SUPREME COURT

CONOR GEARTY

The excitement generated by the establishment of the UK's Supreme Court, now at last up and running, is highest amongst those who know least about law. True there is a grand and suitably nouveau gothic building on an ancient site within which the newly styled 'Justices' have begun to do their work. There can be little doubt that the former Middlesex Guildhall is a more suitable environment for a top court with constitutional ambitions than a few committee rooms scattered along a hidden-away passage in the upper unelected chamber of our ostensible democracy, which is where its predecessor, the appellate committee of the house of lords ('the law lords'), used to meet. The web presence too is predictably grander and more loquacious: where once you scrambled to read the tiny note that indicated who was who from one of the very few seats available behind the lawyers, and asked the barristers if you wanted to find out what was going on, now you can browse at leisure through not only potted biographies of the justices (with pictures) and learn about pending cases, but you can also read about 'customer satisfaction', 'user group meetings' and have other 'corporate information' whisked to you at the touch of a finger. Almost everything will be filmed as a matter of course and it is anticipated that some of the proceedings will be broadcast – another unique aspect of court proceedings in the UK.

The knowing lawyers' response to this excitement is to say in a jaded kind of way that it is all mere appearance, the noise designed to camouflage the substantive silence within. The new court receives the adjudicative powers previously enjoyed by the law lords, extending to cases raising matters of great public importance across the whole United Kingdom for civil matters and for all but Scotland with regard to crime. True the court will also be able to adjudicate on points of conflict between central government and the devolved authorities in Edinburgh, Cardiff and Belfast, but this hardly counts as a new departure, the jurisdiction having been previously exercised by the antiquated judicial committee of the privy council, a kind of residuary legatee for all the legal powers that no other bodies can or want to reach. But in the law establishing the court there is no explicit opportunity given to strike down parliament's statutes, or to pronounce on proposed laws in advance of their enactment, or to subjugate law to the requirements of human or civil rights as interpreted by the justices. In other words, to put it crudely, the Court is not to be allowed to do exactly the kinds of things that mark a court out as Supreme. It is like giving the referee a fabulous new kit and great hi tech support but no whistle with which to subject the fight between the two opposing teams to any rules other than those that they themselves choose to follow.

So are the cynical lawyers or the expectant public right about the Supreme Court? It may be that a number of important factors are underestimated by the lawyers, addicted as they are to the exclusive power of adversarial argument. The first of these is architectural. Organisations draw strength from where they are as much as from what they are empowered to do. In the United States, the era of judicial activism (of first a reactionary and then a progressive nature) coincided with the decision to build and then the move in 1935 into what the Oxford Companion to the US Court describes as 'a grandiose temple of white marble, with a central portico and matching wings'. Such a workplace seemed positively to demand case-law commensurate to its greatness. Perhaps the grandiloquently mock Gothic Middlesex Guildhall will have the same effect? Second there is the sociology of the new court. Here will be a body of men and (so far) one woman, no longer quaint

lords and ladies showcasing their anachronism on the international conference and comparative judicial studies circuit but rather now proper Justices like their American, Canadian, Irish, South African, Indian colleagues (to mention just a few places among many). With one huge exception however – the UK justices will be unable to strike down any primary legislation at all: how supreme is that? And this then begs the key question: how long will it be before the justices buck against remaining in such an obviously lower tier in comparison with their foreign counterparts, developing their powers as a matter of corporate pride as much as constitutional principle?

Such an expansion of power is by no means unthinkable, even without parliamentary approval. Parliament's sovereignty has survived the creation of the Supreme Court but what is not often appreciated is that parliamentary sovereignty is itself a legal artifice: it exists because judges respect as the fundamental rule of the British constitution the basic fact that bits of paper passed by the Commons and the Lords with the assent of the Crown are unchallengeable in court. Parliament did not tell the judges this because before it was known to be the case Parliament had no means of communicating it – a Parliament (Definition of Itself) Act is a logical impossibility. And what the judges have made, they can unmake, or at least vary. In 2005, tempted by the Countryside Alliance's increasingly desperate and well-funded efforts to resist the statutory ban on fox-hunting, some of the law lords (as they then were) allowed themselves to suggest that there may be basic values (identified and policed by themselves) which not even an Act of Parliament could lawfully contradict.

This is a hard point to make when all you are is an anonymous figure in a committee of an unelected chamber, but less so perhaps when you belong to something that Parliament itself has named as Supreme. Perhaps the 'basic values' of the constitution (respect for human rights say as well as a right of access to the courts and perhaps also a commitment to the rule of law) will be 'found' by the justices to be part of the (hitherto largely hidden) 'underlying values of the British constitution' to which parliament as well as ministers and the lower courts must now subordinate themselves. This may take time but it is entirely possible, indeed the creation of a supreme court may well have created an irresistible momentum in exactly this direction. If so we will have arrived at a US system by stealth, but there is nothing so unusual about that – the American system of judicial review was itself smuggled into law by the US Supreme Court in 1803 (in the famous case of *Marbury v Madison*). One of New Labour's last constitutional reforms may yet prove to be the most enduring (Parliament – by definition – will not be able to stop it) and also therefore the most important.