Changing the rules: the judiciary, human rights and the rule of law

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This is the third of four lectures on the rule of law organised by Professor Cranston. The series is in association with JUSTICE and I want to reflect on the concept from the viewpoint of an organisation that consciously expresses its mission as 'advancing access to justice, human rights and the rule of law'.

I take my title, 'changing the rules', from the Prime Minister's speech in which he noted the 2001 Anti-Terrorism Act had been 'declared partially invalid' by the courts but that 'the mood is now different' after the bombings of last July and 'the rules of the game are changing'. In saying this, he simultaneously appeared to be addressing two rather different audiences – aspiring jihadis and sitting judges. He envisaged court challenge to a policy of agreeing diplomatic assurances to allow the return of detainees to countries suspected of human rights abuse. In the event of losing, he announced that:

> We will legislate further including, if necessary, amending the Human Rights Act in respect of the European Convention of Human Rights.[1]

It is somewhat unclear, since national legislation could not affect the UK's obligations under the Convention itself, quite how such an amendment could satisfactorily be sustained once a case reached the European Court of Human Rights. However, Mr Blair's statement is a reminder of the instability of the current constitutional balance.

The difficult and specific issue of terrorism and its response is the topic of Shami Chakrabati's final lecture in the series. I intend to leave that to her.

[1] Press Statement 5 August 2005

I want to examine how the rules governing the constitutional relationship between the different branches of government are already changing. I face the daunting challenge of being followed by Lady Hale – who reflects three judicial attributes given statutory recognition by the Constitutional Reform Act about which I wish, in part, to speak: diversity, merit and good character.[2] I hope that our different perspectives will complement each other.

The rule of law was, famously, one of Dicey's twin pillars of the constitution. The other was Parliamentary sovereignty. His perception of the rule of law was expressly articulated in relation to the role of a parliament which:

> Has, under the English constitution, the right to make any law whatever, and further, no person or body is recognised by the law of England as having a right to override and set aside the legislation of Parliament.[3]

I follow Lord Goldsmith's approach last week in avoiding a definition of the rule of law. And, I agree with him that courts are only its guardians of last resort and that the executive, and indeed the legislature, have a logically prior role in upholding it.

I agree also that the rule of law is not just 'rule by law'. The concept implies more than a set of technical principles. In the Attorney-General's words, it 'comprehends some statement of values which are universal and ought to be respected as the basis of a free society'. For Dicey, by contrast, lack of universality was precisely the point. He saw the rule of law as a distinctly English phenomenon and was happy to quote Voltaire's wonder that in arriving from France: 'he had passed out of the realm of despotism to a land where the laws might be harsh but where men were ruled by law and not by caprice'.[4] Echoes of such Europhobic disdain might still be identified in some of contemporary political resistance to human rights as a dangerously continental influence.

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[2] S63 and 64.
[3] A V Dicey *Introduction to the Study of the Constitution* Macmillan, 1927, p38.
[4] as quoted by J Jowell in 'The Rule of Law Today' in J Jowell and D Oliver *The Changing Constitution* OUP, Fifth edition, p7.

The Constitutional Reform Act 2005 offers no helpful definitions but declares that it does not adversely affect –

(a) the existing constitutional principle of the rule of law; and

(b) the Lord Chancellor's existing constitutional role in relation to that principle.[5]

The effect of the first assertion may be uncertain: the second surely cannot be entirely correct. The whole point of the Act was significantly to change the Lord Chancellor's existing constitutional role. For a start, postholders will cease to be judges. Regardless of such cavils, the website of the Department of Constitutional Affairs proudly proclaims:

> We are responsible for upholding the rule of law.[6]

It is not alone. Promotion of the rule of law is an explicit objective of both our Foreign and Commonwealth Office[7] and the US state department.[8] Indeed, adherence to the rule of law is a settled general principle of the UK government and, if not all states, all that claim to be liberal democracies. As Lord Steyn put it, the UK Parliament does not operate:

> In a vacuum. Parliament legislates for a European liberal democracy based upon the traditions of the common law … and … unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the Rule of Law.[9]

I take the implicit question behind these series of lectures – reasonably posed by Professor Cranston, a former member of both executive and legislature – to be whether changes are happening within, or challenges occurring to, the meaning of the rule of law in contemporary Britain. It would be surprising if we could detect neither. After all, Tony Blair announced to his first party conference as leader in 1994:

> We are putting forward the biggest programme of change to democracy ever proposed by a political party.[10]

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[5] S1(1)
[6] DCA *Strategy 2004-9*, 'Our purpose' http://www.dca.gov.uk/dept/strategy/purpose.htm
[7] UK International priorities http://www.fco.gov.uk
[8] US State Department *Mission: FY 2004-2009 Department of State and USAID Strategic Plan*

Labour's commitment to constitutional change in its first administration was remarkable. As Lord Bingham remarked with characteristic dryness:

> To have enacted 11 statutes of constitutional significance, in some cases major significance, in the first legislative session of a new parliament is, indeed, a striking record – an exercise on which, perhaps, only a fresh and energetic government, unconstrained by long experience of office, would ever have embarked.[11]

Nor was constitutional reform limited to the first session. Much time in Labour's second administration was occupied by the Constitutional Reform Act 2005. That Act and the Human Rights Act 1998 undoubtedly changed the balance of powers. Both Acts may, however, have unexpected and unbalancing side-effects. The Human Rights Act sought to provide mechanisms that incorporated the European Convention of Human Rights into domestic law but preserved Parliamentary sovereignty. It provided a balance between a judicial duty to construe compatibly 'so far as is possible' with the convention and, if not, the duty to make a declaration of incompatibility.[12] Lord Irvine effectively argued that it amounted to no more than a re-arrangement of the pieces on the existing constitutional board in providing:

> a modern reconciliation of the inevitable tension between the democratic right of the majority to exercise powers and the democratic need of the individual and minorities to have their human rights secured.[13]

That reconciliation has surely gone a little further than Lord Irvine admitted at the time, affecting the balance between judiciary, executive and legislature – and thereby notions of Parliamentary sovereignty and the rule of law.

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[9] R v Secretary of State ex parte Pierson [1998] AC 539
[10] 4 October 1994
[11] Speech, 4 October 2001
[12] s3 and 4
[13] Lord Irvine of Lairg 'Britain's Programme of Constitutional Change' in *Human Rights, Constitutional Law and the Development of the English Legal System* Oxford, p?

I want to begin, however, with another question: whether the statutory framework of the Constitutional Reform Act, explicitly designed to 'uphold the continued independence of the judiciary',[14] will not only continue that independence but also begin to develop for them a new constitutional identity. Hitherto, the relationship of judges and government has been close. Lord Schuster, permanent secretary of the Lord Chancellor's Department in the inter-war years, called his department 'some kind of link or buffer' between government and judiciary. His successor, Sir Albert Napier, thought of it as a form of constitutional 'hinge'.[15]

The Constitutional Reform Act formally breaks that close relationship, based on the particular combination of roles formerly undertaken by the Lord Chancellor – judge, minister, legislator. The Lord Chancellor loses his role as head of the judiciary on 3 April 2006 – and retains very limited powers of judicial appointment only for a further year.[16] He will no longer be required by convention, like Lord Falconer and his immediate predecessors, to have had a career as a distinguished lawyer. Indeed, the statutory qualifications for the postholder require only experience as a minister, member of either house of parliament, certain types of lawyer, legal academic or such 'other experience that the Prime Minister considers relevant'.[17] A rumour circulated before the last election that Mr Blunkett was lined up for the post and he would, indeed, have qualified under the Act. Lord Woolf, who gave the first lecture in this series, has revealed that he 'still had real concerns for the future' on precisely this ground because:

> The government has made no secret of the fact that in future the Secretary of State for Constitutional Affairs is likely to be a member of the Commons and could well be a non-lawyer.[18]

In considering the effects of the Act, it is necessary to assume that this will be its eventual result. Within a short time, we may have a Lord Chancellor lacking any natural affinity with the lawyers and judges with whom he or she will need to interact. The relationship may

[14] s 3(1)
[15] As quoted in G Drewry 'Thatcherism catches up with the judiciary' ref?
[16] Lord Falconer Statement 23 January 2006
[17] S2(2) Constitutional Reform Act 2005

better resemble that between the Secretary of State for Health and the General Medical Council.

We need to think through all the consequences. Exchange between judiciary and executive is likely to be more formal. This is entirely proper but we might note the magnitude of the informal role helpfully played by Lord Woolf in relation to the Constitutional Reform Act itself. It is entirely arguable that his lengthy concordat with Lord Falconer outflanked what might have been overwhelming opposition to a badly handled proposal. This was not all. Lord Woolf has given an interesting account of his informal liaison with ministers. Thus, he saw off a Home Office proposal to take over the magistrates courts on which 'it was not appreciated within government that it was inappropriate'; he impressed on the Government the constitutional importance of their judiciary proposals, 'it was apparently seen by Government as a reform capable of being achieved by press release'; he indicated that the judiciary were extremely concerned at attempts to oust their jurisdiction in asylum matters - 'apparently this was of little concern'.[19]

A level of informal contact will, no doubt, continue but will become less easy to assume. A future Lord Woolf is likely to be put in a more public position. From April, the Lord Chief Justice will become the President of the Courts of England and Wales. Lord Woolf's successor, Lord Phillips, will become:

> Responsible for representing the views of the judiciary of England and Wales to Parliament, the Lord Chancellor and to Ministers of the Crown generally.[20]

And may:

> Lay before Parliament written representations on matters that appear to him to be maters of importance relating to the judiciary or otherwise to the administration of justice.[21]

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[18] Squire Centenary Lecture, 3 March 2004
[19] As above.

This makes him a very much more visible, and thereby exposed, than any previous equivalent. He will have a staff of some 60-70 people – with, it seems, at least six press officers. When combined with the effect of a Supreme Court transferred to a new building across Parliament Square from the Houses of Parliament, the separation of the judiciary from the executive will be much more apparent. Processes that are now hidden and informal will become much public and formal. The President will be at the apex of formal consultative and collaborative mechanisms in the form of the Judges Council and a new Judicial Executive Board.[22] The Judges Council sounds a fairly anodyne beast but let us remember how it burst upon the political scene in 1990 to express horror at Lord Mackay's proposed reforms of the legal profession. Mere news of a proposed half day meeting of the council led to a flush of intemperate headines that included 'Rebel judges stop courts' and an MP with a gift for imagery annnounced: 'Beneath the wigs and gowns, we have seen the feet of clay'.[23]

Lord Woolf's experience indicates the range of issues which may arise for the President. On the Constitutional Reform Bill, he played a typically strong hand, making only one false move – the celebrated reference to Lord Falconer as the 'cheerful chappie' – which caused a media firestorm and for which he immediately apologised. But, take an example of the more prosaic kind of issue that might occur. The Criminal Justice Act 2003 makes it easier for bad character evidence to be called against a defendant. This was highly contentious. Indeed, JUSTICE firmly opposed it in the Bill. However, with some amendment, the provision was passed. The Judicial Studies Board duly established a programme so that every relevant judge would be trained by the planned implementation date in March 2005. Suddenly on 25 October 2004, the Prime Minister and the Home Secretary announced the implementation date would be brought forward to 15 December. No coherent reason was advanced: some said that a headline was needed. A President asked to comment by a Parliamentary

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[20] S7(2)(a) Constitutional Reform Act 2005.
[21] S5(2)(a) Constitutional Reform Act 2005
[22] See Lord Justice Thomas *The Judicial and Executive Branches of Government: a new partnership?* 10 November 2005

committee on such a decision might find it difficult to resist and might well find the Judges Council particularly incensed. Any adverse comment does not necessarily trespass against the separation of powers but it will lift the senior judiciary into much greater public prominence with the fourth estate – the media. The Constitutional Reform Act may, therefore, lead to somewhat of a paradox. It will, in time, deprive serving judges of the opportunity to use their position in the legislature to promote their views. A future Lord Woolf will be but Sir Harry. However, the President gains the responsibility to speak to Parliament as an outsider with, paradoxically, greater public visibility.

JUSTICE supported most of the Constitutional Reform Act. However, there will be little benefit if it results in senior judicial figures getting more of the kind of verbal battering that can arise in the bearpit of politics. We might recall the report in the *Sunday Times* that:

> A senior government minister, thought to be Blunkett, was quoted as calling Woolf 'a muddled old codger' with 'an out-of-touch' way.[24]

Lord Falconer was particularly lucky that Lord Woolf did not, as was reported he would, resign on the spot. Unless we are clear about the constitutional changes to come, this sort of destructive row will erupt more often. I am concerned that it will be linked in the mind of the public and media to the different issues raised by the Human Rights Act.

In this context, it is perhaps regretable that the opportunity was not taken to create a Ministry of Justice focused on matters relating to the legal system, as had been the almost universal demand from all those who campaigned for reform of this kind. Instead, we got a Department of Constitutional Affairs which took over a disparate range of matters from the Home Office from electoral matters to House of Lords reform. It may be hard, therefore, for ministers to concentrate on core responsibilities for legal and judicial affairs. The justice system is sufficiently important to have its own ministry with its own ministers. They do not need the

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[23] R Abel *English Lawyers between Market and State*, OUP, 2003, p57
[24] 'Chief justice to quit in Blunkett row' *Sunday Times* 31 October 2004

distraction of a range of issues from the Channel Islands to electoral reform - passed over to streamline the Home Office's focus on criminal justice. An arguable consequence of the lack of focus is that, by default, the Attorney-General is actually emerging as a voice within government for the rule of law. Lord Goldsmith's speech in this series got press coverage for his criticism of Guantanamo Bay. As a practising lawyer, the Attorney-General may well have an affinity with lawyers that may be lacking for DCA ministers without a background in the law. Yet, the Attorney has other responsibilities for prosecution and advice to the government which may mean that the DCA's ministers would be structually better able to take this role without conflict.

In the context of human rights, Lord Goldsmith ended his speech with a celebration of the 'newly elevated status of the law in public life' but warned against seeking to replace rule by Parliament by rule by lawyers. I want specifically to address this in the context of my previous argument. The Constitutional Reform Act implements a much greater formal separation of judiciary, executive and legislature. At the same time, the Human Rights Act potentially sets up a countervailing trend that increases a blurring between such powers. Interestingly, Dicey, the great proponent of Parliament, acknowledged that the boundaries of sovereignty always were fuzzy. He gave the example of whether the 'Imperial Parliament' could actually abolish 'Scotch law'.[25] Actual powers at their outermost limits are perhaps always difficult to define with precision. Partly this is because, any constitutional balance of powers requires a degree of consensus to be workable.

The Human Rights Act – strengthening, as it does, judicial review of executive and legislative action - exposes the judiciary in an unprecedented way. If lawyers and judges have largely accepted the concept of incorporation, the popular press certainly has not. The *Daily Express* announced a verdict on asylum with the headline: 'Who is running Britain, Mr Blair? You should ask Mr Justice Collins.' This *Daily Mail* has taken a similarly strong Diceyan view:

> Unaccountable and unelected judges are openly and with increasing arrogance and perversity, usurping the role of parliament, setting the wishes of the people at nought and pursuing a liberal, politically correct agenda of their own.[26]

The *Sun* typically personified the argument:

> While her husband battles to tighten Britain's terror laws, his wife bleats about remembering terrorists rights … Does she ever think how damaging her interventions are for her husband, our democratically elected prime minister?[27]

Such hostility requires a response. We need to ask why the popular press is so hostile and then whether we can do anything about it?

Partly, the answer lies in the deep influence of a reductionist form of Diceyan dualism on domestic culture. No matter that when Dicey talked of Parliament he quite decidedly did not mean a party-dominated House of Commons, the British public has a deep regard – born, no doubt, of several centuries of battle against the Crown – for Parliamentary supremacy. As a nation, we accept the supremacy of the democratically elected lower house – exactly the legal point in the House of Lords' decision in *Jackson*, the challenge to anti-hunting legislation.[28] Thus, we have difficulty – both judicially and politically – in accepting limitations, for example in relation to the European Union and the contentious notion that there might be common law constitutional concepts that are superior to parliament, such as access to the courts.[29] The widespread cultural acceptance of the legitimacy of the House of Commons is precisely the reason why the executive is able to exert such centralised control and is the problem that has held up reform of the House of Lords - though it is interesting that this is now re-emerging a political issue.

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[25] A V Dicey *Introduction to the Law of the Constitution* Macmillan, 1927, p79
[26] 4 March 2005
[27] 28 July 2005
[28] Jackson v Attorney General [2005] UKHL 56
[29] See r v Lord Chancellor ex parte Witham [1997] ICHRL 23 (7 March 1997)

As a nation, we have been slow to accept the constitutional status of human rights. Lord Hoffman observed of the long-term effect of incorporation:

> The courts of the United Kingdom, though acknowledging the sovereignty of Parliament [will] 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.[30]

This has not penetrated general public consciousness. We need to develop a public understanding of the need for Dicey's dualism to be replaced by a new trinity – Parliamentary sovereignty, the rule of law and the protection of human rights as set out – at least for the time being - in the European Convention of Human Rights. Let me indicate from the Attorney's own speech, the importance of so doing. He said:

> I have previously expressed the view that even when emergency or time of war permit some modification to, or even derogation from, certain rights, there are some rights so fundamental that there can be no compromise on them. Certain rights, for example the right to live, the prohibition on torture, on slavery – are simply non-negotiable.

The right to life is contained in Article 2 of the European Convention, the prohibition on torture in Article 3, the prohibition on slavery in Article 4, the provision on derogation in Article 15. It is not surprising that the Attorney has previously expressed the view that these are non-derogable rights. Add the principle against retrospectivity in Article 7 and he has repeated the full content of Article 15(2). This is not accidental. The Convention was drafted by common lawyers in our Foreign Office. It is, in the words of Lord Steyn, 'a coherent if ageing charter of fundamental rights'.[31] I want to stress the coherence while acknowledging the ageing. Ministers should feel able to admit that we are subject to its provisions; to make explicit their acceptance of a constitutional reform that they initiated.

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[30] R v Secretary of State for the Home Department ex parte Simms [1999] WLR 328
[31] 'Laying the foundation of human rights in the UK', 10 June 2005

In this context, we must also remember incorporation was advanced as only an initial step, first by Charter 88 and then by the Labour party. [Its adoption was accompanied by none of the vigorous popular debate that surrounded the enactment of the Canadian Charter of Fundamental Rights and Freedoms in 1982 or, indeed, that preceded that of the US Bill of Rights in 1789. Incorporation was intended only as a halfway house to a full-grown domestic bill of rights.] There was – and could be - no debate about content. The very idea was that we adopted wholesale a convention originally drafted almost fifty years previously – hook, line and sinker. Thus, we missed the full force of a debate about how the convention may be European in name but reflects the domestic cultural values of the United Kingdom.

The convention provided an easily digestible charter of rights but has disadvantages which lawyers should remember. It is not transparent. The words of the convention are only a start: they have been significantly expanded by jurisprudence of a European Court of Human Rights which declared the convention a 'living instrument'. [It is precisely this process that caused Mr Blair his immeidate problem last summer. He confronts the effect of the 1996 case of *Chahal* which confirms that national security should not override the obligation against collusion in torture.[32] It is true that no UK government signed up to a deal that restricted its powers in the terms of *Chahal*. However, it signed up – and Lord Goldsmith made very clear it has no continuing difficulty with - the principle of no torture or ill-treatment. The court's extension of the principle in *Chahal* was entirely rational and, indeed, in reakpolitik terms, makes complete sense. In the modern world of global comunication, a state that does not comply with article 3 is a menace to every other. It exports – precisely as Algeria does – its militants around the world. The consequent containment of a small number of individuals within the UK is entirely rational. It is, in a sense literally, a small price to pay for a wider principle. We need to get this point across and, I think, we must acknowledge that this has not yet been adequately done.]

It is an enormous weakness to the Human Rights Act that (however attractive to some in the audience) you need a lawyer – or, at least, a very good and up-to-date textbook – to understand it. Take, as an example, the idea of proportionality that has been inferred by the European Court of Human Rights from the words 'necessary in a democratic society'. A leading author called this 'the defining characteristic of the Strasbourg approach to the protection of human rights'.[33] Yet, it is invisible in the text. Furthermore, as domestic caselaw grows, so there becomes an unavoidable accretion of cases unremarked in the original text. An answer to the simple question of which authorities are bound by the Human Rights Act requires a small treatise on the difference between functional and institutional tests.

We must admit that human rights is dangerously drifting away from accessiblity – encouraging it as the province of lawyers not people. We might note that the much-derided European Charter of Fundamental Rights and Freedoms provides an example of one way of countering this: a summary in which detail is sacrificed to clarity. Ultimately, the rights debate needs to move on to the need for some such readable and accessible charter or bill of rights. Such a charter would need, as does the European Charter, to take the European Convention as its base. In adopting a British model , we might take the European Charter (though this will set up enormous cultural resistance) or draft our own. However, if the latter, we would do well to recall Augustine's anguished plea: 'let me repent, O Lord, but not yet'. Let us work out a domestic bill of rights but not quite yet. The process would create a morass into which legions and years could be lost. Practically, for the time being, we ae stuck with the convention as the best bill of rights we can practically have.

The convention inevitably raises the issue of the relationship of the judiciary with the legislature in making law and, at the very limit, whether there are ways in which the very sovereignty of Parliament may be impugned. Judges have admitted to lawmaking ever since

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[32] Chahal v The United Kingdom 23 EHRR 413 1996
[33] K Starmer *European Human Rights Law*, LAG, 1999, para 4.37

Lord Reid revealed that any other view was ‘a fairy tale’ but judgements required by the Human Rights Act, admittedly a statute duly passed by the legislature, get pretty close not only making law but declaring limits on Parliament to do so. This is difficult territory for which to find the right language . That of judicial deference has passed out of favour. I am not sure that talk of ‘discretionary areas of judgement’, understandable though it may be to lawyers, means much to a lay audience. I agree with Lord Bingham’s exposition but it is hard to condense this into a textbook for children:

> The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.[34]

The intention of the government in passing the Human Rights Act was to mitigate the consequences of Lord Bingham’s type of discrimination through the power of a court to declare legislation incompatible with the convention but without any power to strike it down. Parliament would then decide whether to pay any attention. Among litigators, section 4 was disparagingly referred to as the ‘wooden spoon’. It has, in the event, proved rather more valuable. The government has, as a matter of fact, honoured all declarations by re-legislating. Indeed, the political lesson of the legal decision in the *Belmarsh* case may be that the larger the implication, the stronger the political imperative to replace the impugned provisions. It may be too soon to argue that this can amount to a constitutional convention. But, the power to grant a declaration had always to be read in connection with the

[34] A and another v. Secretary of State for the Home Department (Respondent). [2004] UKHL 56, para 29.

requirement on ministers to certify an act as compatible, which Lord Goldsmith commends, and also the over-riding jurisdiction of the European Court of Human Rights which he does not mention. A government minister certifies each Bill as Convention-compliant. Thus, a judicial declaration to the contrary indicates, on the face of it, a ministerial misunderstanding.

In theory, the government could sit it out and appeal to the European Court, or indeed seek to legislate without such a certification. This remains legally possible. Such a formula upholds Parliamentary sovereignty in that it does not allow the court to nullify the legislation. However, the European Court's doctrine of 'margin of appreciation' applies to 'national authorities', that is decisions of governments as upheld by national courts. It is not *carte blanche* for governments themselves. Signatories to the European Convention agree that decisions of the European court are to be implemented under the 'supervision' of the Council of Europe's committee of members.[35] So, the government is caught in a kind of catch-22. A ministerial declaration that a provision is incompatible will provide pretty conclusive grounds for the European Court to accept that the government is right. It will then so rule. There is no way out of this. The European Court is effectively supranational because members of the Council of Europe agree to respect its decisions – albeit that the process of enforcement is not perfect and there may be delays if not evasions.

Thus, the Human Rights Act preserves parliamentary sovereignty, as we might say, with a twist. The Government followed the Belmarsh case by presenting what became the Prevention of Terrorism Act 2005. The original legislation is not annulled by the court but falls *de facto* if not *de jure*. Our limited experience to date is that the court can effectively force the executive to return to the legislature. This would seem a reasonable – and, indeed, desirable - result. Replacement legislation may, of course, present issues in its turn – as did the 2005 Act. It was rushed through Parliament amid chaos in 18 days flat from beginning to end. This was so fast that the Government could not produce amendments promised in the Commons

by the time that the Bill was debated in the Lords. The decision of a court takes us only so far: the struggle to balance liberty and security continues. That is unavoidable. It is politics.

We are within the hallowed walls of the London School of Economics. We talk of the role of the judiciary. We cannot do so without making some reference to John Griffith. He argued – at a time when this was a common view among trade unions and the left – that the judges were an unrepresentative conservative brake on progressive change and, by the later editions of his famous book,[36] he was able to cite the Fares Fair case to prove it pretty conclusively. Should we read about the changing composition of the US Supreme Court with some trepidation? Though those likely to be translated as the first justices of our Supreme Court appear, like Lady Hale, to be universally wise and sensitive to constitutional balance, could this all change over time – perhaps through an appointment process that may now be effectively free of political influence but inclined, through the caution of committee, to make uninspiring appointments of judges with little imagination or understanding? This is a risk but, I would argue, an acceptable one. In the three decades since the outrageous *Fares Fair* decision, much has changed. During two long periods of uninterrupted one party government, the judiciary have developed core principles of review that are now supplemented by the Human Rights Act. This takes the judiciary into an overt constitutional role with transparent, if admittedly still evolving, principles - whereas John Griffith's thesis was that they had a covert one with none.

At one level, a degree of tension between judiciary and executive is a sign of a healthy democracy. However, the kind of vituperative language used by the press suggests that such stresses can be destructive when not understood, explained or accepted. We will need ultimately to define more precisely the role of the judiciary and the impact of human rights on the rule of law. For the moment, however, we might be best take advantage of the flexibility

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[35] Article 46(2)
[36] J Griffiths *Politics of the Judiciary*, Fontana, 1991

that our unwritten constitution bequeaths and encourage, as far as we can, the new balance of powers to settle down with as little fuss as is possible. Our prize is a changed balance in the constitution so that citizens can supplement the democratic accountability of those in public authority with a greater degree of legal accountability against democratic norms. That would be an enormous legacy for any government. But it leaves us in a somewhat unsatisfactory position. Government may threaten further legislation and supporters of human rights fear it - while acknowledging that the current position is unsatisfactory and will require further statutory intervention in due course. This is politically unstable and logically difficult to justify. Our hope must be that familiarity will breed consent and that the media, public and politicians will gradually accepted a rebalanced constitution. Our fear must be that the unfamiliar position in which the CRA and HRA put the judiciary will set off a series of negative responses.

I began with a quote from the Prime Minister's press conference: the rules are changing. I want to end by supplementing that with part of Bob Dylan's lyrics to 'The Times, They are a'changing':

> Come writers and critics who prophesize with your pens
> And keep your eyes open, the chance won't come again
> And don't speak too soon, the wheel's still in spin.