The UK Supreme Court Yearbook · **Legal Year 2014–2015** pp. 52–76

Parliament and the Courts: Strangers, Foes or Friends?

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For most of the 20th century, the constitution of the United Kingdom was seen as essentially settled. It experienced some adjustments, and at time upheavals, in the relationship between the different components of the state. These included the relationship between the state and the people, the nations that formed the United Kingdom, and the two chambers of the legislature.[1] However, the framework of the constitution and the principles underpinning it were viewed as fundamentally sound.

Towards the end of the century by contrast, change was substantial and on a greater scale than before. As Robert Stevens observed in *The English Judges*, the rate of change had tended to be glacial, but from 1970 onwards it was on a scale unseen since the late 17th and early 18th Centuries.[2] There had been major constitutional changes in the intervening years, but these, he recorded, 'were essentially independent acts rather than part of a dramatic period of constitutional restructuring'.[3] What we have witnessed over the past half-century has been a constitution in flux,[4] but one where reforms have been disparate and discrete. Each has been justified on its particular merits and not as part of an intellectually coherent approach to constitutional change.[5]

The changes that have taken place have affected the relationship between the different state organs, not least between the executive, Parliament and the courts. The courts have sought, sometimes struggled, to adapt to new roles deriving from the constitutional change, or at least have done so following change for which judges were themselves responsible. I examine here the relationship between the courts and the legislature, how that relationship has changed and how the two stand in relation to the executive.

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[1] The period saw agitation for female suffrage, Irish home rule and, less violently, limitations on the power of the House of Lords. See Philip Norton, 'Introduction: A Century of Change' (2011) 30(1) Parliamentary History 1.

[2] Robert Stevens, *The English Judges* (Hart Publishing 2002), xiii.

[3] Ibid.

[4] Philip Norton, *The Constitution in Flux* (Martin Robertson 1982).

[5] Philip Norton, 'The Constitution', in Anthony Seldon (ed), *Blair's Britain 1997-2007* (Cambridge University Press 2007) 104.

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DOI: 10.19152/ukscy.617

1 Three Models

In order to make sense of the relationship between the courts and Parliament, I have advanced three models of judicial-legislative relationships.[6] They can be summarised as determining whether the courts and Parliament are essentially strangers, foes or friends.

The first is the *respective autonomy* model. Here, there is a relationship between the executive and the legislature, the executive generating measures of public policy for debate and approval by the legislature; and between the executive and the judiciary, the courts determining challenges brought against public authorities. However, there is no notable or sustained relationship between the legislature and the courts. They are essentially strangers to one another. They reflect the twin pillars of the constitution as identified by Dicey: parliamentary sovereignty and the rule of law. Under the doctrine of parliamentary sovereignty, Parliament has 'the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[7] Parliament determines the law. The courts determine whether ministers and other public authorities have acted within the law. If they have not, the courts can hold their actions *ultra vires* and void. The courts may also so hold in cases where the action runs contrary to the principle of natural justice. This common law power is at the heart of the rule of law. Individual liberty, declared Dicey, was part of the constitution because it was secured by the decisions of the courts, extended or confirmed by the Habeas Corpus Acts.[8] Though Parliament could enact measures that run counter to the principles of natural justice, there has been recognition that judges should be left to protect the principle. Parliament and the courts have seen their roles as distinct, Dicey's twin pillars being precisely that: each upright and not clashing with one another. The

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[6] Philip Norton, 'A Democratic Dialogue? Parliament and Human Rights in the United Kingdom' (2013) 21(2) Asia Pacific Law Review 141; Philip Norton, 'Maintaining the Balance? The relationship of parliaments to other branches of government', in Michal Diamant et al, (eds), *The Powers That Be* (Wolf Legal Publishers 2013) 33.

[7] Albert Dicey, *An Introduction to the Law of the Constitution* (7th ed, Macmillan 1908) 40. The 7th edition was the one in which, as Wade observed, Dicey finally settled the text. See Emlyn Wade, 'Introduction', in Albert Dicey, *An Introduction to the Law of the Constitution* (10th ed, Macmillan 1959).

[8] Dicey (7th ed) (n 7) 197.

pillars underpin the stability of the constitutional edifice of the United Kingdom.

The second is the *competing authority* model. Here there is a relationship between the legislature and the courts, but it is an adversarial relationship. They are seen as foes or at least stand in an uneasy relationship. The legislature asserts its authority to speak for the people and in their name determine public policy. The courts, for their part, may challenge outcomes of the legislature where they offend fundamental constitutional provisions. In the United States, Chief Justice John Marshall argued in *Marbury v Madison* in 1803 that the role of the courts was to interpret the law and since the constitution was the higher law, it was therefore the prerogative of the courts to interpret the constitution.[9] Though some jurists advanced a respective autonomy thesis, arguing that each branch should interpret its powers under the constitution,[10] it was the power of judicial review read into the constitution in *Marbury* that was to prevail. Other nations followed the USA in crafting codified constitutions. Although it is not axiomatic that the courts would serve as the interpreters of the provisions of a constitution, in practice the responsibility has usually been vested in them. The senior courts may thus find themselves in conflict with the executive in holding certain actions unconstitutional. Here, there is engagement, but it is negative.

The third is the *democratic dialogue* model. Here there is a relationship between the legislature and the courts, but it is not an adversarial one, but one of constructive engagement. The two exist as friends, or at least in a relationship of comity. There is a case for both to be involved, especially in systems where courts can only deal with cases and controversies brought before them. They have no formal capacity to be proactive in the protection of rights. The legislature has such a capacity and, in a system where parliamentary sovereignty applies, is the body with ultimate responsibility for approving measures stipulating the rights of the citizens. Courts are thus protecting rights embodied in a document that, as Alison Young puts it, has a democratic pedigree.[11] The courts are best placed to interpret the law, but the legislature is the body that can enact wide-ranging measures to protect rights and indeed enact in law new rights whose moral validity has

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9 *Marbury v Madison* 5 US 137 (1803).

10 See *Eakin v Raub* 12 Sargeant & Rawle 330 (Pa. 1825) (Gibson J) (dissenting).

11 Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009) 128.

only recently been conceded. The value of dialogue between the different branches is that, as Young argues, it underpins stability and it creates a form of checks and balances between the courts and the legislature.[12] It facilitates achieving the balance between the liberal and democratic sides of a liberal-democracy,[13] with both courts and the parliament recognising that each has a legitimate role and that each needs the other if rights are to be protected effectively.

2 A History of Detachment

For most of the 20th century, and indeed prior to that, the model that provided the best fit was the respective autonomy model. The doctrine of parliamentary sovereignty was confirmed by the Glorious Revolution of 1688-89, when parliamentarians and common lawyers combined against the king. If the king was constrained by Parliament then so too were his courts. Judicial obedience to the doctrine constitutes, in the words of William Wade, 'the ultimate political fact upon which the whole system of legislation hangs'.[14] The courts were subordinate to the will of Parliament and therefore not a threat. They could be left undisturbed to fulfil their distinct role. Judicial independence became an established tenet of the British constitution. Parliament and the courts fulfilled discrete roles. They were, in functional terms, strangers. The distance between them was underpinned by art 9 of the Bill of Rights 1688, ensuring that courts did not pry into the proceedings of Parliament. Both Houses of Parliament kept their distance from the work of the courts, adopting the practice of not referring to matters that were *sub judice.*

3 The Challenges

Since the 1960s, the courts have increasingly faced a situation where they have been called upon to render judgments that have been seen to challenge the decisions of ministers, Parliament or devolved legislatures,

[12] Ibid 172.
[13] Philip Norton, 'Maintaining the Balance? The Relationship of Parliaments to other Branches of Government' (n 6).
[14] William Wade, 'The Basis of Legal Sovereignty' (1955) Cambridge Law Review xiii; cited in Emlyn Wade (n 7) lvi.

while at the same time becoming more detached from the other branches of government. The challenges have been several. Only one could be described as self-imposed. Until the mid-20th century, the courts were reluctant to review the actions taken by ministers and administrative authorities. In a series of cases in the 1960s however, the courts held certain ministerial or administrative decisions to be *ultra vires* or contrary to the principle of natural justice.[15] The *Padfield* and *Anisminic* cases in particular, were, according to Lord Scarman, 'indications that in the commercial and financial fields, where... the state has intruded with its administrative agencies, the judges are ready to take the activist line'.[16] The House of Lords in 1966 also decided that it would no longer be bound by its own precedents: 'In future, the House decreed, it would no longer require an act of Parliament to get rid of a precedent of the House which had outlived its "sell by date".'[17] The activism, or vigilance, of the courts showed no signs of abating in succeeding decades.

3.1 Membership of the European Union

Since then, the courts have acquired an enhanced role as a consequence of constitutional changes enacted by Parliament. The first, and constitutionally the most significant, was the European Communities Act 1972, providing the basis in domestic law for the UK's membership of the European Communities (now the European Union). The Act gave the force of law in the UK not only to extant EC legislation, but also to future legislation.[18] Questions of law are to be decided by the European Court of Justice (renamed under the Lisbon Treaty as the Court of Justice of the European Union) or in accordance with decisions of that court.[19] All UK courts are required to take judicial notice of decisions by the European court.[20] Cases that reach the highest domestic court of appeal (then the House of Lords, now the Supreme Court) are, unless the court determines that the law is already settled, referred to

[15] Most notably *Ridge v Baldwin* [1964] AC 40; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Conway v Rimmer* [1968] AC 910; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. See also Philip Norton, *The Constitution in Flux* (n 4), 135-9.

[16] Leslie Scarman, *English Law – The New Dimension* (Stevens 1974) 49.

[17] Alan Paterson, *Final Judgment* (Hart Publishing 2013) 265; Practice Statement [1966] 3 All ER 77.

[18] European Communities Act 1972 s 2(1).

[19] European Communities Act 1972 s 3(1).

[20] European Communities Act 1972 s 3(2).

the European court for a definitive ruling.[21] In the event of a conflict between the provisions of European law and those of an Act of Parliament, the former are to prevail.[22]

The question of what the domestic courts would do in the event of Parliament enacting a measure that expressly overrode a provision of European law remains hypothetical.[23] However, what happens where there is an apparent inconsistency between UK and European law? The courts are enjoined to construe UK law so as to render it consistent with European law, but the implications of what could happen when such construction could not be achieved were not realised until the 1990 *Factortame* and 1994 *EOC* cases.[24] In the former, the ECJ held that the courts had the power of injunction and could suspend the application of Acts of Parliament that on their face appeared to breach European law until a final determination was made. In the latter, the House of Lords held that the provisions of the Employment Protection (Consolidation) Act 1978 effectively excluding part-time workers from the right to claim unfair dismissal or redundancy payments were unlawful, being contrary to European law.[25] 'Britain', declared *The Times,* 'may now have for the first time in its history, a constitutional court'.[26]

3.2 Human Rights Act 1998

However, in terms of bringing the courts more into the political realm, the most significant development has been the enactment of the Human Rights Act 1998, incorporating most of the provisions of the European Convention of Human Rights into UK law. This was a novel challenge for the courts in terms of interpretation. The nature of that interpretation created the potential for conflict with how ministers interpreted particular measures. Although the doctrine of parliamentary sovereignty was explicitly protected

[21] See e.g. C-283/81 *Srl CILFIT v Ministero Della Sanita* [1982] ECR 3415.

[22] *R (Factortame Ltd) v Secretary for State Transport (No 2)* [1991] 1 AC 603.

[23] Cf *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

[24] *R v Secretary of State for Transport, ex parte Factortame* [1990] 2 AC 85; ibid; *Equal Opportunities Commission v Secretary of State for Employment* [1995] 1 AC 1.

[25] See Paul Maxwell, 'The House of Lords as a Constitutional Court – the Implications of *Ex Parte EOC*', in Brice Dickson and Paul Carmichael (eds), *The House of Lords: Its Parliamentary and Judicial Roles* (Hart Publishing 1999).

[26] Ibid 197; citing *The Times* 5 March 1994.

in the Act,[27] the senior courts were empowered to issue declarations of incompatibility where they found that a public authority had acted contrary to the provisions of a particular article (or articles) of the Convention.[28] It was then a matter for Parliament to change the law to bring it into line with the court's interpretation.[29]

The implications of the Act were well expressed by Diana Woodhouse: 'it gives the courts an increased constitutional role, moving them from the margins of the political process to the centre and increasing the underlying tension between the executive and the judiciary'.[30] The number of cases resulting in declarations of incompatibility has not been numerous, averaging fewer than two a year.[31] Where the courts have found UK law to be incompatible with the Convention, Parliament has in all but one case amended the law to bring it into line with the court's judgment. However, the exception highlights the potential for the courts to be mired in political controversy. A declaration of incompatibility was made in *Smith v Scott* in 2007,[32] following the 2005 decision of the European Court of Human Rights (ECtHR) in *Hirst v UK (No 2)*,[33] holding that the ban on prisoners being able to vote in elections was incompatible with the Convention because of its blanket nature. Successive governments avoided taking action on the judgment. Jack Straw, for example, conceded that when he was Justice Secretary, he had spent three years making sure there was no decision in response to the judgment. He had, he admitted, 'kicked the issue into touch, first with one inconclusive public consultation, then with a second.'[34] In a debate in the House of Commons in 2011, MPs voted overwhelmingly, by 234 votes to 22, in favour of maintaining the ban.[35] In 2013, a Joint Committee of both Houses of Parliament was appointed to consider the issue. It recommended that prisoners serving sentences of up to 12 months should be permitted to vote.[36] The report was published at the beginning of

[27] Human Rights Act 1998 s 4(2).

[28] Human Rights Act 1998 s 4(1).

[29] See Human Rights Act 1998 s 8.

[30] Diana Woodhouse, 'Politicians and the Judges: A conflict of Interest?' (1996) 55(2) Parliamentary Affairs (1996) 440.

[31] Philip Norton, *Parliament in British Politics* (2nd ed, Palgrave Macmillan 2013) 186.

[32] *Smith v Scott* 2007 SC 345.

[33] *Hirst v UK (No 2)* (2006) 42 EHRR 41.

[34] Jack Straw, *Last Man Standing* (Macmillan 2012) 538.

[35] HC Deb 10 February 2011, vol 523, col 584.

[36] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility*

2014, but neither the Coalition Government nor its successor moved to act on it.

The prisoner voting ban is the only case of a failure to act on a declaration of incompatibility, but there are cases where Parliament has acted that nonetheless highlights the tension that may derive from a declaration of incompatibility. In 2004, in the *Belmarsh* case, the House of Lords held that powers in Pt 4 of the Anti-Terrorism, Crime and Security Act 2001 were disproportionate and discriminatory in applying only to foreign nationals.[37] Foreign Secretary Jack Straw said the Law Lords were 'simply wrong' and that it was for Parliament and not the courts to determine how Britain could be defended from terrorism.[38] The government nonetheless amended the law, but the resulting legislation – the Prevention of Terrorism Act 2005 – also fell foul of the courts.[39] When Mr Justice Sullivan held that a control order imposed on a particular individual breached art 6, and other orders on a number of men breached art 5 ECHR, he was accused by the Home Secretary's counsel of a string of legal errors and misunderstandings.[40] The Chairman of the House of Commons Home Affairs Committee, John Denham, spoke of a constitutional crisis: 'This is not a battle between government and the judiciary', he said, 'This is between the elected Parliament and the judiciary'.[41] Former Home Secretary Charles Clarke criticised judges for failing to meet him when he was in office in order to discuss human rights legislation in the light of the terrorist threat, characterising it as one of his most depressing experiences as Home Secretary.[42] Although the courts had sought to engage with the executive,[43] this was not necessarily how ministers saw it. Tensions became such that

(Prisoners) Bill: Report (2013-14, HL 103; HC 924).

37 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2004] 2 AC 68.

38 Philip Norton, 'The Constitution: Selective Incrementalism Continues', in Michael Rush and Philip Giddings (eds), *The Palgrave Review of British Politics 2005* (Palgrave Macmillan 2006) 16-17.

39 *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385; *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440.

40 *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin), [2006] HRLR 29.

41 Matthew Tempest, 'Judges spark "constitutional crisis"' *The Guardian* (London, 29 June 2006) <http://www.theguardian.com/uk/2006/jun/29/ukcrime.humanrights> accessed 3 October 2015.

42 Patrick Wintour and Tania Branigan, 'Clarke blames judges for confusion on rights' *The Guardian* (London, 4 July 2006) < http://www.theguardian.com/politics/2006/jul/04/uk.humanrights> accessed 3 October 2015.

43 See Paterson (n 17) 296-7.

the Lord Chief Justice, Lord Phillips of Worth Matravers, felt the need to emphasise that the judge was doing his job of applying the law and enforcing the rule of law.[44] The Lord Chancellor, Lord Falconer, also acted to warn ministers not to interfere in judicial cases.[45]

Relations between government and the judiciary were seen as being at a particularly low point at the end of the Blair premiership. Despite having trained as a barrister, Tony Blair was criticised for not understanding the role of the courts.[46] Tension, however, continued beyond his occupancy of Downing Street as a consequence of media and politicians' criticisms of the courts for their ECHR jurisprudence. The courts were criticised for adhering too closely to the 'mirror principle', faithfully following the interpretation of the Strasbourg court.[47] Although there has been something of a shift in the stance of the senior courts – 'it is clear that the UK courts now regard themselves as being at best loosely bound by the mirror principle'[48] – media criticism of some Strasbourg judgments has fuelled demands for a British Bill of Rights.[49] Following the formation of a Coalition Government in 2010, the two coalition partners reached a compromise on the creation of a commission to consider a British Bill of Rights: In response to a parliamentary question about rulings of the European Court of Human Rights on prisoner voting and a Supreme Court ruling giving offenders the possibility of coming off the sex offenders' register, the Prime Minister stated that 'a commission will be established imminently to look at a British Bill of Rights because it is about time we ensured that decisions are made in this Parliament rather than in the courts'.[50]

The Commission that was formed recommended in favour of such a Bill of Rights, believing that it would help get away from the 'highly polarised

[44] Select Committee on the Constitution, *Meeting with the Lord Chief Justice: Report with Evidence* (2005-06, HL 213) Q59.

[45] BBC News, 'Judges "in touch with reality"' *BBC News Online* (18 July 2006) <http://news.bbc.co.uk/2/hi/uk_news/5192408.stm> accessed 3 October 2015.

[46] Philip Norton, 'Tony Blair and the Office of Prime Minister', in Matt Beech and Simon Lee (eds), *Ten Years of New Labour* (Palgrave Macmillan 2008) 96-7.

[47] See *R v Special Adjudicator ex p Ullah* [2004] UKHL 26, [2004] 2 AC 323.

[48] Colm O'Cinneide, 'Human Rights and the Constitution', in Jeffrey Jowell, Dawn. Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (Oxford University Press 2015) 89.

[49] See Alexander Horne and Lucinda Maer, 'From the Human Rights Act to a Bill of Rights?' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013) 251-79.

[50] Martin Loughlin and Cal Viney, 'The Coalition and the Constitution', in Anthony Seldon and Mike Finn (eds), *The Coalition Effect 2010-2015* (Cambridge University Press 2015) 78.

debate' surrounding the Human Rights Act.[51] Though no action was taken by the Government on the report, the Conservative Party subsequently published a policy document proposing that the HRA be replaced by a measure that in effect rendered judgments of the Strasbourg court as advisory. The proposal to replace the HRA with a British Bill of Rights found its way into the Conservative Party manifesto at the 2015 general election.[52]

The proposal for a British Bill of Rights highlighted the tension inherent in the competing authority model. There is little to suggest that the tension would be abated by the enactment of a British Bill of Rights. Tension may be exacerbated rather than abated given that Convention rights form part of the general principles of European Union law and would potentially have to be applied by the UK courts where EU law is engaged.[53] Devolved administrations are also required by the devolution legislation to comply with Convention rights.[54] Any revision of the constitutional settlement to de-apply Convention rights has the potential to disrupt the devolution settlement.[55] In September 2015, Scottish First Minister Nicola Sturgeon said that while the Human Rights Act 1998 was reserved legislation, human rights was a devolved issue and any attempt to amend the Act would likely require the consent of the Scottish Parliament. 'It is inconceivable in my opinion... that such consent would be granted.'[56]

3.3 Devolution

Devolution has also created significant challenges for the courts. In part, this is a consequence of Wales not having its own judicial system. As the Lord Chief Justice, Lord Thomas of Cwmgiedd, has observed, 'Although the effect of the grant of full law making powers in the devolved fields in 2011 has taken some time to work its way through, the unitary court system of

[51] Commission on a Bill of Rights, *A UK Bill of Rights? – The Choice Before Us* (December 2012), vol 1, 29.

[52] The Conservative Party, *Strong Leadership, A Clear Economic Plan, A Brighter, More Secure Future* (The Conservative Party 2015) 60.

[53] See C-410/98 *Hoechst* [1989] ECR 2859.

[54] See Scotland Act 1998 s 29(2)(d); Government of Wales Act 2006 s 94(6)(c); Northern Ireland Act 1998 s 6(2)(c).

[55] See O'Cinneide (n 48) 100.

[56] BBC News, 'Sturgeon warns against plans to scrap Human Rights Act' *BBC News Online* (23 September 2015) <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-34331682> accessed 3 October 2015.

England and Wales is having to adapt to administering laws passed by two different legislative bodies, one of which legislates bilingually.'[57]

There is a more fundamental challenge in that constitutional change has the potential to propel the courts into political controversy. The courts are in effect constitutional courts for Scotland, Wales and Northern Ireland. (As was previously the case with Northern Ireland when it had its own legislature under the Government of Ireland Act 1920.) The governments of the different parts of the UK can only act within the terms of the Acts creating the devolved systems of government. How the senior courts interpret that legislation could conflict with the interpretation of the devolved administration. The potential is particularly apparent in the context of Scotland. The demands of the Scottish National Party government for more powers may lead to conflict with the courts as well as the UK government. The Scotland Bill introduced after the 2015 general election has significant constitutional provisions, some of which are essentially declaratory and are not obviously amenable to judicial resolution.[58]

The potential for conflict is also facilitated by the fact that, as we have noted, the devolved authorities are bound by the devolution legislation to comply with the provisions of the ECHR. The relevance here is that they lack the capacity of the UK Parliament to decline to comply with the interpretation of the courts. There is thus the potential for Scottish (or Welsh or Northern Irish) politicians to attack the courts for judgments that conflict with decisions they have taken as representatives of the people, but with which they are required to comply. Most devolution cases that come before the Supreme Court (jurisdiction having been moved from the Judicial Committee of the Privy Council) are brought on grounds of conflict with Convention rights, and in some cases it has overridden interpretations made by the Scottish courts.[59] As Lady Hale has recorded, 'Hallowed practices of the Scottish criminal justice system have proved irreconcilable with the

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[57] Lord Thomas, Speech to the Commonwealth Magistrates' and Judges' Association (15 September 2015).

[58] They include a clause that simply states the Sewel convention (that the UK Parliament will not normally legislate on matters that are devolved without the consent of the Scottish Parliament). It fails to stipulate the conditions as to when it is and when it is not permissible for the UK Parliament to legislate in the absence of the Scottish Parliament passing a legislative consent motion.

[59] See John McEldowney, 'The Impact of Devolution on the UK Parliament', in Alexander Horne, Gavin Drewry and Dawn Oliver (n 49), 202-4.

European Convention. This has, to say the least, proved controversial in Scotland.'[60]

Furthermore, law officers can refer Bills after they have been passed by a devolved legislature, but before they have received Royal Assent, to the Supreme Court to determine if they are within the scope of the legislature's powers.[61] There have been three references to date in respect of measures passed by the National Assembly for Wales, but as yet no references in respect of Bills passed by the Scottish Parliament.[62] There may be political reasons for this, given that, as Lady Hale, observed, such a reference by the UK Government may be seen by the Scottish government and Parliament as a hostile act.[63]

4 The Creation of the Supreme Court

The potential for conflict between the courts and Parliament thus increased notably in the latter half of the 20th century. The potential was arguably ameliorated by the extent to which parliamentarians understood and appreciated the role of the judiciary. The proximity of parliamentarians and senior judges (categories that, as we shall see, were not mutually exclusive) enabled each to appreciate the distinct role of the other. In short, the closeness of the two in terms of their daily activities paradoxically helped to protect the autonomy of each in fulfilling their particular roles. It was not the cause of, but it helped maintain, the relationship embodied in the respective autonomy model.

That closeness, though, came under challenge in the latter decades of the century and was largely dissipated by the enactment of the Constitutional Reform Act 2005 (the 2005 Act) creating a Supreme Court of the United Kingdom and replacing the Lord Chancellor with the Lord Chief Justice as

[60] Lady Hale, The Supreme Court in the United Kingdom Constitution (Somerville College Oxford 5 February 2015), 8, citing in particular the decisions in *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601; *Fraser v HM Advocate* [2011] UKSC 24, 2011 SLT 515.

[61] Scotland Act 1998 s 33; Government of Wales Act 1998 s 99; Northern Ireland Act 1998; Northern Ireland Act 1998 s11.

[62] *Local Government Byelaws (Wales) Bill 2012 - Reference by the Attorney General for England and Wales* [2012] UKSC 53, [2013] 1 AC 792; *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43; *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3.

[63] Lady Hale (n 60) 10.

head of the judiciary. The Act was the culmination of a process of detachment of the courts from Parliament. As the Lord Chief Justice, Lord Thomas of Cwmgiedd, has observed, there were various reasons for this. There is now, in contrast with earlier in the last century, only one judge who has served as an MP or minister. There are also few MPs who have practised as lawyers for a significant period of time before becoming MPs,[64] and few who continue in practice after election. The Lord Chancellor's Department, which had been staffed almost exclusively by senior lawyers, evolved into a Ministry of Justice which has senior officials who mostly have no experience of courts and are not lawyers. There is also a notable turnover within the ranks of the civil service, whereas many lawyers and judges perform the same sort of work for most or all of their professional life: 'this provides for a very different outlook and levels of detailed knowledge'.[65]

The point to note about this analysis is that it relates to MPs and the executive (ministers and civil servants). There is no mention of the House of Lords. Until the 2005 Act, the head of the judiciary and members of the most senior court were members of the House of Lords. Law Lords were the first examples of life peers, appointed under the Appellate Jurisdiction Act 1876 to fulfil the judicial function of the House, along with the Lord Chancellor, former Lord Chancellors and peers who have held high judicial office. (Formally, other peers may participate in judicial hearings, but the last time a peer, albeit a barrister of long standing, attempted this – in 1883 – he was ignored.)[66] The Law Lords had offices in the Palace of Westminster abutting offices of other peers. It was also a convention that a Law Lord chaired the European Union Committee sub-committee (Sub-Committee E) dealing with law and institutions. Judicial hearings were heard in a committee room (Committee Room 1 and, as necessary, Committee Room 2) with judgments delivered in the chamber, albeit in a designated judicial sitting. (The Law Lords occupied the two front benches, with the senior Law Lord occupying the Woolsack.) Other peers could, and occasionally

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[64] Though there was a slight reversal of the trend in the 2015 election, when the proportion of lawyers among newly-elected MPs was slightly higher than in the preceding Parliaments.

[65] Lord Thomas, 'The Judiciary, the Executive and Parliament: Relationships and the Rule of Law' (Address to the Institute for Government 1 December 2014) 2.

[66] Owen Hood Phillips, *Constitutional and Administrative Law* (5th ed, Sweet & Maxwell 1973) 136-7. The convention that lay peers do not participate was set in *O'Connell v The Queen* (1844) 11 Cl & F 155.

did, sit in on the chamber sittings. The Law Lords, as members of the House, were eligible to speak in debates. They did not usually speak on legislation, given that they may have to sit judicially to interpret it at a later date, but they could speak on other issues, such as the administration of the court system. Though their participation in the chamber declined when Lord Bingham became senior Law Lord—he took the view that Law Lords should not normally participate[67]—some nonetheless did speak on occasion. The Law Lord chairing Sub-Committee E, for example, would speak to introduce a report emanating from the sub-committee. (The last Law Lord to speak in parliamentary proceedings was Lord Mance, in introducing a sub-committee report.) They were also formally entitled to vote and on very rare occasions did so: two Law Lords (Lord Hoffman and Lord Scott of Foscote) caused some controversy by publicly opposing the ban on fox hunting, an opposition that extended to voting against the ban.

The House also contained other 'judicial peers'. Their number by convention included the Lord Chief Justice, but variously included the Master of the Rolls and the Lord President in Scotland. Some peers have served on the Court of Session. Lord Lowry, Lord Chief Justice of Northern Ireland, was elevated to the peerage in 1979 while still in post.

The detachment of the judiciary from the House of Commons and the executive arguably enhanced the link with the House of Lords. The House of Lords remained as a buffer between the judiciary and the executive, an executive that was such because it enjoyed a majority in the House of Commons. Though there was a Conservative preponderance in the House of Lords until passage of the House of Lords Act 1999, no government could take the House for granted. Law Lords may not normally speak in debates, but other peers with legal experience, including retired Law Lords, could and did. Notable figures to take part in the deliberations of the House in the late 20th century included Lords Ackner,[68] Simon of Glaisdale[69] and

[67] Lord Bingham stated in 2000 that the Law Lords had agreed that it would not be appropriate for them to engage in matters where there was a strong element of public controversy, a statement that 'merely validated a convention which had already grown up.' Michael Beloff, 'The End of the Twentieth Century: The House of Lords 1982-2000', in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press 2009) 253.

[68] A Law Lord from 1986 to 1992.

[69] A former Solicitor General who left Parliament to become a judge, he served as President of the Probate, Divorce and Admiralty Division.

Wilberforce.[70]

The value of this relationship was that it had the potential to reduce or limit conflict between Parliament and the courts. As I wrote in 2005: 'The House of Lords in its legislative capacity can act as something of a protector of the House in its judicial capacity. The Law Lords, for their part, are better able to understand the role of the legislature. The interaction does not jeopardise the independence or the integrity of the judges but enhances their understanding'.[71] The fundamental advantage, as Louis Blom-Cooper and Gavin Drewry observed, was that it was a two-way channel of communication.[72]

The 2005 Act served to sever the link with the House of Lords, thus finalising the detachment of judiciary and Parliament. It not only created the Supreme Court and removed the Law Lords from the House, but also disbarred other judicial peers (such as the Lord Chief Justice) until such time as they completed their tenure of office. The danger posed by the change was to isolate the Supreme Court from the protective environment of Westminster. Recognising the danger of isolation was not confined to observers of the court. Some Law Lords were very much aware of the implications posed by moving across Parliament Square. Although the move was supported by the senior law lord, Lord Bingham, and by three other Law Lords, six opposed it, arguing that the creation of a Supreme Court was unnecessary and potentially harmful.[73] The Supreme Court may be a short walk from the Palace of Westminster, but in terms of its visibility to parliamentarians it may as well be in some far-flung city.

The implications of the move need to be seen in the context of relations between the executive and judiciary. Prime Minister Tony Blair's decision to create a Supreme Court was announced in 2003, without prior consultation with the judiciary, or with the Lord Chancellor, Lord Irvine of Lairg. This was

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[70] The only judge in recent times to be appointed as a Law Lord straight from the High Court bench, he was a Law Lord from 1964 to 1982.

[71] Philip Norton, 'Parliament and the Courts', in Nicholas Baldwin (ed), *Parliament in the 21st Century* (Politico's 2005) 322.

[72] Louis Blom-Cooper and Gavin Drewry, *Final Appeal* (Oxford University Press 1972) 209, cited in Graham Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) 93.

[73] Lords of Appeal in Ordinary, *The Law Lords' Response to the Government's Consultation Paper on Constitutional Reform: A Supreme Court for the United Kingdom* (House of Lords, 27 October 2003) <http://www.parliament.uk/documents/judicial-office/judicialscr071103.pdf> accessed on 3 October 2015, 1.

the year in which the then Home Secretary, David Blunkett, had attacked a decision of the High Court in an asylum case – 'we don't accept what Justice Collins has said' – and claimed that the courts 'routinely' rewrote the effects of a law that Parliament had passed.[74] Judges, he said, should live in the 'real world'. He penned an article for *The News of the World* headed 'It's Time for Judges to Learn their Place'.[75] He was following in the footsteps of some his predecessors in criticising the decisions of the courts.

Various senior lawyers in the Lords responded to the criticism. One former Law Lord, Lord Ackner, observed 'While accepting that in any democracy there will always be a measure of tension between the judiciary and the executive, the present position has become intolerable.'[76] Arguably, the need for the protection afforded by the chamber in which he was speaking was at its greatest in modern history, but the links that enhanced the relationship between the judicial and legislative wings of the House were in the process of being broken. By leaving the confines of Westminster, the highest court was in danger of being isolated and vulnerable to attack by an executive keen to get its way, especially on legislation where it saw the need to protect the public from harm as trumping the protection of individual rights.

5 The Changing Relationship

The challenge facing the courts after the creation of the Supreme Court may be seen in terms of the models of the relationship between Parliament and the courts. The respective autonomy that characterised relations until the late part of the 20th century was in danger of being superseded by one of competing authority. A competing authority model appeared at times to characterise the relationship between the executive and the courts, but could it be avoided in the relationship between courts and Parliament? The ideal was one of comity, of democratic dialogue, for the reasons discussed in opening, but to what extent has experience matched the model?

The need for a relationship between Parliament and the courts has been both understood and facilitated by judges and by Parliament. The

[74] Philip Norton, 'Governing Alone' (2003) 56(4) Parliamentary Affairs 553. See Stevens (n 2) 129-36.
[75] Cited in Gee et al (n 72) 49.
[76] HL Deb 21 May 2003, vol 648, col 891.

recognition may be seen as grounded in what had gone before. As Gee et al recorded, 'Perhaps because of the Law Lords' traditional involvement in the House of Lords, the senior judiciary has been receptive to overtures and willing to engage with Parliament.'[77] The uncertain relationship with the executive provided an impetus for maintaining a relationship with Parliament and Parliament had both the institutional framework and to some degree the political will to facilitate that relationship, both features that were relatively recent.

The established relationship was apparent and had effect when the Constitutional Reform Bill reached the House of Lords in 2004. The House took the unusual step of referring the Bill to a select committee for further consideration. The committee included senior members of the House, among them QCs such as former Foreign Secretary Lord Howe of Aberavon; retired Law Lord, Lord Lloyd of Berwick; and Lords Bledisloe, Goodhart, and Kingsland. It reported in July 2014,[78] making 485 recommendations: no fewer than 462 amendments were made as a result of the committee's work.[79] The changes helped to protect judicial independence.[80] The Lord Chancellor under his oath is sworn to 'respect the rule of law'.[81]

The relationship that I have sketched above thus provided the basis for ensuring that judicial independence continued beyond the period when it was protected by convention and the understandings that underpinned much of the British constitution. As a consequence of the Act, the Lord Chancellor need no longer be a peer or a lawyer,[82] but s/he retains an important role in protecting the independence of the judiciary and a unique role in respect of the rule of law.[83]

Recognition of the need for maintaining a relationship of comity has been well expressed by both peers and judges. The Select Committee on the Constitutional Reform Bill reported that 'it is desirable for a committee of Parliament to act as a bridge between Parliament and the judiciary,

[77] Gee et al (n 72) 124.

[78] Constitutional Reform Bill Committee, *Constitutional Reform Bill – First Report* (2003-04, HL Paper 125-I).

[79] See Gee et al (n 72) 117.

[80] Constitutional Reform Act 2005 s 3(1): 'The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.'

[81] Constitutional Reform Act 2005 s 17.

[82] Constitutional Reform Act 2005 s 2.

[83] Constitutional Reform Act 2005 s 3.

particularly in the event of the senior judges being excluded from the House'.[84] The Lord Chief Justice, Lord Thomas of Cwmgiedd, speaking at the end of 2014 at the Institute for Government, declared: 'the independence of the judiciary, far from precluding relationships with the other two branches of the state, requires engagement with both'.[85] As he went on to note in a later speech, this necessitated a more proactive stance in promoting an understanding of the importance of justice.[86]

Following the changes announced in 2003, resulting in the 2005 Act, judges were keen to develop links to supersede that provided by the presence of the Law Lords as well as more generally to raise the profile of their activities. The initial concern was the absence of a means of communicating formally with Parliament. Neither the Law Lords nor the Lord Chief Justice now had the platform provided by the House of Lords to put their concerns on the record. Before the 2005 Act even made it to the statute book, the Lord Chief Justice, Lord Woolf, moved quickly to establish some link with Parliament, primarily through the Constitution Committee of the House of Lords.[87] It was agreed that should the Lord Chief Justice wish to raise an issue with the Committee, he would be able to do so. This became more formalised, both in statute and in practice through the greater specialisation of both Houses through committees.

The statutory provision came in the 2005 Act. S 7 confers a responsibility on the Lord Chief Justice to represent the views of the judiciary of England and Wales to Parliament. The Lord Chief Justice is also empowered, under s 5, to lay written representations before Parliament. Although the LCJ has not pursued a recommendation of the Constitution Committee to lay a report annually,[88] the power has nonetheless variously been utilised. Both Houses also provide a means for a democratic dialogue through the use of committees. The creation of a series of select committees by the House of Commons in 1979 was arguably the most important parliamentary reform for half-a-century. They provided for a more specialised House and for one that no longer accorded a virtual monopoly to the executive as the

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[84] Constitutional Reform Bill Committee (n 78) [420].

[85] Lord Thomas (n 65) 3.

[86] Lord Thomas (n 57).

[87] At the time of the initial contact, made through the Lord Chancellor, I was Chairman of the Committee.

[88] Select Committee on the Constitution, *Relations Between the Executive, the Judiciary and Parliament*: *Follow-up Report,* (Session 2007-08, HL 177) [21]-[23].

supplier of information. They also provided an agenda setting capacity, given that the topics for inquiry were chosen by the committees and not the Government.

This institutional change occurred at a time, and, indeed, may be seen as a consequence, of as greater willingness on the part of MPs to act independently of their parties. Party whips could not take members' support for granted in the way that had been possible before.[89] In the House of Lords, the principal change was the passage of the House of Lords Act 1999, removing more than 500 hereditary peers from membership. The consequence was that no one party enjoyed a majority in the House. Successive Governments thus had to engage with the House. Whereas the House of Commons indulged in the politics of assertion, the House of Lords engaged in the politics of justification.[90] Both Houses were in a position more than before where members may be willing to stand up to government, including on issues of civil liberties. The Blair Government suffered its first defeat when in 2005 it sought to extend the period for pre-charge detention to 90 days.[91] Attempts to limit jury trials also floundered in the House of Lords,[92] as did an attempt to restrict pre-charge detention to 42 days.[93] Of 488 Government defeats in the Lords between 1999 and 2012, 170 related to justice and the courts.[94]

Parliament was thus in a position, institutionally and politically, to adapt to protect the role of the judiciary and the rule of law following the departure of the Law Lords from the Palace of Westminster. That adaptation took place not least through two new committees. Both came into being in 2001. The Constitution Committee of the House of Lords was created following a recommendation of the Royal Commission on Reform of the House of Lords (the Wakeham Commission) which felt the House

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[89] See Parliament in British Politics (n 31) 27-30.

[90] Philip Norton, 'The Legislative Process in the House of Lords', in Alexander Horne and Andrew Le Seuer (eds), *Legislation and Accountability* (Hart Publishing, 2016, forthcoming).

[91] The provision was rejected by 322 votes to 291. See Richard Kelly, Oonagh Gay, and Philip Cowley, 'Parliament: The House of Commons – Turbulence Ahead?' in Michael Rush and Philip Giddings (n 38) 106-7.

[92] In 2000, the Government abandoned its Criminal Justice (Mode of Trial) Bill after the House voted by 222 votes to 126 for an amendment to restore the right of the accused to choose jury trial.

[93] The House voted in 2008 by 309 votes to 118 against extending the 28-day limit to 42 days.

[94] Gee et al (n 72) 116.

should act as a constitutional safeguard.[95] The Joint Committee on Human Rights (JCHR) was brought into being in response to the implementation of the Human Rights Act 1998.[96] They were complemented by a committee covering the Lord Chancellor's Department, formed in 2003 and later superseded by the Judiciary Select Committee.

The committees provided a specialised means of contact with the judiciary, hearing from judges in the course of various inquiries, and proving allies with the judiciary in ensuring, or seeking to ensure, that both Houses understood the role of the courts. Members of the committees, especially the Constitution Committee and the Joint Committee, variously had backgrounds in the law or the constitution (there were normally one or more QCs on each and, in respect of the Constitution Committee, variously former holders of judicial office) and so the exchanges with judges appearing the committees were informed. Among those serving on the Constitution Committee have been members who have served as Lord Chief Justice (Lord Woolf, Lord Judge), Attorney General (Lord Goldsmith) and Lord Chancellor (Lord Irvine of Lairg). The membership has also included leading lawyers such as Lord Pannick and Lord Lester of Herne Hill, the latter regularly serving also on the Joint Committee on Human Rights.

The Constitution Committee through its inquiries, including its reports on legislation of constitutional significance, generated various constitutional standards to underpin legislation,[97] providing the potential basis for a code of legislative standards, something that would have to come from Parliament, given that government has rejected the need for such a code.[98] Fourteen of the standards relate to the judiciary, mostly designed to protect the independence of the judiciary.[99] It has engaged in dialogue with ministers and judges and become an essential arena for dialogue between

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[95] Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534 2000).

[96] See Paul Evans, 'The Human Rights Act and Westminster's Legislative Process', in Alex Brazier (ed), *Parliament, Politics and Law Making* (London: The Hansard Society 2004) 84-93.

[97] Jack Simpson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (2nd ed, The Constitution Unit 2015).

[98] Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation: Government response to the Committee's First Report of Session 2013-14* (Session 2013-14, HC 611) [12].

[99] Simpson Caird, Hazell and Oliver (n 97) 9-10. There are others dealing with individual rights, access to justice, due process and procedural fairness.

the House of Lords and the judiciary.[100] As LeSueur and Simpson Caird have recorded, the Committee fulfils four main goals. It is a facilitator, enabling judges to air concerns about the administration of justice. It serves to hold ministers to account for responsibilities relating to judicial matters. It serves, within boundaries, to call senior judges to account for matters relating to the judiciary. And, last but not least, it has oversight of the constitutional architecture built since 2005.[101]

It has engaged not only as a recipient of evidence about the work of the judiciary, but has also served to influence the judiciary. It encouraged the Lord Chief Justice to change his communications strategy, resulting in a more proactive Judicial Communications Office and the giving of an annual press conference.[102] Its report on judicial diversity was designed to assist in widening access to judicial appointments by women and members of ethnic minorities.

The committees have proved to be allies with the courts in relation to the executive and on occasion to Parliament as a whole. As Gee et al recorded, the JCHR has helped foster a political culture respectful of the courts and the judges who work in them.[103] 'Behind the scenes, the JCHR has also encouraged ministers to use temperate language when criticising judicial decisions'[104] and prompted a more co-ordinated approach in government to dealing with human rights issues.[105] Part of the culture has been a greater awareness of, certainly more frequent references to, the Committee and to human rights. Hunt, Hooper and Yowell found that in the 2001-05 Parliament, there were 23 substantive references to the committee by MPs and peers. In the following Parliament, there were 1,006 references.[106] The same period also saw a significant increase in references to human rights: 23,328 mentions, of which over 17,000 occurred in the 2005-10 Parliament. Of the references, 60 per cent were in the context of legislative scrutiny.[107] Notably, and not surprisingly in the light of our discussion, two-thirds of all

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[100] Andrew Le Sueur and Jack Simpson Caird, 'The House of Lords Select Committee on the Constitution', in Alexander Horne, Gavin Drewry and Dawn Oliver (n 49) 281, 304-6.

[101] Le Sueur and Simpson Caird (n 90) 305-06.

[102] Gee et al (n 72) 108.

[103] Ibid, 116; see also Philip Norton, A Democratic Dialogue (n 6).

[104] Ibid.

[105] Parliament in British Politics (n 31) 190.

[106] Murray Hunt, Hayley Hooper and Paul Yowell, *Parliament and Human Rights: Redressing the Democratic Deficit* (Arts and Humanities Research Council 2012) 19.

[107] Ibid 30-1.

references to the JCHR were made in the House of Lords.

The contact between committees and judges is notable for its quantity as well as its quality. Gee et al recorded 148 records of oral evidence given by 72 salaried UK judges before select committees.[108] There was a notable concentration on occasion, not least when the Constitution Committee undertook an inquiry into judicial appointments. The hearings on occasion comprised two or more judges appearing to give evidence, notable on occasion for the witnesses not always agreeing with one another. The sessions provided a means of discourse between the judges themselves as well as between the judges and the committee. Hearings also reflected the nature of the Lords as existed previously, the membership of the committee including Lord Irvine of Lairg, who as Lord Chancellor had been responsible for appointing some of the judges appearing before the committee.

The discourse extends to court judgments. Despite the provision of art 9 of the Bill of Rights 1688, it has not been deemed constitutionally improper for courts to refer to reports of the JCHR. In the period to March 2012, there were 72 cases in UK or European courts in which reference was made to the JCHR or a JCHR report.[109] On occasion, they were utilised as potentially persuasive in reaching a decision. 'In total there were fourteen instances (nineteen per cent of cases [in which reports were cited]) where the majority of the court agreed with the reasoning of the JCHR. There was one instance (one per cent of cases) where the views of the JCHR were regarded as persuasive by a dissenting judge.'[110]

The dialogue undertaken by committees extending beyond engaging with judges and ministers in the UK was also apparent in the inquiry undertaken by the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill. It took evidence not only from the Lord Chancellor and the Attorney General (who took somewhat different approaches), but also from Thorbjørn Jagland, Secretary General of the Council of Europe. It was in effect acting as an arena for dialogue between Parliament and the Council of Europe, the Secretary General being keen to stress reforms being undertaken in the ECHR itself. The nature of informed discourse was enhanced by the fact that the members of the Joint Committee included the former President of the Supreme Court, Lord Phillips of Worth Matravers.

[108] Gee et al (n 72) 101.
[109] Hunt, Cooper and Yowell (n 106) 45.
[110] Ibid 52.

6 Conclusion

The relationship of Parliament and the courts has seen some movement from that of respective autonomy to one of democratic dialogue. This is the view of the President of the Supreme Court, Lord Neuberger. When presented with the three models, when giving evidence to the House of Lords Constitution Committee, he took the view:

> It has tended to be the first [respective autonomy], but we have got more of the third [democratic dialogue], and that is a good thing provided we respect each other's boundaries. I would hope that we can avoid the second [competing authority]. So far we have, and I hope that will continue.[111]

Although some judges have occasionally strayed into the territory of arguing that the courts may not uphold legislation that violates basic tenets of the constitution – most notably Lord Steyn in his *obiter dictum* in the *Jackson* case in 2006[112] – they remain siren voices. 'Most Justices might well consider legislation which seeks to alter fundamental or constitutional rights to be lacking in legitimacy, and as such subject it to extremely close scrutiny, but in the end accept that that is the law.'[113] The status of judicial authority was reiterated by Lady Hale in evidence to the House of Lords Constitution Committee, when both she and the President of the Court, Lord Neuberger, confirmed that the Supreme Court was not a constitutional court:

> Lord Norton of Louth: There is a fundamental difference, then. You are saying that the authority of the courts derives from Parliament, and not some higher law document.

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[111] Constitution Committee, Evidence session with the President and Deputy President of the Supreme Court, Evidence Session No 1, Wednesday 8 July 2015, Q7.

[112] *Jackson v AG* [2005] UKHL 56, [2006] 1 AC 262. 'In exceptional circumstances', he said, '(for example the abolition of judicial review)... the new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'. See also *Axa General Insurance v Lord Advocate* [2011] UKSC 46, [2011] 1 AC 868. A similar point was raised in the context of EU law in *R (HS2 Action Alliance Ltd)* (n 23).

[113] Paterson (n 17) 273.

Lady Hale: That is right.[114]

Although the Supreme Court has attracted criticism in some high-profile cases,[115] it has not gone out of its way to court controversy. Lord Bingham sought to couch his judgment in *Belmarsh* in unexciting terms, and Brice Dickson has observed that 'In a range of other cases involving the application of Convention rights the Bingham court was curiously conservative, perhaps conscious that the Human Rights Act is not viewed with universal approbation, especially by most of the tabloid press'.[116] As Eric Ip has argued, anticipation of what could happen should the court challenge Parliament has helped maintain a deferential attitude towards the legislature.[117]

The senior judiciary, then, has recognised the limitations of its position under the doctrine of parliamentary sovereignty and sought to engage in a dialogue with Parliament. It has sought to do the same with the executive, but Parliament has the potential to serve as a protective shield should the executive prove unresponsive or hostile. Achieving such a relationship with the legislature may prove difficult given executive dominance of the House of Commons, but select committees in both Houses now provide some protection, or at least some appreciation of the role of the courts, not least the changing role. This appreciation of the role of judges is not necessarily mirrored in the views of ministers, and notably not in the coverage of court decisions by the tabloid press. However, there is an incentive for Parliament to engage given that the doctrine of parliamentary sovereignty is a judicially self-imposed one, and the *obiter dictum* of Lord Steyn in *Jackson* identified a possible path the courts may travel in the event of government seeking to use a parliamentary majority to ride roughshod over fundamental constitutional principles. The presumption is that no government would do so, and in any event would have difficulty getting it through both Houses of Parliament.

[114] Constitution Committee, Evidence session with the President and Deputy President of the Supreme Court, Evidence Session No 1, Wednesday 8 July 2015, Q6.

[115] See e.g. *A v Home Secretary* (n 37); *Fraser v HM Advocate* [2011] UKSC 24, 2011 SLT 515; *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38, [2014] AC 700.

[116] Brice Dickson, 'A Hard Act to Follow: The Bingham Court, 2000-2008', in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (n 67) 267.

[117] Eric Ip, 'The Institutional Foundations of Supreme Court Power in Britain's Representative Democracy' (2013) 49(3) Representation 281.

The relationship of Parliament and the courts has thus changed. The constitutional changes of recent decades have propelled the courts into the need for a dialogue with Parliament and the executive. The dialogue with Parliament has potential value in creating an ally to resist executive encroachment on areas within the remit of the courts. The position of the House of Lords has been a continuing element in appreciating the role of the courts and in continuing to provide a means by which the courts can speak to parliamentarians (no longer through the floor of the House, but through committees), both formally and informally, and serve as a buffer should the relationship between the courts and the executive take on the characteristics of competing authority.

The relationship between Parliament and the courts has thus shifted somewhat from the first to the third model, as acknowledged by Lord Neuberger, from being strangers to seeking to be friends, but there remains the threat of the second fitting the relationship of the executive and the courts. The government may see the courts as on occasion as, if not foes, then at least unfriendly. The Conservative Government's commitment to a British Bill of Rights derives from a perception that the ECtHR is a threat to decisions taken by the people's representatives and wants to shift the burden to protect human rights to the Supreme Court. It is the perception that shapes behaviour and, given that the Supreme Court has not usually digressed that much from the jurisprudence of the Strasbourg court, creates the potential for an uneasy if not adversarial relationship. This places even more importance on the need for Parliament and the courts to develop their dialogue.