ‘Writers and artists regularly use the steps to

¹ The importance of informal, or social, space will form the basis of forthcoming research by the author.

² See Joint Committee on the Palace of Westminster, *Restoration and Renewal of the Palace of Westminster*, First Report, Session 2016-17, HL Paper 41, HC 659.

represent the ideal that anyone in this country may obtain meaningful justice through application to this Court'.³

The actual buildings are thus important, both in design and configuration. Our principal focus is where they are located. In terms of location, the relationship of the legislature and the nation's highest court may be deemed to be *shared*, *proximate* or *distant*. By shared, we refer to occupying the same building. By proximate, we refer to the court and legislature occupying different buildings, but a short distance from one another, certainly within the same city. By distant, we refer to them occupying different cities.

Sharing is unusual, but not unknown. The US Supreme Court met for more than a century in the Capitol Building. From 1810 to 1860 it sat in what is now known as the Old Supreme Court Chamber and from 1860 to 1935 in the Old Senate Chamber. (Prior to 1810, it met occasionally in rooms in the basement of the Capitol.) It was constitutionally a distinct entity, but it met nonetheless in the same building as the nation's legislature. In the UK, the highest domestic court until 2009 was the House of Lords, which from the 19th Century meant the Appellate Committee of the House, comprising law lords appointed under the Appellate Jurisdiction Act 1876 to fulfil the judicial functions of the House and other peers who had held high judicial office. Unlike the members of the US Supreme Court, members of the UK's highest court of appeal were members of the legislature, though they operated as a distinct entity

³ *Statement Concerning the Supreme Court's Front Entrance, Memorandum of Justice Breyer with whom Justice Ginsburg joins*. Supreme Court of the United States, Monday, May 3, 2010. http://www.scotusblog.com/wp-content/uploads/2010/05/Justice_Breyer_Statement-1.pdf Accessed 14 August 2017.

within the legislature,⁴ rarely engaging in parliamentary proceedings other than judicial sittings.

There was also a further sharing in the UK, this time between the judiciary and the executive. The Judicial Committee of the Privy Council was established in 1833 under the Judicial Committee Act and is the highest court of appeal for certain cases from a number of Commonwealth countries, the Crown Dependencies and British Overseas Territories. It also deals with appeals in certain domestic cases, including from ecclesiastical courts. For a short period, from the coming into force of the Constitutional Reform Act 2005 until 2009, it was the highest court for dealing with devolution issues. Until 2009, the Committee met principally in the Privy Council Chamber, housed in Downing Street, formally considered part of the complex of buildings that constituted 10 Downing Street, the Prime Minister's official residence, but actually in a building on the corner of Downing Street and Whitehall and renumbered in 2001 as 9 Downing Street.

The US Supreme Court moved location in 1935 to its new and imposing building ('the marble palace'), across the road from the Capitol Building. The UK court moved from the Palace of Westminster in 2009 to a dedicated building across the road from the Palace. The move of the Appellate Committee was paralleled by the move of the Judicial Committee of the Privy Council to the same building.

These changes moved both US and UK courts from the first to the second category. The highest court and the legislature thus occupy a position relative to one another

⁴ By the mid-19th Century the convention had developed that peers who were not legally qualified did

that is not as distinctive as that of sharing. In this they are not unusual. This we treat as the most common category, with nations typically having the supreme court and the legislature close to one another. However, there are also nations, such as Switzerland and South Africa, in the third category, with the supreme court in one city and the legislature in another. This category also encompasses the European Union, with the Court of Justice of the EU (CJEU) residing in Luxembourg and the Parliament in its split sites of Strasbourg and Brussels.

Impact of location

Our working hypothesis is that the location of institutions matters. Our premise is that it will not matter in non-democratic regimes, where there is little or no scope for judicial independence. It may matter in democratic regimes, where there is constitutionalism, that is, an acceptance of some degree of autonomy for institutions of the state, the institutions of the state deriving their legitimacy from mass and elite acceptance, and not being the creatures of the regime.⁵ Both the supreme court and the legislature have some degree of autonomy and scope for independent action.

We hypothesise that where the two bodies are physically close, legislators are likely to see judgments of the court as those of a collection of recognisable individuals, whereas the more distant the two bodies the more likely judgments are seen as judgments of an institution. We therefore surmise that the physically closer the

not participate in the judicial proceedings of the House.

⁵ Philip Norton, 'Constitutional Change and the Tensions of Liberal Democracy', in James Connelly and Jack Hayward (eds), *The Withering of the Welfare State: Regression* (Basingstoke: Palgrave Macmillan, 2012), pp. 72-3.

highest court and the legislature, the greater likelihood of each seeing the other in a more benign light than where they are physically distant from one another. We cannot generalise with any confidence – we lack the empirical evidence to do so – but the changes to have taken place in the UK, with a change in location of the highest domestic court, provide an opportunity to examine the possible effects of place.

The purpose of this article therefore is to test our hypotheses through an examination of how relationships change when there is a change of location. We note that when the US Supreme Court moved from the Capitol to its new building, it had an impact on the institutional life of the Court. ‘The building’, as David O’Brien noted in his study of the court, ‘further removed and insulated the justices from the political life in the Capitol.’⁶ It facilitated secrecy, decisions previously having been variously leaked in advance to members of congress and others. It also enabled judges to see more of one another, having previously worked primarily from home.⁷

This suggests merit in examining the consequences of relocation. We treat the more recent case of the move of the highest domestic court of appeal in the United Kingdom. Until 2009, this was the Appellate Committee of the House of Lords and thereafter it was the Supreme Court of the United Kingdom. The change was essentially one of name and physical relocation. As the new President of the Supreme Court, Lord Phillips of Worth Matravers observed, the change was ‘essentially one of form, not of substance’.⁸ The powers of the Appellate Committee, with some

⁶ David M. O’Brien, *Storm Center: The Supreme Court in American Politics* (New York: W. W. Norton & Co., 1986), p. 116.

⁷ John P. Frank, *Marble Palace: The Supreme Court in American Life* (New York: Alfred A. Knopf, 1972), p. 110.

⁸ *Financial Times*, 10 September 2009.

exceptions, transferred to the Supreme Court. The members remained the same: the law lords who formed the Appellate Committee became Justices of the Supreme Court and moved out of the Palace of Westminster to a new court building, the opposite side of Parliament Square to the Palace of Westminster. In short, they were crossing the road in order to carry on doing what they had done before.

The move was designed to dispel public confusion about the House of Lords in its judicial capacity and the House of Lords in its legislative capacity. The justification was thus in terms of perception. Though the Appellate Committee operated as a distinct entity within the Palace of Westminster, its members were members of the House of Lords, hearings were held in committee rooms in the Palace, and judgments delivered in the chamber. The judgments were formally those of the whole House and were reported as judgments of the House of Lords. The senior law lord, Lord Bingham, argued in 2001 ‘that the present position could mislead the ill-informed. When, for example, the Pinochet case came before the law lords, foreign observers mistakenly thought that the issue had become political rather than judicial.’⁹

Although the Government’s claims as to perception were challenged,¹⁰ ministers achieved passage of the Constitutional Reform Act 2005, which established a Supreme Court. The Act barred law lords from membership of the House of Lords during the period that they held office as Justices of the new court, as well as barring other members who held judicial office. It also transferred the headship of the

⁹ Joshua Rozenberg, ‘Bingham suggests supreme court to replace law lords’, *Daily Telegraph*, 5 October 2001.

¹⁰ See the speeches of this writer and former law lord, Lord Lloyd of Berwick, in a House of Lords debate in September 2003, *House of Lords: Official Report (Hansard)*, 8 September 2003, cols. 121-3.

judiciary from the Lord Chancellor (a senior lawyer and lord, but a political appointee and member of the Cabinet) to the Lord Chief Justice of England and Wales (the most senior judge).¹¹ The Supreme Court began sitting in 2009, once the refurbishment of its new home – the former Middlesex Guildhall – was complete.

Our concern here is with the effect of physical relocation of the highest court.

Crossing the road meant that it was no longer within the House of Lords. Did that relocation affect the relationship between the highest court and the legislature? Did that removal from Parliament also have consequences for the relationship of the court to the executive?

We treat, first, the consequences of having the Appellate Committee as part of Parliament before addressing the effects of its translation to the Supreme Court, a move that in geographic terms was a short one – a couple of hundred yards – but arguably, as we shall explore, in political terms was a considerable distance.

Effect of shared location

There were arguably benefits to both Parliament and the courts in having the Appellate Committee of the House of Lords as the highest court of appeal.

The fact that the law lords were part of the House of Lords served, perhaps counter-intuitively, to enhance the functional separation of the legislature and the courts. In

¹¹ See Rt Hon Sir Jack Beatson, 'The new Model Judiciary and the Other Two Branches of State', *The UK Supreme Court Yearbook*, Vol. 6, 2015, pp. 77-92.

terms of models of judicial-legislative relations, the one that has characterised the UK has been the *respective autonomy model*.¹² In this model, the two branches are, in functional terms, strangers to one another. Each recognises the distinct role of the other. As Lord Nicholls of Birkenhead put it in the *Wilson* case (discussed below): ‘Parliament enacts legislation, the courts interpret it and apply it’.¹³ The twin pillars of the UK constitution identified by Dicey – parliamentary sovereignty and the rule of law – are not of equal weight nor mutually exclusive, but the two branches operate in such a way as to ensure that each operates in its respective sphere. In Dicey’s classic definition of parliamentary sovereignty, Parliament ‘has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament’.¹⁴ The courts enjoy the common law power to declare void any action that runs counter to the principle of natural justice. However, in Dicey’s formulation, law emanating from the courts – ‘judicial legislation’ – ‘is, in short, subordinate legislation’.¹⁵ However, the doctrine that establishes that inferiority rests on judicial acceptance. Judicial obedience to the doctrine, according to H. W. R. Wade, constitutes ‘the ultimate political fact upon which the whole system of legislation hangs’.¹⁶ Some *obiter dicta* in recent cases suggest that this

¹² Lord Norton of Louth, ‘Parliament and the Courts: Strangers, Foes or Friends?’ *The UK Supreme Court Yearbook*, Vol. 6, 2015, p. 53.

¹³ *Wilson and others v. Secretary of State for Trade and Industry* [2003] UKHL 40, para.55.

¹⁴ A. V. Dicey, *An Introduction to the Law of the Constitution* (London: Macmillan, 1959), 10th edn., pp. 39-40.

¹⁵ Dicey, *An Introduction to the Law of the Constitution*, p. 60.

¹⁶ H. W. R. Wade, ‘The basis of legal sovereignty’, *Common Law Journal*, 1955, quoted by E. C. S. Wade, in his introduction to the 10th edition of Dicey.

obedience cannot be taken for granted, with some jurists treating the rule of law as the superior pillar.¹⁷

It is therefore in the interests of each branch to exercise self-restraint. To repeat what we have said elsewhere:

Individual liberty, declared Dicey, was part of the constitution because it was secured by decisions of the courts, extended or confirmed by the Habeas Corpus Acts. Though Parliament could enact measures that run counter to the principles of natural justice, there has been recognition that judges should be left to protect the principle. Parliament and the courts have seen their roles as distinct, Dicey's twin pillars being precisely that: each upright and not clashing with one another. The pillars underpin the constitutional edifice of the United Kingdom.¹⁸

The relationship between the two branches has thus avoided being an adversarial one (the *competing authority model*). The position of the law lords meant that there was no need to generate structures to facilitate a dialogue between Parliament and the courts (the *democratic dialogue model*), given that there was a recognition of respective roles deriving from their presence in the second chamber.

Benefit to Parliament. The benefit to Parliament of this arrangement was that the law lords, by virtue of membership of the upper chamber, had some understanding of the

¹⁷ For a notable example, see Lord Hope of Craighead in *Jackson and others (appellants) v. Her Majesty's Attorney General (respondent)*, [2005] UKHL 56, at para. 107.

¹⁸ Lord Norton of Louth, 'Parliament and the Courts: Strangers, Foes or Friends?' pp. 53-4.

role of Parliament. Law lords were in essence participant-observers. They had offices in the Palace of Westminster, abutting those of other peers. They sometimes spent time in the chamber, listening to debates. By convention, a law lord chaired a sub-committee (sub-committee E, dealing with law and institutions) of the House European Union Committee. As chairs of sub-committees served only three years at a time, several law lords gained experience chairing the sub-committee. (This writer served as a member of the sub-committee under three law lords.) This brought them into contact with other peers and also offered exposure in the chamber, where they introduced reports produced by the sub-committee. Occasionally, a law lord would speak on an issue affecting the administration of justice. Two caused some controversy by voting against legislation to ban fox hunting, an issue that was politically contentious.

The impact of membership of the House may have served to provide a different view, or at least a greater appreciation, of the constitutional place of Parliament to that entertained by lower courts. There is at least one notable case that demonstrated a marked division between the Court of Appeal and the House of Lords in the approach taken to Parliament. The former was somewhat dismissive, the latter protective. The 2003 case of *Wilson and others v. Secretary of State for Trade and Industry*¹⁹ dealt with an issue of credit and whether a particular section of the Consumer Credit Act 1974 infringed the European Convention on Human Rights. The Court of Appeal held that Section 127(3) of the Act was incompatible with the ECHR. In so doing, it examined parliamentary proceedings on the Bill, not as an aid to interpretation, but in order to determine why Parliament enacted that particular section. The court

concluded that the debates provided no answer to the issue, such references as there were, they declared, ‘tend to confuse rather than to illuminate’.

The actions of the court alarmed parliamentary authorities. By examining parliamentary debates to determine if the policy behind the Act was justifiable in terms of the ECHR and proportionate to the remedy proposed, the Court was arguably ‘questioning’ proceedings in Parliament, in breach of Article 9 of the Bill of Rights 1689.²⁰ The case was appealed to the House of Lords. Though their Lordships recognised that there were occasions when resort to *Hansard* [the official report of parliamentary proceedings] may be necessary as part of a statutory ‘compatibility’ exercise, such occasions were likely to be rare. In the judgment of Lord Nicholls of Birkenhead, ‘The present case is not such an occasion’.²¹ In the view of Lord Hope of Craighead, care had to be taken not to stray beyond the search for material that will simply inform the court into the forbidden territory of questioning the proceedings of Parliament. ‘To suggest, as the Court of Appeal did at [2002] QB 74, para 36, that what was said in debate tends to confuse rather than illuminate would be to cross that boundary. It is for Parliament alone to decide what reasons, if any, need to be given for the legislation that it enacts. The quality or sufficiency of reasons given by the promoter of the legislation is a matter for Parliament to determine, not the court.’²² Similarly, Lord Hobhouse of Woodborough deemed it ‘an unacceptable approach and

¹⁹ *Wilson and others v. Secretary of State for Trade and Industry* [2003] UKHL 40.

²⁰ Philip Norton, ‘Parliament and the Courts’, in Nicholas D. J. Baldwin (ed), *Parliament in the 21st Century* (London: Politico’s, 2005), p. 319.

²¹ *Wilson*, para. 66.

²² *Wilson*, para. 117.

likely to give rise to abuse'.²³ He also made an observation reflecting upon the impact of being a member of the House:

Judicial experience has taught me, *particularly since I was appointed a member of this House*, that the attempts by advocates to use Parliamentary material from Hansard as an aid to statutory construction has not proved helpful and the fears of those pessimists who saw it as simply a cause of additional expense in the conduct of litigation have been proved correct.²⁴

[emphasis added]

Lord Nicholls echoed the core constitutional point about the respective role of the two branches: 'The House sitting in its judicial capacity is keenly aware, as indeed are all courts, of the importance of the legislature and the judiciary discharging their own constitutional roles and not trespassing inadvertently into the other's province.'²⁵ The case may suggest that this sensitivity is enhanced by the place of the Appellate Committee, generating a greater appreciation of protecting Parliament's position that was apparent in the Court of Appeal. Despite the words of Lord Nicholls, the implication was that the Court of Appeal was not 'keenly aware' and the House of Lords was making clear that courts were expected to stay their side of the boundary.

We cannot prove that the House of Lords would have given a different judgment had it not been part of the second chamber of Parliament, but the difference between the

²³ *Wilson*, para. 143.

²⁴ *Wilson*, para. 140.

²⁵ *Wilson*, para. 54.

approach of the two courts is stark. The law lords not only rejected the approach taken by the Court of Appeal, but did so in terms that constituted the equivalent of a judicial admonishment.

This understanding and appreciation of the role of Parliament may also find some resonance in the reluctance of at least half of the law lords to decant the Palace of Westminster upon the creation of the Supreme Court. The law lords published a memorandum in response to a consultation on the proposal for a Supreme Court, with half arguing that the move was unnecessary and potentially harmful.²⁶ They stressed the benefit to both sides. 'They believe that the Law Lords' presence in the House is of benefit to the Law Lords, to the House, and to others including the litigants.'²⁷ Interestingly, reverting to our earlier observation about the importance of design, they added: 'Appeals are heard in a unique, suitably prestigious, setting for this country's final court of appeal.'

This appreciation may also be reflected in the willingness of law lords to engage in the work of the House of Lords when they retired from the Supreme Court. One, former Deputy President of the Court, Lord Hope of Craighead, was elected Convenor of the Cross-bench Peers (the group of peers with no party political affiliation) shortly after returning to the House. Former President of the Court, Lord Phillips of Worth Matravers, served on a joint committee of both Houses examining a draft Bill on

²⁶ *The Law Lords' response to the Government's consultation paper on Constitutional reform: A Supreme Court for the United Kingdom* (House of Lords, CP 11/03, 27 October 2003), <http://www.Parliament.uk/documents/judicial-office/judicialscr071103.pdf> Accessed 14 August 2017.

²⁷ *The Law Lords' response to the Government's consultation paper on Constitutional reform*, para. 2.

prisoner voting rights. Another, Lord Brown of Eaton-under-Heywood, became an active participant in debates, especially on legal issues.

It is also possible to develop a case for a ripple effect, arguing that sitting within Parliament gives one an appreciation of the legislature, not just in terms of the very body of which one is a member, but legislatures generally. This has relevance in the context of the United Kingdom, with the creation of elected bodies in Scotland, Wales and Northern Ireland. They were created by statute and the role of the courts is to interpret statutes. There was some dispute as to the extent to which the bodies should be given latitude beyond a narrow interpretation of the words of a statute. The issue came up in the *Axa* case in 2011,²⁸ by which time the Supreme Court had been created, but with the Justices largely having served as law lords. The validity of an Act passed by the Scottish Parliament was challenged. The court found that it was the elected Scottish Parliament that should determine social policy, not judges. As Lord Hope of Craighead observed:

The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country's best interests as a whole. A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved

²⁸ *Axa General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland)* [2011] UKSC 46.

legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances.²⁹

Again, we cannot prove that the Court would not have come to this judgment had it not comprised former law lords. We can only record the opinion of Lord Hope and the concurrence of the other judges in according the margin of appreciation that it did to the elected Scottish Parliament.

Benefit to the court. The House of Lords had some appreciation of the role of the highest court and were therefore in a position to protect it, if necessary to act as a buffer between it and the executive. Peers who were not law lords could variously see those who were. In addition to participating in some of the work of the House, the law lords could be seen in the dining rooms and gathering for a morning talk in the library.

Awareness of the work of the law lords may have enhanced the willingness of the House to serve in a protective role, standing as a shield between the Appellate Committee and attacks on the law lords when they issued controversial judgments. This role may have assumed greater significance as the link between judges – and the legal profession generally – and the House of Commons was gradually eroded. The late 20th Century saw a reduction in the number of MPs who had practised as lawyers for a considerable time before becoming MPs and few who continued in practice after

²⁹ *Axa*, para. 49.

election. There was a notable decline in the number of judges who had previous experience as an MP or minister.³⁰ The perceived dearth of senior and suitably qualified lawyers in the House of Commons resulted in the Attorney General, the Government's senior law officer, being recruited in 1999, for the first time since 1700, from the House of Lords.

As the Lord Chief Justice, Lord Thomas of Cwmgiedd, observed in his 2017 Michael Ryle Memorial Lecture, 'One consequence of this greater separation between Parliament and judiciary has been the risk that the two will have a decreasing understanding of their constitutional roles, ways of working and ways of working with each other'.³¹ He offered an illustration of the problems that may arise: 'There have been one or two instances of MPs writing to judges on behalf of constituents who are involved in proceedings. There has been a suggestion, no doubt inadvertent, that the letters should or could be taken account of by the judges dealing with the proceedings. I say inadvertent because I am sure no Member of Parliament would deliberately seek to influence a judicial decision... A proper understanding of the constitution would preclude that possibility.'³²

This has placed greater emphasis on the House of Lords. The House in its legislative capacity was able to act as something of a guardian of the House in its judicial

³⁰ See the comments of Lord Thomas of Cwmgiedd, Lord Chief Justice, 'The Judiciary, the Executive and Parliament: Relationships and the Rule of Law', Address to the Institute for Government, 1 December, 2014, p. 2.

³¹ Lord Thomas of Cwmgiedd, 'The Judiciary within the State – the Relationship between the Branches of the State', Michael Ryle Memorial Lecture, 15 June 2017, para. 22.

³² Lord Thomas of Cwmgiedd, 'The Judiciary within the State – the Relationship between the Branches of the State', para. 24.

capacity.³³ Ironically perhaps, having the highest court within the House of Lords helped protect its independence, certainly in relation to the executive. This was a point stressed by a law lord, Lord Hobhouse of Woodborough, in a debate in the Lords in 2003: ‘The independence from the executive of the Appellate Committee is, in fact, enhanced by its being sheltered under the wing of your Lordships’ House.’³⁴ After reforms to the House of Lords in 1999, no one party enjoyed a majority in the House and so the Government had to treat the House with some caution and to engage with it, rather than take it for granted.³⁵

Effect of relocating

There are differing, but not mutually exclusive, assessments as to the consequences of the highest domestic court ceasing to be the Appellate Committee of the House of Lords and becoming the Supreme Court.

First, there is the argument that the move has strengthened the court through giving it an independent status and emboldening the members of the court in reaching judgments. The Government, in proposing the creation of the Supreme Court, argued that it would ‘reflect *and enhance* the independence of the Judiciary from both the legislature and the executive’³⁶ [emphasis added]. As one member of the Court, who had opposed the move from the Palace of Westminster, conceded, the creation of the

³³ Lord Norton of Louth, ‘Parliament and the Courts: Strangers, Foes or Friends?’ p. 66.

³⁴ House of Lords: Official Report (*Hansard*), 8 September 2003, col. 126.

³⁵ See Philip Norton, *Reform of the House of Lords* (Manchester: Manchester University Press, 2017).

³⁶ Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, CP 11/03, July 2003, p.4.

Supreme Court ‘has changed the public’s perception of what the tribunal stands for.

The very fact that these decisions are now being issued in the name of the court – of the Supreme Court indeed – does seem to have given them an added authority’.³⁷ In the words of one commentator, ‘The court is, after all, making a difference. It is changing the way the public thinks about law and the judges. Its impact seems likely to increase. We – and the judges – had better get used to it.’³⁸

Second, there is the claim that it has rendered the court more exposed in the event of criticism by the media and the executive. The relocation of the court took place at a time when the UK constitution was acquiring a marked juridical dimension, on a scale unknown since the Glorious Revolution of 1688/89 when the courts had accepted the doctrine of parliamentary sovereignty. Membership of the European Union, the enactment of the Human Rights Act 1998, and the devolution of powers to elected bodies in Scotland, Wales and Northern Ireland, all created new roles for the courts.³⁹ They found themselves in a position where they had to determine whether certain provisions of UK law were compatible with EU law. They had to adjudicate on whether certain provisions were compatible with the European Convention on Human Rights. They had to determine whether devolved governments and legislatures were acting within the terms of devolution legislation.

³⁷ Lord Hope of Craighead, ‘The creation of the Supreme Court – was it worth it?’ Gresham College Lecture, 24 June 2010.

³⁸ Martin Kettle, ‘The UK supreme court is changing the way we think about law’, *The Guardian*, 26 October 2011.

³⁹ Philip Norton, *Parliament in British Politics*, 2nd edn. (Basingstoke: Palgrave Macmillan, 2013), pp.182-4, and See Norton, ‘Parliament and the Courts: Strangers, Foes or Friends?’

The courts were in a position where judgments could be politically contentious. A number attracted considerable criticism from the media and ministers. As the same commentator who noted that the impact of the court was likely to increase conceded, the effect of having to adjudicate on such matters opened the court up to greater public attention. He observed that the very fact of the impact would create conflict:

The supreme court has strengthened the saliency of the judicial process merely by coming into existence. It is far more obviously the national temple of justice than its predecessor ever was. It has made itself an institution that matters and that has an identity. Though its influence is being and will continue to be felt more by osmosis than by crisis, the direction of travel increasingly places the court at odds with parliament and with ministers.⁴⁰

Criticism by some media of judges in both the High Court and Supreme Court was marked in 2017 in the *Miller* case, when the courts held that notification of the UK's intention to withdraw from the European Union could not be undertaken by the use of prerogative powers.⁴¹ Attacks on the High Court judges were especially vitriolic, branded by one tabloid newspaper as 'enemies of the people'.⁴²

⁴⁰ Kettle, 'The UK supreme court is changing the way we think about law'.

⁴¹ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5. The case was held to be of such constitutional significance that all members of the Court sat to hear the case.

⁴² See Alisa McNeil, 'Miller and the media: Supreme Court judgment generates more measured response', Constitution Unit Blog, 9 February 2017, <https://constitution-unit.com/2017/02/09/miller-and-the-media-supreme-court-judgement-generates-more-measured-response/> Accessed 14 August 2017.

The potential for conflict is likely to become more marked over time, not least as the understanding by peers of the role of the court diminishes over time. The diminution may be gradual, not least given that retired law lords currently resume membership of the House of Lords.⁴³ (The House also retains among its members three former Lord Chancellors.) Even after the law lords translation to the Supreme Court, there is evidence of the House of Lords continuing to play a guardianship role. This was apparent following the *Miller* case, when the failure of the Lord Chancellor, Liz Truss, to defend the judges led some peers, including two former Lord Chancellors, to defend the position of the judges.⁴⁴

For our purposes, it is not necessary to determine the persuasiveness of these two assessments. The important point is that each is premised on a change of place having consequences for the relationship between the courts and the other organs of the state.

However, in constitutional terms, the most obvious effect has been to change the relationship between court and legislature from one of *respective autonomy* to one of *democratic dialogue*. The presence of the law lords, we have argued, ensured an awareness of the functional independence of each branch. The creation of the Supreme Court precipitated the need for a mechanism for dialogue between the branches that were now demonstrably separate and lacking a means of discourse. The 2005 Act not only removed the law lords from membership of the House of Lords, it also removed the Lord Chief Justice, who was thus denied a platform to raise concerns as to the administration of justice.

⁴³ This, though, may not continue as there has not developed the practice of elevating new members of the Supreme Court to the peerage, either on appointment to the Court or upon retirement from it.

⁴⁴ See House of Lords: Official Report (*Hansard*), 7 November 2016, cols. 929-40.

The point was well made by the Lord Chief Justice, Lord Thomas of Cwmgiedd in the 2017 Michael Ryle Memorial Lecture:

Thus, although one of the objectives of the 2005 Act was to make clear the position of the judiciary as a separate and independent branch of the State, 10 years on it has become very clear that a proper method of working between the judiciary, the Executive and Parliament has had to be established... somewhat paradoxically the 2005 Act and the agreements associated with it have not only provided the necessity for working together, but, if observed, provided a framework for that to happen in a structured way.⁴⁵

There has been a fundamental shift, with the judiciary and Parliament developing a more structured means for discourse between the two. In part, this has been by formal communication. The 2005 Act confers on the Chief Justice of each part of the UK a power to ‘lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.’⁴⁶ However, a more regular and pervasive dialogue has been facilitated through the use of select committees in the two Houses, principally the Constitution Committee in the House of Lords and the Justice Committee in the House of Commons. As we have argued elsewhere, in

⁴⁵ Lord Thomas of Cwmgiedd, ‘The Judiciary within the State – the Relationship between the Branches of the State’, para. 17.

⁴⁶ Constitutional Reform Act 2005, section 5(1).

respect of human rights, it has been facilitated by the Joint Committee on Human Rights.⁴⁷

In the House of Lords, the Constitution Committee has established itself as a major influence on constitutional developments in the UK. In their study of the committee, Le Sueur and Simson Caird identify three principal functions, one of which is ‘to be a forum for dialogue between parliamentarians and the judiciary – an important development in a time of rapid and far-reaching reform of the role and constitutional status of the judiciary and as a safety valve in times of tension between ministers and judges’.⁴⁸ It has undertaken regular meetings with the President (and sometimes also the Deputy President) of the Supreme Court, as well as the Lord Chief Justice, and undertaken inquiries related to the judiciary, including judicial recruitment. The Lord Chief Justice took the opportunity of his appearance before the committee in March 2017 to criticise the Lord Chancellor for failing to defend the judges in the *Miller* case.⁴⁹ In his written evidence, he also identified ten critical issues facing the justice system and the judiciary in England and Wales.⁵⁰ Appearing before the committee the following week, the President and Deputy President of the Supreme Court were

⁴⁷ Lord Norton of Louth, ‘A Democratic Dialogue? Parliament and Human Rights in the United Kingdom’, *Asia Pacific Law Review*, Vol. 21 (2), 2013, pp. 141-66.

⁴⁸ Andrew Le Sueur and Jack Simson Caird, ‘The House of Lords Select Committee on the Constitution’, in Alexander Horne, Gavin Drewry, and Dawn Oliver (eds), *Parliament and the Law* (Oxford: Hart Publishing, 2013), p.282.

⁴⁹Select Committee on the Constitution, Corrected oral evidence: Oral evidence session with the Lord Chief Justice, Wednesday, 22 March 2017, <http://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/CC220317LCJ.pdf> Accessed 14 August 2017.

⁵⁰ Select Committee on the Constitution, Written evidence of the Lord Chief Justice, Wednesday, 22 March 2017, <http://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/written-evidence-lcj2017.pdf>. Accessed 14 August 2017.

able to voice concerns about the implications for the courts of legislation for the UK to exit the European Union.⁵¹

The work of the committee in relation to the judiciary has, according to Le Sueur and Simson Caird, sought to achieve four main goals: as a facilitator (enabling senior judges to raise concerns); to hold ministers to account for their judiciary-related responsibilities; to call the senior judiciary to account, for example on handling the news media; and oversight of the new constitutional architecture.⁵² The committee has not only acted essentially as a medium through which concerns could be expressed by senior judges, but also as a means of judges in effect communicating with one another. This was apparent in its inquiry into judicial appointments, when some judges clearly took views very much opposed by others.

The appearance of judges before the committee, as well as before the Justice Committee (formerly the Constitutional Affairs Committee and before that the Lord Chancellor's Department Committee) in the House of Commons, has been a feature of dialogue between Parliament and the judiciary. According to the research of Gee, Hazell, Malleson and O'Brien, in the ten years from January 2003 (when the decision to create a Supreme Court was announced, and a new committee created in the Commons to cover the Lord Chancellor's Department) to December 2013, there were

⁵¹ Select Committee on the Constitution, corrected oral evidence: Oral evidence session with the President and Deputy President of the Supreme Court, Wednesday, 29 March 2017, <http://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/CC290317SupremeCourt.pdf> Accessed 14 August 2017.

⁵² LeSueur and Simson Caird, 'The House of Lords Select Committee on the Constitution', pp. 304-7.

148 occasions when oral evidence was given by 72 salaried judges.⁵³ ‘If international judges, retired judges, deputy High Court judges and magistrates are included, the number of judges who gave evidence rises to 185 individuals’.⁵⁴ As they note, ‘As judicial contributions to debates in the Lords declined from the late 1990s, there was a significant and sustained (if erratic) increase in the number of judges who gave evidence before committees, with 2003 being a particular turning point’.⁵⁵

Over time, both Houses of Parliament have become more specialised through the use of committees.⁵⁶ The start of the 21st Century saw the existing committees complemented by the creation of both the Joint Committee on Human Rights and the Constitution Committee of the House of Lords. As we have seen, a committee to scrutinise the Lord Chancellor’s Department was appointed in the House of Commons. These developments enabled both Houses to respond to the situation created by the translation of the judicial function of the Lords to the Supreme Court. There was a framework in place for developing a democratic dialogue between Parliament and the judiciary. In evidence to the Constitution Committee in 2015, the President of the Supreme Court, Lord Neuberger, presented with the three models of legislative-judicial relations, acknowledged the change that had taken place:

⁵³ Graham Gee, Robert Hazell, Kate Malleson and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge: Cambridge University Press, 2015), p. 101.

⁵⁴ Gee, Hazell, Malleson and O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution*, pp. 101-2.

⁵⁵ Gee, Hazell, Malleson and O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution*, p. 102.

⁵⁶ See Norton, *Parliament in British Politics*, pp. 126-36.

It has tended to be the first [respective autonomy], but we have got more of the third [democratic dialogue], and that is a good thing provided we respect each other's boundaries. I would hope that we can avoid the second [competing authority]. So far we have, and I hope that will continue.⁵⁷

There has thus been a dynamic deriving from the physical separation of the highest domestic court from the legislature. The short journey by the nation's senior judges across Parliament Square has served to alter the basic relationship between the judiciary and the legislature. Separation has created a new framework for maintaining the Diceyan pillars of the UK constitution.

Conclusion

Place matters. The distinct location of each institution denotes its separateness in constitutional terms. The extent of distance between court and legislature is under-explored and merits more consideration. The UK has a distinctive constitutional structure, but that does not detract from the value examining the relocation of the highest domestic court. The core point is not the particular form of the relationship with the other institutions, but the fact that the relationship is affected by a move from one location to another. The structure of the courts in the UK – until 2009, not just sharing, but having an overlap of membership with the upper house – may be unique. However, what evidence we have from the move of the US Supreme Court from the Capitol to its new home supports the view that a change in the relative place of

⁵⁷ Constitution Committee, Evidence session with the President and Deputy President of the Supreme Court, Evidence Session No. 1, Wednesday, 8 July 2015, Q7. <http://www.parliament.uk/documents/lords-committees/constitution/union-and-devolution/CC080715-supreme-court.pdf!docid=2493633!.pdf> Accessed 14 August 2017.

legislature and court has consequences for judicial-legislative relations. The change is unlikely to be uniform from nation to nation, and may be minor, but transplants rarely occur without some collateral impact.

We conclude on what may appear a paradox deriving from our study. Prescribing a clear physical separation between court and legislature – exemplified in those nations in which the two reside in different cities – in order to protect the independence of each may actually leave the court isolated and potentially vulnerable to criticism by legislators and the executive through lack of understanding by legislators of the constitutional role of the courts. Isolation has its merits, but it may also bring its problems.