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"The kaleidoscope has been shaken. The pieces are in flux."[1]

The question is how and where they settle.

The Government's latest constitutional reforms have been nothing if not deeply polarising. In the blue corner: the judiciary, led by Lord Woolf, Chief Justice. In the red, Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor for the transitional period. The Government contends that its agenda to modernise the public services requires deep structural changes to "unsustainable" institutions – the Lord Chancellorship, the selection of judges and the House of Lords – which no longer command public confidence.[2] In a high-profile news-conference in November, Lord Woolf CJ and his deputy Judge LJ said the proposals represented the greatest threats to judicial independence since the 17th century when "a lot of judges lost their heads."[3] In contrast, proponents of change have dubbed these comments inflammatory and exaggerated. For them, the judiciary's reluctance to contemplate reform is no different from that of the trades-unions in the 1980s, and no less unreasonable.[4]

The changes the Government wishes to make fall into two basic categories: 'visible changes' and 'fundamental changes'. The distinction made is one of effect. 'Visible' are those reforms which change only the appearance of English justice: the abolition of the Lord Chancellor, the reallocation of his multifarious roles, the separation

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[1] The Rt Hon Tony Blair MP, speaking in respect of the geopolitical context, delivered during the course of his speech to the Labour Party Conference, 2nd October 2001.
[2] *Constitutional Reform: A Supreme Court for the United Kingdom,* Department of Constitutional Affairs, July 2003
[3] *'Judges warn of Nazi Threat to Justice'. The Daily Telegraph, 7th November 2003*
[4] Peter Riddell, *The Times,* cited by Joshua Rozenberg in *'How do you judge independence?', The Daily Telegraph, 19th November 2003*

of the Law Lords from the legislature and the creation of a new Supreme Court. 'Fundamental' are the irritating details relating to judicial independence which will have a profound bearing on the way that justice is actually dispensed. Will the Government be able to prescribe the policy by which candidates are appointed so as to create a judiciary in its own image? What are the arrangements to be as regards the vital issues of judicial training, pay, security of tenure, discipline and deployment? Who will replace the Lord Chancellor as champion in Government of the judiciary's independence?

The premise for visible reform is that justice will be better served by introducing a more rational separation of the legislative, executive, and judicial powers. Nowhere is this clearer than with the proposed reforms to the Lord Chancellorship, which currently combines the three. In principle, the Government is correct to argue that the chief-executive of a major, high spending department[5] should have formal ministerial accountability and be able to concentrate on the delivery of an essential public service, without the burdens of being a judge or sitting on the woolsack. Equally, nobody suggests that the final court of appeal was ever appropriately housed in the seat of the legislature.[6]

The problem is that the premise misunderstands the way our unwritten constitution works. Montesquieu[7] described the separation of powers as a means by which liberty and justice under law can be secured. However, the separation of powers is not an end in itself, and whilst necessary to certain types of constitutional arrangements, is not to others. The United States Constitution, for example, embodies the separation of powers to a high degree because the founding fathers felt this was necessary to reconcile

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[5] In 2003 the Lord Chancellor's Department employed 10,000 civil servants and administered a budget of £2.5 billion: ch 18, *Constitutional Reform in the UK*, Oliver, 2003

[6] Ch 2, *Constitutional Reform: A Supreme Court for the United Kingdom*

[7] In his seminal *De l'Esprit des Lois*

a disparate group of independent states into ceding their sovereignty to federal rule. As a corollary, the states viewed this doctrine as a guarantee of their own liberties.

In contrast, the United Kingdom is, and has long been, highly centralised. In the context of parliamentary sovereignty, and of the near fusion of legislature and executive, it is the independence of the judiciary which guarantees liberty and the rule of law. Convention has played a vital role in guaranteeing constitutional propriety. It has clothed and made acceptable to public view what would otherwise be, in the naked legal form of the Lord Chancellor's powers, highly objectionable. The separation of powers, as a mantra to be chanted in ignorance of the underlying context, is meaningless.

Implicitly, the Government recognises this, for it acknowledges the practical efficacy of the current arrangements[8]. If, therefore, the Government's aim is to improve the dispensation of justice, it is the fundamental reforms, and not the visible, which are crucial.

From the composition and powers of the new Judicial Appointments Commission to the precise mechanism by which members of the bench will be appointed, it is worth noting that these reforms comprise the codification of what is currently unwritten and governed by convention. It was, for example, a convention that the Lord Chancellor would appoint members of the judiciary without regard to their political affiliations. Now this is to be consigned to history in favour of statutory restrictions and procedures. What was essentially a political constitution based on trust is being replaced with a 'juridified' model[9], and the content of these codified procedures assumes great importance.

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[8] The Peach Report concluded that the procedures for selecting members of the judiciary were "as good as any in the public sector" and this is cited without disapproval in ch 1, *Constitutional Reform: A New Way of Appointing Judges,* Department of Constitutional Affairs, July 2003

[9] These developments are tracked by Oliver, ch 1, op cit n 5 above

The significance of this is that it provides, for the first time, the opportunity for a future government to subvert the constitution. It is elementary that what is enacted in law by Parliament may be repealed or amended in the future. Once trust has been eliminated, what would there be – in respect of legal form – to stop a Government from appointing a judiciary that would be biased towards it?

Such concerns will doubtless strike some as unrealistic. Yet we need only look to recent history for the very dangers we face. The powers and responsibilities of the executive are greater than they have ever been before. The notion of the 'balanced constitution' has declined; simultaneously, that of the elective dictatorship has arisen. The courts have been forced to fill the vacuum. The massive expansion of judicial review, often into highly controversial areas such as the mandatory life sentence[10] or the conduct of foreign policy[11] has brought them into direct conflict with ministers[12]. It cannot be doubted that any government has an interest in the way the judiciary dispenses justice, that it would like it to be less willing to declare its actions illegal, and that the proposals could provide the means for this to occur.

In saying this, one does not intend to cast doubt on the good faith of ministers introducing measures which they believe will improve justice, transparency and efficiency under the constitution. But analysis of the nature of our constitutional arrangements, the efficacy of those arrangements and the potential implications of the proposals on judicial independence pose important problems which are more than merely

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[10] *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837
[11] R *(Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598
[12] The comments of the Home Secretary at the Police Federation Conference in response to extra-judicial dicta by Sir Oliver Popplewell are a particularly good example: *The Daily Telegraph*, 15th May 2003.

"theoretical."[13] It was perhaps inflammatory to invoke the spectre of Nazi Germany when discussing the proposals, but Judge LJ is right to be fearful. Having thrown the kaleidoscope into flux, it is necessary for the Government to ensure that the pieces fall in the right place.

[13] Lord Falconer of Thoroton, cited in *'Bench Press'*, *The Economist*, 15th November 2003