

## A Supreme Court, Supreme Parliament, and Transnational National Rights. By Alyssa King

In October 2009, the former Law Lords became justices of the newly created Supreme Court of the United Kingdom. With new jurisdiction, and with its own building and resources, the Supreme Court is separate from Parliament for the first time.<sup>1</sup> The new Court can be seen as a procedural complement to the substantive reform made by the United Kingdom's Human Rights Act (HRA).<sup>2</sup> Parliament's decision to create the Court, like its choice to codify human rights law, was made partly in response to the influence of the European Court on Human Rights (ECtHR) and supranational institutions on the state. Some politicians hoped that a supreme court would be able to articulate a distinct national vision in response to the imposition of supranational instruments.

If this reaction were confined to the United Kingdom, it might be a particularity of that state's relationship with continental Europe, but similar courses of action have come to pass in other states with traditions of parliamentary sovereignty. In 2003, reforms in Belgium gave the Constitutional Court the power to review rights under the national constitution.<sup>3</sup> The French Parliament is finalizing a grant of concrete jurisdiction over rights cases to the Constitutional Council which previously was limited to abstract questions of constitutionality raised by Parliament.<sup>4</sup> In each of these instances, parliamentary discussions have highlighted the perceived need to create a system of constitutional review that will have priority over review under the European Convention on Human Rights (ECHR).<sup>5</sup>

In many European states, judges in supreme courts have been viewed as potential buffers between the national legislature and the ECtHR, creating a coherent explanation of the legal order and giving transnational rights local meaning.<sup>6</sup> Speaking of fundamental rights and values, these judges explain the meaning of the law by choosing among competing narratives, or by writing their own.<sup>7</sup> In some respects, the recent reforms to the European judiciaries have only reinforced the judicial role as it has traditionally operated under systems of parliamentary sovereignty; they further empower judges to allow them to speak for the constitution on the belief that judges are the "mouth . . .

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1. Constitutional Reform Act, 2005, c. 4, §§ 40, 48-50 (Eng.).

2. Human Rights Act, 1998, c. 42 (Eng.).

3. Erika de Wet, *The Reception Process in the Netherlands and Belgium*, in *A EUROPE OF RIGHTS* 229, 250 (Helen Keller & Alec Stone Sweet eds., 2008).

4. Bill No. 1975 of Oct. 14, 2009, <http://www.assemblee-nationale.fr/13/pdf/projets/pl1975.pdf> (Fr.).

5. See, e.g., Verbatim Report from the Session of July 21, 2008, *Journal Officiel de la République Française: Débats Parlementaires [J.O.]* [Official Gazette of France: Parliamentary Debates], July 22, 2008, at 15-16 (Fr.), available at <http://www.assembleenationale.net/13/pdf/cri/2007-2008-extra/20081990.pdf>.

6. See, e.g., Aidan O'Neill, *Judging Democracy: the Devolutionary Settlement and the Scottish Constitution*, in *BUILDING THE UK'S NEW SUPREME COURT* 23, 36-37 (Anthony Le Sueur ed., 2004) (arguing that the German constitutional courts play a protective role as a final arbiter on fundamental rights and that British courts may too).

7. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 9-10 (1983).

of the law.”<sup>8</sup> Entry into the supranational European legal order brought a second layer of judicial review, but not necessarily a new view of judges. Judges in national high courts are assumed to express the national law in their decisions, as opposed to ECtHR judges who employ transnational legal norms in their work.

The idea that the judge gives voice to a component of national identity is readily apparent in discussions of the HRA. The United Kingdom began allowing individual petitions to the ECtHR in 1966, as attempts to create a bill of rights gained traction.<sup>9</sup> The incorporation of the ECHR into national law provided an expedient way to write a human rights bill, as was done in 1998 with the HRA.<sup>10</sup> Supporters walked a thin line between engaging Europe and maintaining that the rights they sought to codify were not foreign. In this vein, the United Kingdom’s involvement in drafting the ECHR was frequently cited in political debate.<sup>11</sup> The title of the government’s white paper on the HRA bill, *Rights Brought Home*, evokes the idea that the rights in the ECHR are properly British rights, and that they ought to be dealt with “at home.” The number of U.K. cases sent to the ECtHR remained a political preoccupation.<sup>12</sup> Some politicians saw the work of the ECtHR as revoking control over the development and direction of U.K. law from the United Kingdom.

Though they wished to decrease the number of cases in the ECtHR and keep cases in the U.K. courts, parliamentarians understood that incorporating the ECHR would not remove the possibility that some cases would reach the supranational court. Still, supporters of the bill emphasized the importance of the domestic judicial voice. As the government put it: “British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.”<sup>13</sup> The influence of British judges was a remedy not only for the volume of cases the United Kingdom had to defend in the ECtHR, but also for perceived misunderstandings of and lack of appreciation for the state’s legal tradition.<sup>14</sup> Concerns about preservation of U.K. law were transformed into concerns about giving U.K. judges tools with which to express the law of the sovereign vis-à-vis European judges.

The creation of the Supreme Court in the 2005 Constitutional Reform Act (CRA) continued this theme with implications for the distribution of judicial power in two respects. First, the CRA unifies final jurisdiction over rights cases. Second, the removal of the Law Lords from Parliament

8. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 163 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., Cambridge Univ. Press 2006) (1748) (describing the U.K. constitution and referring to judges as the “mouth that pronounces the words of the law”).

9. ROBERT BLACKBURN, *TOWARDS A CONSTITUTIONAL BILL OF RIGHTS FOR THE UNITED KINGDOM* 5-6 (1999).

10. *Id.* at 7.

11. *See, e.g.*, 582 PARL. DEB., H.L. (5th ser.) (1997) 1227f, *reprinted in* BLACKBURN, *supra* note 9, at 377; HOME DEP’T, *RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997*, Cm. 3782, ¶ 1.14, *available at* <http://www.archive.official-documents.co.uk/document/hoffice/rights/contents.htm>.

12. *Compare* Human Rights Sub-Comm., Nat’l Executive Comm., *A Charter of Human Rights: A Discussion Document for the Labour Movement* (1976), *reprinted in* BLACKBURN, *supra* note 9, at 917, 921, *with* HOME DEP’T, *supra* note 11, ¶ 1.16.

13. HOME DEP’T, *supra* note 12, ¶ 1.14.

14. *See, e.g.*, MARY BARBER, HOME AFFAIRS SECTION, *THE HUMAN RIGHTS BILL, 1997-8*, H.C. 98/24, at 14; *see also* 582 PARL. DEB., H.L. at 1227f.

underlines the independence of the judiciary.<sup>15</sup> The strategy is to accept European norms in order to more effectively resist them, but the logic behind this strategy relies on a misperception about the ability to draw distinctions between judges and the law. Judges may be important, but only because they are assumed to defend and explain state law, not change it.

The HRA serves as a basis for invalidating judicial and administrative decisions.<sup>16</sup> For statutes, the Court exercises what Mark Tushnet calls “weak-form judicial review.”<sup>17</sup> Justices are to interpret laws in a way that renders them compatible with the HRA where possible. If the Court deems it appropriate, it may issue a declaration of incompatibility. This declaration sets in motion a process to change the law, through ordinary legislation, fast track legislation or, in urgent cases, a ministerial order that then must be ratified by Parliament.<sup>18</sup>

Unified jurisdiction was needed after Scottish devolution created opportunities for disagreement between the Lords’ and Privy Councils.<sup>19</sup> Under devolution, Parliament has granted limited legislative powers to regional legislatures. Until the creation of the new Supreme Court, the Privy Council reviewed the limits on the powers of these devolved parliaments.<sup>20</sup> The Scottish Parliament may not make laws contrary to the ECHR. Litigation in the Privy Council became a particularly important avenue for ECHR claims regarding Scottish criminal law, which the Law Lords had no power to review.<sup>21</sup> Meanwhile, the Law Lords (who also made up part of the judicial committee of the Privy Council) used the HRA to review acts of Parliament and other laws made by the devolved legislatures. Because devolution decisions are binding on all British judges, the small space in which the Privy Council has dominated, Scottish criminal law, had an outsized effect on the rest of the United Kingdom.<sup>22</sup> This arrangement thus would have given Scottish law disproportionate influence in the legal system. Limiting the effect of Scottish criminal cases to Scotland or refusing to recognize parallel jurisprudence between the ECHR and the HRA were not satisfactory solutions because either option would leave a disjointedness akin to a circuit split in the U.S. federal courts that the ECtHR would have to resolve. Such an arrangement would further conflict with a unified vision of the rule of law in the United Kingdom.

Another justification for creating a Supreme Court in the United Kingdom was the enhanced visibility of separation of powers.<sup>23</sup> This cosmetic change has both internal and external audiences. The government had hoped

15. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM 157 (2003), <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>.

16. COLIN TURPIN & BETH TOMPKINS, BRITISH GOVERNMENT AND THE CONSTITUTION 272 (6th ed. 2007).

17. MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 28 (2008).

18. *Id.*

19. O’Neill, *supra* note 6, at 42.

20. Anthony Bradley, *The Sovereignty of Parliament-Form or Substance?*, in THE CHANGING CONSTITUTION 25, 50 (Jeffrey Jowell & Dawn Oliver eds., 6th ed. 2007).

21. O’Neill, *supra* note 6, at 31.

22. *Id.* at 33.

23. 429 PARL. DEB., H.C. (6th ser.) (2005) 564 (statement of Christopher Leslie) (claiming the Court will “create a visible apex of an independent United Kingdom judicial system”).

that the internal audience, U.K. residents, would become more aware of the role of law in their lives,<sup>24</sup> further emphasizing its aim of building a sense of national identity through legal identity.<sup>25</sup> Externally, the change was thought to alleviate tension between the domestic judiciary and the ECtHR, which has been seen as increasingly assertive in its criticism of domestic judiciaries.

One general goal of the CRA was to increase judicial independence.<sup>26</sup> Independence is of greater importance when judges have greater powers to censure the legislature and when it is important that people recognize that they can enforce their rights in national courts. Like the HRA, the Court was presented as a “modernizing” move, bringing the United Kingdom in line with the rest of Europe.<sup>27</sup> Lord Thomas Bingham, an early campaigner for the Supreme Court, declared the need to respond to global changes and clarify the functional separation of powers “a cardinal aspect of a modern liberal democratic state governed by the rule of law.”<sup>28</sup>

As the U.K. government was aware, European decisions also raised the possibility that the Law Lords’ place in the legislature would be incompatible with ECHR guarantees of an impartial judiciary.<sup>29</sup> The 2000 ECtHR decision of *McGonnell v. United Kingdom* censured a local official who presided over deliberations on a development plan and then sat as judge in a case challenging the plan several years later.<sup>30</sup> It prompted the Law Lords to adopt a statement saying they would no longer take part in politically sensitive debates.<sup>31</sup> The analogy is imperfect, as the House of Lords can delay but cannot create law. Yet, given their increased ability to rule on rights and their place as expositors of U.K. law, the Lords may have wished to avoid any risk that the ECtHR would threaten their position and legitimacy. By making a concession on structure, U.K. politicians avoid concessions on the content of U.K. laws.

The new U.K. Supreme Court reflects a reaction to the growing importance of European law in the legal systems of member states. This reaction, which ties national law to national identity, also assumes domestic judges will be defenders of that law. This attitude, apparent in the HRA, is also evident in the creation of the Court, which unifies jurisdiction on rights issues and raises the profile of the domestic judges. Still, these reforms depend not only on the identification of law with identity, but also on that of the judge with the law. In one sense, the HRA may have brought rights home; the number of British petitions to the ECtHR has been reduced in recent years.<sup>32</sup> However, the government’s incentives to heed declarations of incompatibility

24. DEP’T FOR CONSTITUTIONAL AFFAIRS, *supra* note 15, at 11.

25. See, e.g., MINISTRY OF JUSTICE, RIGHTS AND RESPONSIBILITIES: DEVELOPING OUR CONSTITUTIONAL FRAMEWORK, 2009, Cm. 7577.

26. DEP’T FOR CONSTITUTIONAL AFFAIRS, *supra* note 15, at 11, 13.

27. Michael Skold, *The Reform Act’s Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom?*, 39 CONN. L. REV. 2149, 2157 (2007).

28. Anthony Lester, *The Human Rights Act 1998—Five Years On*, 2004 EUR. HUM. RTS. L. REV. 258.

29. 657 PARL. DEB., H.L. (5th ser.) (2004) 1226.

30. App. No. 28488/95, 30 Eur. H.R. Rep. 289, 291 (2000).

31. TURPIN & TOMPKINS, *supra* note 16, at 125.

32. Robert Verkaik, *Lawsuits on Human Rights Halve Despite European Act*, INDEPENDENT (U.K.), Apr. 20, 2009, at 16.

are directly linked to the threat of loss in the ECtHR if it does not amend its laws.<sup>33</sup> As a result, the goal of a reduction in petitions will clash with the Supreme Court's institutional interests because it deprives the Court of a meaningful enforcement mechanism against Parliament. As the Court responds to changes to the status of national law wrought by European integration, not to mention internal rights debates such as those over privacy and terrorism, Parliament may question the representativeness of these judges. Its authority will likely be built on a more complicated picture of how judges interact with litigants and law and to what extent judges can be said to speak for law.

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33. TUSHNET, *supra* note 17, at 30.