BRITISH CONSTITUTIONALISM REDUX
Redefining Tradition and Shaping New Paradigms

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In the past five years, the United Kingdom has seen a massive shift in the organisation of its public institutions and constitutional arrangements. It has gone from a polity which takes parliamentary sovereignty as the natural, unquestionable order to one where institutional power and responsibility are blurred and the ultimate source of power comes not from the Palace of Westminster, but from the people: a transition from a nation of subjects to a nation of citizens. For a nation whose constitution is unwritten and where change has been irregular and piecemeal, this is a major upheaval.

This article discusses whether, within the matrix of reform of the British Constitution, there has been a macro redefinition of the institutions of state. If — as this article suggests — there has been, can the United Kingdom still use traditional conceptions of parliamentary supremacy as the basis for its constitutional foundation? Drawing on the programs of devolution, the introduction of a human rights regime and the continuing emergence (and dominance) of European law, it is argued that there is an increasing chasm between such constitutional traditions and the newly minted British state. The ultimate result of this change, of this new architecture of public law, is a new regime to determine the constitutional validity of legislation, allowing the British Constitution to truly evolve as an instrument of national government and popular sovereignty.

Introduction

Now and in the foreseeable future the politics of the British Constitution will not simply be confined to the contested outcomes and projections of constitutional change. It will extend to the ongoing tension between constitutional cultures and their respective claims to the proprietorship of the Constitution. In the final analysis, political arguments over the British Constitution will be governed by the even deeper question of whether the constitutional arrangements in Britain can any longer support a singular frame of reference.

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The introductory comment from Foley[1] provides an appropriate foundation on which to base a discussion of the changing notions of British constitutionalism. In these few lines, many of the tensions, competing claims and agendas can be glimpsed: the contest of citizen or subject; of popular sovereignty over parliamentary supremacy; of explicit declaration of rights against a culture of implied protections; of whether one theory can be said to dominate the constitutional culture of the United Kingdom. Such issues have arisen as a result of the 'biggest program of change to democracy ever proposed'[2] and the claims of a resulting 'new constitutional settlement'[3] after the introduction of this ambitious program.[4] We are yet to be able to definitively state what the effect and outcome of these changes will be; however, it seems impossible to disagree with Hazell and Cornes when they state that, whatever the effect, 'what is undeniable is that the world will be different'.[5]

The extent of this change, however, is one of the central jurisprudential issues facing the British polity in the new millennium. Its effect will seep into every aspect of British life and governance. Some see the change as minimal, arguing that the shifts in the *grundnorm*[6] of British life are in perception only,[7] and will have little tangible effect on the general population. Others, however, claim the effect of these reforms to be profound, even prompting one commentator to ask whether the United Kingdom still has a Constitution.[8] This view places the recent reforms within a wider scope and operation, with King arguing that 'accompanying this round-dozen of constitutional changes has been another change in the political atmosphere in which the Constitution has its being'.[9] That is, change in the Constitution has produced a broader change in the 'atmospherics'[10] of British politics, law-making and judicial activity. Or, in Mount's terms, it is a realisation that, 'deprived of serious constitutional conversation for nearly a century, the British people, on the whole, do not know what they are missing'.[11]

The contemplation of this draws on the notions of a wider role for constitutionalism and constitutional discourse within the United Kingdom. Up until recent times, there has been a contentment with the status quo — an

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1 Foley (1999), p 286.

2 Blair (1994). Alternatively, it has been described as 'the most ambitious and far reaching changes in the British Constitution undertaken by any government this century.' See *Scotland's Parliament* Cm 3658, July 1997.

3 Hazell and Cornes (1999), p 1.

4 It is arguable that these 'reforms' are not a product of a forward-thinking society, but merely reactionary to the changing global shifts in law and politics — see Sampford and Round (2001), p 2.

5 Hazell and Cornes (1999), p 5.

6 See Loftus (1999), p 30; Winterton (1981); Dias [1968], p 255.

7 See Jenkin (1998), p 125.

8 See King (2001).

9 King (2001), p 74.

10 King (2001), p 76.

11 Mount (1992), p 265.

unwavering acceptance of the unquestioned supremacy of parliament and the institutional arrangements such a polity presents. However, with amendments to these most foundational thoughts of social organisation there has been, and will continue to be, a flow-on effect to other corners of the community. As such, it is evident that the reforms of the Labour government have the real capacity to reform not only the structural mechanics of the state but its actors and the role played by the British people. It has been argued that constitutional modification of the type being undertaken in Britain has a real capacity to encourage participation within the polity; that institutional and constitutional reform could produce 'pluralistic institutions which encourage rational discourse rather than assume that a dominant executive knows best'.[12] Reform, cognisant of such possibilities, recognises that it is important for law 'and constitutions in particular, to restate ancient truths and beliefs and instruct those with temporary influence over our affairs to do their utmost to put the empirical world back in touch with those truths'.[13] Reforms such as those contemplated and implemented in Britain can do this and, it will be argued, do achieve these goals. In doing so, it is submitted that they have altered the fabric and context of British constitutionalism. In the terms of the reformers, it is a project which seeks to establish 'a just relationship between society and the individual, one which above all, fundamentally redresses power in favour of the citizen from the state'.[14]

This emerging culture of constitutionalism, a culture which may not have been in existence before, has the potential to operate to enrich the community through increased participation and protection of rights.[15] There is, however, a danger in instituting reform before the required sociological mindset has changed. Writing of this in a human rights context, Rosenberg has argued:

> Constitutions exist in a cultural context. Changing constitutions without first changing the culture in which they will operate is unlikely to further human rights. Problems that are unsolvable in the political context can rarely be solved by the courts. Turning to the courts to protect and enhance human rights substitutes the myth of constitutional change for the reality of political practice. It credits courts, constitutions and judicial decisions with a power they do not have.[16]

To the extent that constitutional reform has been pushed through by the government without a corresponding change or work towards change in the cultural appreciation of governance and constitutionalism, there may be

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12 Douglas Lewis (1999), p 1.

13 Douglas Lewis (1999), p 19.

14 Labour Party (1993).

15 Six (1999), p 75. Six argues (pp 97–98) that the changes introduced in the United Kingdom may fall short of his participatory ideal.

16 Rosenberg (2001), p 229.

lingering questions as to the program's legitimacy and legacy. It is, as Schiengold argues, impossible to have change without the pain.[17]

So what are we left with in reviewing the new terrain of British constitutionalism? Read says the new 'millennium sees a number of changes in the United Kingdom which amount to stages in the building of a constitutional edifice [exemplified by] the introduction of new patterns of devolved government and the adoption of the European Convention on Human Rights as part of domestic law, enforceable for the first time in our own courts'.[18] In describing this, Marquand has adopted a realist perspective, describing it as:

> very British, this revolution. It is a revolution without a theory. It is the muddled, messy work of practical men and women, unintellectual when not positively anti-intellectual, apparently oblivious of the long tradition of political and constitutional reflection of which they are the heirs, responding piecemeal and ad hoc to conflicting pressures — a revolution of sleepwalkers who don't know quite where they are going or quite why ... they may be confused and ambiguous, but they are also dynamic and open ended.[19]

To an extent, these quotes encapsulate the argument of this article. It is my submission that, within the matrix of reform of the British Constitution, we have witnessed a macro redefinition of the institutions of state — in terms of their roles, functions and powers.[20] This in turn raises questions as to the continuing efficacy of historical theory and dogma which have underpinned what I intend to call the 'traditional stance' — the dominance and unrelenting deference to the sovereignty of the Westminster Parliament and the unitary state. I intend to argue that, as a result of the reforms undertaken, the United Kingdom can no longer rely on such tradition. Rather, we stand witness to the development of a movement towards the emergence of court-led determination of constitutional legislative validity — if, indeed, this has not happened already. Consequently, as the United Kingdom marches towards a more settled constitutionalism, parallels can be drawn between Britain and those countries whose constitutional traditions reflect the emerging paradigm here — that is, Australia, Canada and New Zealand.

At its core, this is an argument which suggests the United Kingdom Constitution is no longer just 'what happens',[21] but has evolved into a set of intermeshing and interdependent texts and structures[22] which place an

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17 Schiengold (1974), p 145.

18 Read (1999), p 35.

19 Marquand (1999), p 1. See further Freedland (2000), p 61.

20 It is arguable that this could be extended to all public institutions as the public/private divide becomes less integral to our legal process — see *R v Panel on Takeovers and Mergers ex Parte Datafin PLC* [1987] 2 WLR 699; Loftus (1995); Sampford (1991); Airo Farulla (1992).

21 See Griffith (1963).

22 Efforts have been made to prepare a complete written Constitution for the United Kingdom — see Institute for Public Policy Research (1991).

imposition on Westminster and the British polity in a way not previously contemplated. That is to say:

> Constitutional reform is likely to release dynamics in politics and the law which will take on their own directing force. The cumulative impact of increased openness of government, a rights culture, and devolution will work together to produce a dynamic whole which is greater than the sum of its constituent parts.[23]

In an effort to demonstrate this argument, this article will assume the following structure. Initially, a review of the traditional constitutional framework will be provided, addressing the historical context of the British Constitution and the macro themes which were presented in support of this position. I will then turn to the major reforms which have been introduced. A discussion of devolution, the introduction and operation of the *Human Rights Act 1998* and the expanded role of European jurisprudence will be presented. Such an exposition will demonstrate the increasing chasm between traditional constitutional notions and the revised and modified British state. It will highlight the necessary reappraisal of traditional theory in the light of the changed institutions the theory is intended to serve. A corollary of this is that, if these theories continue to exist, they do so in name only with their substance fundamentally changed; to argue that traditional constitutionalism remains in force may be the new 'noble lie'.[24]

The article will close with the argument that, to the extent the British Constitution and its 'architecture of public law'[25] have changed, the tools to assess the legislative validity of Acts made under that Constitution have also changed and expanded. While technical parliamentary sovereignty may be retained, the full complement of actions traditionally open to parliament has been circumscribed.[26] It is in dealing with this implied limitation of parliamentary power that we can best see the influence of new world constitutionalism[27] in developing a 'constitutional framework ... adaptable to new insights and fresh demands, developed with imagination to meet the needs of modern constitutionalism'.[28]

Historical Context and Traditional Conceptions of British Constitutionalism

If it is the case that the United Kingdom is now supported by new 'constitutional pillars',[29] it is important we assess what has gone before so that

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23 Hazell and Cornes (1999), p 4.

24 Harden and Lewis (1986).

25 Steyn (1999), p 2.

26 See Brazier (1999), p 10

27 Alternatively termed 'world constitutionalism' in Ackerman (1997). On the interconnectedness of constitutionalism, see Jackson (1999).

28 Allen (1993), p 10.

29 Hazell (1998), p 4.

a true picture of the new constitutional culture becomes apparent. It is necessary that we 'map out the anatomy of our modern system of constitutional behavior to establish how far the expectations and claims [held by society] are at odds with reality'.[30] However, in writing of the reforms in this fashion, there is an assumption that there was a settled order in the first place. Dummett has argued that this is not necessarily the case, but rather traditional constitutionalism in Britain was a matter of 'muddling through'.[31] She writes:

> Muddle, indeed, used to be a source of pride in Britishness; we muddled through while more precise and organized foreign nations got things wrong. The Constitution was vague, but we gloried in the fact: Burke remarked that 'it is in the nature of all greatness not to be exact'.[32]

King agrees. He suggests this lack of clear structure is related to there being a piecemeal development of constitutional principles and the lack of a 'defining constitutional moment.' This, he argues, has meant that, until now, the British have 'never had to address themselves to the question of what purposes their Constitution was meant to serve'.[33] Loughlin argues this point more explicitly, suggesting the 'cultural disorientation with respect to constitutional matters'[34] arises as a result of the Constitution being:

> an assemblage of customs and practices concerning our arrangements of government. These practices — and the culture which sustains them — are primary; the rules are secondary and derivative. In this sense, the Constitution may be understood as an inheritance, a partnership between past and present.[35]

Or, in more graphic terms, the Constitution was that of a 'pre-democratic *ancien regime* on which democratic flesh has been grafted ... and government has tried to improvise its way out of the consequences'.[36] As a consequence, we are left, as Johnson has stated, 'floundering in a world of pure pragmatism',[37] with a continually changing foundational theory for British

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30 Harden and Lewis (1986), p 12.

31 With, presumably, apologies to Charles Lindblom.

32 Dummett (1999), p 217.

33 King (2001), p 39. This is not to say others have not tried — Marquand (1999) argues that a constitution, 'for good or ill encapsulates a moral vision: a conception of the ends of political life, of the way in which the members of a political community should relate to each other and settle their differences, of the nature and limits of the public realm, of the sources of authority and power and of the way in which they should be distributed': see Marquand (1999), p 4.

34 Loughlin (1999), p 193.

35 Loughlin (1999), p 195.

36 Marquand (1999), p 5.

37 Johnson (1977), p 29.

constitutionalism.[38] It would seem that, to this point, Britain has not identified a fundamental moral or political theory from which we can say with certainty the validity of Acts of Parliament is derived[39] apart from the recitation of the Diceyian theory.

While these views present a representative overview of British constitutional history, there are definite discernible themes[40] which can be said to characterise traditional constitutionalism. Prime amongst these themes is the sovereignty of the Westminster Parliament.[41] This doctrine, which is considered to have 'dominated constitutional thinking'[42] in Britain, is seen as holding that:

> Parliament can enact any law it chooses, confident that it cannot be challenged in the courts. This means that constitutional laws have the same status as any other legislation passed by the Houses of Parliament in the same way. The House of Lords could in theory be abolished, or adult males disenfranchised, by the same means as legislation to introduce dog licences.[43]

Albert Dicey has championed this theory as a doctrine of politics and law perhaps more than any other jurist,[44] and his name and writings on it are, resultantly, inextricably linked with parliamentary sovereignty and its concordant theory of constitutionalism. In Dicey's words, the theory is best explained as parliament having:

> under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law

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38 In an Australian context, Williams (1995) argues that 'constitutional law must be seen to incorporate an intellectually sustainable framework that does not depend on the arbitrary shifts of political thought'. Fitzgerald (1993), p 265 agrees, arguing for a political theory to provide foundation for a nation's constitutionalism. Often the central theme proposed is that of the republican tradition as espoused by Sunstein and Ackerman (1993) and Ackerman (1991, 1989).

39 Allen (1993), pp 265–66.

40 Or, in King's terms, 'a basic ground plan, of almost cruciform like simplicity' — see King (2001), p 100.

41 This is the experience of most Commonwealth countries: see Hatchard and Slinn (1999).

42 The Constitution Unit (1996), p 16.

43 The Constitution Unit (1996), p 16.

44 He claimed it as the 'dominant characteristic of our political institutions' and 'the very keystone of the law of the Constitution': see Dicey (1964), pp 39 and 70. He was not, however, the first or arguably the most distinguished scholar on this topic — see the extensive historical research by Goldsworthy (2001) and his tracing of the notion of sovereignty of power back to medieval kingship and the sixteenth century. Many of the excerpts from the theorists other than Dicey have been taken from this work.

> of England as having a right to override or set aside the legislation of Parliament.[45]

Earlier formulations of this principle were more dogmatic. For example, Blackstone stated that 'there is no court that has the power to defeat the intent of the legislature when couched in such evident and express words as leaves no doubt whether it was the intent of the legislature or no ... I know of no power in the ordinary forms of the Constitution that is vested with authority to control it.'[46] Such sentiments were reflected in the writings of Burke, where he speaks of 'the unlimited and illimitable nature of supreme sovereignty ... every legislature must be supreme and omnipotent with respect to the law which is its own creature'.[47] In Goodricke's terms, this meant that 'there is no civil or legal power in the state superior to [Parliament] and that its acts can not be controlled or annulled by any other authority'.[48]

Bradley has attempted to explain the ramifications of this theory. Declaring that two arguments run from the Diceyan theory, he suggests:

> The principle, looked at from its positive side, ensures that any new Act of Parliament will be obeyed by the courts. The same principle, looked at from its negative side, ensures that there is no person or body of persons who can make rules which override or derogate from an Act of Parliament or which, to express the same thing in other words, will be enforced by the courts in contravention of an Act of Parliament.[49]

The corollary of this, as King[50] has suggested, is a strictly minimalist role for the people of Britain — ballot box participation only. This has inevitably led to the establishment of a 'political constitution'[51] or a 'parliamentary constitution',[52] as opposed to a legal and political culture formulated with the interests of the population at its core.[53] Despite producing a polity based on institutional dominance and tangential participation of the people, this 'untrammeled power of Parliament' was, according to Dicey, the 'secret of England's power and glory'.[54]

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45 Dicey (1964), p 39. More pithily, 'the British Constitution can be summed up in eight words: What the Queen in Parliament enacts is law.' See Bogdanor (1996), p 5.

46 Blackstone (1765), p 157. See also his strong comments at pp 156 and 178

47 Burke (1981), p 458.

48 Goodricke, as quoted by Reid (1991), p 83.

49 Bradley (2000), p 27.

50 King (2001), p 31.

51 Griffith (1979).

52 Tomkins (1998), p 268.

53 This is a 'unique hybrid of law and political fact deriving its authority from acceptance by the people and by the principle institutions of the state'. See Winterton (1996), p 136.

54 See Mount (1992), p 51.

If, however, we are to accept parliamentary sovereignty as 'historical reality, a theory of the Constitution and a fundamental principle of the common law',[55] then it is instructive to see how it has been interpreted by the courts. Failure to do so is, as Madgwick and Woodhouse suggest, to rely on 'slogans in a sentimental constitutional nationalism, rather than statements of serious constitutional significance'.[56]

There have been many instances where the concept of parliamentary sovereignty has been assessed. In *Cheney v Conn* the doctrine was interpreted to mean:

> What statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known in this country. It is the law that prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal.[57]

This approach has come to be classified by Professor Sir William Wade as 'the rule of judicial obedience'.[58] Accepting this foundation, but expanding its operation, Sedley has described this not as mere judicial subservience to the legislature, but indeed the operation of 'bi-polar sovereignty of the Crown in Parliament and the Crown in its courts'.[59] This approach was adopted in *M v Home Office*, where Nolan LJ held that, under traditional British constitutional arrangements:

> the proper constitutional relationship of the courts with the executive is that the courts will respect all acts of the executive within its lawful sphere and the executive will respect all decisions of the court as to what its lawful province is.[60]

Perhaps more explicit is the statement of Lord Morris in *Pickin v British Railway Board*, and his comment that:

> In the processes of Parliament, there will be much consideration whether a Bill should or should not in one form or another become an enactment. When an enactment is passed, there is finality unless and until it is amended or replaced by Parliament. In the courts, there may

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55 Turpin (1990), p 24.

56 Madgwick and Woodhouse (1995), p 11.

57 [1968] 1 All ER 779.

58 Wade (1955), p 172. This is at the core of recent reforms. Indeed, Wade notes that the only way to break such a rule is by the introduction of a new political reality — a modification of sovereign legislative power: see Wade (1980).

59 Sedley (1995), p 389.

60 [1992] 1 QB 220 at 314–15. See also *X v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1 at 48 per Lord Bridge.

> be argument as to the correct interpretation of the enactment: *there must be none as to whether it should be on the statute book at all.*[61]

While this is accepted theory, with the introduction of recent reforms and the 'supra legal'[62] notions they incorporate, we have seen a scaling back of the exclusive domain the courts cede to the parliament. For example, in 1998 the House of Lords held that:

> A power conferred by Parliament in general terms is not to be taken to authorize the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.[63]

This approach, while expansive, is still clearly cognisant of and based in the theory[64] that 'a citizen only has what rights a government permits them.'[65] This is a notion which must, in light of recent reforms, be reassessed as a continuing canon of British constitutionalism. As Pyke has argued:

> where Diceyan theory remains unmodified ... people's political sovereignty depends, in law, absolutely on the grace of the legally sovereign Parliament. Parliament enacted the laws that gave everyone the vote and that limits its term — and as a matter of law Parliament could repeal them. A system which says Parliament is legally sovereign but which relies on politicians' decency to ensure the people remain the political sovereign is curious indeed. Anyone but the English would expect [basic human rights] to be guaranteed in a document of higher status than ordinary legislation.[66]

In a similar vein, the argument presented by Wass is instructive. He argues:

> That the Diceyan concept of the Constitution has survived the emergence of a dominant all pervasive state and a large public sector is perhaps due to the fact that those who have held public office have

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61 [1974] AC 765 at 789, my emphasis.

62 Such notions are ideas that float above the strict rule of law. See Horrigan (1996).

63 *R v Secretary of State for the Home Department; ex Parte Pierson* [1998] AC 539 at 575 per Browne-Wilkinson LJ. See too the speech of Lord Steyn (1999) at 587–90.

64 In Sampford's terms, a Hobbesian doctrine — see Sampford (1991), p 4.

65 Carty (1991), p 182. This writing is reminiscent of Joseph Raz's 'closure rules' — see Raz (1979), p 61.

66 Pyke (2001), p 206.

> refrained from abusing the powers which their command over Parliament has conferred on them.[67]

This is a clear contrast with the United States constitutional tradition, emphatically declared in *Marbury v Madison*,[68] and the constitutionalism developed in Canada and Australia.[69] On one level, this difference can be attributed to the written/unwritten constitution dichotomy, but to the extent that the recent reforms in Britain are demonstrative of an emerging written Constitution (and this possibly limiting the sovereignty of parliament), such an unwavering theory of constitutionalism may be difficult to continue to justify. In Bradley's terms, 'if the nature of the political system in 1885 was a vital influence on Dicey's analysis of sovereignty, events since then may call for sovereignty to be reassessed in light of the changed political process'.[70] The necessity for this change may indeed have been foreseen by Dicey himself in his concession that the supremacy of parliament was 'an instrument well adapted for the establishment of democratic despotism'.[71]

Mindful of this last point, we can begin to assess the impact of the reforms on the overall constitutional culture of Britain. Given the institutional capture by political parties of parliament,[72] calling into question the 'automatic checks and balances' claimed under traditional theory,[73] Ratnapala's claim that 'electoral politics has hopelessly corrupted the democratic ideal' may be reflected in British jurisprudence.[74] The result of this, as Evans has predicted, is:

> members of Parliament regard themselves not primarily as legislators or as controllers of the executive but as representatives of parties which are either in or out of power. The distinction between executive and legislative powers has entirely disappeared; both functions are exercised by one body — the majority party.[75]

Himsworth has argued that Constitutions which define the limits of public power necessarily presuppose a model of a state in which it can have effect.[76]

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67 Wass (1986), p i.

68 (1803) 1 Cranch 103 at 177 per Marshall CJ.

69 Although, in an Australian context, see *Kartineryi v The Commonwealth* [1988] HCA 22.

70 Bradley (2000), p 30. Or, in Loughlin's terms, 'the traditional beliefs which lawyers have held about the nature of the political order no longer seem able to sustain unconditional respect': Loughlin (1999), p 200.

71 Dicey (1905), p 305. It is recognised that Dicey's fear largely related to the expansion of the franchise.

72 See Loftus (1999), p 50.

73 See Madgwick and Woodhouse (1995), p 39.

74 See Ratnapala (1990), as outlined by Fraser (1992), p 388.

75 Evans (1984), p 266.

76 Himsworth (1996), p 648.

Hence it should be no revelation that if the state and its nature change, constitutional divisions of power should also be modified. In such an event, it is necessary however to ask whether 'our institutions match the principles which make them credible'.[77] The significance for Britain is the implied demand this argument makes for readjustment or modification from a system where ultimate power is held by Westminster to a culture where power is reinvested in the people through the expansion of judicial review,[78] the accretion of rights or increased opportunities for participation in the polity.[79] This is a rejection of the deference to parliament theorem[80] and is reflective of an organic[81] system whereby the:

> authoritarian and exclusive effects of parliamentary sovereignty have started to wane and a respectful multi-voiced and cultured constitutionalism has started to arise. The voices that parliamentary sovereignty helped exclude are being invited in.[82]

Is it the case, therefore, that under traditional constitutionalism, the people are 'the forgotten cause'[83] of Westminster governance? Insofar as the parliament is unable to govern the work of the executive,[84] it appears we have forgotten the 'fabric and systems of public government to which we aspire'.[85] The executive function of government has been reformulated,[86] and this cultural change has 'loosened the ties between the people and their rulers; the benign force of democracy is diminished'.[87] Are we:

> in a period when effective power in all spheres of life is being concentrated in fewer and fewer hands; when parliamentary control of

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77 Finn (1993), p 57. See further Finn (1995).

78 On more fundamental or higher law grounds as conceived by Laws (1995). See also on this Jowell (1999, 2001).

79 Zoller sees this as the core of constitutionalism. She states that: 'There is no such thing as one size fits all in constitutional law. Constitutional rules have to be tailored to each country ... Constitutionalism has been devised for the good and right of human kind ... we must never forget that the starting point and the end result of constitutionalism is indeed the human being.' See Zoller (1996), p 1151.

80 See Omar (1994), p 406.

81 Kirby J has stated that the common law has a unique capacity to 'correct itself from errors and right most wrongs.' See Kirby (1994).

82 Fitzgerald (1995), pp at 56–57.

83 Finn (1994), p 225.

84 Kinley (1995), p 119.

85 Finn (1992), p 257.

86 Johnson (1985).

87 Laws (1995), p 85.

> the executive has been steadily decreasing, without being replaced by other methods of democratic control?[88]

Such contemplations may also mean we need to rethink what we mean by popular sovereignty. Traditionally, parliamentary sovereignty and popular sovereignty were seen as two sides of the same coin — parliamentary sovereignty was viewed as the constitutional expression of popular sovereignty.[89] Put more strongly:

> popular sovereignty is an impossible fiction ... we cannot avoid the device of representation. The scale of our social life involves specialization of function. Political business has to be confided to a small group of men whose decisions, generally speaking, are accepted by the vast majority.[90]

While this remains true, such a restricted definition of popular sovereignty is contestable. I intend to use popular sovereignty in an expanded sense. That is, I suggest it as representative of a theory of constitutionalism which does not see the people's sole role in the machinery of state as voters. Rather, an expanded notion of popular sovereignty would draw on, expand and support liberal democratic government.[91] It is a theory mindful of participation, protective of rights, responsive to individuals. As a result, it is broader than the scope of strict constitutionalism. It takes as its reference points not only constitutional tradition, but political, social and economic developments. Or, in the terms of Allen, popular sovereignty is constitutional law in a 'context which includes the moral and social values prevalent in the community'.[92] More fundamentally, it is a constitutionalism which argues that:

> We, the citizens, have a Constitution. Granted that premise, we have it equally. And, having the Constitution equally, we have the power that it generates equally.[93]

Such an approach views the Constitution as much more than a mere division and limitation of governmental powers. It is in such a context and reflective of this expanded definition that I suggest there has been a shift in Britain from parliamentary to popular sovereignty.

So do recent reforms demonstrate movement towards a culture of enlarged popular sovereignty and participation? Do Labour's changes represent a redefinition of British constitutional law along these lines? Is Loughlin accurate in his claim that the 'traditional idea of the Constitution is

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88 Crossman (1963), p 46.

89 See Ewing (2002, 1999).

90 Laski (1919), p 204.

91 Dworkin (1984), pp 134–36.

92 Allan (1985), p 119.

93 Detmold (1994), p 229.

more or less bankrupt ... sovereignty divided is sovereignty destroyed'?[94] Moreover, is the role of parliament in British constitutional culture no longer representative of Dicey's theory, but Birch's in his claim that:

> a government is acting responsibly not when it submits to parliamentary control but when it takes effective measures to dominate Parliament [?] Perhaps this reversal of meaning indicates as well as any description the gap between the doctrine of collective responsibility and the practice of contemporary politics.[95]

Is this new constitutionalism we are seeing developing an answer to a dilemma noted in 1776 by Burgh? He stated:

> Our ancestors were provident; but not provident enough. They set up parliaments as a curb on kings and ministers; but they neglected to reserve to themselves a regular and constitutional method of exerting their power in curbing parliaments when necessary.[96]

The continued appropriateness to modern British life of seventeenth century principles epitomised by an unwritten constitution, and expanded upon above, must be questioned. The lack of clarity and certainty in personal rights, the over-arching and unchecked institutional dominance; the capture of those institutions by political forces; the emergence of supra-national organisations with competing claims of sovereignty and the rise of competing legal and political demands (and the inability of traditional theory to answer such demands) make reform vital and inevitable. It is to these developments and their ultimate effect on British constitutionalism that I now turn.

Institutional Change and Constitutional Evolution

Lord Lester has written:

> The huge obstacles impeding constitutional change in this country are well understood ... by anyone who remembers the political shambles of previous attempts to modernize the British Constitution. The obstacles could be overcome, but only by a very rare combination of political commitment, imagination, broad-mindedness, acumen and good luck.[97]

Having discussed the traditional tenets of British constitutional law, its indeterminacy and, paradoxically, its resistance to change, I now intend to look at some specific areas of reform and revolution in the public law matrix. As outlined earlier, it is the intent of this article to argue that the introduction of these reforms will result in a re-evaluation of the fundamental principles of

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94 Loughlin (1999), pp 193 and 204.

95 Birch (1969), p 138.

96 Burgh (1989), pp 988–89.

97 Lester (1995).

British constitutionalism. It may be that the 'political constitution'[98] has been co-opted and taken over by the politicians. It is out of this detailed review of a few areas that we can begin to undertake the 'broader reappraisal'[99] needed and, moreover, describe what now stands. I shall look to the issues of devolution, the *Human Rights Act 1998* and Britain's interaction with the European Community to make such an assessment.

The Devolved Kingdom

Perhaps the most significant reform instituted in the first term of the Blair government was the legislating for devolved assemblies for the constituent nations of the United Kingdom.[100] Indeed, Bogdanor states that the devolution process is:

> the most radical constitutional reform this country has seen since the *Great Reform Act* of 1832. This is because it seeks to reconcile two seemingly conflicting principles, the sovereignty of Parliament and the grant of self government in domestic affairs to Scotland and Wales.[101]

This is a program which has attempted to repatriate some sense of national government and ownership of legislative process from London to Belfast, Cardiff and Edinburgh. In doing so, it raises questions as to the very foundation of the United Kingdom — a unitary state, a Union of States, a quasi-federal model or, indeed, the transformation to a federation. This program has gone forward on an asymmetrical basis — for example, Scotland will have the most devolved power however Northern Ireland will have the greatest freedom to expand the range of devolved functions and powers.[102] Wales, it is noted, only enjoys devolved executive power. Because of this, some see the reforms as 'piecemeal' and 'too complex ... lacking any overall constitutional coherence' to be of concern or relevance to 'ordinary citizens'.[103] This is arguable[104] and, indeed, it may be that devolution is not so much a conscious effort to reform the British Constitution but to assuage nationalist movements and in doing so achieve more immediate political

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98 See Griffith (1979).

99 See Tomkins (1998), p 272.

100 See *The Scotland Act 1998, The Government of Wales Act 1998* and *The Belfast Agreement* and *The Northern Ireland Act 1998*.

101 Bogdanor (1996), p 6.

102 See Hazell and O'Leary (1999), p 21.

103 Ward (2000), pp 111 and 118.

104 See Bromley, Curtice and Seyd (2002).

goals.[105] It is, therefore, worthwhile to briefly examine each of these settlements in turn[106] before making some general comments.

Scotland

Hazell and O'Leary note that the *Scotland Act 1998* provides for the Scottish Parliament to be able to legislate for all matters except issues relating to the United Kingdom Constitution, foreign policy, defence and national security, immigration and nationality, macro-economic, monetary and fiscal policy, regulation of markets, employment and social security.[107] Importantly, one of the powers which has been extended to the Scottish Parliament is the ability to modify its taxation regime from that set by Westminster to a point within a three pence radius of the tax rate set by the central government. The parliament has 129 members who are either direct representatives of electorates,[108] or drawn from one of eight regional lists.[109] This is seen as ensuring proportionality in representation.[110] In time, the numbers of representatives at Westminster will be reduced so that the Scottish people are not over-represented in London.[111]

Northern Ireland

This is the second attempt at devolution in Northern Ireland. The *Government of Ireland Act 1920* provided for the establishment and operation of the Stormont Parliament between 1922 and 1972. The 108 members enjoy broadly the same scope of powers as the Scottish Parliament; however, an important supplement to this is the ability of the Cabinet[112] to expand its autonomy. Given the particular history of the Northern Ireland settlement, there are special conditions relating to the fabric of the executive, with the Cabinet to be made up of members in proportion to the number of seats held by various parties in the assembly.[113] There are several other distinct features of the legal architecture of the assembly which, while interesting, are not germane to this discussion.[114]

Wales

Of the three national assemblies, Wales has been given the least scope of activity and responsibility. The powers devolved to the National Assembly of

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105 See Leicester (1999), pp 252–53, 262; Bogdanor (1996), p 71; Paterson (1994).

106 Much of the minutiae of the different settlements can be found in the first two annual reviews of the devolution process prepared by the Constitution Unit. See Hazell (2000); Trench (2001).

107 Hazell and O'Leary (1999), pp 21–22.

108 A total of 73 members are elected in this way.

109 A total of 56 members are elected in this way.

110 Hazell and O'Leary (1999), p 22.

111 For more detail, see The Constitution Unit (2001).

112 On condition of local and Westminster approval.

113 Unionists and Nationalists will be represented in Cabinet, thus overcoming a failing of the earlier Stormont Parliament — see Hazell and O'Leary (1999), p 28.

114 For a fuller outline, see Hazell and O'Leary (1999), pp 29–31 and Wilson and Wilford (2001).

Wales are executive in nature only. Funding is dependent on a block grant from Westminster, and the entire legislative program and direction of government are similarly dictated from London. It is the execution of this predetermined statutory regime which is left to the Welsh nation. The Assembly has 60 members, 40 of whom are responsible to individual electorates with the remainder elected on a proportional basis.[115]

From even this very brief outline of the various national assemblies, some serious challenges to the traditional constitutional settlement can be seen. Prime amongst these considerations is the form this reform takes — the writing of these various Acts is tantamount to the introduction of a partial written constitution.[116] This conception of a de facto, partially written constitution has been highlighted by Burrows, in her argument that for a country 'whose constitutional mantra is that there is no written Constitution, the deference to the written word in the devolution process is astonishing'.[117] A strong analogy can be drawn between the constituent Acts empowering the devolved assemblies and the various state constitutions which operate in the Australian federation. The Australian state constitutions[118] are normal statutes with no special manner and form requirements relating to their enactment or modification — it can be done by an amending Act of the state parliament. These constitutions outline similar issues as the devolution legislation does for Wales, Scotland and Northern Ireland — method of election, length of electoral term and procedures for passage of legislation. The only significant difference in such a comparison is the reverse operation of the 'reserve powers doctrine.' In the Australian context, what is not listed in the Federal Constitution in section 51 is left as the domain of the state legislature.[119] A similar principle operates in devolution; however, the listing of Westminster exclusive topics is included in the devolution Acts.[120] All remaining issues are within the competence of the devolved institution. The significance of this development — in the reduction to writing and the formal division of power between legislative centers — is significant in comparison to traditional constitutionalism which has Westminster as a power hoarding central authority. In other terms, this claimed preservation of sovereignty is:

> mere constitutional theory. [These new assemblies] will create a new locus of political power, making it extraordinarily difficult for Westminster to continue to exercise its supremacy. In practice,

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115 Hazell and O'Leary (1999), p 35. For a fuller examination of the institutional matrix of the Welsh Assembly, see The Constitution Unit (1996).

116 Bogdanor (1996), p 65.

117 Burrows (2000), p 2. See also Masterman and Mitchell (2001), p 195; House of Lords Select Committee on the Constitution (2001), HL 11, para 50.

118 See, for example, *Constitution Act 1867* (Qld) or *Constitution Act 1934* (Tas).

119 See *Commonwealth v Amalgamated Society of Engineers* (1909) 9 CLR 48.

120 Scotland and Northern Ireland only.

> therefore, sovereignty is being transferred ... after devolution that supremacy will become merely a nebulous right to supervise.[121]

Or, in the terms of Dalyell:

> It is just not possible to have a subordinate Parliament in part, though only part, of a unitary state which, above all, one wishes to keep united. There is not the proverbial cat in hell's chance of the situation remaining stable.[122]

Hyperbole aside, this raises an important point in the guise of intergovernmental jurisdictional disputes. It is known that the Privy Council will act as a 'devolution boundary umpire' and, while this will superficially mean that devolution disputes as to scope and operation of power have a determined method of resolution, the change this presents to the constitutional fabric of the union is significant. It means that the United Kingdom, for the first time, has a *de facto* constitutional court — empowered to make determinations on the province and operative domain of the legislatures.[123] While it is true that the decision of the Privy Council can be overturned by a subsequent Act of the Westminster Parliament, the fact that this step could need to be contemplated represents the huge change in traditional structure of power within the Union. As Craig has written:

> The devolution of power to Scotland and Wales does raise interesting and important issues of constitutional review ... It is axiomatic that any system of devolved power will, of necessity, involve the drawing of boundary lines which serve to define the spheres of legislative competence of the Westminster Parliament in relation to other bodies which have legislative power.[124]

The importance of such a comment is demonstrated when considered in a broader judicial context. In recent years, there has been a continual increase in the willingness of courts to limit the operations of government on the premise that such actions infringe constitutional principles.[125] In such a context, 'it is not impossible to imagine a future phase of judicial activism whereby judges would refuse to allow provisions of the *Scotland Act*, which they might regard as fundamental constitutional legislation, to be impliedly repealed by Westminster'.[126] Bradley agrees, noting that in the 'absence of a written

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121 Bogdanor (1996), p 12. This is expanded upon in Bogdanor (2000), p 61.

122 Dalyell (2000), p 257.

123 See further on this, Woodhouse (2000), p 263.

124 Craig (1999), p 70.

125 See *R v Secretary of State for the Home Department ex Parte Leech (No 2)* [1994] QB 198; *R v Secretary of State for the Home Department ex Parte Simms* [1999] 3 All ER 400; Jowell (1999, 2001); Craig (1999).

126 Bogdanor (1996), p 13. On this 'unconstitutionality point' see Leigh (2000), pp 27–28 and Olowofoyeku (2000), pp 161–62.

Constitution for the United Kingdom, "the Constitution" may refer to the entire structure and system of government of the United Kingdom'.[127] With modified principles of judicial review, this creates a new dynamic in British constitutionalism. This is, naturally, supplemented by the revolutionary notion of pre-enactment judicial review for legislative competence by the Privy Council.

It would be incorrect to assert that because a resolution mechanism has been established to resolve devolution boundary disputes, the scope of the change devolution presents to traditional constitutionalism is reduced. Indeed, I would argue the opposite. Further, the limitation on the actions which can be referred to the Privy Council should not be seen as limiting the novelty of this development. In the case of Scottish legislation, Craig notes that a reference to the Privy Council cannot be made where it questions whether Westminster has infringed on Edinburgh's domain.[128] Importantly, however, the Privy Council will be able to adjudicate the limits of Scottish legislation and, moreover, interpret and apply Westminster legislation in a fashion so as not to impinge on devolved areas.[129] This demarcation of legislative competence, according to Lord Steyn,[130] inevitably involves the courts in constitutional review. This is previously unheard of in British conceptions of their Constitution. These courts are to undertake such review without 'independent moorings',[131] and this 'constrains their ability to be institutional referees, especially when those institutional boundaries are drawn and redrawn through the ordinary legislative process'.[132] Further, what this will mean — in practical terms — is that it will become 'increasingly understood that the Westminster Parliament [will] not legislate in areas covered by Community law, in breach of the Human Rights Act or in spheres over which the Scottish Parliament has legislative competence'.[133] So, while the 'omni-competence of the [Westminster] legislature'[134] remains in theory, legislative practice represents a different restrictive, yet cooperative, constitutionalism. Sovereignty divided or limited in this way is sovereignty destroyed.[135] This is put in a more eloquent argument by Cornes where he states that:

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127 Bradley (1998), p 36.

128 This is not remarkable — witness the operation of section 109 of the Australian Constitution. Such predetermination of legislative superiority is not an automatic preserve of parliamentary sovereignty.

129 Craig (1999), p 72.

130 Steyn (1999), p 11.

131 O'Connor [2001], p 504.

132 O'Connor [2001], p 504. Cf Chapter III of the Australian Constitution and Article III of the Constitution of the United States. This has prompted calls for the establishment of a separate constitutional court for the United Kingdom — see Le Sueur and Cornes (2000, 2001); Le Sueur (2001).

133 Craig (1999), p 73.

134 Craig (1999), p 73. See also Reed (1998), pp 21–23 and 31.

135 Loughlin (1999), p 204.

> The relationships established as a result of devolution, while not involving handing over absolute legal sovereignty over subject areas as in a federal system, do involve the handing over of effective political sovereignty. This is something which Westminster could only take back 'under pathological circumstances'.[136]

We have seen this in the previous devolution of power in Northern Ireland. Bogdanor argues that while the same right of 'override' operated with the Stormont Parliament, in practice it was hardly ever used.[137]

The effect on sovereignty, and as a result United Kingdom constitutionalism, will be marked, no matter how often and strenuously the Lord Chancellor denies it.[138] Devolution will alter British constitutionalism because it will alter constitutional practice — it will require governments to accept, as has been the case in Canada and Australia and the United States, 'principles which limit their power'.[139] It may be, as Allen has argued, that:

> when constitutional debate is opened up to ordinary legal reasoning, based on fundamental principles, we shall discover that the notion of unlimited parliamentary sovereignty no longer makes any legal or constitutional sense.[140]

It is apparent, therefore, that Lee's argument that this approach to constitutional reform has resulted in the United Kingdom being 'pulled in both directions'[141] is accurate. The point at hand is best established by Justice O'Connor of the United States Supreme Court. On comparing the changes in British constitutionalism to her country, she writes:

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136 Cornes (1999), p 157. See also Bogdanor (1998), p 12.

137 Bogdanor (1998), p 11.

138 See Irvine (1998), pp 2–3 and the white papers pre-empting devolution — for example, *Scotland's Parliament*, Cm. 3658, 1997 at para 4.2.

139 Bogdanor (1998), p 18. Mount's (1992) comparison of the establishment of these national assemblies and the establishment of Dominion Parliaments is instructive. While technically the Parliament of the Commonwealth of Australia was subordinate to the Imperial Parliament, the thought of legislation being passed in London to affect Australian legislation without consent was unthinkable. Yet it was not until the *Australia Acts 1986* (UK) and (Cth) that such power was dissolved. A similar approach has been adopted in relation to devolution with the acceptance of the Sewel Convention in the concordat between London and Edinburgh regarding legislative authority. See the *Memorandum of Understanding and Supplementary* Agreements Cm 4444 at para 13 and the speech of Lord Sewel in the House of Lords recorded in Hansard at HL Deb, 21 July 1998, col 791. See also Mount (1992), p 61.

140 Allen (1997), p 449. This is convincing, but fails to address Ewing's argument that parliamentary sovereignty is the constitutional expression of popular sovereignty — see Ewing (1999), p 55.

141 Lee (2000).

> Each of our countries is deeply engaged in a debate concerning the proper allocation of power among various levels of government ... In each sense, however, the diffusion of power proceeds from a different premise. In the United States, power originally resided with the people or in the States and was ceded upward to a national government of limited authority. In the United Kingdom, power is being devolved from the sovereign Parliament of a unitary state to national assemblies ... Each of our countries, accordingly, has something to learn from the other.[142]

If the issues discussed in this section are the 'new pillars of [the British] Constitution',[143] then there is much to be cheerful about; they may go some way in addressing issues of democratic deficit, improved accountability and participation.[144] Similarly, however, there is a need to admit to and recognise these features of British Constitutionalism as novel; to recognise that this 'decentralised, more pluralist, more legally controlled system will amount to a new constitutional order'.[145] The process of devolution has become not an event, but a spectacle.[146]

A Human Rights Culture

In an oft-quoted phrase, Helena Kennedy has suggested that, with the introduction of the *Human Rights Act 1998* ('the Act') there was a 'shift in the tectonic plates' of Britain and a 'different Zeitgeist' emerged.[147] To the extent that constitutional reform is about 'the interplay between the political, practical [and institutional] frameworks',[148] the challenge presented by this Act is massive indeed. Klug puts it in these terms:

> [with the implementation of the Act] the British government voluntarily relinquished a whole chunk of its power without any coercion from another force ... [the Government] will no longer be secure in the knowledge that the courts are constitutionally bound to enforce all Acts in the manner that Parliament intended.[149]

More than this, the Act was designed to 'help build a human rights culture in the United Kingdom'[150] or, in the terms of Klug, to ensure the Act 'led to a

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142 O'Connor [2001], pp 495–96.

143 Hazell (2000), p 4.

144 See Roddick (2000), pp 479–81 and Olowofoyeku (2000), pp 135–36.

145 Hazell (2000), p 5.

146 Davies (1999).

147 See Kennedy (2000), p xi. The Act was rapturously welcomed — see Thomas (2001), p 360.

148 The Constitution Unit (1996), p 21.

149 Klug (2000), p 19.

150 See Human Rights Task Force (1999), p 4.

cultural shift way beyond the law courts'.[151] This is a claim which needs to be assessed and, more importantly, the impact such a modification will have on traditional constitutional norms needs to be determined. Such an appraisal is justified when ministers pronounce that the Act is 'the cornerstone of [the government's] work to modernize the Constitution' and is 'one of the most important pieces of constitutional legislation the UK has seen'.[152]

The Act is remarkably simple in its construction and ingenious in its operation.[153] It operates to give effect to certain provisions of the European Convention on Human Rights;[154] however, it attempts to do this in a way which remains consistent with the traditional structures of parliamentary sovereignty outlined above.[155] It aims to achieve this end by empowering courts to operate an interpretative principle whereby British law is considered in a way consistent with the principles in the ECHR.[156] In the terms of the then Home Secretary, it is the:

> ambition of the *Human Rights Act* that possible meanings [of legislation] fit within the Convention principles and norms and are always to be preferred.[157]

Where such an interpretation is not possible, judges can make formal declarations of incompatibility between the law and the ECHR.[158] This will then set off a chain reaction in the legislature whereby the minister can enact reforms so as to remove the inconsistency. In this way, there is no technical usurpation of the supremacy of parliament and it is the parliament which is invested with the authority and responsibility to amend Acts of otherwise questionable legislative validity. In the terms of Ewing, the Act purports 'to reconcile in subtle form the protection of human rights with the sovereignty of Parliament'.[159]

But what is the full effect of such a declaration? Ewing notes that:

> If granted, a declaration of incompatibility has no operative or coercive effect and does not prevent either party relying on, or the courts

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151 Klug (2000), p 26. This approach replicates the 'culture shift' attempted in Canada and New Zealand on the introduction of similar legislation — see The Constitution Unit (1999), p 13. See too *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357 at 365–67.

152 Straw (1999), p 1.

153 Ewing (1999, p 79) gives a useful description of the various epithets provided to the Act.

154 'The ECHR'. The Act gives effect to all of the convention, apart from articles 1 and 13.

155 Irvine (1999), pp 32–33.

156 HRA, section 3.

157 Straw (1999). See also Marshall [1998, 1999]; Bennion [2000].

158 HRA, section 4.

159 Ewing (1999), p 79.

> enforcing the law in question; it does not affect the validity, continuing operation or enforcement of the legislation; nor is it binding on the parties in the proceedings in which it is made.[160]

The White Paper was more explicit in its stated protection for traditional constitutionalism. In explaining the limitations on courts under the Act, it states:

> In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate because they are elected, accountable and representative.[161]

While some see the Act as a masterpiece of legislative drafting,[162] the more immediate realisation is the failure of the Act to live up to the challenge laid down by Lord Scarman in his comment that:

> Means [to protect human rights] have to be found whereby (1) there is incorporated into English law a declaration of such rights [and] (2) these rights are protected against all encroachments, including the power of the state, even where that power is exerted by a representative legislative institution such as the Parliament.[163]

Given this 'soft constitutional review',[164] and the inability to entrench the Act or the rights it enshrines,[165] on what basis can the introduction of such an Act be said to have the impact claimed? As with the other main reform, the significance is not immediately obvious — and indeed, it is hidden behind the legislature's attempts to proclaim significant change, without pain.[166] This is a fallacy. It unalterably changes the constitutionalism of the United Kingdom.

The real shift in the constitutionalism is represented by a change in political reality. In the terms of Lord Borrie:

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160 Ewing (1999), p 88 (footnotes omitted).

161 United Kingdom (1997), para 2.13.

162 Lord Kingsland, House of Lords Debates, vol 582, col 1256, 3 November 1997.

163 Scarman (1974), p 15.

164 Craig (1999), p 70.

165 The Constitution Unit (1996), p 27. Alternatively, McGoldrick argues that the Act is 'effectively entrenched for practical constitutional purposes'. See McGoldrick (2001), p 946. Note also the limitation on horizontal effect of the Act — see Hunt [1998].

166 Schiengold (1974), p 145. The sentiment expressed is that of the then Home Secretary, Jack Straw. See House of Commons Debates, vol 317 col 1300.

> while historically the courts have sought to carry out the will of the Parliament, in the field of human rights Parliament will carry out the will of the courts ... [the] government and Parliament will faithfully implement any declaratory judgment made by the High Court.[167]

As such, what the introduction of the Act means is that 'as a matter of constitutional legality, Parliament may well be sovereign, but as a matter of constitutional practice, [Parliament] has transferred significant power to the judiciary'.[168] As such, the two central effects the introduction of the Act will have on British constitutionalism will be in the area of parliamentary sovereignty and the process of and politics of adjudication. Or, in the words of Browne-Wilkinson LJ, 'it is going to make an enormous difference to the way that judges perform the law'.[169]

In recent times in Britain, there has been much talk of 'higher law' and the inability of the legislature to override such principles without express statement of intention to do so.[170] This approach is largely informed by Lord Cooke's notion that:

> some common law rights may go so deep that even Parliament can not be accepted by the Court to have destroyed them.[171]

The counter point to this notion is presented by a fellow New Zealander in his comment that:

> the judicial lions discontented with their position under the throne, claim the right to leap up onto and prance about upon the seat of government and to jostle aside that seat's rightful occupants.[172]

Within this broader context, Klug has written that the Act is 'the first UK statute which can be fairly described as a "higher law"'.[173] Thus some saw the passage of this legislation — the enacting of these higher principles — as a possible means to permanently circumvent the burden of parliamentary

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167 House of Lords Debates, vol 582 cols 1275–76.

168 Ewing (1999), p 92.

169 See Lord Browne-Wilkinson, Speech at The Law Society, 15 October 1997.

170 See Jowell (1999, 2001) and the overview of inter-institutional tensions in Olivier (1999), p 53.

171 *Fraser v State Services Commission* [1984] 1 NZLR 116. This is adopted in Woolf (1995), pp 68–69. More broadly on this, see Doyle (1995). One method to determining the scope of such rights is reference to international law instruments — see Fitzgerald (1994).

172 Dugale (1988). This reflects Francis Bacon's *Of Judicature*: 'Let judges be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty' as cited by Marshall (1998), p 72. See further Conaglen (1994).

173 Klug (2000), p 164. See also Laws [1995], pp 84–85.

sovereignty and, as a result, were disappointed with its limited operation.[174] Perhaps, however, Wade is more accurate in his assessment that, while the Act is 'minimalist', it is a step in the right direction and that 'reverence for parliamentary sovereignty nor fear of increasing judicial power should be allowed to impede progress'.[175] Indeed, the case for implied reduction of sovereignty under the Act is strong:

> Human Rights are fundamental, and fundamental rights ought be as secure as the law can make them. I do not see why [the United Kingdom] should suppose that our own judges should not do what is routinely done by the judges of many Commonwealth countries and, where the right of appeal still exists, by our own judges in the Privy Council.[176]

International comparisons aside, it is questionable whether parliamentary sovereignty ought to have been the guiding rationale for this Act, given its increasing weakening as a fundamental theory of the state in Britain as a result of Europe, devolution and increasing activism by the courts.[177] Such an argument is supported by Lester and his suggestion that this is one of several reforms which takes as its starting point, not parliamentary sovereignty, but popular sovereignty.[178] On a deeper level, this is a fundamental reassessment of the notion that all a court can do with legislation is apply it. We must recognise the:

> significance of the new interpretative duty and the power of superior courts to declare incompatibility ... a court that makes such a statement will have scrutinized the legislation closely against the Convention jurisprudence and will have stated the extent of the incompatibility and the reasons for its view ... Although the offending legislation continues fully in force, in practice, it may well become inoperative.[179]

This is the key to understanding the transformative effect the Act has had on British constitutionalism. It is not an explicit reformation of theory but the fact that a court can now 'deliver a wound to Parliament's handiwork that will often prove mortal ... simple reassurances that the sovereignty of Parliament is not affected are misleading'.[180] Legislative power remains in form, but its substance has been altered. Yet again, it is submitted that sovereignty divided

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174 Wadham (1997). Lord Donaldson sees the preservation of sovereignty as 'the right of Parliament to make some stupid decisions': see House of Lords *Official Report*, 25 January 1995, col. 1146

175 Wade (1998), p 62.

176 Wade (1998), p 65.

177 See Wade (1998), p 66.

178 Lester (1998), p 105.

179 Bradley (1998), p 55.

180 Bradley (1998), p 56.

along these lines is sovereignty destroyed.[181] A further effect of this type of adjudication is canvassed by Johnson and his comment that this Act will result in:

> a human rights jurisdiction [which is a] gradual accumulation of precedents indicating the range and extent of the limits placed on Parliament's legislative authority ... the courts would be filling out the meaning of particular rights and in doing so would be putting up 'do not trespass here' notices for the future attention of Parliament. The discretion of Parliament to legislate as it sees fit, and thus its claim to sovereignty would in practice be limited.[182]

Again, experience from the Commonwealth is instructive. For example, in the 1990s, the Australian High Court established several 'implied rights' drawn from the fabric of the Australian Constitution.[183] In *Lange v Australian Broadcasting Corporation*, the court addressed the interplay between rights and the sovereignty of parliament and held that 'the Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature'.[184] Similar arguments can be made about decisions invalidating legislation under the Canadian *Charter of Rights and Freedoms* and the impact of the New Zealand *Bill of Rights Act 1990*.

To the extent, therefore, that Britain is moving towards a more settled, better defined constitutional culture which imposes limits on the scope of parliamentary activity, it should not be surprising that British courts may tend towards the interpretative principle espoused in Lange. This is a 'new legal order'.[185] It is perhaps an admission, or a realisation, that Ewing's argument that an unrestrained legislature is the mechanism which best gives effect to notions of participatory democracy and popular sovereignty[186] is flawed. Can our law-makers operate totally free of restraint? The parliament itself, in enacting the *Human Rights Act*, in entering the European Community, in devolving power to national assemblies, says no. This is a new constitutional theory for Britain — the *form* of parliamentary sovereignty complemented by the *reality* of diffuse, intermeshing public law power bases.

This change is demonstrable in the changing role for the judiciary under this Act. Lester has written that, while the courts are essential to maintaining common law principles, they are subordinate to parliament; if such interpretation 'has undesirable consequences, the matter must be corrected by

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181 Loughlin (1999), p 204. See too Lester (1998) and O'Connor [2001], p 508.

182 Johnson (2000), p 145.

183 See *ACTV v The Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1; *Levy v Victoria* (1997) 146 ALR 248, among others.

184 *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 109.

185 Steyn [1999], p 55.

186 Ewing (1999), p 55.

the legislature and not by the courts'.[187] Technically, this is unchanged; however, the courts now have the capacity to declare an Act incompatible with a code of fundamental human rights. This is a significant new power — one which reflects a new mode of sovereignty, of the 'political reality' which necessitates the 'sharing of power needed in meeting the changing needs of a complex post-industrial society'.[188] Wilson J of the Canadian Supreme Court has noted that such a change reorients judicial activity. Rather than interpret the will of the parliament, as has been the traditional role of the courts, judges are now intent on assessing whether such legislation infringes rights.[189] Again, in the role allocated to the judiciary in the separation of powers under the Constitution, this is a significant departure from orthodoxy. It is in such a light that we might begin to comprehend Sedley's notion of a new 'bi-polar sovereignty'[190] in operation. Or, in Loughlin's terms:

> through the emerging rights discourse, the judiciary have reconceptualised the relationship between law and the Constitution and this is an innovation which potentially is of major importance ... The judiciary are searching for a more appropriate way of comprehending the universe of civic rights and responsibilities. At the heart of their endeavors is the attempt to reconstruct the political order on the foundation of rights.[191]

While such a 'reconstruction' seems appropriate and reasonable in modern society, we must realise that it is also a fundamental reconsideration of our polity and protection of rights. Wolfe has stated that traditionally, we have not relied:

> on the judiciary as their primary institutional mechanism for protecting rights. Rights were to be protected by the ordinary democratic process, emphasising the principle of majority rule and the moderating effects of a multiplicity of interests in an extended republic. Courts were to be an auxiliary precaution.[192]

With this new, constitutional basis for rights protection, it seems Freedland's concern about the possibility that an individual's rights can be 'snatched back by government in a heartbeat'[193] will recede, or at a minimum be subjected to much greater scrutiny.

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187 Lester (2000), p 91.

188 Lester (2000), p 100. See further, Bamforth [1998].

189 See Wilson [1988], p 371. More detail is provided in Austin (1999) and *Marcic v Thames Water Utilities* [2002] 2 All ER 55.

190 Sedley [1995], p 389.

191 Loughlin (1999), pp 194 and 201.

192 Wolfe (1991), p 124. While Wolfe is talking of the United States, the analogy is not too difficult to draw.

193 Freedland (2000), p 74.

The end result of this is, according to Ewing, the introduction of a 'distinctively British bill of rights',[194] both in scope and application. Its introduction has largely been a success;[195] however, its introduction, in denying the 'traditional British assumption that civil liberties are best protected through the informal conventions of a liberty-loving political class than through any formal code',[196] alerts us to the fact that:

> the old maps which helped us navigate the contours of political life are now hopelessly out of date. The ideological faultlines which characterized Britain and much of the rest of the world for more than a century can no longer be relied upon to guide us through unchartered waters.[197]

Indeed, the *Human Rights Act* is a part of a broader project of the government in attempting to introduce a human rights culture, affecting decision-making, policy development, service provision and the interface between citizen and government.[198] It is an attempt to ensure that 'human rights form part of the rules of the game under which the system of politics and government is conducted'.[199] This procedural modification, as well as philosophical outlook, represents a further 'constitutionalisation of public law'[200] and, in doing so, a central change to traditional notions of British constitutionalism.

Supra-national Considerations

While the reforms discussed immediately above represent significant challenges and changes to the traditional scope of British constitutionalism as outlined in section one, the first real challenge to this state of affairs came 30 years earlier, with the passage of the *European Communities Act 1972*. In the eyes of Mount, passage of this Act was 'unmistakably a major entrenchment of a superior source of authority'.[201] Similar sentiments have been expressed by

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194 Ewing (1999), p 86.

195 Croft (2002).

196 Marquand (1999), p 2.

197 Klug (2000), p 1.

198 Section 19 allows for 'human rights proofing', in Hazell's terms — see Hazell (2000), p 15. Also, there is the operation of the Parliamentary Standing Committee on Human Rights.

199 Blackburn (1999), p xxxii. This is a 'distinctly social-democratic model of human rights protection, combining the protection of individual rights with a role for participative citizens involved in the democratic decision making in their community': Hunt (1999), p 89. This despite the courts being limited to act only on applications received. Croft explains the possible scope for this cultural change — see Croft (2000), pp 10–16. Ward concurs, but sees the Act as failing to reach such goals — see Ward (2001), p 114.

200 Steyn [1999], p 9.

201 Mount (1992) at 263.

the European Court of Justice. In *Van Gend en Loos v Nederlandse Tarief Commissie*,[202] it was stated :

> The Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.[203]

Thus, as Bradley[204] states, community law creates obligations on the United Kingdom and UK law can not be supreme over community law without 'the legal basis of the Community being called into question'.[205]

The domestic effect of Community membership was boldly displayed in the *Factortame* litigation,[206] in that this was that for the first time an Act of the Parliament of the United Kingdom, the sovereign legislature, could be required to be amended by virtue of a court ruling. Membership of the European Community has therefore played a major role in reshaping the domestic constitutionalism of the United Kingdom. In the words of Lord Bridge in *Factortame (No 2)*:

> whatever limitation of its sovereignty Parliament accepted when it enacted the *European Communities Act 1972* was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.[207]

What this means for the untrammeled sovereignty of parliament is that, so long as the *European Communities Act* remains in force, 'courts will consider nothing short of an express statement by Parliament that it intends to derogate from EC law as sufficient to preclude according superiority to Community law'.[208] Or, in the terms of O'Connor, the 'dynamics' of membership of the European Community 'will require institutions within the United Kingdom to adjust and find new accommodations with each other'.[209]

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202 [1963] CMLR 105.

203 [1963] CMLR 105.

204 Bradley (1998), p 40.

205 *Costa v ENEL* [1964] CMLR 425 at 455–56.

206 See *R v Secretary of State for Transport ex Parte Factortame (No 1)* [1990] 2 AC 85; *R v Secretary of State for Transport ex Parte Factortame (No 2)* [1991] 1 AC 603. See especially on this Craig (1991).

207 *R v Secretary of State for Transport ex Parte Factortame (No 2)* [1991] 1 AC 603 at 658–59.

208 Craig (1999), p 73.

209 O'Connor [2001], p 508.

This development, and the introduction of an interpretative principle so as to interpret British law in line with Community law,[210] has led Mount to argue that no supra national regime:

> can push a society beyond the limits of its prevailing world view ... But it can animate that society with a sense of what is right and instill into government an understanding of the proper limits to the exercise of power; above all it can inform the conversation of politics with a sense of dispersed responsibility.[211]

On such an issue, a further parallel can be drawn with the constitutionalism of Australia. The Australian High Court has effectively used supra-national institutions and law to enrich its constitutional law and procedure and to impose constraints on the actions of the federal government.[212] Indeed, one member of the court would go so far as to have such supra-national ideals be used as interpretative tools in adjudicating on domestic constitutional law.[213] These issues and the solutions the United Kingdom courts have already proffered are an accurate description of where we find the British Constitution today. The difference from the 'constitutional orthodoxy'[214] — the departure from the unassailable authority of the parliament — could not be more pronounced.

The New 'Constitutional Settlement' Defined

Gillian Peele writes of Britain moving towards a 'new constitutional settlement'.[215] In the case of *R v Secretary of State for the Home Department; ex Parte Pierson*,[216] Lord Steyn came close to outlining what this settlement looks like. Instead of an unrestricted and supreme parliament free to enact its will, the reality is now that:

> Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law.[217]

The new canons of this European liberal democracy have been spelt out in the preceding section of this article. It speaks to devolved power and participatory government, respect for human rights, membership of supra-national organizations — of the limitation of the power of parliament, not the

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210 See The Constitution Unit [1996], p 29.

211 Mount (1992), p 266.

212 See *Minister for Immigration v Teoh* (1995) 183 CLR 273.

213 See Kirby J in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 567–71.

214 Craig (1999), p 68.

215 Peele (2000), p 116.

216 [1998] AC 539.

217 [1998] AC 539 at 587.

unfettered right to make or unmake any law it so chooses. Craig has suggested there are two views that can be taken of this revolution. A minimalist view is that of a sovereign parliament, subject to an:

> ever increasing range of practical political limitations. The omni-competence of the legislature would continue to be regarded as a cornerstone of the Constitution, but it would become increasingly understood that the Westminster Parliament would not legislate in areas covered by Community law, in breach of the *Human Rights Act* or in spheres over which the Scottish Parliament had legislative competence.[218]

Alternatively, at their most radical, these changes might suggests that:

> the traditional idea of Parliamentary supremacy would itself be modified. It would no longer be accepted, even in theory, that the majoritarian will as expressed in the legislature would necessarily be without limits ... there are rights based limitations on what the elected Government can attain and these should be monitored by the courts. It might come to be accepted that Parliament could not derogate from a norm of EC law while remaining a member of the Community. There may be further developments relating to the structure of the UK ... towards federalism, with the consequence that there would be constitutional review formally delimiting the legislative competence of both Scottish and Westminster Parliaments.[219]

After this review, it is too early to say which of Craig's models describes the outcome. The new British Constitution is not yet a 'finished fact to be categorically assessed'.[220] What is undeniable is that there is a real, distinct and significant shift away from the traditional conception of what the British Constitution is, and the reasons for such a constitutionalism. Dummett is correct when she argues against governments trying to define the culture of their people through modes of governance or constitutionalism,[221] but this does not mean we can not draw some conclusions about what recent reforms mean or represent.

At the core of any conclusions drawn is the question of whether there has been a change in the determination of constitutional legislative validity and the institutions of the state. Clearly there has been. Under both assessments of the reform that Craig offers above, it is clear that the parliament now labours under several additional criteria which, if not actually restrictive of its legislative domain, certainly confine its scope as well as possibly impose

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218 Craig (1999), p 73.

219 Craig (1999), p 73. The notion of Britain moving towards a formal review of legislative competence is a view shared by the Australian Chief Justice — see Gleeson (2000), p 87.

220 Dewey (1927). Dewey was writing in an American context.

221 Dummett (1999), p 229. Alternatively, see Berns (1997), pp 179–80.

implicit limitations which may solidify into binding conventions over ensuing years. Such reforms also lend influence to the expanded notion of popular sovereignty addressed earlier in the article.

Patently, this is a political as well as legal reform agenda,[222] and its practical application in some respects, especially devolution, is limited.[223] Acknowledgment of such realities does not, however, diminish the fundamental nature of the reforms and their potential for British constitutionalism. While arguably born of an economic or political rationale, or even a concession to resurgent nationalistic fervour in parts of the Union, these reforms conceive a creative constitutionalism which relies upon and reflects community values through greater representation in legislative bodies and in developing criteria for judicial review. Further, the reforms represent a previously ignored understanding of individual rights, not only through the *Human Rights Act 1998* but also the continuing deference to the European Community and its institutions, the expanded grounds of judicial review[224] and greater diffusion of power within the United Kingdom. While there may be some claim of the *Human Rights Act* establishing a 'juristocracy', it must be remembered that the success or otherwise of the Act is not so much dependent on the activities of the judges but, indeed, on the types of cases which the public brings to the court. It is for the British public to now claim their rights and take up their expanded constitutional roles.

Thus, at its core, these reforms tell of a transformation of the British state and people — from subjects of a sovereign parliament to citizens of a nation with intermeshed institutions which implicitly, and perhaps eventually explicitly, limit each other's power. It is an evolutionary revolution with the principles of republicanism, of participatory democracy and communitarianism at its heart.[225] It is well summarised by Tushnet in his argument that:

> We simply have to live with the fact that the power that we hope will benefit us — whether it is the power of the legislatures or the judges — might also hurt us. [We must] do what we can to make it more likely that the people with power will help rather than hurt.[226]

This is the foundation of the British experiment.

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222 See Tomkins (1998), p 271 and Leicester (1999), p 262. Indeed, much remains to be done — see Hazell (2001).

223 It should be recalled that devolution only affects 15 per cent of the British population — see Hazell (2000), p 269.

224 Some of which are seen as explicitly 'constitutional' in nature — see Jowell (1999, 2001).

225 See Sunstein and Ackerman (1993); Sunstein (1988), p 1562.

226 Tushnet (1987), p 226.

Conclusion

Lord Steyn has defined constitutionalism as being 'concerned with the merits and quality of institutional arrangements. In aid of political liberty it sets minimum standards of constitutional government'.[227]

In this article, I have attempted to show that with recent reforms instituted by the Labour government the constitutionalism of Britain has undergone a radical transformation, in theory and practice; that the 'institutional arrangements' of the United Kingdom are no longer predetermined by automatic reference to the unquestionable power of parliament, but rather to a range of factors including national self-government, individual rights and membership of supra-national organisations — of what I term 'popular sovereignty'. Looked at in terms of constitutional interpretation, it is a constitutionalism which pushes away the 'dead hands' of history which 'reach from the grave to negate or constrict the natural implications of [a] Constitution's provisions or doctrines'.[228] The United Kingdom is on a journey which will continue to expand and develop its constitutional notions. There is no reason why reinvigorated constitutional theory cannot develop in a fashion which supports a new and reinvigorated theory of government — a theory mindful of the dangers of institutional capture and with aims of broad participation of its citizens at its core.

I initially attempted to demonstrate this argument by providing an overview of the traditional constitutionalism of the United Kingdom. Fundamentally attached to the supremacy of the parliament, this potentially acted as a break on broad participation in government and protection of individual rights. I then moved to look at the reforms instituted since 1997, namely:

- devolution to Scotland, Wales and Northern Ireland;
- the introduction of the *Human Rights Act 1998* and the contemporaneous expansion in grounds of common law/constitutionally principled judicial review; and
- the continuing membership of and ceding of power to institutions of the European Community.

I suggest that these reforms modify traditional constitutionalism. They challenge the supremacy of Westminster power and, in doing so, challenge the theoretical foundation on which Britain is built. In the final section of the article, I attempted to describe the new constitutional settlement. While precise definition can not yet be given, we can say with certainty that the conception of the British state is not what it was; the constitutionalism of the United Kingdom has changed. Rather than be an abstract dictum expounding the power of the legislature, the British Constitution — now comprising several

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227 Steyn (1997).

228 Patapan (2000), p 28. See also *Theophanous v Herald & Weekly Times Ltd* (1993) 124 ALR 1 at 50, per Deane J.

constituent parts, including the common law[229] — can properly be seen as 'an instrument of national government'.[230]

Perhaps even broader themes can be drawn from this. The experience in reducing constitutional principles to writing, the development of a culture of human rights, the emergence of and resolution of devolution disputes and the recognition of supra-national law and institutions are issues which raise parallels with the constitutionalism of members of the Commonwealth. Australia, Canada and New Zealand have been grappling with the erosion of parliamentary supremacy and the rise of supra-constitutional notions. The reforms in Britain have been, and I suggest will continue to be, informed and guided by such experiences. At their conclusion, the United Kingdom constitutionalism is likely to reflect that which has emerged in her former colonies — a (semi-)written, higher law which has as its touchstones participation, popular sovereignty and individual rights. It may be thought to have a sovereign parliament, but there will be an understanding and an acknowledgment that the power of such a body can be legitimately restricted or curtailed by other institutions of the state or by the people.

In his study of constitutions and political theory, Lane argued that:

> A democracy needs the institutions of a constitutional State with its emphasis upon procedural stability, accountability, the autonomy of the judiciary, multi-level government and civil and political rights.[231]

Britain has long enjoyed procedural stability and judicial autonomy. It is only now, in this 'current process of establishing an explicitly constitutional dimension [whereby we are] assigning to the Constitution a separate identity and authority to that of the government',[232] that we see the other features listed taking shape. Sir Ivor Jennings wrote that 'a writer on the British Constitution selects what seems to him to be important'.[233] Perhaps in this article I have done this, selectively focusing on areas where I believe the change to be most marked or most significant. Irrespective of this, the changes described here and the emerging constitutionalism of the United Kingdom are meaningful because at the core of any democracy is the Constitution — the law which 'speaks to, and is the touchstone for, the legitimacy of government and governing arrangements'.[234]

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229 Allen argues the common law can 'adapt to new insights and demands ... and meet the needs of modern constitutionalism' — see Allen (1996), p 146.

230 Mason (1986), p 24.

231 Lane (1996), p 263.

232 Foley (1999), p 285.

233 Jennings (1966), p 37.

234 Wass (1986), p 7.

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