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Supreme Court UK: Radical Change, or Business as Usual?

The Supreme Court of the United Kingdom; its title alone implies radical change. Yet, in truth, the final court for England and Wales, Northern Ireland and Scotland in civil matters is a bit of a disappointment. In the words of Lord Woolf, "though called a Supreme Court, it will not, in fact, be a supreme court"[1]. While heralded as a landmark constitutional reform, the Supreme Court of the United Kingdom is not, in fact, a constitutional court, "or one whose primary role would be to give preliminary rulings on difficult points of law"[2]. It has none of the powers typically attributed to a supreme court, such as the power to overturn legislation. The jurisdiction of the Appellate Committee of the House of Lords has simply been transferred to the Supreme Court[3]. Indeed, "Among the Supreme Courts of the world, our Supreme Court will, because of its more limited role, be a poor relation"[4]. Disappointingly, it is business as usual in Parliament Square.

What, precisely, was so wrong with 'Appellate Committee of the House of Lords'? Why exchange, "a first class Final Court of Appeal for a second class Supreme Court?"[5]

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[1] Lord Woolf, *Squire Centenary Lecture: The Rule of Law and a Change in the Constitution*, University of Cambridge 3 March 2004.
[2] Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, Consultation Paper 11/03 July 2003, p 8.
[3] Constitutional Reform Act 2005 s. 40 and Sch. 9.
[4] Lord Woolf, above at fn 1.
[5] Ibid.

Prior to the changes under the Constitutional Reform Act 2005, the United Kingdom was famously described by Walter Bagshot as a 'fusion' of powers rather than a seperation of powers. Traditionally, the triple hats of Lord Chancellor and the hybrid nature of the House of Lords, sitting both as legislature and judiciary, had blurred the boundaries of the *trias politica*.

Towards the beginning of the 21st century this constitutional anomaly became untenable because of a "changing climate of opinion"[6]. According to the Government, an uptake in judicial review proceedings had raised the profile of the judiciary, increasing the danger that decisions of the House of Lords could be perceived to be politically motivated. The Human Rights Act 1998 and developing jurisprudence under article 6 of the European Convention of Human Rights 1950 had emphasised the increasing importance, not only of judicial impartiality, but the appearance of judicial impartiality[7].

Therefore, the purpose behind the Constitutional Reform Act 2005 was to create a distinct constitutional separation between the legislature and the judiciary[8]. It did this by simultaneously reducing the role of Lord Chancellor, extracting the highest appeal court from the bosom of Westminister and curtailing automatic peerage and voting rights of the new Justices of the Supreme Court. The explanatory notes to the 2005 Act put it bluntly and put it best: "The new Supreme Court will be separate from Parliament"[9]. Hitherto there had been a separation of powers in principle but never in practice.

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[6] Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, Consultation Paper 11/03 July 2003, p 11.
[7] Justice, *A Supreme Court For The United Kingdom*, Policy Paper November 2002, paras. 4-6.
[8] Government Explanatory Notes to the Constitutional Reform Act 2004, para. 61.
[9] Ibid, at para. 58.

Nevertheless, while the powers are now distinct, they are by no means equal. The United Kingdom remains one of the few systems of governance where the will of the legislature is supreme. The creation of the Supreme Court of the United Kingdom has not changed this. Therefore, it is unrealistic to view the physical autonomy of the judiciary as the catalyst for judicial revolution. To speak of "unintended consequences"[10] and "unexpected results"[11] is perhaps optimistic.

In an era characterised by presidential style government, unprecedented regulation and disillusionment with Parliamentarians, there may be an expectation or even a demand for the new Supreme Court to take an interventionist approach. Certainly, it is significant that the first case specially selected to inaugurate the Supreme Court by Lord Phillips was *A & Ors v Her Majesty's Treasury*[12]*:*

> This case is not simply about the making of executive orders which freeze individuals' assets to a point where they are effectively prisoners of the state. It is about the steady encroachment of executive government on liberties which it is its duty to respect and protect. Against such encroachments the only resort of the individual is to the courts…[13]

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[10] Attributed to Lord Neuberger MR in the article by Lord Lester of Herne Hill, *Supreme confidence*, Law Society Gazette, 17 September 2009.
[11] Lord Woolf, *Squire Centenary Lecture: The Rule of Law and a Change in the Constitution*, University of Cambridge 3 March 2004.
[12] [2008] EWCA Civ 1187. See Macdonald A, *Case Preview: A v Her Majesty's Treasury*, *UKSC blog*, 30 September 2009, http://www.olswang.com/blogs/scotuk2/article.asp?id=236.
[13] *A & Ors v Her Majesty's Treasury* [2008] EWCA Civ 1187 per Lord Justice Sedley at para. 125. This case concerned the Terrorism (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006 and whether these orders were unlawful because they restrict fundamental human rights without the express authorisation of Parliament.

Yet, even if the new Supreme Court wanted to flex its muscles, it has no effective way of doing so. As Lord Hope has said, judges must interpret legislation in a manner that is, as far as possible, compliant with the Human Rights Act 1998 but this does not entitle them to act as legislators[14]. Judges may declare legislation incompatible with Convention rights, but they may not strike it down or declare it invalid. The Human Rights Act 1998 has already caused confrontation between Parliament and the judiciary, most notably in relation to counter-terrorism control orders. Why will things be any different now? There is no intention of bestowing upon the Justices enhanced powers or constitutional remedies.

There are plans to introduce single majority judgments. This will inevitably mean that judgments will be more potent, if only because the court will be deemed to have passed judgment, rather than an individual or a group of individuals. As a collective, the judiciary is strengthened. Yet, however strong their rhetoric may prove to be, the judiciary's influence remains capped by Parliament. The Supreme Court of the United Kingdom represents symbolic rather than substantive change.

At the present time, the Supreme Court of the United Kingdom is beholden to the legislature and will continue to be so, until such time as Parliament makes way for a written constitution. Perhaps only then will Lord Woolf's "second class" Supreme Court be in a position to provide radical change.

Natalie Kyneswood

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[14] Lord Woolf, *Squire Centenary Lecture: The Rule of Law and a Change in the Constitution*, University of Cambridge 3 March 2004.