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THE WESTMINSTER MODEL, GOVERNANCE, AND JUDICIAL REFORM

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Abstract

How are we to interpret judicial reform under New Labour? What are its implications for democracy? This paper argues that the reforms are part of a broader process of juridification. The Westminster Model, as derived from Dicey, upheld a concept of parliamentary sovereignty that gives a misleading account of the role of the judiciary. Juridification has arisen along with new theories and new worlds of governance that both highlight and intensify the limitations of the Westminster Model so conceived. New Labour's judicial reforms are attempts to address problems associated with the new governance. Ironically, however, the reforms are themselves constrained by a lingering commitment to an increasingly out-dated Westminster Model.

THE WESTMINSTER MODEL, GOVERNANCE, AND JUDICIAL REFORM

Immediately following the 1997 general election in Britain, the New Labour government started to pursue a series of radical constitutional reforms with the overt intention of making British political institutions more effective and more accountable. As a result of these reforms, the British judiciary has witnessed more change in the last ten years than in the entire past century. The Human Rights Act (1998) dramatically extended the practice of judicial review. The Constitutional Reform Act (2005) overhauled the Lord Chancellor's office and the process of judicial appointments while also setting the scene for the creation of a supreme court.

How are we to interpret judicial reform under New Labour? What are its implications for democracy? One way of answering these questions is to describe New Labour's reforms as part of the broad pattern of juridification that many social scientists have observed taking place in various states as well as transnational and international spaces. Juridification can be defined provisionally as the increasing role of the courts in processes of collective decision-making. To appeal to a broad pattern of juridification is, however, only to push back our questions. How are we to explain juridification? What are the implications of juridification for democracy?

This paper approaches general questions about juridification through discussion of the British example. To begin, I outline the conventional view, deriving from A. V. Dicey, of the role of the judiciary in the Westminster Model. Next I suggest that the Westminster Model obscured the fact of a dispersed pattern of rule in which the judiciary sometimes played a role very different from that described by Dicey. Juridification is, I argue, part of the rise of new theories and new worlds of governance that both highlight and intensify the limitations of the Westminster Model as an account of British politics. From this perspective, New Labour's

judicial reforms are attempts to address problems associated with the new governance, and yet, ironically, the reforms are themselves constrained by an increasingly out-dated Westminster Model as well as by a belief in expertise.

The Judiciary in the Westminster Model

New Labour's judicial reforms are part of a wider process of juridification. In particular, they are an example of politicians handing more power and decisions to judges and courts in an attempt to address problems of effectiveness and accountability that have arisen as new theories and worlds of governance have eroded the plausibility of elder images of the judiciary such as that associated with the Westminster Model. Often they are attempts to formalise through law what otherwise might be decided by democratic processes.

The nineteenth century background

Relatively few general accounts of the British constitutional and political system were published before the middle of the nineteenth century. When they came, they rushed in. The year of 1867 alone saw the appearance of William Hearn's, Government of England, Alpheus Todd's Parliamentary Government in England, and Walter Bagehot's English Constitution. Erskine May's Constitutional History of England had appeared a few years earlier in 1861. During the next two decades, several other classic studies were published, including Edward Freeman's The Growth of the English Constitution (1872), Sir William Anson's The Law and Custom of the Constitution (1886), and, most importantly for us, A. V. Dicey's Introduction to the Study of the Law of the Constitution (1885).¹ These classic works were characteristically written against the

background of Whig historiography, and they entrenched the broad outlines of what became the Westminster Model.

The rush of interest in the constitution arose in part out of a concern with the development of representative and responsible government in the colonies.² Todd's family had emigrated to Canada when he was eight, and Hearn had moved to Australia in 1854 to take up a Professorship at the University of Melbourne. Nonetheless, the main source of concern with the constitution was, of course, the debates around the Reform Act of 1867. During the nineteenth century, from early fears of Jacobinism to the later rise of socialism and the New Unionism, the British state constantly faced the threat and reality of popular protests demanding an extension of political and social rights. These protests were met by a series of Reform Acts, such as that of 1867, which slowly extended the franchise to an ever-larger proportion of adult males. Yet, the Reform Acts, precisely because they extended the franchise, contributed to a widespread anxiety about the entry of the lower classes into government. Even radical liberals were affected by this anxiety, with, for example, J. S. Mill advocating a system of plural voting as a means to preserve the competence of the electorate.³ One component of the anxiety was the idea that the extension of the franchise would disrupt social stability and constitutional principles. Dicey examined the constitution to dispel this idea. The Westminster Model was to some extent an interpretation of constitutional history developed by conservative Whigs in response to anxieties about popular participation.

Dicey on the constitution

Dicey himself tried to alleviate fears over the spread of democracy by appealing to a constitution within which popular participation was restrained by parliamentary sovereignty, the

rule of law, and informal constitutional conventions. In doing so, he provided the classic account of the place of the judiciary within what was to become the Westminster Model.

(i) Parliamentary sovereignty

Dicey begins his analysis of the British legal system by looking at Parliament. He writes, “the sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions.”⁴ Parliamentary sovereignty means that Parliament (composed of the King, the House of Lords, and the House of Commons) can make or unmake any law it chooses and no other person or institution can overrule its laws.⁵ Parliament is the only body with the authority to make laws. Hence parliamentary sovereignty implies the subordination of the judiciary. The judiciary cannot challenge an Act of Parliament.

This attempt to subordinate the judiciary might appear to fail in light of the common law. The common law appears to allow judges to make laws by establishing precedents that are then binding upon their successors. Dicey argues, however, that the practice of the common law does not really contradict the supremacy of Parliament since “judicial legislation is . . . subordinate legislation” to Acts of Parliament.⁶ Crucially, for Dicey, there is nothing in the constitution akin to the judicial review provided by the Supreme Court in the US. To the contrary, Parliament ultimately has supreme authority in every jurisdiction, including the rights of the individual.

At this point parliamentary sovereignty begins to resemble just that kind of despotism which so enraged many eighteenth and nineteenth century radicals. Parliament appears to be a leviathan against which individuals have no appeal and from which they can expect no redress. Dicey argues, however, that two limitations circumscribe the actions of even the most despotic ruler. First, no prudent monarch or government would knowingly pursue a morally repugnant

law that may incite the people to revolt. Secondly, even tyrants who may possess the power to make unilateral decisions are unlikely to take certain actions given the cultural context in which they govern.

(ii) Rule of law

If parliamentary sovereignty appears as a counter to popular participation, the rule of law is, for Dicey, something of a counter to parliamentary despotism. Legislators in parliament are constrained by a commitment to the rule of law. Dicey identifies the rule of law, rather narrowly, with known rules, equality, and respect for precedent. For a start, Dicey argues that government operates in accord with known rules rather than arbitrary caprice or even discretion. Dicey also argues that Britain, unlike its counterparts, has long boasted a notion of equality before the law, according to which all individuals are treated similarly regardless of class or rank. Finally, Dicey associates the rule of law with the way in which the principles that protect individual liberties have become entrenched over time through the decisions of judges. In his view, although some other states rely on enumerated powers and formalised rights, Britain's use of precedent is in fact a more effective way of ensuring individual liberties.

It is difficult to see how Dicey's account of the rule of law can be reconciled with his principle of parliamentary sovereignty. To mention just one issue: if Parliament is bound to follow known rules rather than make and unmake laws on a whim, how can it be free to do as it pleases? Dicey himself argued that far from being in conflict, the two ideas actually reinforced one another: "the sovereignty of Parliament . . . favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise, and thus increases the authority, of Parliamentary sovereignty."⁷ But his argument here is vague, controversial, and

arguably implausible. To say that parliamentary sovereignty favours the supremacy of the law is not to say it favours a rule of law based on formal equality and respect for precedent. Likewise, it is far from clear why Parliament requires a strong legal system rather than, for example, a strong executive branch of government.

(iii) Constitutional conventions

The final section of Introduction to the Study of the Law of the Constitution is in part an attempt to explain how the rule of law can operate alongside parliamentary sovereignty. Dicey's explanation consists of an appeal to the importance of constitutional conventions. He argues that the legal system consists not only of the procedural enforcement of rules and precedents but also of the informal "customs, practices, maxims, or precepts which are not enforced or recognised by the Courts, [and which] make up a body not of laws, but of constitutional or political ethics."⁸ The unwritten constitution of Britain is one in which these conventions and implicit rules are vital to the operation of democracy. Indeed, Dicey elevates the customs and conventions into a "constitutional morality" to which he then appeals to limit the powers of a popularly elected parliament.⁹ A sovereign parliament that adheres to these constitutional precepts will not oppose the supremacy of law and so the individual liberties secured by precedent.

After Dicey

Dicey's constitutional views proved extremely influential among both academics and political actors. Even if Bagehot loomed as large over the imagination of political scientists interested in government, Dicey clearly defined the agenda for legal scholars and others interested in the constitution and the judiciary.¹⁰ Indeed, for most of the twentieth century the

dominant image of the British political system was of a Westminster Model defined in terms of parliamentary sovereignty. Within the Westminster Model, the courts are expected merely to interpret Acts of Parliament to the best of their abilities. Judges are meant to rule in accord with the intention of the legislature: their decisions are meant to reflect how a given Act was designed to function. Judges are not meant to challenge, let alone overturn, legislation as they can in, for example, the US. Indeed, by combining parliamentary sovereignty with a concept of the rule of law that was based on precedent, Dicey's followers implied that a judge should never actually challenge an existing law, regardless of whether that law arose from a legislative act or from the past decision of a judge. Any attempt by the courts to reexamine the content of law appeared to be an abuse of power.¹¹

Social scientists and legal scholars have been slow to recognise the impact of their work on the world they study. It is thus important to recognise the extent to which Dicey and his followers helped to construct the very world about which they wrote. Their constitutional views influenced political and legal actors thereby helping to bring into being the kind of constitution they argued existed. One prominent example is the comparatively weak development in the twentieth century of administrative laws covering the expanding welfare state. Britain proved slow to devise an administrative law that applied only to government actions and procedures not to private corporations and individuals. Many of those involved thought such an administrative law would be incompatible with Dicey's account of the role of equality and precedent within the rule of law. British administrative law thus tended to develop through the application of case law based on private law.

For a hundred years Dicey's Law of the Constitution was the preeminent work in the field. Of course, Dicey's views were challenged often and vigorously during that time: Sir Ivor

Jennings in particular argued that the constitution should be understood in the context of social and economic changes.¹² Yet, despite such challenges, Dicey's authority began to crumble only in the 1970s. Just as Dicey's views reflect the problems of nineteenth-century democratisation, so the turn away from his views owed much to new theories and new worlds of governance. New theories, such as behaviouralism and rational choice theory, undermined his assumptions about the behaviour of political actors and institutions. New international worlds, notably the rise of the European Union (EU), challenged the practicability of his concept of parliamentary sovereignty. New domestic worlds, including contracting-out and regimes of regulation, challenged his concept of the rule of law.

Juridification and Governance

The new theories and worlds of governance have decisively undermined the Westminster Model. A process of juridification has undermined Dicey's account of the role of judges and the courts in British government. New Labour's reforms are simultaneously an extension of this process of juridification and a response to problems associated with it. Yet, before we turn to New Labour, let us briefly explore the way in which the new governance has undermined Diceyan ideas such as those about parliamentary sovereignty and a subordinate judiciary.

Defining juridification

The word "juridification" is used in several different ways to capture various changes that make law a more powerful or prevalent force in state and society. Law and judges are, it seems, playing more prominent parts in our collective decision-making and so in structuring social life. The popularity of the notion of juridification owes much to Jurgen Habermas. For Habermas, and

many others, juridification has a narrow meaning.¹³ It refers to the tendency of modern states to deploy the law to transform civil society and private life. The state transforms private life into a public matter especially through its extension of the welfare state. However, while this narrow notion of juridification draws attention to some changes in regulatory laws, it risks occluding other ways in which law is increasingly penetrating politics and society. In Britain, for example, the Thatcher governments of the 1980s used legal regulations less to expand welfare than to regulate local government in an attempt to roll-back the state.¹⁴ Thatcherism thus provides an example of juridification occurring alongside an attempt to reduce the role of the state in the market, civil society, and private life.

A broader concept of juridification might refer to all the ways in which an expanded role for law narrows the scope for democratic processes within civil society or within governmental institutions themselves. Juridification thus captures not only the expanding range of laws but also the growing reliance on judges and courts to interpret and apply laws. These processes constrain the space for democratic decisions. Even when a representative institution creates a rule on an issue and hands the application of that rule to the courts, it thereby constrains the space for any future democratic decisions on that issue. When the application of the rule is given over to the courts, then citizens (and legislators and public officials) have an incentive to try to get their way on that issue by employing a lawyer rather than by engaging in democratic politics. This broader concept of juridification would cover the ways in which law continues to become more powerful even as neoliberal governments and their successors seek to roll-back or reform the welfare state.

Lars Blichner and Anders Molander identify five different types of juridification, emphasizing that they need not occur simultaneously.¹⁵ First, “constitutive juridification” is the process by which the norms of a political system are created or changed to improve the

competencies and role of the legal system. This process covers not only the expansion of the administrative and welfare state but also, as we will see, the expansion of judicial review. A second type of juridification can occur when legal regulation is expanded or increasingly differentiated. Third, juridification takes place when social actors, in and outside of government, increasingly refer to the law to resolve conflicts. A fourth type of juridification is identified with the judges and the courts playing an increasingly prominent role in lawmaking. In Britain, and the EU more generally, the European Court has facilitated the courts expansion into lawmaking. Yet, as we will see, this type of juridification sometimes might be less a result of the judiciary grabbing for more power than of the government or citizens forcing the judiciary to take on a greater role. Finally, a fifth type of juridification is a vague process in which people increasingly come to define themselves and others in legal terms, such as what it means to be an EU citizen.

Understanding juridification

Once we expand our concept of juridification to cover the diverse processes identified by Blichner and Molander, we need to relate it not only to the welfare state but, arguably more importantly, to the rise of marketisation, contracting-out, networks, joined-up governance, and other related developments. How are we to understand and explain juridification so conceived? How are we to explain the increasing irrelevance of Dicey?

We might begin by relating juridification to the new governance. To relate juridification to more general changes in governance and the state is neither particularly controversial nor particularly original. Lars Trägårdh and Michael Carpini write, “the juridification of politics to a considerable extent must be understood in empirical, rather than normative terms; that is, as one expression of the broad secular trend that is currently challenging the political order that we call

‘national democracy’.”¹⁶ They then go on to identify the relevant secular trends with both globalisation and the rise of a modern individualism, concluding that a globalised market society is hollowing out the state from above and below.

Trägårdh and Carpini offer little concrete discussion of the ways in which the new governance leads to juridification. We can get a sense of some of the processes involved, however, if we return to the attempts of the Thatcher governments to regulate local government.¹⁷ As was mentioned above, central government used law to constrain local government as part of its attempt to promote marketisation, the new public management, and other aspects of the new governance. In addition, when central government attacked established bureaucratic norms and procedures, it created a climate of uncertainty such that political actors, including central and local governments, turned to the courts to determine their rights and duties.

More generally, the new governance has led to juridification through the following general processes:

- The new theories of governance drew attention to the ways in which the law played a more extensive role than was suggested by previous theories including those of Dicey.
- The new worlds of governance, including the rise of transnational institutions and contracting-out, gave the law a more extensive role than it previously had.
- Politicians, judges, and citizens have been inspired by the new theories to respond to the new worlds in ways that have given the law a yet more extensive role.

Let us illustrate each of these processes with examples from British politics prior to New Labour coming to power in 1997.

New theories of governance

New theories of governance have drawn attention to the ways in which the law plays a more extensive role than that suggested by Dicey and the Westminster Model. Gaps in Dicey and the Westminster model became visible in the 1930s as modernist social scientists began to pay more attention to behavioural topics such as policy networks and political parties. It is surely no accident that the most famous early twentieth century critic of Dicey, Sir Ivor Jennings, was one of the social scientists writing between the wars who focused on the actual behaviour of political actors (individuals and institutions) rather than their formal constitutional roles – he was almost a precursor of contemporary scholars of public administration and governance who evoke a core executive and policy networks in ways that challenge the Westminster Model.¹⁸

Various new theories suggested that the courts always had played an active role in British politics. While early twentieth century constitutional lawyers focused on topics inherited from Dicey, paying little attention to administrative law, social scientists began to pay more and more attention to public administration and the policy process. Once legal scholars too began to take note of the administrative state, Diceyan opposition to a distinct administrative law seemed implausible, as did the idea that the judiciary remained above politics.¹⁹ Among the roles that the judiciary has long played in British politics are, first, judicial review based on case law, and, second, administrative regulation by ombudsmen, tribunals, and inquiries.

In so far as Diceyan inspired constitutional lawyers paid attention to administrative law, they concentrated on the case law of judicial review by the courts. As we saw, Dicey's attempt to reconcile parliamentary sovereignty with the rule of law was unconvincing. The courts use case law as the basis for a type of judicial review, and judges review government actions against

procedural values such as proportionality and reasonableness. Lord Reid, as a member of the judicial committee of the House of Lords, played a notable role in the development of just such judicial review after the Second World War. More recently, in 1993, when the Home Office proceeded with a deportation despite having assured the court that it would not do so, the courts even decided that Ministers could be in contempt of court.²⁰

The influence of Dicey meant that constitutional lawyers were slow to recognise the extent to which law intervened in politics not only by judicial review but also by ombudsmen, tribunals, and inquiries.²¹ It is true that some of the tribunals and inquiries that judges lead are fairly uncontentious investigations into national disasters such as that into the collapse of crowd barriers at Hillsborough football stadium. Even these inquiries can have direct policy and legal implications, however, such as the requirement that certain stadiums be seating only. What is more, judges also head tribunals and lead investigations that concern the actions of government ministers, parliamentarians, civil servants, and street-level bureaucrats. Macmillan initiated such an inquiry into the Profumo affair. In the Thatcher years, Lord Justice Scarman examined the causes of race riots in Brixton, London.

New worlds of governance

New worlds of governance have given the law a more extensive role than it had previously. In mentioning new worlds of governance, I do not want to suggest that they arose as part of an inexorable process of functionalisation, rationalisation, or modernisation independent of the theories of policy actors. To the contrary, the new worlds of governance can be seen as products of the new theories of governance: neoclassical economics and rational choice theory inspired contracting-out and other neoliberal reforms, and institutionalist theories of networks are

now inspiring attempts to promote partnerships and joined-up government.²² In mentioning new worlds of governance, I want to suggest only that new policies, such as contracting-out, and new institutions, such as the EU, extended the role of law in political decision-making.

Neoliberal reforms of the public sector often transformed administrative relations into legal ones.²³ For example, contracting-out replaced the hierarchic relationships of a bureaucracy with a contractual one between purchaser and provider. The rise of such legal relations meant that the courts had to play a greater role in defining where formal powers and liabilities lay in a range of public services.

A far more dramatic impact came about as a result of Britain joining the EU.²⁴ Legal appeals then could be made to two European bodies. These are the European Court of Justice (ECJ) in Luxemburg, which is the judicial branch of EU government, and the European Court in Strasbourg. When Britain entered the EU in 1972, Parliament accepted EU law into the British constitution. In principle Parliament was (and, as we shall see, by and large, still is) free to vote not only to leave the EU but also to reject any part of EU law, although equally, of course, other members of the EU would probably see any attempt by Britain to reject significant EU laws as a breach of its treaty obligations. Still, over time EU law has come in practice to act as something akin to a higher law for Britain. The most dramatic moment in the assertion of the supremacy of EU law came with the Factortame cases of 1990 and especially 1991.

The Factortame decision arose out of a dispute about fishing rights. The Merchant Shipping Act of 1988 effectively barred foreign companies from fishing in British waters in a way that seemed contrary to EU law. When a Spanish company, Factortame, appealed, the British courts deferred the issue to the ECJ while saying that they could not strike down an Act of Parliament. The ECJ declared that the House of Lords did have the authority to overturn

parliamentary legislation so as to uphold EC law. In 1991, the British courts decided the case by declaring that when domestic and EU law appeared to conflict, the courts should assume that Parliament intended to give precedence to EU law.²⁵ Hence the courts have come to adjudicate differences between national and supranational legislation.

Responding to governance

Politicians, judges, and citizens have been inspired by the new theories to respond to the new worlds in ways that have given the law a yet more extensive role. Indeed, at a very general level, an increased awareness of the role of law has prompted many political actors to intensify their practices of self-scrutiny. For example, the growth of a regime of regulation, and with it a consciousness of regulations, has prompted many local governments and executive agencies to see and manage themselves in increasingly legal terms. Legal consciousness and legal relations have thus become more prominent in all kinds of everyday practices of governance.

Citizens have forced the courts to take on a more active role. There are parallels here between developments in Britain and the US. According to some legal scholars, the US has witnessed the rise of a culture of “adversarial legalism”: as popular trust in politicians has declined so individuals and interest groups have turned to the courts and litigation to check government action and resolve disputes.²⁶ To this well-known story, I would add only the suggestion that the decline of popular trust in politicians owes something to the spread of a loose set of beliefs about the self-interested nature of political action (beliefs not unlike the informing assumptions of neoclassical economics and rational choice theory).²⁷ Adversarial legalism thus starts to appear as a broad phenomena inspired by the spread of concepts of economic rationality and the theories of governance to which these have given rise.

While citizens have forced a more extensive role on the courts, judges have actively grabbed for a greater role. Sometimes they are inspired by the rise of new patterns of global governance: high court justices from different countries form an increasingly distinctive and self-conscious network, drawing on one another's decisions in a way that gives international norms authority over domestic governments.²⁸ Sometimes they are inspired by a liberal institutionalism in which the judiciary stands as an independent branch of government defending the rights and welfare of individuals, and perhaps the public interest.²⁹ The Thatcher years certainly saw several individual judges acting – often to the chagrin of the government – in just this way. More generally, during the late 1970s, the Law Commission advocated a series of procedural reforms to strength judicial review, and some of the reforms were passed in the Supreme Court Act of 1981. In particular, the Act simplified the procedure for invoking a legal remedy in public law disputes. It made judicial review far more accessible and common.

Politicians have actively given the courts a greater role. The new governance began with some of them seeking the aid of the courts in challenging existing ways of regulating social life, and it has left most of them grasping for new levers of control and worrying about declining levels of participation and trust. The Thatcher governments used the courts as well as industrial tribunals to restructure labour relations. They also created numerous regulatory bodies to oversee privatised industries, independent executive agencies, and the contractual relationships that rose with outsourcing. Later, John Major, as Prime Minister, turned to judges to address the questions of ethics that arose over the conduct of several members of his government. Lord Justice Scott led an inquiry into the arms for Iraq affair. Lord Nolan conducted a general review of ethical standards in public life. The government responded to the Nolan report by replacing the elder

practice of self-regulation by the House of Commons with one headed by a new Parliamentary Commissioner for Standards.

New Labour's Reforms

New Labour's judicial reforms are a further example of politicians promoting juridification in response to the new of governance. I do not want to deny that the reforms seek to promote and protect individual rights and welfare within a branch of the state that is largely independent of the executive – a view that I suspect is held by many of those responsible for the reforms. Rather, I would suggest that this liberal institutionalist view is itself one that people have come to hold in response to the new governance.

The new theories and worlds of governance lead to an emphasis on network governance rather than the formal constitution. There is widespread recognition now that civil servants, street-level bureaucrats, judges, and others do not merely enact legislation but also interpret, make, and redefine government policies. Hence the new governance gives rise to dilemmas of effectiveness and accountability. How can the government effectively realise its policies when these are subject to redefinition and even resistance all down the policy chain? By what procedures can citizens hold accountable all the diverse actors in the policy process, many of whom are, of course, unelected? New Labour has responded to these dilemmas of efficiency and trust by promoting juridification. It has turned to judges as experts who can provide efficient protection of human rights and welfare. And it hopes that the performance of lawyers will create widespread trust in this new pattern of rule thereby giving it legitimacy.

New Labour has been inspired by the new theories of governance to respond to what seems to be a new world in ways that give law a more extensive role. New Labour's reforms thus

embody recognition of the limitations of the Westminster Model. Yet, ironically, the reforms also embody a lingering attachment to the Westminster Model. New Labour has clung to the vestiges of parliamentary sovereignty, and to an image of a representative democracy in which elected politicians make policy on the advice of experts. New Labour's reforms neglect the possibility that the new governance requires a participatory democracy.

The Human Rights Act (1998)³⁰

New Labour came to power in 1997 committed to a programme of constitutional reform that concentrated on devolution, parliament, and electoral practices. The reforms also included alterations to the British judiciary. The main judicial reform was the incorporation of the European Convention on Human Rights into British law. This reform was realised through the 1998 Human Rights Act (HRA). Arguably New Labour justified the HRA primarily in terms of effectiveness. Government spokespeople argued that the reform would create a more efficient system in which citizens could appeal to the European Convention on Human Rights without having to take "the long road to Strasbourg". They also suggested that the HRA would mean domestic courts would screen cases before they went to Strasbourg, thereby reducing the long and embarrassing list of cases in which the ECJ had ruled against the British government. Government spokespeople also appealed at times to trust and accountability. They argued that the HRA would increase the level of trust in government by giving citizens the security of knowing that the courts would prevent the state misusing its power.³¹

The Human Rights Act incorporated the European Convention on Human Rights (ECHR) into domestic British law. The ECHR contains a set of standards and absolute rights which no member state can circumvent through their own domestic legislature. Britain readily adopted the

Convention's charter back in the 1950s. Indeed, the British government of the time played a significant part in preparing and drafting the charter, perhaps not quite foreseeing the extent to which it might be used to oppose later government actions. The HRA challenges Britain's long tradition of common law in favor of an enumeration of vague general principles. It also means that Parliament concedes to the judiciary the power of reviewing legislative acts against a formal written document. Section 3 of the Act explicitly states, "primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

The HRA continues to be confined by the limits of Diceyan conceptions of the judiciary and its relationship with a sovereign parliament. By empowering the courts with a new capacity to review domestic legislation, the Act effectively welcomes the courts into the policymaking process. But this break with the Westminster model is constrained by a clear attempt to uphold parliamentary sovereignty. Technically the HRA still leaves the courts only interpreting prior legislation, although in practice they may come close to legislating. Likewise, technically the HRA does not allow the courts to overturn an Act of Parliament: to the contrary, according to Section 4 of the Act, a declaration that legislation is incompatible with the ECHR simply refers that legislation back to Parliament.

The Constitutional Reform Act (2005)³²

The Human Rights Act might have seemed no more than a reluctant response to international pressure for adherence to the ECHR. But New Labour continued to attempt to reform the judiciary's lack of formal, independent, and transparent procedures. Finally, after years of opposition from the House of Lords, the government passed its Constitutional Reform

Act (CRA) in 2005. The CRA introduced dramatic changes to the office of the Lord Chancellor and the judicial appointments process, and it even proposed the creation of a Supreme Court. Once again, the government justified the reforms in large part by appealing to effectiveness and trust. The reforms, especially those to the office of the Lord Chancellor, were intended to make the operations of the judiciary more efficient and more transparent.

(i) The Lord Chancellor

No proposed feature of the Act met anywhere near as much resistance as the elimination of the office of the Lord Chancellor. Ultimately the government kept the office while radically limiting its powers. Historically, the Lord Chancellor has served as an important inter-branch actor with responsibility for coordinating the judiciary's actions with the government's agenda. The Lord Chancellor has had a wide variety of duties as both Speaker of the House of Lords and head of the judiciary. The CRA separates these two roles, giving the duties of the latter to a Lord Chief Justice. The government argued that one person could not adequately serve the interests of both the judiciary and the government especially after the HRA had increased the independence of the courts. The government also suggested that making the head of the judiciary more independent would address concerns about centralization and a lack of transparency. Hence the new Lord Chief Justice has become the central figure in upholding the autonomy and independence of the judiciary.

The Lord Chief Justice is now responsible for reporting before Parliament to discuss issues of importance to the judiciary. It is also the authority of the Lord Chief Justice to give "designated directions" over the procedural operations of the judicial system. Additionally, in what may seem like a trivial point of semantics, the CRA includes an addendum for numerous

alterations to previous Acts that refer to the Lord Chancellor as a parliamentary equivalent to the Speaker of the House of Commons. It replaces such references with “Speaker of the House of Lords.” Yet other facets of the Lord Chancellor’s historic duties, like control over judicial appointments, are now shared between the Lord Chancellor and the Lord Chief Justice through procedural consultation. Finally, in addition to inheriting powers, the Lord Chief Justice has been imbued with new powers meant to address British needs in an age of judicial autonomy from Parliament. The reduced role of the Lord Chancellor further reinforces the clearer separation of powers among the branches of government.

(ii) Judicial appointments

In addition to circumscribing the Lord Chancellor’s statutory powers, the CRA has also transformed the method of judicial appointments. Although the Queen was nominally in charge of appointments, in practice the Lord Chancellor determined them by advising the monarchy. Here too the Lord Chancellor has lost ground – this time to a new Judicial Appointments Commission. The appointments process has become more formal and independent. The Judicial Appointments Commission screens potential candidates on the basis of merit. (In an attempt to increase accountability and representation, the Commission will include legal scholars, judges, and laypeople.) The role of the Lord Chancellor is largely restricted to rejecting nominees deemed unfit. The CRA has also modified the process for disciplining judicial actors. The power to remove and suspend jurists is now shared between the Lord Chancellor and the Lord Chief Justice.

(iii) A supreme court?

The CRA hints at an even more formal separation of powers in its proposal for a supreme court. Historically the highest court in Britain has been composed of the Law Lords, all of whom are also, by virtue of being Law Lords, members of the House of Lords. The proposed Supreme Court will consist of twelve senior judges who will be selected through consultation between the Lord Chancellor and the Judicial Appointments and only then recommended to the Queen by the Prime Minister. This same appointment process will apply to the President and Deputy President of the proposed Supreme Court. Once in office, Supreme Court judges will serve for the duration of their lives unless they are removed through a bicameral decision. The President of the Court will decide all its other operating principles and rules after consulting with the Lord Chancellor. The Lord Chancellor will have little direct impact on the cases the Court hears or the procedures it adopts. His role appears to be limited to securing proper accommodation for the Court (Part 3, Section 50) and administering its costs (Part 3, Section 53). The jurisdiction of the Court will cover the responsibilities presently held by the Law Lords together with matters arising from the new forms of judicial review and others arising from devolution – the latter of which are currently covered by the Judicial Committee of the Privy Council.

The reforms in practice

New Labour's judicial reforms are a response to the problems the new governance poses for the Westminster Model, and yet they also cling to the vestiges of the Westminster Model. The result is a tension in the way the government treats law and the courts. So, on the one hand, the lingering presence of the Westminster Model encourages the government to treat the law as apart from politics. The application of the law here involves a neutral expertise. The courts appear as instruments for applying government policy, which now includes an adherence to the

ECHR, and for protecting fundamental rights and interests. On the other hand, the emerging presence of the new governance encourages the government to treat judges and the courts as part of the policy-making process. The application of the law is here an open, creative, and political act. The courts appear as sites of political games in which the government and judge alike are players trying to cajole and coerce one another into adopting and promoting particular policies and outcomes.

Recognition of the tension between these two views of law casts doubt on New Labour's hope that its reforms will increase effectiveness and legitimacy. Rather, the political role of law in the new governance already seems to be undermining the hope of effectiveness, in terms of protecting rights as well as implementing policy, and over time this failure of effectiveness might well undermine any legitimacy that the courts currently possess based on their performance.

The new theories of governance would suggest that the government's use of law would meet with resistance from all kinds of political actors, including the courts themselves as well as local governments and citizens. The center loses control of its judicial reforms just as it does of its administrative ones. Indeed, after 9/11, the government increasingly began to grumble about the ways in which its reforms were operating. The most dramatic application of the HRA came in 2004 when the courts declared an anti-terror law, which allowed for foreign nationals being detained indefinitely if they could not be deported, to be incompatible with the ECHR.³³ Blair and David Blunkett, the then Home Secretary, complained of judges overturning parliamentary decisions and suggested the HRA might have to be revised. Later, in 2006, when a court decided against the government's efforts to deport some Afghani hijackers, Blair ordered the Home Office and the Department of Constitutional Affairs formally to review the HRA.

It might appear that examples of the courts overruling the government are examples of the success of the HRA in providing for protection of rights and welfare. Yet the state of civil liberties in Britain is in fact bleak. Blair has presided over a greater erosion of defendant's rights, freedom of protest, and personal privacy than any other post-War premier.³⁴ The Terrorism Act (2000) and the Regulation of Investigatory Powers Act (2000) subordinate individual rights to the supposed needs of crime control. This erosion of civil liberties has taken place not only through measures taken against terrorism after 9/11 but also as a result of New Labour's attempt to curb anti-social behaviour and balance rights with responsibilities. The larger point is, of course, that network governance means the center cannot control the judiciary but also that the judiciary cannot control the center. Rights and liberties are enacted and protected by a network of actors that includes citizens, social movements, the administration, and the central government and the judiciary.

Conclusion

Juridification is intimately linked to the new governance. New theories of governance increased awareness of the role courts have always played. New worlds of governance made judges and courts more significant. Finally, politicians, judges, and citizens responded to the new governance by giving a greater role to law and the courts. New Labour's judicial reforms are an example of this latter active promotion of juridification.

To recognise the extent to which juridification has been actively promoted as a response to the new governance is to challenge its aura of inexorability. When social scientists link juridification to globalisation and the new governance, they often give it an aura of historical inevitability. Earlier I evoked Trägårdh and Carpini favourably as having recognised the links

between juridification and the wider processes that were eroding national democracy and creating new forms of governance. Now I would point out in a more critical vein that they describe these processes as if there were no alternative. They write, “from this point of view, the juridification of politics is a more or less unavoidable fact of modern political life.”³⁵ Yet, to associate juridification with the new governance is to suggest it is unavoidable only if one assumes, first, that the new governance is unavoidable, and, second, that the association between them is necessary rather than contingent. Both these assumptions are questionable. We can question the inexorability of the new governance by emphasising the extent to which it has been actively crafted in accord with new theories that undermined elder images of politics. Likewise, we can question the necessary association between the new governance and juridification in so far as we regard juridification as having been actively promoted in response to the new governance, rather than merely revealed by new theories of governance or conjoined to new worlds of governance. Far from juridification being more or less unavoidable, other responses to the new governance might be possible.

The possibility of other responses gains piquancy from the irony of New Labour clinging to the vestiges of Dicey’s constitutional ideas even as it enacts reforms in response to the very forms of governance that have undermined Dicey, the Westminster model, and arguably our inherited concept of representative democracy. One alternative response to the new governance would thus be to give up even our lingering attachment to these ideas. We might turn instead to more participatory forms of democracy and more dialogic forms of policy-making.

Alas, even if participatory democracy and dialogic policy-making offer an alternative response to the new governance, there are few signs of their likelihood. Both of the main political parties remain caught within visions of representative democracy leavened with the

alleged expertise of judges and social scientists. Juridification – especially judicial review with reference to codified rights – appears to have become an unquestioned doxa of British politics. Gordon Brown began his campaign to become leader of the Labour Party with a speech that included hints of further constitutional and judicial reforms.³⁶ After Brown became Prime Minister, his government issued a green paper, with the significant title The Governance of Britain, which proposed a distinct British Bill of Rights and Duties.³⁷ The green paper called for preliminary hearings and public consultations on such a Bill to begin later in 2007. Even if Brown lost the next general election, the Liberals are even more committed to such proposals, and the Conservatives now accept some such idea. David Cameron, the current leader of the Conservative Party, supports the repeal of the Human Rights Act, but, unlike his predecessors, he proposes replacing it with an alternative bill of rights for Britain. It would take a dramatic change for radical democracy and deliberative policy-making to emerge from the shadow of codified rights and alleged expertise.

¹ General studies of nineteenth century political thought include S. Collini, D. Winch, and J. Burrow, That Noble Science of Politics: A Study in Nineteenth Century Intellectual History (Cambridge: Cambridge University Press, 1983); and M. Francis and J. Morrow, A History of English Political Thought in the 19th Century (London: Duckworth, 1994).

² On the global and imperial forms of constitutional theory at this time see D. Bell, The Idea of Greater Britain: Empire and the Future of World Order, 1860-1900 (Princeton: Princeton University Press, 2007).

³ J. S. Mill, “Considerations on Representative Government”, in The Collected Works of John Stuart Mill (Toronto: University of Toronto Press, 1963-91), vol. 19.

⁴ A. Dicey, Introduction to the Study of the Law of the Constitution (London: Macmillan, 1902), p. 34

⁵ Dicey here followed Sir William Blackstone, an earlier conservative Whig.

⁶ Dicey, Law of the Constitution, p. 58

⁷ Dicey, Law of the Constitution, p. 402.

⁸ Dicey, Law of the Constitution, p. 413.

⁹ Dicey, Law of the Constitution, p. 424.

¹⁰ Bagehot did not discuss either parliamentary sovereignty or the rule of law, and he showed no interest in the constitutional role of courts and judges. See W. Bagehot, The English Constitution (London: Oxford University Press, 1963).

¹¹ Compare K. Davis, “The Future of Judge-made Public Law in England: A Problem of Practical Jurisprudence”, Columbia Law Review 61 (1961), 202.

¹² I. Jennings, The Law and the Constitution (London: University of London Press, 1933).

¹³ J. Habermas, “Law as Medium and Law as Institution”, in G. Teubner, Dilemmas of Law in the Welfare State (Berlin: W. de Gruyter, 1986).

¹⁴ See J. Gyford, S. Leach, and C. Game, The Changing Politics of Local Government (London: Unwin Hyman, 1989).

¹⁵ L. Blichner and A. Molander, “What is Juridification?”, Northwestern Journal of International Law and Business 97 (1996), 354-97.

¹⁶ L. Trägårdh and M. Carpini, “The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects”, in L. Trägårdh, ed., After National Democracy: Rights, Law and Power in America and the New Europe (Oxford: Hart, 2004), p. 42.

¹⁷ Compare M. Loughlin, “Law, Ideologies and the Political-Administrative System”, Journal of Law and Society 16 (1989).

¹⁸ I. Jennings, Cabinet Government (Cambridge: Cambridge University Press, 1936); and I. Jennings, Parliament (Cambridge: Cambridge University Press, 1939).

¹⁹ See, for example, I. Harden and N. Lewis, The Noble Lie: The British Constitution and the Rule of Law (London: Hutchinson, 1986).

²⁰ M v Home Office [1993] 3 All ER 537 (HL).

²¹ A fine exception is C. Harlow and R. Rawlings, Law and Administration (London: Butterworths, 1997)

²² M. Bevir, New Labour: A Critique (London: Routledge, 2005).

²³ Compare P. Vincent-Jones, “The Limits of Near Contractual Governance: Local Authority Internal Trading Under CCT”, Journal of Law and Society 21 (1994).

²⁴ Among the extensive literature on the impact of the EU, see D. Nicol, EC Membership and the Judicialization of British Politics (Oxford: Oxford University Press, 2002), and, for a comparative perspective, A-M. Slaughter, A. Sweet, and J. Weiler, The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context (Oxford: Hart, 2000).

²⁵ R v Secretary of State for Transport, ex p. Factortame Ltd (No. 2) [1991] 1 AC 603.

²⁶ There are parallels here between developments in Britain and the rise of “adversarial legalism” in the US. Compare R. Kagan, Adversarial Legalism: The American way of Law (Cambridge, MA: Harvard University Press, 2001).

²⁷ It is thus ironic (perhaps tragic) to find political scientists trying to explain adversarial legalism by showing how it is a rational choice for actors in certain institutional contexts. On the one hand, when actors believe in an economic concept of rationality, the explanations are obviously right. But, on the other, when the explanations take belief in this concept of rationality for granted, rather than treating it as historically contingent, they manifest the very culture

that they seek to explain in a way that obscures the possibility of any profound alternative. See T. Burke, Lawyers, Lawsuits, and Legal Rights (Berkeley, CA: University of California Press, 2002).

²⁸ See generally A-M. Slaughter, A New World Order (Princeton: Princeton University Press, 2004).

²⁹ See, for a British example, the writings of the Court of Appeal judge, Sir J. Laws, especially J. Laws, “Law and Democracy” Public Law (1995); and J. Laws, “The Constitution: Morals and Rights”, Public Law (1996). For a scholar offering an extended defense of a similar position, see T. Allan, Law, Liberty and Justice: The Legal Foundations of British Constitutionalism (Oxford: Clarendon Press, 1993).

³⁰ Humans Rights Act 1998, <http://www.opsi.gov.uk/ACTS/acts1998/19980042.htm>

³¹ At the risk of over-simplification, one might suggest that New Labour has gradually shifted from an emphasis on effectiveness to one on trust.

³² Constitutional Reform Act 2005, <http://www.opsi.gov.uk/ACTS/acts2005/20050004.htm>

³³ A and Others v Secretary of State for the Home Department [2004] UKHL 56.

³⁴ For an early study see H. Fenwick, Civil Rights: New Labour, Freedom, and the Human Rights Act (London: Longman, 2000).

³⁵ Trägårdh and Carpini, “The Juridification of Politics in the United States and Europe”. p. 42.

³⁶ The Guardian, 25 September 2006.

³⁷ The Governance of Britain, July 2007.