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Day one: judges put power to the test

Ministers hate to be overruled, but their dangerous dominance has made the Supreme Court vital

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Many years before the passage of the Human Rights Act, some lawyers on the left distrusted the notion of powerful judges. They believed that the supremacy of Parliament was a more reliable friend to democracy than any collection of elderly men ruminating over lunch in the Strand. MPs were elected, after all, and judges were not. These robed fish swam in the smallest of pools and they shared the closest of genes. Their passage through the depths was mysterious and they didn't want to reform — how could you trust them to mediate the power of the State?

But this analysis was myopic. It was blinking through mist as that power became the untrammelled might of an executive dominating the House of Commons, and a whipped party system with its arcane disciplines destroyed the integrity of parliamentary voting. Too many backbenchers pawned their souls for future office and then grew feeble, allowing themselves to appear pointless. In this depressing process, parliamentary sovereignty flirted foolishly close to sovereignty for the Government. Of course, the wider public did not articulate these developments as a constitutional historian might, but they nevertheless shared an increasingly morbid sense that the Commons was failing to count. This bitter fruit fermented into widespread cynicism about politics.

The growth of judicial review in the 1990s signalled some clear spring air. In the High Court, judges began to show more courage than some of the men and women climbing the sticky poles in Westminster, and they began to examine the behaviour of public bodies. Chiefly under scrutiny was the Government itself. Slowly at first, and then with growing confidence, the judiciary began adjudicating closer to the heart of power — and this process was canonised by the passage of the Human Rights Act.

If it takes aim at this legislation next year, a Conservative government will have to answer the question posed so directly by Lord Bingham of Cornhill: which rights exactly, of all those laid out in the European Convention, do Tories think are unworthy of protection? As Peter Oborne and Jesse Norman argue in their important new booklet *The Conservative Case for the Human Rights Act*, it contains the most basic values learnt from 900 years of British history, including great conservative ideas such as freedom under the law, restraint on the power of the State and the inviolability of the link between individual liberty and private property. For good reason the authors subtitle their text: *Churchill's Legacy*.

Of course it is a great irritant to government. For most of his career, Churchill was too. That, after all, is half the point. It's no fun, as an elected minister, being second-guessed by the courts. Many a Home Secretary has been left fulminating at some new reverse and Tony Blair himself was enraged as his wilder responses to terrorism were blocked.

Privately he sought ways to lock out the judges, to protect the more "sensitive" government work from their scrutiny. But he got no encouragement from his law officers, who understood that the world had moved on and were glad. No scaffold could be dispatched to the Royal Courts of Justice: the new Human Rights Act was being used as it should, to guarantee the rights of those the State wanted to imperil.

Now at the apex of this system of law stands the Supreme Court, open for business this morning. With deliberate symbolism, the new Justices have chosen their first case to test the limits on a government's right to make law by executive order. The message is clear: this will be a Constitutional Court and it will take to power with ease.

There are other messages too. The Supreme Court's new home is carefully designed to make public viewing as easy and natural as possible. Stone walls have been replaced with great panes of glass,

inviting curious eyes. And as the freshly appointed Justices take their seats, cameras will begin to broadcast the proceedings to a world far beyond any law books. A populace that has shown little interest in the gloomier ways of our legal past is invited to bear witness to the more visible future on a pleasingly opposite side of Parliament Square.

It may have been conceived on the back of one of Charlie Falconer's envelopes, but the work was cleverly done. Great reform probably needs an element of ruthlessness, if it is to succeed. In the British style, a consultation preceding the decision would have dragged on for years. To have the consultation after the announcement was an unintended stroke of genius. In the event much negotiating was done, particularly with the judiciary. Their hasty divorce from Parliament was certainly messy, but they emerged with their independence and stature greater than before.

But this process should have been only a first step in modernisation.

The House of Lords remains unelected and the Commons an elaborate rubber-stamp. Senior politicians may well be right that there are few votes in constitutional reform: doubtless there are other, more pressing topics of debate in bars up and down the land. Yet ministers should reflect that there are multiple costs in disillusionment and heavy payment will be due in time. The rules of governing and scrutiny matter.

If they don't seem to include the public, or reflect our common sense of what is right, they become incompetent and cease to command loyalty. So let our judges protect the rule of law, if no one else will.

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