

# Constitutional Crisis Over the Proposed Supreme Court for the United Kingdom

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Although relatively little noticed on this side of the Atlantic, the United Kingdom is in the midst of a constitutional crisis over proposals to reform the judiciary and to establish a Supreme Court for the first time in their history. Resulting primarily from long standing debates over how best to “modernize” ancient British institutions and practices, these reforms are also influenced by the immediate and serious practical pressures facing any government grappling with global threats to national security. Accordingly, the debate in the U.K. has important implications for all democratic governments seeking to uphold “the rule of law” and preserve liberty in the face of international terrorism.

## THE INTRODUCTION OF PROPOSALS FOR REFORM

Prime Minister Tony Blair stunned the British legal community on June 12, 2003, by announcing the creation of a Supreme Court for the United Kingdom, the abolition of the office of Lord Chancellor, and an entirely new approach to selecting the country’s judiciary.<sup>1</sup> These changes are aimed at separating the British judiciary from the executive and legislative functions of government, and incorporate proposals that had generally

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<sup>1</sup> See, Department of Constitutional Affairs, CP 11/03, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE U.K. (14 July 2003) at 4-6, <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> [hereinafter CONSULTATION PAPER: COURT].

been part of the Labour Party agenda since coming into office in 1997.<sup>2</sup> Nevertheless, the announcement of these constitutional reforms actually came as an unexpected part of a relatively routine mid-term cabinet reshuffle. In effect, Blair attempted to sweep away 1400 years of British constitutional history and significantly alter the country's unwritten constitutional conventions with a press release.<sup>3</sup>

While the British typically regard the ability to evolve and adapt to new circumstances over time as one of its principal strengths of their unwritten constitution, when compared to the more rigid structure and amendment process of a written constitution such as that found in the United States for example, announcing major constitutional reforms in this fashion was seen by many within and without the judiciary as ill-considered at best. Following upon various government sponsored legislative acts that incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms into British domestic law,<sup>4</sup> devolved greater legislative and executive authority to Northern Ireland, Scotland, and Wales,<sup>5</sup> and removed the right of most hereditary peers to sit in the House of Lords,<sup>6</sup> the government's announcement greatly surprised the Conservative opposition and many others. Characterized as a "ragbag"<sup>7</sup> of proposals and

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<sup>2</sup> See Oral Evidence Before the House of Commons Select Committee on the Lord Chancellor's Department, June 30, 2003, Question Nos. 51-52, <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmlcd/903/3063001.htm> [hereinafter EVIDENCE.]

<sup>3</sup> See, George Jones and Joshua Rozenberg, *Blair Casts Aside Legal History in Radical Reshuffle*, The Daily Telegraph, June 13, 2003, at 1; *Pegs and Holes, Institutional Reform, New Labour, and a Cabinet Reshuffle*, The Times, June 13, 2003, at 25.

<sup>4</sup> Human Rights Act 1998, 1998 Chapter 42, <http://www.hmso.gov.uk/acts/acts1998/19980042.htm>.

<sup>5</sup> Northern Ireland Act 1998, 1998 Chapter 47, <http://www.hmso.gov.uk/acts/acts1998/19980047.htm>; Scotland Act 1998, 1998 Chapter 46, <http://www.hmso.gov.uk/acts/acts1998/19980046.htm>; and Government of Wales Act 1998, 1998 Chapter 38, <http://www.legislation.hmso.gov.uk/acts/acts1998/19980038.htm>.

<sup>6</sup> House of Lords Act 1999, 1999 Chapter 34, <http://www.hmso.gov.uk/acts/acts1999/19990034.htm>.

<sup>7</sup> Francis Gibbs, *Three Years Grace for the Title of Lord Chancellor*, The Times, June 14, 2003, at 13.

“yet another trendy constitutional upheaval worked out on the back of an envelope, hopelessly ill-thought through,”<sup>8</sup> these latest reforms were severely criticized for being handled in a manner that was “a bit of a shambles”.<sup>9</sup> Others also noted that “even the best friends of this proposal might have hoped for a better start for it”.<sup>10</sup>

Lord Irvine of Lairg’s immediate resignation and tributes to his role as the “last Lord Chancellor” following the Prime Minister’s announcement,<sup>11</sup> combined with the appointment in his stead of Lord Falconer of Thoroton to the newly created post of Secretary of State for Constitutional Affairs,<sup>12</sup> created an initial impression that these changes were a *fait accompli*. However, even with an unwritten constitution, the process of change is more complex than simply issuing a press statement. As subsequently clarified,<sup>13</sup> that process involves a government consultation paper, soliciting public comments,<sup>14</sup> and culminates with the passage of implementing legislation in Parliament. During this time Lord Falconer serves as Secretary of State for Constitutional Affairs, while also wearing the Lord Chancellor’s wig and robe, as he shepherds the reforms through Parliament.<sup>15</sup> Accordingly, the Constitutional Reform Bill may have started “on

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<sup>8</sup> Greg Hurst, *Lords to Lose a Little Pomp*, The Times, June 13, 2003.

<sup>9</sup> EVIDENCE, *supra* note 2, at Question No. 73.

<sup>10</sup> *Id.* at Question No. 56, comment by Mr. A.J. Beith, Chairman, Committee on Lord Chancellor’s Department.

<sup>11</sup> Peter Riddell, *Players Left in Wings as Stage is Set for New Drama*, The Times, June 13, 2003, at 7.

<sup>12</sup> Phillip Webster, *Emergency Surgery on Cabinet*, The Times, June 13, 2003, at 1.

<sup>13</sup> EVIDENCE, *supra* note 2, at Question No. 40, and *Statement by the Prime Minister on Reshuffle*, <http://www.number-10.gov.uk/output/Page3965.asp>.

<sup>14</sup> CONSULTATION PAPER: COURT, *supra* note 1, at 7.

<sup>15</sup> See Gibbs, *supra* note 7; EVIDENCE *supra* note 2, at Question No. 2.

the back of an envelope,” but as introduced in the House of Lords on February 24, 2004, it actually runs more than 200 pages.<sup>16</sup>

The abolition of the post of Lord Chancellor, a position that dates to 605 and precedes the establishment of Parliament by several centuries, is the keystone of the Bill and the government’s proposals for reform.<sup>17</sup> Historically, the Lord High Chancellor and Keeper of the Great Seal of the Realm acted as the sovereign’s secretary and chief administrator.<sup>18</sup> As a key figure in the Royal Council, the Lord Chancellor was also responsible for the courts of equity, and later presided over Parliament when the monarch was unavailable or absent.<sup>19</sup> Today, as a result of the nineteenth century merger of the courts of law and equity, the Lord Chancellor serves as the head of the judiciary for England, Wales, and Northern Ireland, in addition to chairing the Appellate Committee of the House of Lords and presiding over the Judicial Committee of the Privy Council; sits as Speaker in the House of Lords; and is the senior government official responsible for the administration of the courts, and is specifically assigned various responsibilities in nearly 700 separate statutory references.<sup>20</sup> Thus, the Lord Chancellor simultaneously

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<sup>16</sup> See <http://www.publications.parliament.uk/pa/ld200304/ldbills/030/2004030.pdf> However, Lord Woolf also noted that the 200 page length of the bill was “relatively modest by today’s standards”. See Lord Woolf, The Lord Chief Justice of England and Wales, *The Rule of Law and a Change in the Constitution*, Squire Centenary Lecture, Cambridge University, 3 March 2004, available at <http://www.dca.gov.uk/judicial/speeches/lcj030304.htm>. [Hereinafter WOOLF LECTURE].

<sup>17</sup> See *id.* and Department for Constitutional Affairs, *Lord Chancellors: AD605 - Present* <http://www.dca.gov.uk/lcfr.htm>.

<sup>18</sup> Department of Constitutional Affairs, CP 13/03, CONSTITUTIONAL REFORM: REFORMING THE OFFICE OF LORD CHANCELLOR (18 September 2003) at 12-14, <http://www.dca.gov.uk/consult/lcoffice/lcoffice03.pdf> [hereinafter CONSULTATION PAPER: CHANCELLOR].

<sup>19</sup> *Id.*

<sup>20</sup> See *id.* at 16-18, and Annex E. The Lord Chancellor also has a number of other roles, including the administration of certain Royal Peculiars, ecclesial rights and patronage, and supervision of academic institutions and eleemosynary (*i.e.* charitable) corporations. See *id.* at 23-35. See also WOOLF LECTURE, *supra* note 16, at 8.

serves as a judge, parliamentarian, and government minister, and it is this multiplicity of roles which the Constitutional Reform Bill endeavors to untangle.<sup>21</sup>

The Bill does so by abolishing this ancient office, which has been held by figures such as Thomas Becket, Sir Thomas More, and Cardinal Wolsey,<sup>22</sup> and reallocating the Lord Chancellor's various responsibilities. The Bill would assign the Lord Chancellor's ministerial or executive functions for the court system to the Secretary of State for Constitutional Affairs who will neither act as a judge nor sit on any body in a judicial capacity.<sup>23</sup> In a related provision, the Lord Chief Justice is given new authority as the President of the Courts of England and Wales for representing the interests of the judiciary to Parliament and the Secretary of State.<sup>24</sup> The Secretary, and all other government ministers, are also subject to a new statutory obligation to respect and safeguard the continued independence of the judiciary.<sup>25</sup> A further measure designed to bolster the independence of the judiciary from political influence is the transfer of the Lord Chancellor's power to nominate and appoint judges for England and Wales to the Secretary, acting upon the recommendations of an independent Judicial Appointments

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<sup>21</sup> A further layer of complexity is introduced when the special status of the Scottish legal system within the United Kingdom is considered. Unlike England and Wales, the Scottish legal system has a strong civil law component and an entirely different structure in which the Lord Chancellor plays a much diminished role. Moreover the independence of the separate Scottish system is guaranteed by the 1707 Treaty of Union, which has significant implications for the jurisdiction and role of the proposed Supreme Court, operating separate and apart from Parliament. *See e.g.*, Chris Himmsworth & Alan Paterson, *A Supreme Court for the United Kingdom: Views from the Northern Kingdom*, 24 LEGAL STUDIES: THE JOURNAL OF THE SOC'Y OF LEG. SCHOLARS 99 (2004); James Chalmers, *Scottish Appeals and the Proposed Supreme Court*, 8 EDIN. L. R. 4 (2004).

<sup>22</sup> Department for Constitutional Affairs, *Lord Chancellors: AD605 - Present*  
<http://www.dca.gov.uk/lcfr.htm>.

<sup>23</sup> CONSULTATION PAPER: CHANCELLOR *supra* note 18 at 5-6; Constitutional Reform Bill (H.L. 30), Part 1, cl.3, <http://www.publications.parliament.uk/pa/ld200304/ldbills/030/2004030.pdf>.

<sup>24</sup> Constitutional Reform Bill (H.L. 30), Part 1, cl.2,  
<http://www.publications.parliament.uk/pa/ld200304/ldbills/030/2004030.pdf>.

<sup>25</sup> *Id.* at cl.1.

Commission.<sup>26</sup> With regard to the Lord Chancellor's parliamentary role, the Speaker of the House of Lords will be made independent of the executive and the position filled in a manner to be determined by the Lords themselves.<sup>27</sup> Lastly, Parliament's judicial function, as exercised by the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council, is transferred to a new Supreme Court for the United Kingdom, thereby separating the legislature from the judiciary for the first time in Parliament's history.<sup>28</sup>

Irrespective of the merit of these proposals, the manner in which the government announced the reforms and its intent to push the matter to a conclusion in the current session of Parliament continues to have serious repercussions. Opponents of the reform package, including many of the senior members of the judiciary, strenuously assert that the proposals are not well thought out, and that more time is needed to study and understand their implications – an argument that is perhaps bolstered by the special role that a complex mix of practice, convention, and tradition plays in delineating the legitimate scope of authority for the various branches of government when constitutional checks and balances are not specifically enumerated in a written constitution.<sup>29</sup>

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<sup>26</sup> See *id.* at Part 3, and Department of Constitutional Affairs, CP 10/03, CONSTITUTIONAL REFORM: A NEW WAY OF APPOINTING JUDGES (14 July 2003), <http://www.dca.gov.uk/consult/jacommission/judges.pdf>.

<sup>27</sup> See, Constitutional Reform Bill (H.L. 30), Part 1 cl.11, <http://www.publications.parliament.uk/pa/ld200304/ldbills/030/2004030.pdf>, and *Statement by the Prime Minister on Reshuffle*, <http://www.number-10.gov.uk/output/Page3965.asp>.

<sup>28</sup> See, Constitutional Reform Bill (H.L. 30), Part 2, <http://www.publications.parliament.uk/pa/ld200304/ldbills/030/2004030.pdf>.

<sup>29</sup> See *e.g.*, Frances Gibb and Philip Webster, *Ministers Are Breaking the Law, Say Judges*, *The Times*, March 4, 2004, at 1.

In a highly unusual move, the House of Lords voted by a substantial margin to send the government's Constitutional Reform Bill to a select committee, a parliamentary tactic used to block further consideration of proposed legislation employed only once before in modern times.<sup>30</sup> In response, the government apparently considered withdrawing the bill from the House of Lords, reintroducing it into the House of Commons, and eventually seeking its passage over the Lord's objection under the authority of the Parliament Acts,<sup>31</sup> which prevents the House of Lords from blocking legislation in two consecutive sessions of Parliament.<sup>32</sup> Although a less confrontational approach won out, the attitudes and comments revealed during this parliamentary maneuvering are particularly telling.

While the judiciary and the House of Lords criticized the government for proceeding with major constitutional changes with insufficient preparation or thought, they were in turn accused of attacking the government's Bill, at least in part, because they oppose the Labour government's plans to abolish the remaining hereditary peers, resulting in an upper house that is entirely appointed.<sup>33</sup> Peter Hain, the Labour party Leader of the House of Commons, declared that by referring the Bill to a select committee what the "peers are proposing is completely undemocratic... We cannot allow it to happen. Peers are being incited by Michael Howard [the leader of the Conservative Party] to overturn the will of the elected chamber.... That is absolutely undemocratic and we cannot allow it to happen."<sup>34</sup> Lord Falconer also said that he feared that referring the Bill to a select

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<sup>30</sup> Greg Hurst and Gabriel Rozenberg, *Supreme Court Bill "Wrecked" by Lords Vote*, The Times, March 9, 2004 at 10.

<sup>31</sup> Parliament Act, 1949, 13 & 14 Geo. 6, c. 103 (Eng.); Parliament Act, 1911, 1 & 2 Geo. 5, c. 13 (Eng).

<sup>32</sup> Philip Webster, *Labour Vows to Defeat Lords in Power Struggle*, The Times, March 8, 2004, at 1.

<sup>33</sup> See Peter Waugh, *Lords Told To Agree Deal Or Face Cut In Powers*, The Independent (London), March 10, 2004, at 16.

<sup>34</sup> Philip Webster, *Labour Vows to Defeat Lords in Power Struggle*, The Times, March 8, 2004, at 1.

committee would mean that the “elected chamber” would not get a chance to consider it in the current session.<sup>35</sup> Baroness Amos, the Labour leader in the House of Lords voiced a similar opinion after the vote to refer the Bill to the select committee passed, saying, “[b]y this vote, this House - the unelected House [of Lords] - has made it impossible for the democratically elected House of Commons to receive this Bill, promised in the Queen's Speech in November, in time to consider it this session. That is very serious indeed.”<sup>36</sup> Ultimately, however, the government and Lords agreed to continue with the current bill on the understanding that the select committee would consider the reform proposals expeditiously and that, if necessary, the Bill could be carried over into the next Parliamentary session in time to still pass before the next general election in 2005.<sup>37</sup> “It is a compromise but we will get our Bill” according to at least one government minister.<sup>38</sup>

## THE REASONS FOR CHANGE

Complaining that the Lords are frustrating the will of the people’s elected representatives shows a lack of appreciation of the role of the second chamber in providing political balance in a system in which the government is formed by the party that controls the House of Commons – or at least a latent desire for a unicameral legislature. Moreover, given the focus of this particular Bill, it also suggests a lack of understanding of the judiciary’s traditional role in legally limiting the power of the majority in governmental

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<sup>35</sup> Greg Hurst and Gabriel Rozenberg, *Supreme Court Bill “Wrecked” by Lords Vote*, The Times, March 9, 2004 at 10.

<sup>36</sup> Marie Woolf And Ben Russell, *Government Crisis As Lords Scupper Supreme Court Bill*, The Independent (London), March 9, 2004, at 11.

<sup>37</sup> Philip Webster, *Ministers in Deal with Tories After Lords Sabotage*, The Times, March 10, 2004, at 13.

<sup>38</sup> *Id.*

systems characterized by a greater separation of powers than historically has been the case in the United Kingdom.

In Britain, the doctrine of parliamentary sovereignty limits the courts' authority or willingness to overturn legislation, but these limits on judicial review are counterbalanced by the presence of the Law Lords in the legislature and by the judicial functions exercised by Parliament in the Appellate Committee of the House of Lords and in the Privy Council. It is actually the different approach British courts take towards judicial review that fundamentally distinguishes the legal system in the United Kingdom from that in the United States, rather than a reliance upon unwritten or written constitutional provisions. The ability of the courts in the United States to declare legislative or executive actions illegal is, after all, itself a creature of caselaw – and based upon Justice Marshall's 1803 decision in *Marbury v. Madison* rather than the text of the U.S. Constitution itself. Moreover, Marshall's conception of judicial review is inherently undemocratic, and highlights the courts' role in protecting individual interests from the will of the majority as part of a system characterized by a strong separation of governmental powers.

The Constitutional Reform Bill, and many of the other constitutional reforms instituted by Blair's "New Labour" government in the name of modernization, arguably reflect a desire for greater executive authority and freedom from the checks and balances imposed by the structure and conventions of the British constitutional system. The irony of the current proposal is that by throwing away long established constitutional practices, conventions, and institutions, the government may well be setting the stage for a greater

role for judicial review in the British system. Rather than simply providing greater flexibility to government, establishing a Supreme Court and enhancing the separation of the judiciary from Parliament might result in the substitution of new more legalistic limits on executive and legislative authority, replacing the traditional British reliance upon essentially political controls to ensure the responsible exercise of governmental power.

Two different motivations appear to be causing the Blair government to pursue these changes: one based upon longstanding debates over constitutional principle and theory – whether Locke’s or Montesquieu’s view of government should prevail over that of Austin, Bentham, and Hobbes<sup>39</sup> – and the other prompted by the much more prosaic and practical needs of a government fighting an international war on terrorism in the post 9/11 world.

From the perspective of constitutional theory, the traditional British system of legislative sovereignty has its ideological roots in the authoritarian view of the social contract espoused by Thomas Hobbes, whereas the separation of powers doctrine at the heart of the U.S. legal system emphasizes equal and semi-autonomous authorities derived from John Locke’s conception of natural law and restricted governmental power.<sup>40</sup> Very different roles for the judiciary, and different methods for protecting individual liberty, resulted from these contrasting approaches to the nature of government and the source of sovereign power.<sup>41</sup>

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<sup>39</sup> See EVIDENCE, *supra* note 2, at Question No. 22.

<sup>40</sup> G. Marshall, CONSTITUTIONAL THEORY 1-2 (1971).

<sup>41</sup> See, P.L. Fitzgerald, *An English Bill of Rights? Some Observations from Her Majesty’s Former Colonies in America*, 70 Georgetown L.J. 1229, 1282-1296 (1982).

When describing the English legal system in his *Commentaries* in the 18<sup>th</sup> century, Blackstone hypothesized “there is and must be in all [states] a supreme, irresistible, absolute, uncontrolled authority”; and this authority is “the natural, inherent right that belongs to the sovereignty of the state . . . of making and enforcing laws”.<sup>42</sup> “All other powers of the state . . . in the execution of their several functions,” have to conform to this inherent law-making power, “or else the Constitution is at an end.”<sup>43</sup> Parliament – the aggregate body of the Crown, Lords, and Commons – is the law making power in Britain. Therefore, it is in Parliament that the “absolute despotic power” called sovereignty resides.<sup>44</sup> As a consequence, Blackstone reasons that judicial review is necessarily limited:

I know that it is generally laid down...that acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it; and the examples usually alledged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above the legislative, which would be subversive of all government.<sup>45</sup>

Thus, the British judiciary are confined to applying and interpreting the laws passed by Parliament, rather than ruling on their constitutional legality. As Professor Dicey noted in the late 19<sup>th</sup> century, in English history Parliament was the traditional protector of individual rights, and the guarantor of the independence of the judiciary, against overreaching authority of the monarch. According to Dicey’s classic formulation of the

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<sup>42</sup> 1 W. Blackstone, COMMENTARIES 48 (Tucker ed. 1803).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* Bailyn suggests that this doctrine of parliamentary sovereignty is justified in the end by the theory of the ultimate supremacy of the people, a “supremacy that is normally dormant and exercised only at moments of rebellion against tyrannical government” and cites John Locke’s apology for the Glorious Revolution, the *Second Treatise of Government*. See B. Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 160-75 (1967), at 173, 201.

<sup>45</sup> 1 W. Blackstone, COMMENTARIES 9 I (1st ed. 1765).

doctrine of parliamentary sovereignty, Parliament alone has, “the right to make or unmake any law whatever; and further...no person or body is recognized...as having a right to override or set aside the legislation of Parliament.”<sup>46</sup>

So in the United Kingdom:

the Crown remains the source of governmental authority. Sovereignty rests in the Crown in Parliament. The popular will is expressed through the representative institution of Parliament, and the popular or democratic control is exercised through the ballot box . . . . The Crown is controlled by Parliament, the Crown in general being confined to advisors who have the confidence of Parliament. The judiciary, appointed by the executive under Parliamentary authority, is to resolve contests between subjects, or between subjects and the executive, according to the law, unwritten or statutory.

In...contrast...when the American colonies cut the umbilical cord and secured the Treaty of Paris, the people were postulated as the source of power and authority. The representative institutions of government, President and Congress, were denied sovereignty which resided with the people. These institutions operate in government, as it were, by delegation. As a result of American history, the judiciary came to occupy the position of an arbiter between government, and the people, ensuring that rights, natural or human rights, over which power had not been delegated or which was held not to have been delegated, were not infringed by legislative or executive action. If to this situation is added the American Bill of Rights, the difference in judicial traditions is both apparent and explained.<sup>47</sup>

Accordingly, in the U.K. there is neither a separate constitutional court, as found in many civil law systems, nor an “American style” supreme court with the power to overturn legislation. Instead, the Appellate Committee of the House of Lords hears criminal and civil appeals from the courts in England, Wales, and Northern Ireland, and civil (but not

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<sup>46</sup> See A.V. Dicey, *THE LAW OF THE CONSTITUTION* (10th ed. 1959) at 39-40.

<sup>47</sup> Sir Garfield Barwick, Chief Justice of the High Court of Australia, Address Before the Bentham Club, University College, London 9-10 (July 16, 1979) *as quoted in* Fitzgerald, *supra* note 41, at 1272-1273.

criminal) appeals from Scotland.<sup>48</sup> The twelve Lords of Appeal in Ordinary, also known as the “Law Lords,” perform the judicial function of the House of Lords pursuant to the Appellate Jurisdiction Act of 1876, as well as being full members of the House of Lords and life peers.<sup>49</sup> Additionally, the Judicial Committee of the Privy Council in the House of Lords handles questions concerning devolution, that is, whether the Scottish Parliament, the National Assembly for Wales, and the Northern Ireland Assembly, are acting within the proper scope of their respective authority, along with certain appeals from Commonwealth countries.<sup>50</sup> Established pursuant to the Judicial Committee Act of 1833, the Judicial Committee is comprised of the Law Lords, and numerous Privy Councillors, although it is nevertheless separate and distinct from the Appellate Committee with its own jurisdiction.<sup>51</sup> The multiple roles performed by the Lord Chancellor – as the presiding officer on these judicial committees, speaker of the upper house, and member of the government’s cabinet – are a key part of this system, and helped to make the British constitutional structure work as the demands made upon the Crown and government evolved over time.<sup>52</sup> In essence, one of the reasons that the British constitutional structure has been so successful in adapting to changing circumstances over times is because of the *absence* of a formal separation of powers,

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<sup>48</sup> CONSULTATION PAPER: COURT, *supra* note 1, at 10-11, House of Lords, LLN 2003/007, *The Appellate Jurisdiction of the House of Lords* (2003) at 13, <http://www.parliament.uk/documents/upload/HLLAppellate.pdf>.

<sup>49</sup> *Id.*

<sup>50</sup> The Privy Council also has jurisdiction over certain ecclesiastical matters. See CONSULTATION PAPER: COURT, *supra* note 1, at 10-11, House of Lords, LLN 2003/007, *The Appellate Jurisdiction of the House of Lords* (2003) at 17-19, <http://www.parliament.uk/documents/upload/HLLAppellate.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> See Robert Stevens, *Don't Let "Independence" Mythology Halt Reform*, *The Times*, July 15, 2003, Law, at 8.

combined with a powerful traditional culture of mutual respect, restraint, and cooperation among the various arms of government.<sup>53</sup>

Despite its demonstrated historical success, questions nevertheless arise concerning the actual or perceived independence of the judiciary under this structure.<sup>54</sup> Given the importance now placed on a more strict separation of powers in modern times – especially with regard to the various emerging democracies – the current constitutional structure in United Kingdom has been increasingly criticized. For example, even though the U.K. is widely recognized as one of the world’s oldest democracies, an original signatory to the European Convention on Human Rights (ECHR), and a founding member of the Council of Europe, the compatibility of the British constitutional system with terms of the ECHR is not entirely clear. In September of last year, the Parliamentary Assembly of the Council of Europe passed a resolution expressing its concern over Britain’s compliance with the right to a fair trial by independent and impartial tribunals as guaranteed by Article 6 of the ECHR, and specifically endorsed the need for the constitutional reforms proposed by the Labour government.<sup>55</sup> Although this concern may perhaps be mitigated by the Law Lords’ practice of generally refraining from party political debate in Parliament, or recusing themselves from judicial matters when they have actually participated in debate,<sup>56</sup> the Council felt it “essential that even in the absence of concrete challenges, the judiciary should be seen as independent both by

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<sup>53</sup> See, WOOLF LECTURE, *supra* note 16, at 2.

<sup>54</sup> See e.g., Raymond Youngs, *Cold Neutrality? A Comparison of the Standards of the House of Lords with those of the German Federal Constitutional Court*, 20 OXFORD J.LEG. S. 391 (2000).

<sup>55</sup> Council of Europe, Standing Committee on Legal Affairs and Human Rights, *Resolution 1342 on Office of the Lord Chancellor in the Constitutional System of the United Kingdom* (8 September 2003), <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2FTA03%2FERES1342.htm>.

<sup>56</sup> See e.g. *Remarks of Lord Bingham* Hansard, 22 June 2000, column 419.

[those in the U.K.] and by fellow European countries.”<sup>57</sup> Indeed, the European Court of Human Rights held in *McGonnell v United Kingdom*, that there was an apparent (though not actual) lack of impartiality when the Bailiff of Guernsey sat in judgment on a case involving legislation that he participated in passing.<sup>58</sup> The Court of Session in Scotland similarly held in *Starrs v Procurator Fiscal, Linlithgow* that the executive’s systematic reliance on temporary judges who could be discharged at any time without challenge or explanation was inconsistent with an independent judiciary and the right to an impartial trial under the ECHR.<sup>59</sup>

The Council’s resolution and these cases reflect an evolving notion that judicial independence and impartiality must be measured by both subjective and objective standards. As the European Court of Human Rights stated in *Findlay v. United Kingdom*, a “tribunal must be subjectively free of personal prejudice or bias [and] it must also be impartial from an objective viewpoint, that is it must offer sufficient guarantees to exclude any legitimate doubt in this respect.”<sup>60</sup> Beyond the need to objectively demonstrate independence and impartiality within the British judicial system, however, the Council of Europe’s resolution also reflected a concern among the other forty members with written constitutions that the situation in the U.K. “may ... cause

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<sup>57</sup> Erik Jurgens, *Report to the Council of Europe, Standing Committee on Legal Affairs and Human Rights on the Office of the Lord Chancellor in the Constitutional System of the United Kingdom*, Doc. 9798 (28 April 2003), at ¶33, <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FWorkingDocs%2FDoc03%2FEDOC9798.htm>.

<sup>58</sup> *McGonnell v United Kingdom*, (2000) 30 EHRR 289.

<sup>59</sup> *Starrs v Procurator Fiscal, Linlithgow*, [2000] HRLR 191.

<sup>60</sup> *Findlay v. United Kingdom*, [1997] 24 EHRR 221, at ¶73.

confusion, or be abused, in the new member countries.”<sup>61</sup> As the countries comprising the Council, including the U.K., are “repeatedly stressing the judiciary should be a completely independent branch of government” there is a political desire to avoid being seen as directing newly emerging democracies to “do as I say and not as I do”.<sup>62</sup>

Thus, the push for reform is not really driven so much by a need to significantly alter an already well-regarded constitutional system, but rather to update intergovernmental relationships regulated by practice, convention, and informal – largely political – checks and balances, with more defined structures in order to increase confidence in the British constitutional system in line with modern understandings of basic governmental principles. In this sense, the Constitutional Reform Bill is really just the latest iteration of a largely theoretical debate running since at least the 1970s.<sup>63</sup>

The second, more immediate and political, motivation for reform is a desire for greater executive and legislative flexibility as the demands for government services increase, particularly with the need to address the recent rise of global threats such as international terrorism. The way the executive and legislative authority evolves and responds to these pressures poses important practical and pragmatic questions as to how government should operate in the 21<sup>st</sup> century. However, the British judiciary and common law also continues to evolve in the face of these and other new challenges – for example, to

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<sup>61</sup> Erik Jurgens, *Report to the Council of Europe, Standing Committee on Legal Affairs and Human Rights on the Office of the Lord Chancellor in the Constitutional System of the United Kingdom*, Doc. 9798 (28 April 2003), at ¶34.

<sup>62</sup> *See id.*

<sup>63</sup> *See e.g.*, Louis Blom-Cooper & Gavin Gavin Drewryin, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (1972).

address the growth of modern administrative bureaucracy created by executive and legislative action, and to adapt to a world characterized by a multiplicity of different types and sources of law and regulation. Accordingly, if the constitutional balance among the various functions of government in the United Kingdom that was gradually established over many years of incremental change is now to be radically adjusted, as with the Constitutional Reform Bill, the ultimate impact of the proposed reforms may not be entirely predictable – particularly with regard to the scope of judicial review practiced in the United Kingdom.<sup>64</sup>

#### THE PROSPECTS FOR JUDICIAL REVIEW UNDER A REVISED BRITISH CONSTITUTIONAL SETTLEMENT

Notwithstanding the theoretical neutrality and subservience of the courts to Parliament as enunciated by Dicey, the British courts are increasingly prone to exercise their powers to interpret law in creative ways that are starting to look remarkably like what Justice Marshall would recognize as judicial review – especially when it is recalled that Marshall articulated but declined to exercise that power in *Marbury*. Historically, judicial review in the U.K. was confined to restraining the exercise of executive or administrative discretion in excess of the authority granted by legislation. However, even this limited form of review grew dramatically with the expansion of government throughout the late 20<sup>th</sup> century, from a mere 160 cases in 1974 to more than 4,000 in the 1990s.<sup>65</sup> Moreover, Parliament itself has encouraged – and sometime directed – that the courts engage in a broader form of review. Lord Denning spoke of the impact of the “incoming tide” of a

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<sup>64</sup> See WOOLF LECTURE, *supra* note 16, at 9.

<sup>65</sup> *Judges v. Ministers: Courts Step In where MPs Fail to Tread*, The Guardian, February 24, 2003, at 21; *Scales of Justice*, The Times, March 5, 2004, at 27.

different – European style – law following the U.K.’s joining the Common Market,<sup>66</sup> which effectively helped the judiciary to reshape British law to meet European obligations in accord with the European Communities Act of 1972,<sup>67</sup> a trend which presumably will only increase if and when the draft European Constitution is adopted.<sup>68</sup> More recently, devolution of a varying degree of legislative authority to Northern Irish, Scottish, and Welsh regional assemblies, and perhaps even more importantly the Human Rights Act of 1998 (HRA),<sup>69</sup> provide the courts with new powers not only to interpret legislation but to rule on its legality.<sup>70</sup>

The HRA was one of the first major constitutional reforms instituted by the Labour party after it returned to power following nearly twenty years of Conservative government. The Act purports to formally bring the European Convention on Human Rights into U.K. domestic law although, as Britain was a major architect of the ECHR, many of the Convention’s substantive provisions appear at first glance simply to be a codification of common law principles.<sup>71</sup> That view prevailed in the initial years following drafting and signature of the Convention in 1950, and therefore there was no immediate perceived need to expressly incorporate the international obligations of the ECHR into British law, although it was nevertheless cited in hundreds of domestic cases as an aid to the courts in

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<sup>66</sup> *Bulmer v. Bollinger*, 2 All E.R. 1226, 1231 (C.A. 1974) (opinion of Lord Denning).

<sup>67</sup> European Communities Act 1972, 1972 Chapter 68, §2, <http://www.legislation.hmsso.gov.uk/acts/acts1972/20068--b.htm#2>.

<sup>68</sup> See Draft Treaty Establishing a Constitution for Europe, 18 July 2003, <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>; and Europa, *Future of the European Union* web page available at [http://europa.eu.int/futurum/index\\_en.htm](http://europa.eu.int/futurum/index_en.htm).

<sup>69</sup> Human Rights Act 1998, 1998, Chapter 42, <http://www.hmsso.gov.uk/acts/acts1998/19980042.htm>.

<sup>70</sup> *Id.* at §4, <http://www.hmsso.gov.uk/acts/acts1998/80042--a.htm#4>.

<sup>71</sup> See, Lord Donaldson’s comment that “you have to look long and hard before you can detect any difference between the English common law and the principles set out in the Convention, at least if the Convention is viewed through English judicial eyes” in *R v. Secretary of State for the Home Department, ex Parte Brind* [1991] 1 AC 696 at 717.

interpreting domestic law.<sup>72</sup> However, following the British acceptance of an individual right of petition to Strasbourg in 1966, the U.K. lost more than fifty cases – particularly with regard to measures it took to address terrorism in Ireland.<sup>73</sup> The fact that European judges were interpreting and applying the Convention in ways that differed from what British judges might do – and declaring Parliament’s legislation illegal – greatly added to the pressure to “bring the Convention home” and to authorize domestic courts to apply the ECHR directly.<sup>74</sup>

Previous attempts to do so had floundered in the face of the doctrine of parliamentary sovereignty, and the question of how to entrench fundamental rights against their repeal or derogation by the actions of a subsequent, sovereign, Parliament.<sup>75</sup> The HRA essentially ignores the entrenchment issue, and was passed as an ordinary piece of legislation. It simply relies upon a responsible government and legislature to respect the intent and importance of the fundamental rights listed in the Convention and that are made part of domestic law by the Act. In other words, the Labour government took a classically pragmatic British approach to the tough conceptual legal problem posed by parliamentary sovereignty. Lord Irvine of Lairg, the then Lord Chancellor, did so by essentially ensuring that the Act was not seen as a direct assault upon Parliament’s traditional sovereign role.

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<sup>72</sup> See e.g. S. Grosz, J. Beatson, & P. Duffy, *Human Rights: The 1998 Act and the European Convention* (2000); M. Beloff & H. Mountfield, *Unconventional Behaviour – Judicial Uses of the European Convention in England and Wales*, [1996] EHRLR 467.

<sup>73</sup> Les P. Carnegie, *Privacy And The Press: The Impact Of Incorporating The European Convention On Human Rights In The United Kingdom*, 9 *Duke J. Comp. & Int'l L.* 311, 329 (1998).

<sup>74</sup> See, Jack Straw, Home Secretary, *The Human Rights Act 1998 and the European Convention on Human Rights (ECHR)*, <http://jurist.law.pitt.edu/world/ukcor3.htm#Straw>.

<sup>75</sup> See generally, Fitzgerald, *supra* note 41.

The HRA directs that courts and other tribunals are to take the Convention rights and related European decisions into account when rendering their judgments,<sup>76</sup> but they are also directed to construe legislative and public acts as compatible with the ECHR whenever feasible.<sup>77</sup> Only in the rare instances when that is clearly not possible, may the court make a “declaration of incompatibility”<sup>78</sup> and award other appropriate relief, including compensation.<sup>79</sup> Significantly, however, the declaration does not affect the validity, continuing operation, or enforcement of the offending measure.<sup>80</sup> The government or Parliament, rather than the courts, must decide whether or not to act to resolve the issue with a remedial order.<sup>81</sup> Additional provisions in the HRA preserved the U.K.’s preexisting derogations to the ECHR relating to the Prevention of Terrorism Acts and Orders, and the Education Acts, and the ability to modify these or take similar actions in the future<sup>82</sup> – which subsequently became necessary with the Terrorism Act of 2000<sup>83</sup> and the Anti-Terrorism, Crime & Security Act of 2001.<sup>84</sup>

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<sup>76</sup> Human Rights Act 1998, 1998, Chapter 42, §2, <http://www.hmso.gov.uk/acts/acts1998/80042--a.htm#2>.

<sup>77</sup> *Id.* at §3, <http://www.hmso.gov.uk/acts/acts1998/80042--a.htm#3>; §6, <http://www.hmso.gov.uk/acts/acts1998/80042--a.htm#6>.

<sup>78</sup> *Id.* at §4, <http://www.hmso.gov.uk/acts/acts1998/80042--a.htm#4>.

<sup>79</sup> *Id.* at §8, <http://www.hmso.gov.uk/acts/acts1998/80042--a.htm#8>.

<sup>80</sup> *Id.* at §4(6), <http://www.hmso.gov.uk/acts/acts1998/80042--a.htm#4>.

<sup>81</sup> *Id.* at §10, <http://www.hmso.gov.uk/acts/acts1998/80042--a.htm#4>; and Schedule 2, <http://www.hmso.gov.uk/acts/acts1998/80042--g.htm#sch2>.

<sup>82</sup> *Id.* at §§14-17, <http://www.legislation.hmso.gov.uk/acts/acts1998/80042--b.htm#14>; and Schedule 3, <http://www.legislation.hmso.gov.uk/acts/acts1998/80042--h.htm#sch3>.

<sup>83</sup> *See*, Terrorism Act 2000, 2000 Chapter 11, <http://www.legislation.hmso.gov.uk/acts/acts2000/20000011.htm>; and The Human Rights Act (Amendment) Order 2001, Statutory Instrument 2001 No. 1216, <http://www.legislation.hmso.gov.uk/si/si2001/20011216.htm>.

<sup>84</sup> *See*, Anti-Terrorism, Crime & Security Act 2001, 2001 Chapter 24, <http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm>; The Human Rights Act 1998 (Designated Derogation) Order 2001, Statutory Instrument 2001 No. 3644, <http://www.legislation.hmso.gov.uk/si/si2001/20013644.htm>; and The Human Rights Act 1998 (Amendment No. 2) Order 2001, Statutory Instrument 2001 No. 4032, <http://www.legislation.hmso.gov.uk/si/si2001/20014032.htm>.

Thus, the HRA affirmatively directs the courts to apply the ECHR and related European law, while at the same time attempting to preserve Parliament's preeminent role in the British constitutional system. When the executive makes a bad decision, it is sent back to the government for review; similarly when Parliament passes a bad law, Parliament must decide what to do. Nevertheless, some commentators suggest that in reality the Act, by making government and public bodies more accountable, "represents an unprecedented transfer of political power from the executive and legislature to the judiciary, and a fundamental restructuring of [Britain's] political constitution."<sup>85</sup> The result, in a classic illustration of the law of unintended consequences, was a dramatic increase in tension between the Blair government, that made passage of the HRA a major part of its party manifesto during the 1997 election, and the judiciary.

The always tense relationship between the judiciary and the Home Office, a government ministry with responsibilities roughly akin to the Department of Homeland Security and the Department of Justice in the U.S.,<sup>86</sup> became particularly contentious in the aftermath of the 9/11 attacks. The Ministry's attempts to curtail the use of juries in criminal cases,<sup>87</sup> permit the Home Secretary to impose harsher minimum sentences than recommended by the courts in certain cases,<sup>88</sup> limit the rights of immigrants or asylum seekers,<sup>89</sup> and

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<sup>85</sup> K. D. Ewing, *Human Rights Act And Parliamentary Democracy*, (1999) 62 *Modern Law Review* 79, at 92.

<sup>86</sup> See, Home Office, *Statement of Purposes and Aims*, <http://www.homeoffice.gov.uk/inside/aims/index.html>.

<sup>87</sup> See e.g. Jean Eaglesham & Bob Sherwood, *Blunkett Takes A New Tack On Multiple Offences*, *Financial Times*, November 22, 2003, National News at 2; Ben Russell, *Blunkett Saves Flagship Legislation With Climbdown On Trial By Jury*, *The Independent* (London), November 21, 2003, News at 12.

<sup>88</sup> *Regina v Secretary of State for the Home Department, ex parte Anderson (FC)* [2002] UKHL 46, [2003] 1 AC 837.

<sup>89</sup> *Regina (Q) v Secretary of State for the Home Department. Regina (D) v Same. Regina (J) v Same. Regina (M) v Same. Regina (F) v Same. Regina (B) v Same Court of Appeal (Civil Division)*

provide for the indefinite detention without trial of suspected foreign national terrorists,<sup>90</sup> were all rebuffed by the courts or the House of Lords.

The Home Secretary, David Blunkett, is reportedly incensed and “fed up with having to deal with a situation where Parliament debates issues and the judges overturn them”.<sup>91</sup>

While acknowledging the “right of judges to challenge [the government] when we step outside what parliament lays down,” Blunkett says, “what [he doesn’t] “understand is the assertion...that somehow there is the right of judges to be engaged in perpetually checking and overturning processes [of] a democratically elected parliament...The judges are saying that they want to remain in the political debate. They are opposed to us removing them from the House of Lords.”<sup>92</sup> Moreover, Blunkett believes, “[t]hey want a supreme court which has the right to overturn the will of Parliament.”<sup>93</sup> Known as a plain spoken and populist Home Secretary, Blunkett also demonstrated his frustration with the judiciary when he asked, “[t]he question is do we have a democracy where parliament makes the decisions and if it gets them wrong overturns them? ...Or do we have a democracy where we say ‘You can go so far, but the real democracy is in the judiciary’

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[2003] EWCA Civ 364, [2004] QB 36.

<sup>90</sup> See Anti-Terrorism, Crime & Security Act 2001, 2001 Chapter 24, §§21-23, <http://www.legislation.hmso.gov.uk/acts/acts2001/10024--e.htm#21>; Privy Council Review Committee, *Anti-Terrorism, Crime & Security Act 2001: Report*, 18 December 2003, [http://www.atcsact-review.org.uk/lib/documents/18\\_12\\_2003/Report.pdf](http://www.atcsact-review.org.uk/lib/documents/18_12_2003/Report.pdf); and *M v Secretary of State for the Home Department Court Of Appeal (Civil Division)* [2004] EWCA CIV 324, [2004] All ER (D) 367 (Mar), (Approved judgment).

<sup>91</sup> *Scales of Justice*, The Times, March 5, 2004, at 27.

<sup>92</sup> Roy Hattersley, *The News Interview*, The Observer, March 7, 2004, News at 27.

<sup>93</sup> *Id.*

and they should not only want to sit in parliament...they should also be able to override parliament?"<sup>94</sup>

Some commentators suggest that Blunkett's exasperation with an increasingly independent judiciary unafraid to use their powers under the HRA was responsible, in part, for the Blair government's seemingly precipitous attempt to abolish the Lord Chancellor's Office and the announcement of the related reform proposals in June, 2003.<sup>95</sup> Lord Hattersley, a Labour party politician from 1958 to 1997 who served in many posts including that of Shadow Home Secretary,<sup>96</sup> wrote that "[n]o Home Secretary in living memory...has a worse record for attempting to interfere with the judicial process. Arrogance has combined with populism to make Blunkett attack every judgment with which he disagrees."<sup>97</sup> Accordingly, as a defender of the judiciary and the HRA, Lord Irvine's retort to the Home Secretary's being "fed up" with judges – made shortly before the issuance of the press release announcing the government's constitutional reforms – that "maturity requires that when you get a decision that favours you, you do not clap [a]nd when you get one that goes against you, you don't boo," probably did not help his position in the rough and tumble of British politics, and arguably contributed to the move to abolish the office of Lord Chancellor.<sup>98</sup>

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<sup>94</sup> Martin Kettle, *Why Labour's Visceral Hatred of the Judges Persists*, "The Guardian (London), March 9, 2004, at 24.

<sup>95</sup> Jon Ungood-Thomas & David Leppard, *Contempt of Court: Is Tony Taking the Law into His Own Hands as Ministers Rewrite the Constitution?*, The Sunday Times, June 15, 2003, News at 12.

<sup>96</sup> See Wikipedia, the free encyclopedia, *Roy Hattersley*, [http://en.wikipedia.org/wiki/Roy\\_Hattersley](http://en.wikipedia.org/wiki/Roy_Hattersley).

<sup>97</sup> Roy Hattersley, *Arrogance and Populism: Its Constitutional Changes are Fine, but the Government has a Slapdash Approach to Justice*, The Guardian (London), June 23, 2003, at 16.

<sup>98</sup> David Pannick, *Asylum: An Abuse of Power that Would Embarrass Even Mugabe*, The Times, February 24, 2004, Law at 4.

The desire for more unfettered governmental authority, combined with a greater need to protect one's borders from foreign threats, also led to the inclusion of a specific judicial ouster clause in the government's Asylum and Immigration (Treatment of Claimants, etc.) Bill.<sup>99</sup> Introduced at about the same time as the Constitutional Reform Bill, the Asylum Bill brought the clash with the judiciary and the House of Lords to a head. The Asylum Bill amends the Nationality, Immigration and Asylum Act of 2002<sup>100</sup> to create a new unified system of administrative tribunals to handle appeals. Simultaneously, however, it precludes any further appeal from these administrative tribunals to the courts,<sup>101</sup> even though the 2002 Act instituted an expedited judicial review process designed to reduce the problem of excessive or abusive appeals that occurred under prior law.<sup>102</sup> This prompted one MP commenting on the new Asylum Bill to quip that "[i]t is indeed a novel principle of dealing with an abuse of process by removing the process rather than the abuse."<sup>103</sup>

The Asylum Bill broadly declares that "[n]o court shall have any supervisory or other jurisdiction (whether statutory or inherent) in relation to the Tribunal," along with extensive additional provisions specifically aimed at limiting judicial review under both

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<sup>99</sup> Asylum and Immigration (Treatment of Claimants, etc.) Bill (Bill 36), <http://www.publications.parliament.uk/pa/ld200304/ldbills/036/04036.i-iv.html>.

<sup>100</sup> Nationality, Immigration and Asylum Act of 2002, 2002 Chapter 41, <http://www.legislation.hmsso.gov.uk/acts/acts2002/20020041.htm>.

<sup>101</sup> Asylum and Immigration (Treatment of Claimants, etc.) Bill (Bill 36), §14, <http://www.publications.parliament.uk/pa/ld200304/ldbills/036/2004036.pdf>.

<sup>102</sup> WOLF LECTURE, *supra* note 16, at 11. Appeals under the 2002 Act are eliminated by §14(5) of the Asylum Bill.

<sup>103</sup> David Heath, MP, House of Commons Standing Committee B, Hearings on Asylum and Immigration (Treatment of Claimants, etc.) Bill, 20 January 2004, at Col. 257, <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmstand/b/st040120/pm/40120s01.htm>.

existing caselaw and under the HRA.<sup>104</sup> As such, this provision embodies the essence of the Home Secretary's concerns over the judicial role, and became the focal point of the

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<sup>104</sup> See, Asylum and Immigration (Treatment of Claimants, etc.) Bill (Bill 36), §14(7), <http://www.publications.parliament.uk/pa/ld200304/ldbills/036/2004036.pdf>, which reads:

(7) After section 108 of that Act (proceedings in private) insert—

**“108A Exclusivity and finality of Tribunal’s jurisdiction**

(1) No court shall have any supervisory or other jurisdiction (whether statutory or inherent) in relation to the Tribunal.

(2) No court may entertain proceedings for questioning (whether by way of appeal or otherwise)—

- (a) any determination, decision or other action of the Tribunal (including a decision about jurisdiction...),
- (b) any action of the President or a Deputy President of the Tribunal that relates to one or more specified cases,
- (c) any decision in respect of which a person has or had a right of appeal to the Tribunal...
- (d) any matter which the Tribunal—
  - (i) was obliged to determine in accordance...this Act, or
  - (ii) would have been obliged to determine in accordance with that section had a right of appeal mentioned in paragraph (c) been exercised, or
- (e) a decision to remove a person from the United Kingdom or to deport a person, if—
  - (i) the removal or deportation is in consequence of an immigration decision, and
  - (ii) the person was notified, in accordance with regulations..., of a right to appeal [to the Tribunal] against the immigration decision (whether or not he exercised the right).

(3) Subsections (1) and (2)—

- (a) prevent a court, in particular, from entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of—
  - (i) lack of jurisdiction,
  - (ii) irregularity,
  - (iii) error of law,
  - (iv) breach of natural justice, or
  - (v) any other matter, but
- (b) do not prevent a court from—
  - (i) reviewing a decision to issue a certificate under section 94 or 96 of this Act or under Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (removal to safe country),
  - (ii) entertaining proceedings to determine whether the Tribunal has acted in a way which is incompatible with a person’s rights under Article 5 of the Human Rights Convention (liberty and security), or
  - (iii) considering whether a member of the Tribunal has acted in bad faith.

judiciary's and House of Lord's efforts to preserve the application of the rule of law to government.<sup>105</sup>

Judicial ouster clauses are, of course, not new.<sup>106</sup> Nor are British judges reluctant to use their interpretative powers to mitigate or eliminate the impact of such clauses whenever possible.<sup>107</sup> What is significant in this Bill, however, is the breadth and extent of the ouster. By drafting an exceptionally comprehensive ouster provision, the fundamental issue of whether the judiciary would continue to accept the classic formulation of the doctrine of parliamentary sovereignty, or possibly *actto* overrule Parliament's attempt to deny access to the courts as a violation of the rule of law, was squarely presented.

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(4) A court may consider whether a member of the Tribunal has acted in bad faith, in reliance on subsection (3)(b)(iii), only if satisfied that significant evidence has been adduced of—

- (a) dishonesty,
- (b) corruption, or
- (c) bias.

(5) Section 7(1) of the Human Rights Act 1998 (c. 42) (claim that public authority has infringed Convention right) is subject to subsections (1) to (3) above.

(6) Nothing in this section shall prevent an appeal under section 2, 2B or 7 of the Special Immigration Appeals Commission Act 1997 (c. 68) (appeals to and from Commission).

(7) In this section “action” includes failure to act.”

<sup>105</sup> It should also be noted, however, that prior to passage of the Bill by the House of Commons, the Committee on Constitutional Affairs stated it believed that the judicial ouster provision in the Asylum Bill was “without precedent” and that “as a matter of constitutional principle some form of higher judicial oversight of lower Tribunals and executive decisions should be retained. This is particularly true when life and liberty may be at stake.” House of Commons, Constitutional Affairs Committee, ASYLUM AND IMMIGRATION APPEALS, SECOND REPORT OF SESSION 2003-2004 (24 February 2004), <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/211.pdf>, at ¶70.

<sup>106</sup> *See id.* at ¶66.

<sup>107</sup> *Id.* at ¶66-67. *See also e.g., R v Secretary of State for the Home Department, ex parte Fayed* [1997] 1 All ER 228, [1998] 1 WLR 763.

As a result of the continuing evolution of the common law, as well as being encouraged to be more active by Parliament's own legislation, the courts in recent years increasingly recognized that certain fundamental rights have constitutional import within the British system.<sup>108</sup> Were Parliament to unambiguously contravene those rights, courts might conceivably refuse to enforce such a law notwithstanding the traditional strictures of parliamentary sovereignty. As Lord Chief Justice Woolf stated in his 1994 F.A. Mann Lecture, this is simply:

...a proper recognition of ... the equal responsibility that Parliament and the courts are under to respect the other's burden's and play the proper role in upholding the rule of law. I see the courts and Parliament as being partners both engaged in a common enterprise...

There are however situations where...in upholding the rule of law, the courts have had to take a stand. The example which springs to mind is the *Anisminic* case.<sup>109</sup> In that case even the statement in an Act of Parliament that the [Foreign Compensation] Commission's decision "shall not be called in question in any court of law" did not succeed in excluding the jurisdiction of the court [to examine whether the Commission was properly acting within the scope of authority granted to it by Parliament]. Since that case Parliament has not again mounted such a challenge to the reviewing power of the High Court. There has been, and I am confident, there will continue to be, mutual respect for each other's roles

However, if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent. Some judges might choose to do so by saying that it was an unrebuttable presumption that Parliament could never intend such a result. I would myself consider that there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept. They are no more than are necessary to enable the rule of law to be preserved.<sup>110</sup>

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<sup>108</sup> See e.g. *Thoburn v. Sunderland City Council* [2003] QB 151; *R v. Lord Chancellor, ex parte Lightfoot* [2000] QB 597; *R v. Lord Chancellor, ex parte Witham* [1998] QB 575; *R v. Home Secretary, ex parte Pierson* [1998] AC 539; *R v. Secretary of State for the Home Department, ex parte Leech* [1994] QB 198.

<sup>109</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208.

<sup>110</sup> Woolf, *Droit Public – English Style*, [1995] PUBLIC LAW 57, 68-69.

Notwithstanding the confidence Lord Woolf expressed in political restraint and responsible government, the “unthinkable” was under consideration in the government’s Asylum Bill.

Since the doctrine of parliamentary sovereignty matured not a single provision of primary parliamentary legislation has been set aside by a British court, apart from cases where Parliament effectively directed the courts to do so as in the European Communities Act or the HRA.<sup>111</sup> However, continued judicial deference to legislation also depends, as Lord Woolf suggested in his lecture, upon Parliament observing the “principle of legality” and upholding the rule of law. Lord Hoffmann pursued a similar theme in the House of Lords decision in the *Simms* case where he stated that:

[p]arliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights.... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.<sup>112</sup>

Thus, while parliamentary sovereignty remains the key distinguishing feature of Britain’s unwritten constitution, observance of the “rule of law” is itself recognized as a fundamental constitutional principle derived from the common law and comprising part

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<sup>111</sup> *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Southall* [2003] 3 C.M.L.R. 18 [2003] EWCA Civ 1002 at ¶10.

<sup>112</sup> *R v. Secretary of State for the Home Department, ex parte Simms* [2000] A.C. 115, at 131.

of the background against which parliamentary legislation may be measured. This latent ability to engage in an examination of whether the other arms of government have abused their power, which is broader than simply ensuring that Parliament's legislative intent is properly implemented, is inextricably intertwined with judicial enforcement of the rule of law. Whether motivated by irrefutable presumptions against infringing fundamental rights, or limited by the principle of legality, as Professor Geoffrey Wilson stated:

[n]obody should be surprised if in a real case of legislative enormity the courts did not discover a higher principle of law by which they felt free or even obliged to ignore the current version of the doctrine [of parliamentary sovereignty] not only in the name of constitutional convention but also in the name of law.<sup>113</sup>

There is nothing in Britain's unwritten constitutional settlement that mandates that the courts continue to defer in all instances to the will of the government as expressed in Parliament. Judicial deference, like the broader "American style" power of judicial review, is the product of caselaw, history, and the judiciary's own conception of the proper role of the courts. Just as the executive and legislative functions of government continue to evolve in the face of new challenges and circumstances, so do the courts and the common law – whether as a result of gradual processes or of a conscious and radical transformation. Indeed, “the genius of the common law” is said to be “its capacity to develop,”<sup>114</sup> and in “the developing field of judicial review, it is usually unwise to say ‘never’.”<sup>115</sup>

In recent years several judges at different levels, while continuing to give all due deference to Parliament, also articulated a basic belief that the judicial role in the British

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<sup>113</sup> Michael Patrick Nolan, *THE MAKING AND REMAKING OF THE CONSTITUTION* (1997) at 116.

<sup>114</sup> *Kuddus v. Chief Constable of Leicestershire Constabulary* [2001] UKHL 29 [2002] AC 122, at ¶33.

<sup>115</sup> *R v Panel on Take-overs and Mergers, ex parte Fayed* [1992] BCLC 938, [1992] BCC 524 at 536.

constitutional system needs to be respected.<sup>116</sup> Although a broader notion of judicial review is – as the Blair government notes – inherently undemocratic, it is also fundamental to protecting society from an "elected dictatorship".<sup>117</sup> As Lord Bridge stated in the *Morgan-Grampian* case:

The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.<sup>118</sup>

Lord Lester similarly noted that Parliament cannot be regarded as having an unchallenged authority to "alter or destroy the essential features of the basic structure of the constitution," and that if it attempts to do so the "courts will be available to decide these graves issues for the first time for almost three centuries,"<sup>119</sup> applying common law principles to the British constitution in a manner already seen in Commonwealth cases and in decisions appealed to the Privy Council.<sup>120</sup> Lord Chief Justice Woolf went so far as to say:

I am not over-dramatising the position if I indicate that, if this [ouster] clause were to become law, it would be so inconsistent with the spirit of mutual respect

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<sup>116</sup> See e.g. *In Re F (Adult: Court's Jurisdiction)* [2001] Fam 38 where J. Sedley said:

Since the conflict and settlement of the 17th century the courts have recognised the ultimate legislative authority of Parliament, and Parliament in its turn has respected the authority of the courts within their self-delineated sphere as the authors of the common law and the source of equity. The relationship between the two is a working relationship between two constitutional sovereignties.

*Id.* at 56.

<sup>117</sup> See Lord Hailsham, *Richard Dimbleby Lecture*, 14 October 1976, as referenced in Royal Commission for Reform of the House of Lords, *A House for the Future*, January 2000, at 25, <http://www.archive.official-documents.co.uk/document/cm45/4534/chap3.pdf>; WOOLF LECTURE, *supra* note 16, at 4.

<sup>118</sup> *X Ltd. Respondents v. Morgan-Grampian (Publishers) Ltd.* [1991] 1 AC 1

<sup>119</sup> Lord Lester, *The Constitutional Implications of Ouster Clauses*, speech before the Administrative Bar Law Association, 26 February 2004, at 8-9, available at [http://www.blackstonechambers.com/pdfFiles/Blackstone\\_APL\\_ALBA%20rule%20of%20law.pdf](http://www.blackstonechambers.com/pdfFiles/Blackstone_APL_ALBA%20rule%20of%20law.pdf).

<sup>120</sup> See, Joint Committee on Human Rights, ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC) BILL, FIFTH REPORT OF SESSION 2003-2004 (10 February 2004) at ¶s 58-60. See also *Société United Docks v. Government of Mauritius* [1985] AC 585, 609, where the Judicial Committee of the Privy Council left open the question whether a Constitutional Amendment Act constituted an unconstitutional interference with the Supreme Court of Mauritius.

between the different arms of government that it could be the catalyst for a campaign for a written constitution. Immigration and asylum involve basic human rights....The response of the government and the House of Lords to the chorus of criticism of [the ouster clause] will produce the answer to the question of whether our freedoms can be left in their hands under an unwritten constitution.<sup>121</sup>

Faced with an increasingly vociferous opposition from its most senior judges, as well as many others, and the likelihood that the judiciary might employ what the Liberal Democrat and Shadow Lord Chancellor, Lord Goodhart, called the "nuclear option" of refusing to enforce Parliament's legislation,<sup>122</sup> the government ultimately backed down. Lord Falconer announced at the second reading of the Asylum Bill that the government was withdrawing the ouster clause, and would work with the House of Lords to provide for some sort of appeal mechanism to the courts in a revised version of the Asylum Bill.<sup>123</sup>

This, however, is the background against which the Constitutional Reform Bill will be considered, and the role of the proposed supreme court relative to the other arms of government decided. The working assumption reflected in the Constitutional Reform Bill is that the new supreme court, initially comprised of the existing Law Lords, will essentially pick-up the judicial functions currently exercised by the House of Lords, unchanged.<sup>124</sup> Indeed, the portion of the Constitutional Reform Bill addressing the actual operation of the proposed supreme court – as opposed to its selection, appointment,

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<sup>121</sup> WOOLF LECTURE, *supra* note 16, at 11.

<sup>122</sup> Clare Dyer, *The Guardian Profile: Lord Woolf*, *The Guardian* (London), March 5, 2004, Home Pages at 13.

<sup>123</sup> Comments of Lord Falconer, *Second Reading Debate Before the House of Lords, ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC.) BILL*, 15 March 2004, column 51, [http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds04/text/40315-14.htm#40315-14\\_head1](http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds04/text/40315-14.htm#40315-14_head1)

<sup>124</sup> *See*, Constitutional Reform Bill (H.L. 30), Part 2, <http://www.publications.parliament.uk/pa/ld200304/ldbills/030/2004030.pdf>.

composition, and benefits – consists of but a single clause and schedule that simply substitutes the new court for any references to the Appellate Committee or the Judicial Committee of the Privy Council in prior legislation.<sup>125</sup> However, if the traditional doctrine of parliamentary sovereignty applies, as a consequence of these reforms the new court and its justices will be separated from, but effectively subordinate to, Parliament. In Lord Chief Justice Woolf's words:

[a]mong Supreme Courts of the world, our [new] Supreme Court will, because of its more limited role, be a poor relation. We will be exchanging a first class Final Court of Appeal for a second class Supreme Court.<sup>126</sup>

The proposed legislation assumes that the *status quo ante* regarding the judicial role in the British constitutional system will be maintained – but there is nothing in the Bill that necessarily mandates that either the new supreme court or that the lower courts must continue to view themselves as subservient to the will of Parliament. That view depends upon a constitutional practice or convention, rather than a legal requirement, and is ultimately enforced only by judicial acquiescence and adherence to precedent. As Lord Woolf's comments imply, establishing a new supreme court as part of a set of reforms aimed at providing greater separation among the executive, legislative, and judicial functions of government makes the move towards claiming an enhanced power of judicial review almost inevitable over time. Although this is not what Lord Woolf was advocating, the alternative is for the courts to accept second class status in a new British constitutional settlement, because the political balance among the various arms of government will be radically realigned with these reforms.

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<sup>125</sup> See, Constitutional Reform Bill (H.L. 30), Part 2 cl.31 and Schedule 8, <http://www.publications.parliament.uk/pa/ld200304/ldbills/030/2004030.pdf>.

<sup>126</sup> WOOLF LECTURE, *supra* note 16, at 9.

Were the Constitutional Reform Bill to be amended to try to legislatively prevent the courts from modifying their traditional approach to their role or the doctrine of parliamentary sovereignty, it would pose an issue similar to that raised by the Asylum Bill. To the degree that a statement endorsing parliamentary sovereignty in the legislation was regarded as reflecting current norms and merely precatory, it would probably be regarded as much less egregious than the ouster clause, and largely unobjectionable. To the degree that such a provision attempted to legally limit the courts' ability to develop or enforce emerging common law notions of fundamental rights and freedoms, it comes much closer to raising the problems associated with the Asylum Bill's ouster provision. In either case, including such a provision in the Constitutional Reform Bill would also raise many of the same difficult issues regarding entrenching one sovereign Parliament's acts from modification or repeal by a subsequent sovereign Parliament that delayed the various proposals to incorporate the ECHR into domestic British law for so many years. Passage of the HRA as ordinary legislation suggests that entrenchment is an irresolvable legal problem, or at least irresolvable so long as the courts adhere to the traditional view of parliamentary sovereignty. Thus, were Parliament to attempt to legally prevent the courts from taking a more expansive view of judicial review in an amended version of the Bill, that attempt would fail if the judiciary were itself to decide that the broader reasons for supporting their conventional acquiescence to parliamentary sovereignty – the cooperation among the various arms of government to support the rule of law – no longer applied.

Lord Woolf also voiced additional practical political concerns over the courts' role in the revised constitutional structure created as a result of the abolition of the Lord Chancellor's Office. The Secretary of State for Constitutional Affairs, who the government has stated in future years is likely to be a non-lawyer member of the House of Commons, can reasonably be expected to face extraordinary demands from the Home Office concerning its needs to address compelling criminal justice issues as well as the ongoing war on terrorism, and Lord Woolf points to the Asylum Bill as an example of the types of issues that might arise. His concern is that the Secretary of State might be less well placed to protect the independence and interests of the judiciary and the unified court system than was the Lord Chancellor under the old structure, and that the Home Office might come to "dictate the agenda for the courts."<sup>127</sup> If that indeed becomes the case, it simultaneously provides both an example of the unintended political consequences that might flow from these reforms, and a possible additional justification for the judiciary to reassess its own role in the process in appropriate circumstances.

Accordingly, while many questions remain unanswered over the proposed supreme court's jurisdiction – particularly with regard to whether giving the new court the ability to hear appeals from Scotland is compatible with the 1707 Treaty of Union that created the United Kingdom<sup>128</sup> – it is unlikely that there will be any attempt to entrench or mandate adherence to the doctrine of parliamentary sovereignty as enunciated by

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<sup>127</sup> *Id.* at 10.

<sup>128</sup> See Lord Lester, *The Constitutional Implications of Ouster Clauses*, speech before the Administrative Bar Law Association, 26 February 2004, at 6, available at [http://www.blackstonechambers.com/pdfFiles/Blackstone\\_APL\\_ALBA%20rule%20of%20law.pdf](http://www.blackstonechambers.com/pdfFiles/Blackstone_APL_ALBA%20rule%20of%20law.pdf); Chris Himmsworth & Alan Paterson, *A Supreme Court for the United Kingdom: Views from the Northern Kingdom*, 24 LEGAL STUDIES: THE JOURNAL OF THE SOC'Y OF LEG. SCHOLARS 99 (2004); James Chalmers, *Scottish Appeals and the Proposed Supreme Court*, 8E DIN. L. R. 4 (2004).

Dicey.<sup>129</sup> However, rearranging traditional British constitutional practices and conventions as proposed in the Constitutional Reform Bill, combined with the ongoing evolution of the common law and the judiciary's own view of their proper role, might well prompt the development over time of a more activist approach to deciding constitutional issues by the new supreme court and perhaps the lower courts.

## CONCLUSION

Despite the means of the announcement, and the need for greater detail, the basic reforms proposed by the Blair government in the Constitutional Reform Bill make sense.

Separating the judiciary from the executive and legislative arms of government has come to be recognized as a basic principle to help ensure the safe distribution of power in modern democracies. Accomplishing these reforms will remove a latent threat to the independence of the judiciary, increase confidence in British institutions across the globe, and bring the United Kingdom more into line with the current understanding of many of its international obligations. Moreover, it will do so at a crucial time, when there is unprecedented pressure to respond to new global threats in ways that might otherwise impinge upon the basic freedoms which fundamentally characterize and distinguish democratic governments – irrespective of whether those governments are based upon written or unwritten constitutions.

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<sup>129</sup> Interestingly, Dicey appeared to back away from the doctrine of unqualified parliamentary sovereignty, himself, when he argued in 1913 that if the Irish Home Rule Bill passed it would nevertheless lack constitutional validity. *See id.* at 6-7, quoting AV Dicey, *THE LAW OF THE CONSTITUTION* 145 (10th ed 1959).

Even though Lord Woolf delayed his retirement to lead the attack on many aspects of the government's proposals,<sup>130</sup> he publicly recognized that the reforms will and should go through in some fashion; that the Lord Chancellor's position is no longer tenable in modern times; that the judicial selection process needs fundamental reform; that the independence of the judiciary needs statutory protection; and that too much currently rests upon a foundation of "insecure conventions and understandings".<sup>131</sup> The Queen included these reforms in her annual opening speech to Parliament,<sup>132</sup> and the government is committed to passage of the Constitutional Reform Bill prior to the 2005 general election.<sup>133</sup> Given the government's commitments, and the recognition of the need for change even among the critics of the proposals, even though important details remain unresolved – such as the costs associated with the court<sup>134</sup> – the Constitutional reform Bill will pass in some form. The ancient office of Lord Chancellor will be abolished or radically transformed, and there will be a new Supreme Court for the United Kingdom.

Of all its various reforms put forth by this government, including the HRA, devolution, and reform of House of Lords, the Constitutional Reform Bill represents the single most fundamental and radical change in the British constitutional settlement in over three hundred years. While not its primary object, the Bill will necessarily prompt a wider debate on the question of whether Parliament or the British judiciary should decide whether any given law passes constitutional muster. Judicial deference and unquestioned

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<sup>130</sup> Frances Gibb, *Top Judge Stays To Fight Politicians*, The Times, August 1, 2003, Home News at 1.

<sup>131</sup> WOOLF LECTURE, *supra* note 16, at 5-6.

<sup>132</sup> Queen's Speech to Parliament, 26 November 2003,

<http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/31126-01.htm>.

<sup>133</sup> See *supra* notes 37-38 and accompanying text.

<sup>134</sup> See, Ann Treneman, *Cheerful Chap Turns Prophet Of Doom*, The Times, March 9, 2004, Features at 2.

acceptance of parliamentary sovereignty is a product of the old constitutional settlement in the United Kingdom. Given the conscious changes being pursued by the current government in the name of modernization, the historical conventions, rationale, and political balancing that made those doctrines suitable may no longer apply with the same force. Accordingly, the result might well be a judiciary that is much more prone to engage in the broader style of judicial review that parliamentary sovereignty effectively curtailed. All that is needed is for a judge to decide, as John Marshall did when presented with an appropriate case, that it is ultimately the rule of law that is the paramount principle underlying the restructured British constitutional settlement— something which the judiciary in Great Britain appears to be increasingly willing to contemplate.