The Times Law Awards

"Supreme Court UK: radical change or business as usual?"

We tend to assume that our unwritten constitution is fundamentally sound, and could weather any crisis. But like the levees in New Orleans and Lehman's in New York, we generally fail to take the risk of low-probability, high-impact events into consideration. As Daniel Finkelstein has recently argued in a different context[1], we should not ask if our constitution can withstand day-to-day life – the test is whether it could survive Katrina, or a credit crunch. The lesson of the last few years is that, in Donald Rumsfeld's words, "Stuff happens" – even unlikely events do occur.

The Supreme Court will not change radically simply because it has a new name. However, if "stuff happened" – for example if Parliament passed a law depriving individuals of their access to the courts – the Supreme Court should assert a new right to strike down Acts of Parliament.

The reason for the creation of the Supreme Court given by the Government was that the existing arrangements breached the doctrine of the separation of powers. But according to classical Diceyan theory, Parliament is sovereign and may pass any law it wishes, overriding the wishes of the judiciary and the executive. Today, as a result of the growth of organized and disciplined political parties, and the system whereby the executive is chosen by the leader of the majority of MPs, the legislature is structurally subordinate to the executive. Speaking in 1998, Lord Irvine LC acknowledged that therefore, "*the capacity of Parliament to hold the*

[1] The Times, November 25, 2009
http://www.timesonline.co.uk/tol/comment/columnists/daniel_finkelstein/article6930463.ece

executive to account is necessarily limited", and the judiciary had taken a more active role in public life as a "*pragmatic response to a pressing constitutional need*."[2]

Therefore, arguing that the Supreme Court was necessary in order to remedy a deficiency in the UK's separation of powers entirely misses the point. In the UK, powers are not separate. The historic link between the legislative and judicial branches, now broken, pales in comparison with the structural fusion of powers which results from the sovereignty of Parliament, and the executive's power over the legislature.

Parliament is (at least partly) elected, to be sure, but that is not a reason for that body to have sovereign power. A democratically elected body still needs limits on its power to protect against the tyranny of the majority; all the more so when it is dominated by the executive. If we are concerned with the separation of powers, we must ensure that the executive does not control the legislature, and also that the legislature does not dominate the courts.

How can the Supreme Court fulfill its founding intention – to uphold the separation of powers? Only by rejecting parliamentary sovereignty as an absolute principle. And how could this be done? The clue is in the method by which the creation of the Supreme Court was announced without consultation or consensus - the Government followed Nike's exhortation, and just did it.

In our unwritten constitution, we cannot look to a higher, final document for authority. Its binding force is simply the force of custom. Until this year, it was part of the constitution that the House of Lords was the final court of appeal. Now it is not. The constitution is changed by those who do. It is changed by being broken.

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2 "Principle and Pragmatism: The Development of English Public Law under the Separation of Powers" Lecture at the High Court in Hong Kong, 18 September 1998, available at http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/speeches/1998/hongkong.htm

Parliament is sovereign because the judges accept that it is. They are bound by no rule but the constitution to do so, and as the manner of the Government's decision demonstrated, the constitution may be changed, by those who act.

Although there would inevitably be handwringing from newspapers whose constitutional analysis is limited to howling that judges are "unelected", if we truly seek the separation of powers, the judiciary must have actual power to check the legislature. Otherwise the creation of our new Supreme Court will be "a mere demarcation on parchment"[3], as James Madison put it, which is not a sufficient guard against tyranny. If taking this power led to constitutional crisis, so much the better; it is out of constitutional crises that written constitutions are born.

Will they do it? In the short term, there will be business as usual. The justices will only take this new power if they are driven to it, but that may happen, so long as the attitude of some in Government is that judges are an unwarranted, unelected restriction on ministers' freedom of action. It was this sentiment that led to the Government attempting to restrict access to the courts for asylum claimants in the Asylum and Immigration (Treatment of Claimants) Bill 2003. On that occasion, the government backed down. But what if they hadn't? And in the future, what if they don't?

Discussing a similar, counterfactual scenario, Lord Woolf wrote:

> "*The courts would be required to act in a manner which would be without precedent … ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold ...*"[4]

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3 The Federalist No. 48

4 Lord Woolf "Droit public – English style" [1995] PL 57

It has been said that whether parliamentary sovereignty will continue "lies in the breast of judges." We know what lies in Lord Woolf's breast, but what about the current Justices?

There is one small hint that on today's court sits an independent spirit who might one day throw off the historical shackles of parliamentary sovereignty. The Justices have selected quotations to decorate their new library, to guide them and their successors as they work. One of them (we are not told which), chose Tolstoy's question, now carved into the very fabric of the new court:

> "*Where is there any book of law so clear to each man as that written in his heart*?"[5]

If that once-in-a-hundred-years constitutional hurricane approaches our shores, let us hope that the new Justices of the Supreme Court do not hide in their library behind the levees of outdated Diceyan dogma, but look up, see Tolstoy's words, and follow in the footsteps of the US Supremes, who were not given, but instead, in Marbury v Madison[6], took their right to strike down legislation that offended constitutional principles.

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5 http://www.supremecourt.gov.uk/visiting/new-artwork.html

6 5 U.S. (1 Cranch) 137 (1803)