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The Impact of The Constitutional Reform Act 2005 on Separation of  
Powers in the United Kingdom

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DIPLOMOVÉ PRÁCE

*„Prohlašuji, že jsem tuto diplomovou práci na téma „The Impact of The Constitutional Reform Act 2005 on Separation of Powers in the United Kingdom” zpracovala samostatně, a že jsem vyznačila prameny, z nichž jsem pro svou práci čerpala způsobem ve vědecké práci obvyklým“*

V Plzni dne .....

.....

Eva Filipcová

*Na tomto místě bych ráda poděkovala především Mgr. et Mgr. Renátě Vokrojové, za odborné vedení, vstřícný přístup a cenné rady, které mi při zpracování této práce velmi pomohly, a bez kterých bych tuto práci nedokázala vypracovat.*

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## **List of abbreviations**

CRA – Constitutional Reform Act

HRA – Human Rights Act

MoJ – Ministry of Justice

UK – United Kingdom

ECHR – European Convention on Human Rights

EU – European Union

AC – Appointment Commission

MP – Member of Parliament

HMCS – Her Majesty's Court Service

## **1 Introduction**

This thesis focuses on the influence of the Constitutional Reform Act 2005 on the Constitution of the UK. The enacting of the CRA was the result of a long process of constitutional reform, which has considerably transformed the British Constitution. I find it necessary to include the explanation of the term constitution in European and British perspective, as I believe the process it has undergone in the past twenty years is not going to be comprehensible without its definition. For the same reasons I decided to talk about the constitutional principles – the separation of powers, the rule of law and the sovereignty of Parliament which are of paramount importance to the unwritten British Constitution. In particular, the separation of power – or lack thereof – in the British Constitution was one of the reasons for enacting the CRA and because of its great influence, all of these doctrines and the balance between them have been affected

As the CRA has arisen as part of a constitutional process, I will introduce the circumstances which lead to its initial proposal.

The goal of this thesis is to introduce the CRA as a result of British historical development, the European and domestic influences on the UK, and to summarize and evaluate the changes it caused in the UK. I will describe how these changes have impacted mainly upon the post of the Lord Chancellor, the Supreme Court and the Judicial Appointment Committee and I will explain how the balance of powers changed after it was implemented. In the last chapter, I will suggest the possible future development of the British Constitution based on my own observations as well as on observations made by various theoreticians of law.

## 2 Sources of Constitution

This chapter will explain the meaning of the word constitution, how constitutions came to be and how they are divided, as well as provide a description of the British Constitution and its sources.

### 2.1 What is constitution?

To define the term constitution we must introduce the two prominent views of the constitution.

In its *narrow* meaning, constitution is a single document or series of documents with a special legal status containing all the basic rules and principles of a state<sup>1</sup>. In some countries, the constitution has an overriding legal force, such as in the USA or Czech Republic, which means that law which contradicts the constitution will not be applied or in some cases, it will be derogated. The law is usually declared as incompatible with the constitution in proceedings in front of a high –ranking court, which interprets the text of the constitution in disputed cases (e.g. the Supreme Court in the USA or the Constitutional Court in Czech Republic)<sup>2</sup>.

The *broader* view says that a constitution is a text and a set of rules (laws, institutions and customs, derived from certain principles, both written and unwritten) which sets out the fundamental law of the nation. As such, it provides a framework of basic rules which describe the main institutions of the state and the relationship between them. It places limits on the exercise of power and sets out the principles of basic human rights as well as rights and duties of individual citizens<sup>3</sup>.

#### 2.1.1 History of constitutions

The term constitution first appeared in the 18th century and its primary meaning is to set out or to form. It was used as a description of common laws which governed the functioning of the French monarchy. At first, constitutions

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<sup>1</sup> CAVENDISH PUBLISHING LIMITED. *Constitutional Law*. 4. vyd. Great Britain: Cavendish Publishing Limited, 2004, s. 1. ISBN 1-85941-941-0.

<sup>2</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 4. ISBN 978-1405873505.

<sup>3</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s.1. ISBN 978-1849461603.

developed mostly to limit the power of the monarch and to prevent absolutism, as well as to set out basic rules by which the main organs of the state would function and the balance between these organs. In time, this safeguard and the organizational functions of the constitution were joined by the principles of basic human rights.

During democratic revolutions in modern history, the term developed further. It no longer referred simply to laws governing the functioning of a state, but also included declarations, constitutions, various decisions of the constitutional courts and other laws. These acts were usually the result of a new political authority coming into power and needing to establish the principles by which they would rule.

The condition of an existing and functioning constitution is a democratic system, mainly the plurality of powers and political opinions<sup>4</sup>.

#### 2.1.2 Rigid and flexible type of constitution

A rigid constitution is a system in which the constitutional law has greater force than other laws, and constitutions can only be altered by a special legislative process (e.g. in Czech Republic the 3/5 majority of Chamber of Deputies and the 3/5 of the Senators present must vote for such a change<sup>5</sup>), whereas a flexible constitution requires no special procedure to be altered.<sup>6</sup>

#### 2.1.3 Written and unwritten constitution

As was mentioned before, the word constitution in the meaning we now know it first appeared in 18<sup>th</sup> century as a result of the French and American revolutions. It is then when it became identified with a single document or series of documents. A common characteristic of written or also modern constitutions is that they were usually drawn up to introduce a new system of government to mark a distinct break with the previous regime<sup>7</sup> and the making of a constitution usually followed a fundamental political event. Tom Paine stressed the political

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<sup>4</sup> KLÍMA, Karel. *Ústavní právo*. 3. vyd. Plzeň: Aleš Čeněk s.r.o., 2006, s 42-43. ISBN 80-7380-000-4.

<sup>5</sup> Česká Republika. *Ústava České republiky*. In: *1/1993 Sb.článek.39*, 1992.

<sup>6</sup> BLAHOŽ, Josef, Vladimír BALAŠ a Karel KLÍMA. *Srovnávací ústavní právo*. 2. vyd. Praha: ASPI Publishing, 2003, s. 79. ISBN 80-86395-89-8.

<sup>7</sup> CAVENDISH PUBLISHING LIMITED. *Constitutional Law*. 4. vyd. Great Britain: Cavendish Publishing Limited, 2004, s. 2-5. ISBN 1-85941-941-0.

significance of the new concept of constitutions “A *constitution is a thing antecedent to a government, and a government is only the creature of a constitution... A constitution is not the act of a government, but of a people constituting a government, and government without a constitution, is a power without a right*”.<sup>8</sup>

This type of constitution has been adopted all across the world with nearly 200 states now having written constitutions of the modern type. These modern constitutions also possess varying degrees of authority, and the vast majority of these constitutions have been fundamentally amended in the last thirty years. Modern constitutions serve as instruments of government by guiding and controlling the procedures of public decision making, and also as documents which highlight the symbols of unity and identity.<sup>9</sup>

There are very few countries which do not possess a written constitution. Examples are the United Kingdom, New Zealand and Israel as well as countries that consider Koran to be their highest law.<sup>10</sup> *Unwritten* constitutions are made out of constitutional conventions, judge made law and ordinary laws. They may also be considered less precise, since they draw on custom and practice as opposed to formal rules. It can be argued however, that these practices are always evolving and they may be able to reflect the changes in the political culture of the nation much more easily than written constitutions.<sup>11</sup>

Distinguishing between written and unwritten constitutions may sometimes not be so clear and could be considered relative, as we can find documents forming unwritten constitutions, at least to some degree, in writing also.<sup>12</sup>

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<sup>8</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 5. ISBN 978-1405873505.

<sup>9</sup> LOUGHLIN, Martin. *The British Constitution: A Very Short Introduction*. Gosport, Hampshire: Ashford Colour Press Ltd, 2009, s. 11-13. ISBN 978-0-19-969769-4.

<sup>10</sup> KLÍMA, Karel. *Ústavní právo*. 3. vyd. Plzeň: Aleš Čeněk s.r.o., 2006, s. 47. ISBN 80-7380-000-4.

<sup>11</sup> LOUGHLIN, Martin. *The British Constitution: A Very Short Introduction*. Gosport, Hampshire: Ashford Colour Press Ltd, 2009, s. 13. ISBN 978-0-19-969769-4.

<sup>12</sup> BLAHOŽ, Josef, Vladimír BALAŠ a Karel KLÍMA. *Srovnávací ústavní právo*. 2. vyd. Praha: ASPI Publishing, 2003, s. 79. ISBN 80-86395-89-8.

## 2.2 British Constitution

The most distinctive feature of the British Constitution is the fact that it has not been wholly reduced to writing. It has not been codified and it is highly flexible as, in theory, Parliament is not bound by any law and it may enact any law it wishes to enable the constitution to react quickly to the current situation of the nation.<sup>13</sup> It is one of the few constitutions that have remained unwritten. Because the written concept of constitution is so prevalent in the modern world, we can encounter opinions which state that Britain does not even possess a constitution. The fact is that even though we cannot find the British Constitution in one single document and that the relationships between high organs of the state may not even be codified in the form of law, this does not mean that the constitution does not exist.<sup>14</sup>

In spite of the fact that the British Constitution lacks formal codification, it does display the broad characteristics of a liberal democracy and a constitutional framework.<sup>15</sup> The lack of a written constitution resulted in a vacuum which needed to be filled by principles and doctrines to ensure constitutional principles would be upheld and upon which the current constitution stands. These doctrines were the sovereignty of Parliament and the rule of law. There are no formal restraints upon the exercise of power in the UK, though this has been partially diminished by enacting various Acts of Parliament (such as the Human Rights Act in 1998). As a result of these changes, the power of the courts has been largely extended, especially in the area of upholding and protecting of human rights.<sup>16</sup>

The fact that there is no written constitution also affects the sources of constitutional law. As a result of this, more sources of constitutional law must be taken into consideration than in other countries. The British Constitution is also much less reliant on legal rules and safeguards than other constitutions, as there is

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<sup>13</sup> CAVENDISH PUBLISHING LIMITED. *Constitutional Law*. 4. vyd. Great Britain: Cavendish Publishing Limited, 2004, s.4-5. ISBN 1-85941-941-0.

<sup>14</sup> LOUGHLIN, Martin. *The British Constitution: A Very Short Introduction*. Gosport, Hampshire: Ashford Colour Press Ltd, 2009, s. 14. ISBN 978-0-19-969769-4.

<sup>15</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s.23. ISBN 978-1849461603.

<sup>16</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 7-8. ISBN 978-1405873505.

no actual body of rules which governs the organs of state and government. It instead relies upon constitutional conventions and principles.

It is very difficult to describe the British Constitution in the usual constitutional terms; the way it is usually described is a summary of the past constitutional experience. For example, the sovereignty of Parliament has been derived purely from the behaviour of courts and Parliament over many years, and constitutional conventions reflect the balance of power between the individual powers of the state at a particular point in time.<sup>17</sup>

### 2.2.1 Why is the British Constitution unwritten?

As explained previously, the constitutions of the modern kind were usually a result of a critical moment in the history of a state, and have been adopted as the foundations of the newly formed governmental authority.

If we look at the development of the UK since the 18<sup>th</sup> century, we will see that there has actually been no major revolution in Britain ever since this new type of constitution emerged. Britain has suffered no fundamental breakdown of government, no defeat in war or revolution of any kind; therefore, there was no genuine constitutional moment and therefore no reason for the British to change their constitution.<sup>18</sup>

In addition to this historical reason, there is also a conceptual one. To understand that, we need to revisit the concept of the sovereignty of Parliament. According to this principle, there cannot be any superior authority to Parliament which could limit its powers in any way. If this were to remain true, there can never be a codified institution, as such a document would surely place limitation upon its power.<sup>19</sup>

*The British constitution could thus be summed up as in just eight words “What the Queen in Parliament enacts is law”.*<sup>20</sup> In other words, unless

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<sup>17</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, s. 19-26. ISBN 978-1841136714.

<sup>18</sup> LOUGHLIN, Martin. *The British Constitution: A Very Short Introduction*. Gosport, Hampshire: Ashford Colour Press Ltd, 2009, s. 14-16. ISBN 978-0-19-969769-4.

<sup>19</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, s. 13-14. ISBN 978-1841136714

<sup>20</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, s. 13. ISBN 978-1841136714.

the principle of sovereignty of Parliament is abandoned, there is no point in having a written constitution.

### 2.2.2 Constitutionalism

The current western tradition assumes the existence of a written constitution, the existence of a democratic parliament, independent state organs that uphold and respect law, and a system of independent courts which serve to protect the citizens from abuse of power.

The idea of constitutionalism is partially associated with this system. It is clearly recognizable where the state's authority and legitimacy is derived from, and what the limits of its power are. Since in the UK there is no such formal limit, demands for a new constitution and a new Bill of Rights have been rising, supported also by the belief, that the parliamentary process does not in fact protect the public against the abuse of power as well as it should. All these factors have led to increased number of constitutional reforms.<sup>21</sup>

### 2.2.3 Constitutional law

Constitutional law is characterized as "*part of national law which governs the system of public administration and the relationships between the individual and the state*".<sup>22</sup> As well as the idea of constitutionalism, there are issues arising from the fact that the British Constitution is not written. Constitutional law expects the existence of laws which regulate the power and set out the framework and structure of the principal organs of government. In the UK however, many of these rules are not in fact governed by law.

Another issue with defining constitutional law would be that in the UK there is no real line between constitutional law and other branches of law. "*There is hardly any department of law which does not at one time or another, become of constitutional importance*". Examples could be found in the fields of family law (the constitutional importance could be seen in the right for protection of family life) or in criminal law (in the procedure of criminal law numerous civil

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<sup>21</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s.8. ISBN 978-1405873505.

<sup>22</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 9. ISBN 978-1405873505.



liberty issues arose, and their solutions are now considered a part of the constitutional law).<sup>23</sup>

In theory, all Acts of Parliament could be regarded as equally important, as they have the exact same status as one another (e.g. Human Rights Act has the same status as Dangerous Dogs Act), but their actual importance is determined by the courts. Even though we cannot always be sure which law constitutes the constitution, there is a consensus which says that those laws which govern the relationship between parts of the UK or between the high state organs, and laws concerned with voting are considered to be forming a constitution.<sup>24</sup>

It is also important to realise that any given definition of constitutional law or constitution in the UK needs to be adjusted regularly as the principles and conventions which govern them continue to evolve over time.

#### 2.2.4 Development of the British Constitution

The British Constitution is one of the few which has not been designed according to any ideology or theory. The principles upon which it now stands have been accumulated over the centuries as a response to historical circumstances and important events.<sup>25</sup>

The British Constitution consists partially of written documents and unwritten rules. To understand it fully, we often need to interpret ordinary laws as well. Common law is one of the pillars of the British constitutional tradition. The strength of common law is that it reflects and moderates the current situation. It responds to actual struggles of the state without the need to stand for any grand philosophical theory.<sup>26</sup> From the common law principles, other principles such as the sovereignty of the Parliament and royal prerogative arose. The gaps in law were filled with the creation of constitutional conventions, and later by written laws.<sup>27</sup>

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<sup>23</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 8-9. ISBN 978-1405873505.

<sup>24</sup> KLÍMA, Karel. *Ústavní právo*. 3. vyd. Plzeň: Aleš Čeněk s.r.o., 2006, s. 63-64. ISBN 80-7380-000-4.

<sup>25</sup> LOUGHLIN, Martin. *The British Constitution: A Very Short Introduction*. Gosport, Hampshire: Ashford Colour Press Ltd, 2009, s. 11. ISBN 978-0-19-969769-4.

<sup>26</sup> LAWS, John. *The Common Law Constitution: (The Hamlyn Lectures)*. Cambridge: Cambridge University Press, 2014, s. 7. ISBN 978-1107434653.

<sup>27</sup> KLÍMA, Karel. *Ústavní právo*. 3. vyd. Plzeň: Aleš Čeněk s.r.o., 2006, s. 63-64. ISBN 80-7380-000-4.

However, such a setup does not really comply with the current views of constitution, which is why many British scholars and publicists have, during the past twenty years or so, expressed the need to reform the constitution, as they believe the British system has lost its way.<sup>28</sup> The belief that the unwritten rules of the constitutional practice must now be formalized had become more common. This process had actually started in early 1990's and has been continuing until today. Some authors, such as Vernon Bogdanor, actually proclaim that since the recent reforms we should be speaking about 'the new British Constitution'.<sup>29</sup> Others, such as Martin Loughlin, say that the changing of the constitution "*does not signal the emergence of a new constitution, but it merely marks the extent to which the old constitution has lost its guiding spirit and must now be shored up by formal rules*".<sup>30</sup> A whole different approach has been expressed in the book *The Common Law Constitution* by John Laws<sup>31</sup>, who I believe is very much a proponent in the common law method and its high adaptability.

### 2.3 Sources of the Constitution

Because of the character of the British Constitution and the constitutional law in the UK, it is difficult to be precise about what should actually be included under the sources of constitution. That is why it is important to have a good overview of the elements that make up the constitution. The most common division of the sources would be to legal and non-legal.<sup>32</sup>

#### 2.3.1 Legal sources

Legal sources are further divided into legislation, common law, European Union law and the royal prerogative.

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<sup>28</sup> LOUGHLIN, Martin. *The British Constitution: A Very Short Introduction*. Gosport, Hampshire: Ashford Colour Press Ltd, 2009, s. 39-41. ISBN 978-0-19-969769-4.

<sup>29</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, 334 s. ISBN 978-1841136714.

<sup>30</sup> LOUGHLIN, Martin. *The British Constitution: A Very Short Introduction*. Gosport, Hampshire: Ashford Colour Press Ltd, 2009, s. 41. ISBN 978-0-19-969769-4.

<sup>31</sup> LAWS, John. *The Common Law Constitution: (The Hamlyn Lectures)*. Cambridge: Cambridge University Press, 2014, 105 s. ISBN 978-1107434653.

<sup>32</sup> CAVENDISH PUBLISHING LIMITED. *Constitutional Law*. 4. vyd. Great Britain: Cavendish Publishing Limited, 2004, s. 8. ISBN 1-85941-941-0.

### 2.3.1.1 Legislation

Since there is no written constitution, many Acts of Parliament which govern the system of government have been enacted. These Acts however do not complete the constitutional code and many areas have not yet been enacted.<sup>33</sup> As was said before, in theory all Acts have the same status, but there are some statutes which have a special constitutional significance.<sup>34</sup>

*Magna Carta* - was granted in 1215, it placed limits upon the power of monarch, set out rights of various classes of the medieval community, freed the Church from the state power and gave more freedom to the cities.

*Petition of Right* – granted in 1628, was concerned with loans and taxes - King was newly required to have the permission of the Parliament.

*Bill of Rights* – granted in 1689, strengthened the position of the Parliament at the expense of the power of the Crown, many of its principal provisions are still in force.

*Acts of Settlement* – granted in 1700, together with the Bill of Rights it marked the victory of Parliament by further strengthening their position, gave more protection to judges and dealt with the issue of line of succession to the throne.

*Other statutes of constitutional importance* – the Act of Union with Scotland 1707, the Parliament Acts 1911 and 1949, the European Communities Act 1972, the British Nationality Act 1981, the Public Order Act 1986 and more recently the Scotland Act 1998, the Human Rights Act 1998, the House of Lords Act 1999, the Terrorism Act 2000 and the Constitutional Reform Act 2005.

These Acts do not require a special procedure to be followed in the Parliament, even though they amend the constitution. The House

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<sup>33</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 13. ISBN 978-1405873505.

<sup>34</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 26. ISBN 978-1849461603.

of Commons may examine these Bills in more detail and these Acts may easily be repealed by a newer Act.<sup>35</sup>

#### 2.3.1.2 Case Law

Even though Parliament is sovereign and may enact any law it wishes, it is the courts which apply the law in given cases.<sup>36</sup> These decisions, also called precedents, are binding and used to develop the law. Some of them have expanded the common law in a constitutional context (e.g. the case of *Entick v Carrington*, which is concerned with trespassing, “*placed the limits on powers of the Crown and Secretary of State to interfere with the person or property of the citizen without lawful authority*”).<sup>37</sup>

**Common law** is a binding principle of the British Constitution and its important source. It is based on the ideas of reason, fairness, and presumption of liberty. John Laws explains the method of common law as a fourfold of evolution, experiment, history and distillation.

By *evolution*, he means, “*the rules of law are honed through the doctrine of precedent*”<sup>38</sup>. Even though the doctrine of stare decisis (stand by what has been decided) is applied, the Supreme Court and High Courts are not bound their own decisions, which enables the development of the law.

*Experiment* – the common law itself is a hypothesis and as such, it will work until it has been disproved and as that has not happened yet, it must mean that it does in fact work.

*History* – respect for history and respect of law has been an important driving force in the development of the British Constitution.

*Distillation* – is the process of adjusting the old law in order for it to be able to reflect the present state and fill out the gaps that may have emerged.<sup>39</sup>

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<sup>35</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 15. ISBN 978-1405873505.

<sup>36</sup> CAVENDISH PUBLISHING LIMITED. *Constitutional Law*. 4. vyd. Great Britain: Cavendish Publishing Limited, 2004, s. 9. ISBN 1-85941-941-0.

<sup>37</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 28. ISBN 978-1849461603.

<sup>38</sup> LAWS, John. *The Common Law Constitution: (The Hamlyn Lectures)*. Cambridge: Cambridge University Press, 2014, s. 7. ISBN 978-1107434653.

<sup>39</sup> LAWS, John. *The Common Law Constitution: (The Hamlyn Lectures)*. Cambridge: Cambridge University Press, 2014, s. 7-9. ISBN 978-1107434653.

These four methods ensure that the common law is ‘endlessly creative’, living law built on tradition but constantly evolving to fit the modern world. **Interpretation of statute law** means that it is the courts who interpret law, especially in cases where the correct meaning of an Act is in question. The courts seek the intention of Parliament by using the established principles of interpretation, internal aids (found in the Act itself), or external aids.

In some decisions, the courts have used the presumed interpretations to develop the common law constitutional rights (e.g. the right to access to a court).

Most of the methods of interpretations have evolved from the judicial decisions themselves, but some may be given by Parliament (e.g. “*all legislation, whenever made, must so far as it is possible to do so, be read and given effect in a way that is compatible with the rights protected by the European Convention*”).<sup>40</sup>

#### 2.3.1.3 European Union law

The UK joined the European Union (then European Communities) in 1972 and since then the British law culture has been influenced by the European one.

The establishing treaties, directives, and regulations issued by the European Union may have a direct effect in the UK and since the Human Rights Act was enacted, the European Convention on Human Rights has also been incorporated.<sup>41</sup>

The non-codified British Constitution with an unclear separation of powers did not really correspond with the European view of a constitution and the pressure of the EU on the UK was one of the reasons for the era of the constitutional change in the UK.

#### 2.3.1.4 Royal Prerogative

Royal prerogative has its origins in historical powers of a monarch when monarchs were involved in the process of government in a more direct way.

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<sup>40</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 38. ISBN 978-1405873505.

<sup>41</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 28-30. ISBN 978-1849461603.

Nowadays few such powers remain and they are mainly exercised by Ministers.<sup>42</sup> The examples of the powers exercised by the Queen could be – the right to prorogue Parliament, granting royal pardons, making treaties, declaring war, deploying armed forces, and appointing the Prime Minister.<sup>43</sup>

### 2.3.2 Non legal sources

Non legal sources are divided into conventions and books of authority. In spite of them not being laws, they still have a very significant impact on the constitution and are crucial to understanding how the British Constitution functions.<sup>44</sup>

#### 2.3.2.1 Conventions

Conventions determine the practices of government and some aspects of the conduct of state institutions and unlike laws; they are not enforceable at court. According to AV Dicey<sup>45</sup> the conventions “*consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of ministers, and of other persons under the constitution, are not in strictness laws at all*”.<sup>46</sup>

They consist of understandings, habits, practices, and maxims which are needed in order for the high organs of state to function properly. The conventional rules of the constitution are, for example, royal assent must be given to a Bill which has been approved by both Houses of Parliament in order for it to become an Act; the Prime Minister will resign immediately in the event that he/she did not get the confidence of a majority in the Commons; all appointments are made by the monarch on the advice of the Prime Minister and many others.<sup>47</sup>

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<sup>42</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 31. ISBN 978-1849461603.

<sup>43</sup> CAVENDISH PUBLISHING LIMITED. *Constitutional Law*. 4. vyd. Great Britain: Cavendish Publishing Limited, 2004, s. 11. ISBN 1-85941-941-0.

<sup>44</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 32. ISBN 978-1849461603

<sup>45</sup> teacher at the university of Oxford, his lectures were published in 1885 as Introduction to the Study of the Law of the Constitution

<sup>46</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 33. ISBN 978-1849461603

<sup>47</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 20-23. ISBN 978-1405873505.

### 2.3.2.2 Books of authority

In general, no legal textbook is considered a source of law. The authority of the most important text is only to the extent it is considered to have accurately reproduced enacted law.<sup>48</sup>

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<sup>48</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 30-31. ISBN 978-1405873505.

### 3 Separation of powers

This chapter will examine the constitutional principles which affect the British Constitution, with the focus on the doctrine of the separation of powers and its development and individual powers and state organs of the UK.

As mentioned in the introduction I find it necessary to include a chapter about the constitutional principles since the enactment of the Constitutional Reform Act changed their relationship considerably and I believe the change can only be seen by comparing these doctrines prior to the Act and after it came into force.

#### 3.1 Constitutional Principles

Parliamentary sovereignty, the rule of law and the separation of powers are the constitutional principles governing the functioning of the British Constitution. They are important for their historical importance as well as for the current practice of law. The doctrines upon which the constitutional principles are based are related and influenced by each other in the sense that laws must gain their legitimacy in a sovereign Parliament, functioning as a separate organ of the state, but at the same time, the laws must not be arbitrary or abusive— they must respond to the doctrine of rule of law.<sup>49</sup>

#### 3.2 Parliamentary sovereignty

The doctrine of Parliamentary sovereignty is the fundamental principle. Firstly, it means that in theory the Parliament can pass or repeal any law it wishes with basically no interference from other high organs of government (e.g. courts cannot declare statute invalid). Secondly, it says that provisions in a more recent statute will prevail over ones in an older one and thirdly, that there is no other body which could challenge the validity of laws made by Parliament as long as they have passed the law-making process in the correct manner.

Professors Wade and Allan have developed an influential view of Parliamentary sovereignty by claiming, “*Legislation obtains its force from the doctrine of Parliamentary sovereignty, which is itself a creature*

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<sup>49</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 46. ISBN 978-1849461603



*of the common law and whose detailed content and limits are therefore of judicial making. Parliament is sovereign because the judges acknowledge its legal and political supremacy”*<sup>50</sup>

In the 19<sup>th</sup> century the Parliament was politically supreme - it was in fact able to control governments - but with the growth of political parties its position became weaker and after some time it was in fact the government which controlled the Parliament. As was mentioned before, there are no constitutional checks upon the power of Parliament’s legislature (so in this situation de facto no checks upon the power of government which controls the Parliament), the lack of these formal checks and balances has been sorted by the informal checks – the constitutional conventions.<sup>51</sup>

More limits to the doctrine were implemented in time, especially in connection to the European Convention on Human Rights and later the Human Rights Act. As mentioned before, after enactment of the HRA and including the ECHR into the British law, the Parliament imposed upon the courts new interpretational rule – all statutes must be interpreted in a way which is compatible with the ECHR. Consequentially the Parliament may no longer enact any law it wishes, as this principle also binds the future legislation.

Even with this limitation, Parliament needed to amend legislative provision as the only power the courts have is to issue the declaration of incompatibility but it lies upon the Parliament to react to such statement. Between the years 2000, when the HRA came into force, and January 2009 there were 17 declarations of incompatibility. 14 of them have been remedied and only 3 of those arose because of the HRA.<sup>52</sup>

Recently the UK as well as other European Union members appears to be more sceptical when it comes to the EU. In the UK this resulted in the passing of the European Union Act in 2011, which attempts to prevent putting more power from the UK into the hands of EU by introducing various safeguards

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<sup>50</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 48-49. ISBN 978-1849461603

<sup>51</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, s. 14-15 ISBN 978-1841136714.

<sup>52</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, s. 58-61 ISBN 978-1841136714.

and locks (e.g. the need of parliamentary approval and a nation-wide referendum) on new EU treaties and proposed changes of the existing ones, thus protecting its existing tradition of law and with that the Parliamentary sovereignty.<sup>53</sup>

### 3.3 The rule of law

The rule of law means that there is nothing above the law and all individuals are to be equal under the law and not subjected to arbitrary rule.

#### 3.3.1 Dicey's rule of law

According to AV Dicey, there are three aspects of this principle: 1) “...no man is punishable ... except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.”

2) “...every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”

3) “...the general principles of constitution are with us as the result of judicial decisions determining the rights of private persons...”<sup>54</sup>

The *first aspect* means, that no one can suffer any punishment unless he broke the law, and no other authority but ordinary courts can judge him. These laws and powers should be defined clearly, so that it is obvious that they are being breached and under which conditions the power can be applied.

The *second aspect* implies that no one is above the law and everyone obeys the same law.

The *third aspect* is concerned with the protection of individual rights which is guaranteed by ordinary remedies of private law.

The concept of rule of law and sovereignty of Parliament seems at first to be opposing each other as it imposes requirements upon the legislation. Dicey explains the relationship between the two like this: “*The sovereignty of Parliament and the supremacy of the law of the land... may appear to stand*

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<sup>53</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 56-58. ISBN 978-1849461603

<sup>54</sup> CAVENDISH PUBLISHING LIMITED. *Constitutional Law*. 4. vyd. Great Britain: Cavendish Publishing Limited, 2004, s. 18. ISBN 1-85941-941-0.

*in opposition to each other, or to be at best only counterbalancing forces. But this appearance is delusive; the sovereignty of Parliament, as contrasted with other forms of sovereign power, favours the supremacy of law, whilst the predominance of rigid legality throughout our institutions evokes the exercise, and thus increases the authority of Parliamentary sovereignty.*"<sup>55</sup>

In Dicey's view, the common law offered better protection to the fundamental rights than any written constitution. His view is, however, based on many assumptions which no longer apply. Unlike his views on the sovereignty of Parliament, his view of the rule of law does not comply with today's understanding of law.<sup>56</sup>

### 3.3.2 The rule of law today

The new approach to the rule of law is also based on three statements.

*Law and order better than anarchy.* The rule of law doctrine could in theory apply to a dictatorship as well as it applies to a democracy, in case that the government would not be created in free elections, and its true intentions only thrive in today's state of political liberty. There needs to be a way for the citizens to fight oppression which is seemingly in accordance with the rule of law principle. For example in case that law of the given country is emptied of moral content, otherwise we cannot truly speak of the rule of law.

*Government according to law.* The organs of the state may only operate within the limits given by law and can only be created in accordance with law. They must be subjected to effective sanctions in case they breach the rules which govern their actions.

*The rule of law as a broad doctrine affecting the making of new law.* The doctrine should also affect the laws enacted in the future. The laws should be open, certain, judges should be independent, and courts should remain accessible while at the same time the substance of the law itself should actually satisfy

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<sup>55</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 66. ISBN 978-1849461603

<sup>56</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 92-95. ISBN 978-1405873505.

the needs of the citizens. These values are often observed in judicial decisions and they are included in the ECHR.<sup>57</sup>

As we can see, the rule of law had changed significantly since the times of Dicey and if it is to remain a functioning principle, in not only the UK, but also all around the world, it will need to flexibly adapt to the future events and changes in understanding of law.

### 3.4 Separation of powers

Separation of powers seeks to avoid the concentration of powers in a single body in order to prevent the abuse of governmental power. It separates the governmental power into three – the legislature, executive, and the judiciary which exercise their power independently.<sup>58</sup>

#### 3.4.1 John Locke, Montesquieu on the separation of powers

The doctrine of the separation of powers was developed by John Locke and later further by Montesquieu.

John Locke published *Second Treatise of Civil Government* in 1690. In it he expressed his concern about human nature when it comes to handling power, especially when it comes to the ruling of a state. He thought it was too tempting for people who possessed the power to make law to also have the executive power, as they would then create laws which would suit their personal needs. For this reason, he suggested the separation of the executive and legislative powers.

Montesquieu continued to develop the doctrine in 18<sup>th</sup> century, and based his work on the English constitution. He was concerned with not only the executive and legislature, but also the judiciary and stated that if these powers are not separate from each other there is no liberty. He especially stressed the pressing need to have the judicial functions exercised by a separate body.<sup>59</sup>

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<sup>57</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 95-100. ISBN 978-1405873505

<sup>58</sup> The Ultimate Ruling Principle of the British Constitution. YUEN KIT KUAN. *The Student Journal of Law* [online]. 2011 [cit.2014-09-03]. Dostupné z: <http://www.sjol.co.uk/issue-5/the-ultimate-ruling-principle-of-the-british-constitution>

<sup>59</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 91. ISBN 978-1405873505.

Even though Montesquieu based his work on the English constitution, he failed to take the developing parliamentary form of government, which was then an on-going process in the UK, into consideration. Unlike Locke, Montesquieu did not attempt to judge the system of power. Instead, he analysed the mechanism which was in fact working at the time. He disapproved of absolute power of the ruler or the people and instead favoured the separation of powers as a means of distributing the power evenly. His theory influenced the modern constitutions, especially the one of the US.<sup>60</sup>

### 3.4.2 Separation of powers in the UK

As there is no written constitution in the UK setting out formal rules to govern the state, there is no formal separation of powers either. There are a number of overlapping powers, such as the control of Parliament over the courts (see sovereignty of Parliament) but at the same time the judiciary, while performing its constitutional function, keeps the Parliament in check through the rule of law.<sup>61</sup>

Instead of the system of the separation of powers, the UK adopted a system of checks and balances which serve the same purpose.<sup>62</sup>

### 3.5 Judicial function

The most important judicial function is to determine whether some disputed, action occurred, while applying the laws made by Parliament. It is performed by civil (concerned with private and public law) and criminal (concerned with the conduct of trials as well as the sanctions imposed upon those who have been convicted) jurisdiction. Some matters (usually the matters of government) are also resolved by tribunals, which operate under civil courts. Since the UK is a part of the EU, the matters of Community law are resolved by the European Court of Justice and the Court of First Instance. UK courts are

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<sup>60</sup> KLOKOČKA, Vladimír. *Ústavní systémy evropských států*. 2. vyd. Praha: Linde Praha a.s., 2006, s. 42-43. ISBN 80-7201-606-7.

<sup>61</sup> The Ultimate Ruling Principle of the British Constitution. YUEN KIT KUAN. The Student Journal of Law [online]. 2011 [cit.2014-09-03]. Dostupné z: <http://www.sjol.co.uk/issue-5/the-ultimate-ruling-principle-of-the-british-constitution>

<sup>62</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 73. ISBN 978-1849461603

also bound by the HRA, which means they must take the decisions made by the European Court of Human Rights into consideration as well.<sup>63</sup>

For the judiciary to function, it is necessary that it remains independent and impartial. Otherwise, there could be no confidence that the matters in front of courts will be handled justly.<sup>64</sup> However, even after hundreds of years of evolution the judiciary is not entirely separated from the government. The most significant change to the independence of the judiciary since the Magna Carta was the Constitutional Reform Act 2005, which established the Supreme Court, changed the system of the appointment of judges and the role of the Lord Chancellor.<sup>65</sup>

### 3.5.1 System of courts in the UK

The court system in Britain is rather complicated, as it has been developing for over a thousand years. The system changed greatly after enacting the CRA by establishing the Supreme Court.

*Criminal cases* are dealt with in front of the magistrate's courts (for less serious offenses) and the Crown Court (for the more serious criminal matters and appeals from magistrate's courts). Appeals from the Crown Court are decided by the High Court and in case the procedure started in front of the High Court, the appeal will proceed to the Criminal division of the Court of Appeal, and if the matter is of a great importance, to the Supreme Court.

*Civil cases* can originate at magistrate's courts or the County Court. Its appeals are again dealt with by the High Court and then by the Civil Division of the Court of Appeal, which consists of three divisions – the Queen's Bench Division which deals with contract law, personal injury or negligence cases and also functions as a supervisory court, the Chancery Division which deals with business law, trust law, probate law, insolvency and equity and the Family Division which deals with matters such as divorce, children, probate and medical treatment. This structure applies in England and Wales.

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<sup>63</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 80. ISBN 978-1405873505.

<sup>64</sup> Independence. *Www.judiciary.gov.uk* [online]. n.d. [cit. 2015-02-22]. Dostupné z: <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/>

<sup>65</sup> History of the judiciary. *Www.judiciary.gov.uk* [online]. n.d. [cit. 2015-02-22]. Dostupné z: <http://www.judiciary.gov.uk/about-the-judiciary/history-of-the-judiciary/>

Lastly, *the tribunals* deal with various day-to-day matters and they form a two-tier system – First-tier Tribunal and an Upper Tribunal which functions as an appellate court. The Court of Appeal once again handles the appeals from Upper Tribunal.<sup>66</sup>

Prior to the CRA the functions of the highest courts were divided between the Appellate Committee of the House of Lords, and the Judicial Committee of the Privy Council. As these bodies were a part of the executive as well as the legislature, there was limited transparency and independence. This system was criticised by Europe for lacking clarity which was one of the reasons for the Supreme Court to be established.<sup>67</sup>

### 3.6 Legislative function

By legislative, we mean the enactment of laws which determine the rules governing the structure of powers, public authorities as well as those which govern the conduct of citizens and private bodies. In the UK, this happens when a Bill (a proposal of law) is approved by both houses of Parliament – the House of Lords and House of Commons – and is granted the royal assent.

The legislative function is carried out by the Parliament of the United Kingdom and Northern Ireland as the supreme legislative body, the Scottish Parliament, the National Assembly of Wales, the Northern Ireland Assembly and by European Union.<sup>68</sup>

#### 3.6.1 Parliament of the UK

Since its formulation in the 13<sup>th</sup> century, the role of Parliament has been changing considerably, though it never ceased to exist. Its continuous existence is a proof of the flexibility of the British Constitution and its unshakeable position is

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<sup>66</sup> Structure of the courts system. *Www.judiciary.gov.uk* [online]. n.d. [cit. 2015-02-22]. Dostupné z:<http://www.judiciary.gov.uk/about-the-judiciary/>

<sup>67</sup> MAICAN, Ovidiu-Horia. Reform of the United Kingdom judicial system. *Judicial Tribune* [online]. 2013, Vol. 3, Issue 2 [cit. 2015-03-19]. Dostupné z:[http://www.heinonline.org/HOL/Page?handle=hein.journals/juridtrib3&div=15&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults&terms=Reform%20of%20the%20United%20Kingdom%20judicial%20system%20Lecturer%20PhD%20Ovidiu%20Horia%20MAICAN&type=matchall](http://www.heinonline.org/HOL/Page?handle=hein.journals/juridtrib3&div=15&collection=journals&set_as_cursor=0&men_tab=srchresults&terms=Reform%20of%20the%20United%20Kingdom%20judicial%20system%20Lecturer%20PhD%20Ovidiu%20Horia%20MAICAN&type=matchall)

<sup>68</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 78-79. ISBN 978-1405873505.

the most important reason why the British never formalised a legal concept of the state nor the system of administrative law.<sup>69</sup>

The Parliament consists of the House of Commons, whose 645 members are elected, and the House of Lords, whose members are largely life peers (appointed for life), hereditary peers, Law Lords (prior to CRA) and bishops. Both houses also have a Speaker, whose role is to communicate requests of Parliament to the Queen. The Parliament is also crucial to formation of the government, since it is the leader of the party with majority of votes who becomes a Prime Minister.<sup>70</sup>

The Constitutional Reform Act influenced the composition of House of Lords by removing the Law Lords and the Judicial Committee and changed the person of the Speaker.

### 3.7 Executive function

The executive function is very broad, encapsulating matters such as the initiating and implementing legislation, maintaining order and security, public services, international relationships, and promoting public welfare.

Historically the executive function was performed by the monarch, but now the power has shifted into the hands of the Prime minister and other ministers, who together form the Government. Tasks such as maintaining order and security may be performed by other bodies, such as the police and the armed forces. Devolved<sup>71</sup> organs in Scotland, Wales, and Northern Ireland have also been granted the executive function and since the UK is a part of the EU, executive powers also belong to the Council and the Commission.<sup>72</sup>

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<sup>69</sup> LOUGHLIN, Martin. *The British Constitution: A Very Short Introduction*. Gosport, Hampshire: Ashford Colour Press Ltd, 2009, s. 42-44. ISBN 978-0-19-969769-4.

<sup>70</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 362 s. 2nd Revised edition, s. 108, 114-115. ISBN 978-1849461603

<sup>71</sup> devolution of Scotland, Wales and Northern Ireland is described in chapter 3.1. Devolution

<sup>72</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 80-81. ISBN 978-1405873505.



### 3.8 Overlapping powers

The intent of the doctrine of the separation of powers is for no one organ to hold more than one power, but as was mentioned before, the separation of powers in the UK is far from complete.

#### *Legislature and executive*

The House of Commons, as a part of legislature, controls the executive since it can effectively withdraw its support of government, which is then forced to resign (governed by the system of checks and balances – constitutional convention).<sup>73</sup> However, if the Cabinet has the support it has a rather extended control over the work of the Commons. Members of the Government are also members of the House of Commons, which allows them to use their voting power there, but as such, they are heavily outnumbered.

#### *Legislature and judiciary, judiciary and executive*

Prior to the Constitutional Reform Act 2005, these powers overlapped in the person of the **Lord Chancellor** who was the head of the judiciary, member of the cabinet as well as a member of the House of Lords. In **Judicial Committee**, which was historically an executive organ which at the same time functioned as the court of law and **Law Lords** who were a part of the House of Lords as well as members of the Court of Appeal. After the CRA came to force, these issues were resolved by altering the position of the Lord Chancellor and Law Lords, an abolition of the Judicial Committee and creation of the Supreme Court.<sup>74</sup>

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<sup>73</sup> CAVENDISH PUBLISHING LIMITED. *Constitutional Law*. 4. vyd. Great Britain: Cavendish Publishing Limited, 2004, s. 24. ISBN 1-85941-941-0.

<sup>74</sup> BRADLEY, A.W. a K.D. EWING. *Constitutional and administrative law*. 15. vyd. Great Britain: Longman, 2010, s. 84-89. ISBN 978-1405873505.

## 4 Constitutional changes, progress of the Bill

The Constitution of the UK has undergone a long process of development, but never have the changes been as frequent as in the past twenty years. When the Labour party assumed the office in 1997, various committees were established and started to propose broad constitutional changes in the areas of elections, voting, funding political parties, administration, the House of Lords and the House of Commons, devolution to Scotland and Wales and so on. This resulted in enacting important constitutional legislation such as the Scotland Act 1998, the Northern Ireland Act 1998, the Government of Wales Act 1998, the Human Rights Act 1998 and many others. The Constitutional Reform Policy Committee has overseen these activities and European Legislation greatly influenced the development.<sup>75</sup> This chapter will further introduce these changes which ultimately lead to the proposal of the Constitutional Reform Bill in 2003 and the process the Bill has undergone to become an Act of Parliament.

### 4.1 Devolution

Devolution is the process of creating subordinate legislatures and assemblies, a process of decentralization, which is meant to put the citizen closer to the source of power.<sup>76</sup> For Northern Ireland, devolved government was the goal since its separation from Ireland but it gained more attention when the Scottish National Party and Welsh National Party emerged in 1970s.<sup>77</sup>

After unsuccessful attempts of legislative devolution in 1974-1979, the devolution of Scotland, Northern Ireland and Wales took place in 1998 after referendums held in 1997. During this process, some legislative power previously held by the Parliament of the UK was given to the newly formed Parliament of Scotland, and Assemblies of Wales and Northern Ireland. Since the

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<sup>75</sup> DINGLE, LESLEY a MILLER. *A summary of Recent Constitutional Reform in the United Kingdom*[pdf]. 2005 [cit. 23.2.2015]. International Journal of Legal Information: Vol.33, Iss. 1, Article 7. Dostupné z: <http://scholarship.law.cornell.edu/ijli>

<sup>76</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, s. 89. ISBN 978-1841136714.

<sup>77</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 2nd Revised edition, s.246. ISBN 978-1849461603

Parliament of the UK is still sovereign, it may however repeal its Acts at any time.<sup>78</sup>

Devolution is an important aspect of the new British Constitution as it effectively changed its form from a unitary state to a multi-national one. The intention was to resolve the issues arising between the individual nations in the UK as well as the expanding economy.

Whether that was successful is in my opinion rather questionable, especially since the latest development – namely the Scotland's independence referendum in 2014, which even though it remained unsuccessful, gained the votes of 1,6 million (44%) of Scots with a 86% turnout.<sup>79</sup> A turnout of this magnitude is unheard of in Czech Republic and is, I believe, not the last of its kind. Northern Ireland's Sinn Fein<sup>80</sup> has also been committed to becoming united with the rest of Ireland, and perhaps the Scottish referendum will even aid its attempts to do so.

#### 4.2 House of Lords reform

The House of Lords has been reformed considerably since 1997, when the plan to remove the right of hereditary peers to sit and vote in the House was announced. Firstly, in 1999 when the House of Lords Act came into force, the number of hereditary peers was reduced by more than 600. Shortly after, in 2000, the House of Lords Appointment Commission was established with the agenda of approving and recommending new candidates for the Lords. In 2007, the White Paper was published which introduced a new plan – 50% of Lords were now to be elected and 50% were to be appointed. When this proposition was put to vote, the Commons had supported the election, while the Lords voted for a fully appointed House. This plan was revisited again in 2012, when the Joint Committee published a report recommending that 80%

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<sup>78</sup> Devolution of powers to Scotland, Wales, and Northern Ireland. *Www.gov.uk* [online]. 2013 [cit. 2015-02-22]. Dostupné z: <https://www.gov.uk/devolution-of-powers-to-scotland-wales-and-northern-ireland>

<sup>79</sup> First Minister on Referendum Outcome. *Www.scotreferendum.com* [online]. 2014 [cit. 2015-02-22]. Dostupné z: <https://www.scotreferendum.com/2014/09/first-minister-on-referendum-outcome/>

<sup>80</sup> Irish republican political party

of Lords should be elected, while the rest will remain appointed but dropped in September of 2012 when Deputy prime minister announced its withdrawal.<sup>81</sup>

The House of Lords reform was meant to resolve two issues – its composition and its power. The composition did somewhat change, but the fact remains that the Lords are still not becoming a more representative sample of the population. Until 1999, the issue of the power of the Lords was governed by the Salisbury convention from 1947, which stated that Lords should not use their powers, but merely ensure that the Commons could legislate (the Lords only stopped 4 Bills in this time). This balance of power changed after the reform, as the Salisbury convention lost some of its power. As for the proposed electoral system, the primacy of the Commons was a concern. However, the Government stated that other countries, such as the Czech Republic, Poland, or Japan, have wholly elected second chambers, but the primary chamber still has the power to override their decision.<sup>82</sup>

The reform of Lords is still under debate, and in my opinion, I do not think that its current composition will be able to hold on much longer.

#### 4.3 House of Commons reform

House of Commons was not directly reformed. Rather, it was modernised by removing out-dated practices and rules, creating an easier access to Parliament (including creating a website for the Commons), reorganising of work hours, and easing the legislative programmes.<sup>83</sup>

In 1994, the guidelines governing the conduct of MPs were changed. This subject was revisited again in 2009 when inflated and fraudulent expenses of MPs came to light. Their regular salary was 65, 000 pounds, but this could come up to 100, 000 pounds for office expenses. However, it was discovered that many of the MPs maximised their financial gain in contrary to what the Green Book

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<sup>81</sup> House of Lords reform. *Www.parliament.uk* [online]. n.d. [cit. 2015-02-23]. Dostupné z: <http://www.parliament.uk/business/lords/lords-history/lords-reform/>

<sup>82</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, s. 146-167. ISBN 978-1841136714.

<sup>83</sup> DINGLE, LESLEY a MILLER. *A summary of Recent Constitutional Reform in the United Kingdom*[pdf]. 2005 [cit. 23.2.2015]. International Journal of Legal Information: Vol.33, Iss. 1, Article 7. Dostupné z: <http://scholarship.law.cornell.edu./ijli>

for Members<sup>84</sup> allowed. These actions of course caused a public scandal to which the Parliament responded with the Parliamentary Standards Act in 2009.<sup>85</sup>

#### 4.4 Human Rights Act 1998

In 1998, the Human Rights Act was enacted and changed the British constitutional practice fundamentally. It meant codifying protections contained previously in the European Convention only into UK law. All public bodies or bodies carrying out public functions must uphold these protections. It does not only affect the public authority, but also individuals who can now argue their human rights cases in the European Court of Human Rights. The rights protected by the HRA include the right to life, fair trial, liberty and security, protection of family life and many others.<sup>86</sup>

As mentioned before, the HRA imposed limitations on the previously sovereign Parliament. Article 19 (1) of the Act says that a minister in charge of the Bill must, before Second Reading, either issue a statement of compatibility or a statement that he wishes the House to proceed even though the Bill is not compatible. The judiciary now also needs to take into consideration the decisions made by the Commission, Committee, and the European Court on Human Rights as well as interpret the Acts in the light of the ECHR declaration. The courts under HRA gained the power to issue a declaration of incompatibility, in the event that they found a provision of primary legislation incompatible with the Convention rights.<sup>87</sup>

The HRA is, in the British way, the closest thing they now possess to the bill of rights and it revolutionised understanding of law. It strengthened the position of judiciary and made it, as well as the Parliament and Government, much more capable of protecting the human rights.

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<sup>84</sup> a publication of the House of Common which until 7 May 2010 set out the rules governing MPs' salaries

<sup>85</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 2nd Revised edition, s.246. ISBN 978-1849461603

<sup>86</sup> The Human Rights Act. *Www.equalityhumanrights.com* [online]. n.d.[cit. 2015-02-23]. Dostupné z: <http://www.equalityhumanrights.com/your-rights/human-rights/what-are-human-rights/human-rights-act>

<sup>87</sup> United Kingdom. The Human Rights Act 1998. In: *Chapter 42*, 1998

#### 4.4.1 The Human Rights Act, sovereignty and rule of law

Even though the courts were granted the power to declare incompatibility, simply doing so does not invalidate the primary legislation. This means that the sovereignty of Parliament still applies as the ultimate decision about the future of the legislation is still in its power.<sup>88</sup>

As for the rule of law, the purpose of the Act is to preserve the main democratic principle and secure the human rights culture. The balance between these doctrines is dependent on compromise between the two. If the judges attempted to make the judiciary supreme over Parliament, using the judicial review, they would surely meet with an intense disapproval. At the same time, if the Parliament ignored the declarations of incompatibility and chose not to repeal the statutes, the HRA would have close to no value. If this compromise is not being upheld, a clash between judiciary and legislature may occur. The difficulty of balancing these powers is seen in the amendments proposed by the Prime Minister and the Leader of the Opposition in 2006, which arose mainly in connection with the issues of asylum and terrorism.<sup>89</sup>

In conclusion – the HRA upholds both doctrines by increasing the power of the courts upholding the rule of law principles and leaving the final decision of repeal to the Parliament. This will remain balanced as long as the courts do not attempt to exceed their power and the Parliament respects the rule of law by repealing Acts declared as incompatible.

#### 4.5 Judicial reform

In 1998, the legislature was devolved and the HRA passed. This only strengthened the issue of the lack of separation of powers, especially in the person of the Lord Chancellor who held all three powers. Law Lords, who with the Lord Chancellor formed the Appellate Committee of the Lords (judicial function), sat in the House of Lords and to whom the devolved legislature was being referred to, also needed to undergo change.

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<sup>88</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 2nd Revised edition, s.58. ISBN 978-1849461603

<sup>89</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, s. 68-70. ISBN 978-1841136714.

As a reaction to these and many other arising issues, in June 2003, three Consultation papers were issued as a base of the Constitutional Reform Bill.<sup>90</sup>

#### 4.6 Proposal of the Constitutional Reform Bill 2003

Professor Vernon Bogdanor described the numerous reforms since 1997 as an era of constitutional reform and the CRA continued the trend.

Its policy was formulated in 2001 and consecutively the Minister and his Department proposed matters to be discussed in the collective consideration, which was the task of a Cabinet Sub-Committee. The proposals formed by the Committee were published in a Green Paper (which offers for the matters to be redefined), and later a White Paper (which contains a firm proposal).<sup>91</sup> On June 12 2003 Tony Blair, the then Prime minister, announced plans to implement constitutional reforms and created the Department for Constitutional Affairs and the position of Secretary of State, which replaced the post of the Lord Chancellor, as its head.<sup>92</sup> The House of Lords expressed its dismay about the circumstances in which the Government introduced this policy. According to them, the announcement was made by the Government without the understanding of the post of the Lord Chancellor and without any kind of consultation outside of the government.<sup>93</sup> The three Consultation Papers proposed mainly the creation of a Supreme Court, the Judicial Appointment Commission and the abolition of the post of Lord Chancellor. The Bill itself was introduced to the House of Lords on 24<sup>th</sup> February 2004.<sup>94</sup>

During the Second Reading of the Bill, a number of speakers referred the Bill to a Select Committee, a very rare practice for a Governmental bill rather

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<sup>90</sup> DINGLE, LESLEY a MILLER. *A summary of Recent Constitutional Reform in the United Kingdom*[pdf]. 2005 [cit. 23.2.2015]. International Journal of Legal Information: Vol.33, Iss. 1, Article 7. Dostupné z: <http://scholarship.law.cornell.edu./ijli>

<sup>91</sup> *Constitutional Reform Act 2005: Report with Evidence* [pdf]. London: The Stationery Office Limited, 2005 [cit. 23.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/83/83.pdf>

<sup>92</sup> MAUTE, Judith L. English reforms to judicial selection: Comparative lessons for American states. *Fordham Urban Law Journal*[online]. 2006, Vol. 34, Iss. 1 [cit. 25.2.2015]. Dostupné z: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1949&context=ulj>

<sup>93</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary, and Parliament: Report with Evidence* [pdf]. London: The Stationery Office Limited, 2007 [cit. 25.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

<sup>94</sup> DINGLE, LESLEY a MILLER. *A summary of Recent Constitutional Reform in the United Kingdom*[pdf]. 2005 [cit. 23.2.2015]. International Journal of Legal Information: Vol.33, Iss. 1, Article 7. Dostupné z: <http://scholarship.law.cornell.edu./ijli>

than to a Committee of the Whole House for a more detailed examination. The Select Committee included 400 amendments that were intended to clarify and improve the Bill while remaining true to its original structure.<sup>95</sup> In the Select Committee, an agreement was reached concerning 44 issues, but the creation of the Supreme Court as well as the abolishment of the Lord Chancellor's post resulted in defeat for the government.<sup>96</sup>

As the Government was committed to the contents of the Bill, it made the legislative process more difficult than necessary, with many instances of individual proposals being examined more than once. Since the changes it proposed were directly aimed at the person of the Lord Chancellor and the House of Lords, it also put a strain on their relationship with the government.<sup>97</sup>

#### 4.6.1 The Lord Chancellor

The most controversial element introduced in the Consultation Papers was surely the abolition of the post of the Lord Chancellor and his replacement with the Secretary of State for Constitutional Affairs. The reason for this was to ensure that judges are protected from political pressure and that their independence is remains free from the influence of the executive.<sup>98</sup> The members of the Lord Chancellor's Department were astounded by the proposed abolition of their department as neither they, nor the Lord Chancellor were consulted on the matter at all. The Lord Chancellor himself found about the change in *The Times*. Lord Irvine, the then Lord Chancellor, also submitted a paper to Tony Blair in which he expressed his dismay and stressed that such a change would have a great influence on both primary and secondary legislation. He

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<sup>95</sup> SELECT COMMITTEE ON THE CONSTITUTIONAL REFORM BILL [HL]. *Constitutional Reform Bill* [pdf]. London: The Stationery Office Limited, 2004 [cit. 24.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf>

<sup>96</sup> DINGLE, LESLEY a MILLER. *A summary of Recent Constitutional Reform in the United Kingdom*[pdf]. 2005 [cit. 23.2.2015]. *International Journal of Legal Information*: Vol.33, Iss. 1, Article 7. Dostupné z: <http://scholarship.law.cornell.edu./ijli>

<sup>97</sup> *Constitutional Reform Act 2005: Report with Evidence* [pdf]. London: The Stationery Office Limited, 2005 [cit. 23.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/83/83.pdf>

<sup>98</sup> MALLESON, Kate. APPENDIX 3: *The effect of the Constitutional Reform Act 2005 on the relationship between the judiciary, the executive and Parliament*. [www.parliament.uk](http://www.parliament.uk) [online]. 2007 [cit. 2014-09-03]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15110.htm>



himself held about 5,000 different functions at the time.<sup>99</sup> Lord Irvine was strongly opposed to the changes and was dismissed by Tony Blair in 2003 and was replaced by Lord Falconer as the first State Secretary for Constitutional Affairs.<sup>100</sup>

The Select Committee was questioning whether the office should be abolished or how could it be refined and retained. It also questioned the replacement of the Lord Chancellor with the person of Secretary of State for Constitutional Affairs as the Prime Minister could choose a person without a law background and a member of the Commons rather than the Lords. The view of the Committee was that such a person should continue to be a senior lawyer and a member of the Lords without any political career aspirations.<sup>101</sup>

After the debate in the Lords, the proposal changed and the Bill itself suggested only its reformulation into the post of Secretary of State for Constitutional Affairs. After further discussions, it was decided that the title Lord Chancellor would remain, but the powers available to him would be decreased. Instead of the Lord Chancellor, it would be the Lord Chief Justice who would become the head of the judiciary, as well as the President of Courts of England.

The Concordat was the cornerstone of the new relationship between the two branches – executive and judiciary. It was thanks to the Concordat that the tension between the two decreased. The Lord Chancellor and the Lord Chief Justice would meet regularly to discuss the roles of their posts, and their agreements were incorporated directly into the CRA. The Concordat established that the role of the head of the judiciary would now be the task of the Lord Chief

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<sup>99</sup> LORD PHILLIPS. The Supreme Court of the United Kingdom. *Auckland University Law Review* [online]. 2013, Vol. 19, č. 13 [cit. 2015-03-19]. Dostupné z: [http://www.heinonline.org/HOL/Page?handle=hein.journals/auck19&div=6&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults&terms=special|feature|the|supreme|court|of|the|united|kingdom|lord|phillips\\*&type=matchall](http://www.heinonline.org/HOL/Page?handle=hein.journals/auck19&div=6&collection=journals&set_as_cursor=0&men_tab=srchresults&terms=special|feature|the|supreme|court|of|the|united|kingdom|lord|phillips*&type=matchall)

<sup>100</sup> HAZELL, Robert. *Judicial Independence and Accountability in the UK* [pdf]. 2014 [cit. 26.2.2015]. Dostupné z: [https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference\\_Paper\\_Judicial\\_Independence\\_and\\_Accountability\\_in\\_the\\_UK\\_jun14](https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference_Paper_Judicial_Independence_and_Accountability_in_the_UK_jun14)

<sup>101</sup> SELECT COMMITTEE ON THE CONSTITUTIONAL REFORM BILL [HL]. *Constitutional Reform Bill* [pdf]. London: The Stationery Office Limited, 2004 [cit. 24.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf>

Justice and it formulated the basis for the new partnership of the two powers, both of which were to have equal influence.<sup>102</sup>

#### 4.6.2 Judicial appointments

Historically it was one of the Lord Chancellor's powers to appoint regular judges, whereas the Prime Minister appointed judges for the Court of Appeal and the House of Lords on his recommendation. Since one of the most important changes proposed by the Bill was to alter the powers of the Lord Chancellor, this was no longer a desirable concept to the Government.

During its examination, the Committee focused on several issues concerning judicial appointments. One of these was the recommending of judges by the Appointments Commission. They found this to be inappropriate, as it was the Minister who had the power to make appointments, rather than the Commission. The recommending Commission proposed by the Government was not well received. However, the hybrid model proposed by the Lord Chancellor, which suggested that the AC would appoint the junior judiciary and make recommendations to the Secretary of State (who was meant to replace him in the appointment process) for the more senior appointments, was successful amongst the Law Society<sup>103</sup> and some of the Committee. The Law Society also acknowledged the need for democratic accountability for more senior appointments.<sup>104</sup>

As the abolition of the post of Lord Chancellor was later revoked, new discussions arose. The members of the judiciary were of the opinion that the executive should not be involved in this process at all, while others thought it was important to have a link between the democratic process and the appointments (the link was secured by the influence of the elected Parliament).

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<sup>102</sup> MALLESON, Kate. APPENDIX 3: *The effect of the Constitutional Reform Act 2005 on the relationship between the judiciary, the executive and Parliament*. Wwww.parliament.uk [online]. 2007 [cit. 2014-09-03]. Dostupné z:

<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15110.html>

<sup>103</sup> an independent professional body for solicitors

<sup>104</sup> SELECT COMMITTEE ON THE CONSTITUTIONAL REFORM BILL [HL]. *Constitutional Reform Bill* [pdf]. London: The Stationery Office Limited, 2004 [cit. 24.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/125.pdf>

The Bill proposed that both the Supreme Court Commission and the Judicial Appointments Commission would have the decision-making power. They would both suggest one candidate to be appointed, whose name could be rejected by the Lord Chancellor only in certain circumstances. This means that the Parliament plays no role in judicial appointments, but it still has the power to remove errant senior judges.<sup>105</sup>

#### 4.6.3 Supreme Court

Even before the Bill was introduced, others were calling for the creation of a Supreme Court. Professor Andrew Le Sueur and Richard Cornes argued that there was a case for reform because the HRA, in its 6<sup>th</sup> Article, guarantees an independent and impartial hearing. Law Lord Steyn suggested the creation of a Supreme Court as “*an independent of other branches of government, in the framework of our existing system in which the supremacy of Parliament is the paramount principle of our constitution*”; and so did Lord Bingham, in his lecture *A New Supreme Court for the United Kingdom*. In the Government’s consultation paper, *Constitutional Reform: a Supreme Court for the United Kingdom*, published in 2003, it was proposed to move the function of the Appellate Committee of Lords to a new separate Supreme Court. This matter was revised on by the Constitutional Affairs Committee, which agreed on the creation of the Supreme Court but called for a delay in its implementing and also called for a draft form of the plan to be published. Finally, the Government, on 9 February 2004, made a statement to the Lords in which it introduced the plans for the Supreme Court and the Bill was introduced.<sup>106</sup>

According to Part 3, the Supreme Court of the UK was meant to consist of 12 judges appointed by the Queen. The First members would be the existing Lords of Appeal in (the Law Lords of House of Lords) and their senior would become the President of the Court and second senior the Deputy President.

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<sup>105</sup> MALLESON, Kate. *APPENDIX 3: The effect of the Constitutional Reform Act 2005 on the relationship between the judiciary, the executive and Parliament*. [www.parliament.uk](http://www.parliament.uk) [online]. 2007 [cit. 2014-09-03]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15110.htm>

<sup>106</sup> FAIRBAIRN, Catherine a Sally BROADBRIDGE. HOME AFFAIRS SECTION. *The Constitutional Reform Bill [HL]: a Supreme Court for the United Kingdom and judicial appointments* [pdf]. 2005 [cit. 24.2.2015]. Dostupné z: [www.parliament.uk/briefing-papers/RP05-06.pdf](http://www.parliament.uk/briefing-papers/RP05-06.pdf)

The future members were required to have held high judicial office for at least 2 years or have been a qualifying practitioner for at least 15 years.<sup>107</sup>

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<sup>107</sup> United Kingdom. The Constitutional Reform Bill HL. Part 3 2004.

## 5 Constitutional Reform Act 2005

The Act received royal assent on 24 March 2005 and came into force in 2006. It contains 149 sections and 18 Schedules. Since its revolutionary character and relatively unexpected introduction in 2003, the Act required much debate in both Houses and rather lengthy and extensive debate in the Select Committee. Because of this, the legislative process took two entire years.

*„An Act to make provision for modifying the office of Lord Chancellor, and to make provision relating to the functions of that office; to establish a Supreme Court of the United Kingdom, and to abolish the appellate jurisdiction of the House of Lords; to make provision about the jurisdiction of the Judicial Committee of the Privy Council and the judicial functions of the President of the Council; to make other provision about the judiciary, their appointment and discipline; and for connected purposes.“*<sup>108</sup>

The CRA may be the „single most fundamental and radical change...in over three hundred years.“<sup>109</sup> It intended to move away from the overlapping powers so typical for the British Constitution and towards the more traditional separation of powers. It brought profound structural changes especially for the judiciary, which is now more independent than ever and has a more distinct identity.<sup>110</sup>

### 5.1 Rule of law

Under Section 1 of the Act this Act does not adversely affect—

- (a) The existing constitutional principle of the rule of law, or
- (b) The Lord Chancellor’s existing constitutional role in relation to that principle.<sup>111</sup>

Democratic values can only be secured by the application of the rule of law and it needs to be upheld in order for there to be an independent judiciary

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<sup>108</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. 2005.

<sup>109</sup> MAUTE, Judith L. English reforms to judicial selection: Comparative lessons for American states. *Fordham Urban Law Journal*[online]. 2006, Vol. 34, Iss. 1 [cit. 25.2.2015]. Dostupné z: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1949&context=ulj>

<sup>110</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary, and Parliament: Report with Evidence* [pdf]. London: The Stationery Office Limited, 2007 [cit. 25.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

<sup>111</sup>United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. part 1, section 1 2005.

protected mainly from the influence of the executive. By proclaiming the rule of law as an existing constitutional principle, the CRA is attempting to secure and strengthen its position. This is seen in the increasing independence of the judiciary in parts 3 and 4 of the Act.

## 5.2 Lord Chancellor

The CRA sought for a clearer separation of powers which was defied in the person of the Lord Chancellor and it noticeably restricted and transferred his powers. The CRA continued a trend set out by other constitutional reforms, mainly the HRA. Prior to the reform the Lord Chancellor had a hybrid role and complex responsibilities acquired over an extended period of time – senior judge who sat on the Appellate Committee, member of the cabinet and the Speaker of Lords. Even though the Lord Chancellor possessed all these powers, constitutional conventions served as their limitation. For example, they prevented the Lord Chancellor from having an entirely political role by limiting his power to sit as judge at a panel of the Lords in politically controversial cases. His law background was considered very important, as he was the voice of the judiciary in the Cabinet, which served as a protection of the judiciary from the executive.<sup>112</sup>

Lord Falconer<sup>113</sup> said about the post of the Lord Chancellor, “*having a leader of the judges drawn from the judiciary rather than a politician drives a sense of ownership and momentum. It gives judiciary confidence that the pressure for change, if it comes from the head of judiciary, comes from the profession and not from the politicians.*”<sup>114</sup>

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<sup>112</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 2nd Revised edition, s.196-197. ISBN 978-1849461603

<sup>113</sup> Lord Chancellor and the first Secretary of State for Constitutional affairs in 2003, first Secretary of State for Justice

<sup>114</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary, and Parliament: Report with Evidence* [pdf]. London: The Stationery Office Limited, 2007 [cit. 25.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

His office represented important constitutional values and was respected greatly, which is why the proposed abolition of the office did not meet with great success and why the position had been retained.<sup>115</sup>

Effective as of July 4<sup>th</sup> 2006, the Lord Chancellor was replaced by an elected Speaker in the House of Lords and the Lord Chief Justice became the head of the judiciary.<sup>116</sup>

### 5.2.1 CRA on Lord Chancellor

Part 2 of the Act – Arrangements to modify the office of the Lord Chancellor consists of sections 2-22. It considers, amongst other topics, the qualifications for office of the Lord Chancellor, continued judicial independence; the judiciary and courts in England and Wales, the judiciary and courts in Northern Ireland as well as functions subject to transfer, modification, or abolition.

#### 5.2.1.1 Qualifications for the office of Lord Chancellor

Section 2 of the Act says that any person who seems qualified by experience, in the opinion of the Prime Minister, may be appointed as the Lord Chancellor. By experience, it means ministerial, parliamentary, judicial, legal experience or any other relevant experience.<sup>117</sup>

#### 5.2.1.2 Continued judicial independence

Section 3 guarantees continued judicial independence by stating that the persons responsible for matters of the judiciary or administration of justice must uphold the continued independence of judiciary, nor can the Lord Chancellor or other Ministers influence judicial decisions. The Lord Chancellor himself must defend the independence and support the judiciary to enable them to exercise their functions and make sure that the public interest is represented properly with regards to the judiciary and administration of justice.<sup>118</sup>

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<sup>115</sup> HORNE, Alexander. HOME AFFAIRS RESEARCH SECTION. *The Changing Constitution: A Case for Judicial Confirmation Hearings* [pdf]. London, 2010 [cit. 25.2.2015]. Dostupné z: <http://www.studyofparliament.org.uk/spg-paper-1.pdf>

<sup>116</sup> MAUTE, Judith L. English reforms to judicial selection: Comparative lessons for American states. *Fordham Urban Law Journal*[online]. 2006, Vol. 34, Iss. 1 [cit. 25.2.2015]. Dostupné z: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1949&context=ulj>

<sup>117</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 2, Section 2. 2005.

<sup>118</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 2, Section 3. 2005.

### 5.2.1.3 Judiciary and courts in England and Wales, Other provisions about the judiciary and courts

Section 7 replaced the Lord Chancellor as the head of Judiciary of England and Wales with the Lord Chief Justice. The Lord Chief Justice then became responsible for representing the views of the judiciary to Parliament and the Ministers, who will use the resources made available by the Lord Chancellor to train and guide the judiciary of England and Wales, and who will deploy the judiciary and allocate the work within courts.

According to sections 8 and 9, it will be the Lord Chief Justice who, after consultation with Lord Chancellor, will be naming senior judges. With the consultations of the Lord Chancellor, the Lord Chief Justice will also have the power to make the rules for the procedures of courts (section 12), and the power to issue practice directions supplementary to procedural rules (section 13).

Under the Section 14 and Schedule 3, the appointment functions would be transferred to Her Majesty.<sup>119</sup>

The relocation and modification of powers is included in section 15 and schedule 4, which is by far the longest with its 100 pages. Schedule 4 amends numerous Acts when it comes to the person of the Lord Chancellor, for example the Habeas Corpus Act 1679, the Pluralities Act 1838, the Public Notaries Act 1843, the Judicial Committee Act 1915, the Administration of Justice Act 1970, the Armed Forces Act 1976 and many others. These only illustrate the broad power of the Lord Chancellor, and the enormous change that the CRA brought to all branches of law.<sup>120</sup>

### 5.2.1.4 Functions subject to transfer, modification or abolition

Section 19 gives Lord Chancellor power to make orders for transfer, modification, or abolition of his powers mentioned in Section 14.<sup>121</sup>

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<sup>119</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 2, Section 7-14. 2005.

<sup>120</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Schedule 4. 2005.

<sup>121</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 2, Section 19. 2005.



### 5.3 Supreme Court

Lord Falconer said, during the debates on the Bill, “*the time has come for the UK’s highest court to move out from under the shadow of the legislature... the key objective is to achieve a full and transparent separation between the judiciary and the legislature...* “. <sup>122</sup> Even though the Selection Committee was not convinced that the Supreme Court should exist, in 2009 it was established as the final court of appeal for both civil and criminal cases, and its agenda is to judge cases of the greatest constitutional importance. <sup>123</sup>

#### 5.3.1 CRA on Supreme Court

The Supreme Court is established in part 3, sections 23-60, which are concerned with its creation, the appointing of judges, terms of their appointment, acting judges, jurisdiction, relation to other courts, composition for proceedings, practice and procedure, staff and resources, fees and annual report. Section 23 says that there is to be a Supreme Court of the UK, composed of 12 judges (the existing Law Lords). The recommendations for an appointment for judge of the Supreme Court, President of the Court or the Deputy President of the Court are to be made to the Queen by the Prime Minister with the aid of a 5 membered commission. As well as this, consultations with senior judges, the First Minister in Scotland, the Assembly First Secretary in Wales, the Secretary of State for Northern Ireland and the Lord Chancellor are also required.

The selection itself must be on merit, and only a person who meets the necessary requirements<sup>124</sup> and has the knowledge and experience of the law of each part of the UK can be selected.

##### 5.3.1.1 Terms of appointment

The terms of appointment will be conditioned by an oath of allegiance and judicial oath. The tenure of a judge of the Supreme Court will be that he will hold the office during good behaviour and he may be removed on the address of both Houses of Parliament. The salary will be determined by the Lord

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<sup>122</sup> BENWELL a Oonagh GAY. PARLIAMENT AND CONSTITUTION CENTRE. *The Separation of Powers* [pdf]. n.d. [cit. 25.2.2015]. Dostupné z: [www.parliament.uk/briefing-papers/sn06053.pdf](http://www.parliament.uk/briefing-papers/sn06053.pdf)

<sup>123</sup> *The Supreme Court* [online]. © Crown Copyright, 2015 [cit. 2015-02-25]. Dostupné z: <https://www.supremecourt.uk>

<sup>124</sup> Described in chapter 3.6.3. Supreme Court

Chancellor. A judge of the Supreme Court may also resign at any time (by giving a notice in writing to the Lord Chancellor) and can retire for medical reasons.<sup>125</sup>

#### 5.3.1.2 Acting judges

Senior territorial judges and the members of the supplementary panel may make a request to the President or the Deputy President of the Court to sit as a judge after they reach the age of 75.<sup>126</sup>

#### 5.3.1.3 Jurisdiction, relation to other courts etc.

By section 40, schedule 9 will transfer the jurisdiction from the House of Lords Judicial Committee of the Privy Council to the Court and will also make other amendments relating to jurisdiction. The Supreme Court will hear appeals and, for that purpose, will consist of an uneven number of judges (at least 3, half of which are permanent). It will also have the power to seek the assistance of more specially qualified advisers. The President of the Court, after consultation with the Lord Chancellor, will make the Supreme Court rules governing practice and procedure. The Lord Chancellor will then decide when these will come into force and will include them in a statutory instrument.<sup>127</sup>

#### 5.3.1.4 Staff and resources

The Court will have a chief executive appointed by the Lord Chancellor with the consultation of the President of the Court. The President will also appoint officers and staff of the court whose numbers will be determined by the chief executive with the agreement of the Lord Chancellor. The Lord Chancellor will also be responsible for the Court's accommodation and other resources.<sup>128</sup>

#### 5.3.1.5 Fees and annual report

The scale for fees will be made by the Lord Chancellor with the agreement of the Treasury with regard to the principle of access to the courts.

A report will be prepared annually by the chief executive and be laid down before the Parliament by the Lord Chancellor.<sup>129</sup>

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<sup>125</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 3, Section 32-36. 2005

<sup>126</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 3, Section 38. 2005

<sup>127</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 3, Section 40-46. 2005

<sup>128</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 3, Section 47-51. 2005

<sup>129</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 3, Section 52-54. 2005

### 5.3.2 Lord Phillips on the Supreme Court

According to Lord Phillips,<sup>130</sup> the appointment process is, with its two stages, overly elaborate and the Lord Chancellor's veto power<sup>131</sup> controversial. Lord Phillips is of the opinion that the power of veto is actually justified since it would not be desirable for the Appointment Commission to appoint a judge at the highest level who did not have support of the Government represented by the Lord Chancellor.<sup>132</sup>

Another thing questioned by Lord Phillips, and prior to him by the Select Committee on the Constitution, was the financial independence of the Supreme Court.

In the view of the Select Committee, the integrity of the legal system depends on proper funding and they considered it one of the vital tasks of the Lord Chancellor. They suggested he should ensure maximum protection from budgetary pressures.<sup>133</sup>

Lord Falconer, who was responsible for the budget of the Court, proposed a different scheme than the one actually applied in the CRA. He initially said “...*the Supreme Court will be administered as a distinct constitutional entity. Special arrangements will apply to its budgetary and financial arrangements in order to reflect its unique status.*” He also explained how he wanted to achieve the financial independence required. He wanted the President of the Supreme Court and the chief executive to determine the bid for resources for the Court and pass those to the Minister, who would then submit it to the Treasury. The Treasury was then to scrutinise the bid and approve it before it went to the Commons, who would approve it as a part of overall Estimates. The funds were then to be transferred to the Court directly from the Consolidated Fund. This

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<sup>130</sup> Lord Chief Justice of England and Wales, President of the Supreme Court 2009-2012

<sup>131</sup> Lord Chancellor has the power to reject the person recommended to be appointed judge of the Supreme Court

<sup>132</sup> LORD PHILLIPS. *Judicial Independence & Accountability: A View from the Supreme Court* [pdf]. 2011 [cit. 25.2.2015]. Dostupné z: [https://www.supremecourt.uk/docs/speech\\_110208.pdf](https://www.supremecourt.uk/docs/speech_110208.pdf)

<sup>133</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary, and Parliament: Report with Evidence* [pdf]. London: The Stationery Office Limited, 2007 [cit. 25.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

procedure would ensure independence was maintained, that the level of funding could not be influenced by Ministers, and that the chief executive, who with directions of the President, would be the one responsible for the finances in the Court. If we have a look at section 50 (1), it says that The Lord Chancellor must ensure that the Supreme Court is provided with the following—

- (a) Such court-houses, offices and other accommodation as the Lord Chancellor thinks are appropriate for the Court to carry on its business.
- (b) Such other resources as the Lord Chancellor thinks are appropriate for the Court to carry on its business.<sup>134</sup>

In Lord Phillip's opinion those provisions are not in fact in accordance with what Lord Falconer said. Even though the Lord Chancellor did in fact provide the Court with a court house, it was under different circumstances and the Court now needs to repay the cost of it. The reason the funding was not provided in the way Lord Falconer envisioned it was the Treasury, as they did not support the idea of a completely free body which they would be dealing with directly. The Treasury instead proposed a model which would fund the Court from court fees which was considered to be in contrary to the principle of access to justice. After rather lengthy debates, it was established that the cost of the Court would be funded by the civil business as a whole, and the rest would be provided by the Treasury. However, this model does not provide the Court with stable and secure funding, nor does it guarantee the institutional independence.<sup>135</sup>

Currently, the Supreme Court is dependent on the Department of Constitutional Affairs for its funding as well as for an administrative support.<sup>136</sup>

#### 5.4 Judicial Appointments Discipline

The judicial selection process has been reformed several times before the CRA came into force. The new process introduced by the Act

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<sup>134</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 3, Section 50(1) 2005

<sup>135</sup> LORD PHILLIPS. *Judicial Independence & Accountability: A View from the Supreme Court* [pdf]. 2011 [cit. 25.2.2015]. Dostupné z: [https://www.supremecourt.uk/docs/speech\\_110208.pdf](https://www.supremecourt.uk/docs/speech_110208.pdf)

<sup>136</sup> WOODHOUSE, Diana. United Kingdom: The Constitutional Reform Act 2005-defending judicial independence the English way. *International Journal of Constitutional Law* [online]. Oxford University Press and New York University School of Law, 2007, Volume 5, Number 1 [cit. 2015-03-19]. DOI: doi:10.1093/Acon/mo1039. Dostupné z: <http://www.heinonline.org/HOL/Page?handle=hein.journals/injcl5&div=11&collection=journal&set as cursor=0&men tab=srchresults&terms=United|Kingdom|The|Constitutional|Reform|Act|2005|defending|judicial|independence|the|English|way&type=matchall>

developed after extensive consultations with a large number of academics, professional bodies and interest groups and lengthy negotiations in the Parliament. Transferring powers to an independent judiciary began on April 3, 2006. The new head of the judiciary the Lord Chief Justice assumed his office and replaced the Lord Chancellor.<sup>137</sup>

The main reason for establishing the new Judicial Appointments Commission was to separate the judiciary from the executive and eliminate any political involvement that the executive may have had.<sup>138</sup>

In Lord Phillips' opinion, the process of judicial appointments was not flawed to begin with, even though they were made on the recommendations of the Lord Chancellor. The Lord Chancellor's Department was searching for the most eligible candidates, some of whom never even applied for the post themselves and the appointments were based on consultations with judiciary. The system was criticised since most of the judiciary consisted of white male upper social class judges and because the appointments were made in a non-transparent process. The CRA reacted to this criticism by creating the Judicial Appointments Commission and giving the power of a very limited veto to the Lord Chancellor.<sup>139</sup>

#### 5.4.1 CRA on Judicial Appointments Discipline

Part 4, sections 61- 122 are concerned with the new system of appointments of judges. In its 4 chapters, it focuses on the Commission and Ombudsman; appointments of Lord Chief Justice and Heads of Division; Lords Justices of Appeal; Puisne<sup>140</sup> judges and other office holders; complaints and references; disciplinary powers and applications for review and references.

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<sup>137</sup> MAUTE, Judith L. English reforms to judicial selection: Comparative lessons for American states. *Fordham Urban Law Journal*[online]. 2006, Vol. 34, Iss. 1 [cit. 25.2.2015]. Dostupné z: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1949&context=ulj>

<sup>138</sup> HORNE, Alexander. HOME AFFAIRS RESEARCH SECTION. *The Changing Constitution: A Case for Judicial Confirmation Hearings* [pdf]. London, 2010 [cit. 25.2.2015]. Dostupné z: <http://www.studyofparliament.org.uk/spg-paper-1.pdf>

<sup>139</sup> LORD PHILLIPS. *Judicial Independence & Accountability: A View from the Supreme Court* [pdf]. 2011 [cit. 25.2.2015]. Dostupné z: [https://www.supremecourt.uk/docs/speech\\_110208.pdf](https://www.supremecourt.uk/docs/speech_110208.pdf)

<sup>140</sup> a regular member of a court

#### 5.4.1.1 Commission and Ombudsman

Chapter 1 introduces the new bodies of the Judicial Appointments Commission and the Judicial Appointments and Conduct Ombudsman.<sup>141</sup>

The Commission is further described in Schedule 12, according to which it will consist of a lay chairman, 5 judges, 2 practising lawyers, 5 lay members 1 legal tribunal member and 1 magistrate. The limit of the membership will be 5 years and the maximum length of membership can last no longer than 10 years.<sup>142</sup>

By Schedule 13, the Ombudsman will be recommended by the Lord Chancellor and appointed by the Queen. The Ombudsman candidate must not have ever held the position of a judge or a practising lawyer. In case he held position such as civil servant, MP or a member of Judicial Appointment Commission, it must not have been such a position which had made him inappropriate for the post of Ombudsman. The post can be held for no longer than 10 years and the appointment must not be longer than 5 years.<sup>143</sup>

#### 5.4.1.2 Appointments

Chapter 2 contains rules for the appointments of the Lord Chief Justice, Heads of Division, the Lord Justices of Appeal and Puisne judges, and other office holders. According to section 63(2), the selection must be solely on merit and (3) a person must not be selected unless the selecting body is satisfied that he is of good character. What is meant by good character is not described anywhere in the Act. Section 64(1) says that the Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.<sup>144</sup>

As mentioned before, the lack of diversity especially amongst higher judiciary was criticised and this Section was meant to prevent that happening in the future. Whether it was actually successful will be discussed in chapter 5.

The Lord Chancellor's role in this new process will be mostly consultation and it is subject to approval in both Houses of Parliament.<sup>145</sup>

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<sup>141</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 4, Section 61, 62. 2005

<sup>142</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Schedule 12. 2005

<sup>143</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Schedule 13. 2005

<sup>144</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 4, Section 63, 64. 2005

<sup>145</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 4, Section 65, 66. 2005

The Committee is thus a recommending body who will present one name to the Lord Chancellor who is then going to be the one to appoint the judge. Every selection made by the Committee will need to be explained in a written report. The report will serve the Lord Chancellor in considering the candidate presented to him and annually given to the Parliament.

The detailed requirements on the composition and selection of the Commission are rather significant. Commissioners will be selected in an open application process and they will be required to be persons of selflessness, integrity, objectivity, accountability, openness, honesty, and leadership. There will also be a detailed inquiry into their professional and personal backgrounds.

The appointment process will also vary according to the level of the appointment. A similar approach will be used for the highest level judges, the Lord Chief Justice, the Division Heads and the Lords Justices of Appeal. The Lord Chancellor initiates this process, and a panel will perform the selection process. The lower level appointments will follow a similar procedure also, but the selection will not need to be performed by a panel.<sup>146</sup>

The new process laid out in the CRA should also provide more transparency in judicial appointments. The Commission was established in 2006.

<sup>147</sup>

#### 5.4.1.3 Complaints and references

There are three kinds of complaint introduced under section 99.

(2) A Commission complaint is a complaint by a qualifying complainant of maladministration by the Commission or a committee of the Commission.

(3) A departmental complaint is a complaint by a qualifying complainant of maladministration by the Lord Chancellor or his department in connection with any of the following—(a) Selection under this Part;

(b) Recommendation for or appointment to an office listed in Schedule 14.

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<sup>146</sup> MAUTE, Judith L. English reforms to judicial selection: Comparative lessons for American states. *Fordham Urban Law Journal*[online]. 2006, Vol. 34, Iss. 1 [cit. 25.2.2015]. Dostupné z: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1949&context=ulj>

<sup>147</sup> DAKOLIAS, Maria. Are We There Yet?: Measuring Success of Constitutional Reform. *Vanderbilt Journal of Transitional Law*[online]. 2006, Vol. 39, Iss. 4 [cit. 2015-02-28]. Dostupné z: <http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Dakolias.pdf>

(4) A qualifying complainant is a complainant who claims to have been adversely affected, as an applicant for selection or as a person selected under this Part, by the maladministration complained of.<sup>148</sup>

These complaints can only be made by a person who claiming he was adversely affected in the selection process. The complaints must be made within 28 days after the matter of the complained occurred. They will be examined by the Commission or the Department and if necessary by the Ombudsman. Complaints which do not concern maladministration may be made to the Ombudsman at any time.<sup>149</sup>

#### 5.4.1.4 Discipline

The Lord Chancellor has a power to remove a person from an office for inability or misbehaviour and he can do so only after compliance with prescribed procedures.

The Lord Chief Justice with the agreement of the Lord Chancellor and following agreed procedure will be authorised to give a formal warning or reprimand. With the agreement of the Lord Chancellor, he may also suspend a person from judicial office who is subject to criminal proceedings, or has under certain circumstances been convicted of an offence. With the agreement of the Lord Chancellor, he may suspend a senior judge from office while he is subject to proceedings for an Address and the holders of other offices while they are under investigation for an office or subject to prescribed procedures.

Suspended person may not perform any of the functions of the office.<sup>150</sup>

In order for the judges to be independent there also needs to exist a system of accountability. This topic will be introduced further in chapter 5.

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<sup>148</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 4, Section 90. 2005

<sup>149</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 3, Section 100, 101. 2005

<sup>150</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 4, Section 108. 2005



## 6 Consequences and the impact of the change

The process of constitutional change was described by the Lord Chancellor as, “*stripping away confusing traditions, introducing transparent, comprehensible systems of governance*”. The purpose of the change was to modernize and renew democracy to make it more suitable to the world we live in now.

In the view of Professor Bogdanor, this new constitution is written down, embodied in statute and does not rely so heavily on the conventions and tacit understandings.<sup>151</sup> It complements the changes brought by HRA by enhancing the independence of the judiciary, isolating the judicial appointments from political influence, and removing the highest court of appeal from the House of Lords. The judges will no longer be appointed by the members of the executive as they were in the past. The character of the British Constitution remains now adapted and reformed. The constitutional principles remain as well but they are more easily identified. Even though the Parliamentary sovereignty still applies and the change the CRA brought can be repealed at any time, right now the judiciary is more powerful than before. The rule of law and judicial independence are for the first time included in a statutory form.

The UK has undergone this process without any revolution or radical change in the government under the existing legal framework, not because of a huge amount of pressure, but because it is taking a pragmatic and long view.<sup>152</sup>

### 6.1 Changes in the judiciary

The constitutional change had most substantial effect when it comes to the judiciary. In the opinion of the Lord Chief Justice, Lord Judge, the removal of the Lord Chancellor as the head of the judiciary is “eroding something rather important” as there is nobody who is able to represent the needs of the judiciary to the government.<sup>153</sup> But even though the judiciary lost their link with Parliament

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<sup>151</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, ISBN 978-1841136714

<sup>152</sup> DAKOLIAS, Maria. Are We There Yet?: Measuring Success of Constitutional Reform. *Vanderbilt Journal of Transitional Law*[online]. 2006, Vol. 39, Iss. 4 [cit. 2015-02-28]. Dostupné z: <http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Dakolias.pdf>

<sup>153</sup> Lord chief justice: changes to judiciary 'eroding something important'. *The Guardian* [online]. Guardian News and Media Limited, 2013 [cit. 2014-09-03]. Dostupné z: <http://www.theguardian.com/law/2013/jan/30/lord-chief-justice-changes-judiciary>

in the person of Lord Chancellor the judges are appearing in front of the Select Committee in Parliament instead and The judges communicate with the public more directly as their speeches are published on the newly created judicial website.<sup>154</sup> The power to recommend judicial candidates was stripped from the Lord Chancellor and all appointments are going through the Judicial Appointments Committee. The complaints are now handled by the Judicial Appointments and Conduct Ombudsman.<sup>155</sup>

### 6.1.1 Judicial independence

The purpose of judicial independence is to make sure that judges can perform their duties, protect the citizens from the arbitrary use of power of the government and resolve disputes impartially. In the UK, unlike in the countries with constitutional courts, the focus is for the courts to uphold the rule of law and to protect the human rights. It is not meant to be a privilege of the judge but rather their duty and it is necessary to maintain public confidence in the system of government.<sup>156</sup>

The constitutional principle of independent judiciary should not mean that the judiciary is to be isolated from other branches of the government or that the judiciary should not be accountable.<sup>157</sup>

The reforms the judiciary has undergone strengthened the compliance of the UK's model with the international standards. In 2003, the Council of Europe expressed the issues they found with this principle. As a response, the government prepared a Consultation Paper. They identified the issues

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<sup>154</sup> HORNE, Alexander. HOME AFFAIRS RESEARCH SECTION. *The Changing Constitution: A Case for Judicial Confirmation Hearings* [pdf]. London, 2010 [cit. 25.2.2015]. Dostupné z: <http://www.studyofparliament.org.uk/spg-paper-1.pdf>

<sup>155</sup> MAUTE, Judith L. English reforms to judicial selection: Comparative lessons for American states. *Fordham Urban Law Journal*[online]. 2006, Vol. 34, Iss. 1 [cit. 25.2.2015]. Dostupné z: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1949&context=ulj>

<sup>156</sup> WOODHOUSE, Diana. United Kingdom: The Constitutional Reform Act 2005-defending judicial independence the English way. *International Journal of Constitutional Law* [online]. Oxford University Press and New York University School of Law, 2007, Volume 5, Number 1 [cit. 2015-03-19]. DOI: doi:10.1093/Acon/mo1039. Dostupné z: [http://www.heinonline.org/HOL/Page?handle=hein.journals/injcl5&div=11&collection=journal\\_s&set\\_as\\_cursor=0&men\\_tab=srchresults&terms=UnitedKingdomTheConstitutionalReformAct2005defendingjudicialindependencetheEnglishway&type=matchall](http://www.heinonline.org/HOL/Page?handle=hein.journals/injcl5&div=11&collection=journal_s&set_as_cursor=0&men_tab=srchresults&terms=UnitedKingdomTheConstitutionalReformAct2005defendingjudicialindependencetheEnglishway&type=matchall)

<sup>157</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary, and Parliament: Report with Evidence* [pdf]. London: The Stationery Office Limited, 2007 [cit. 25.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

in the person of Lord Chancellor, the fact that the Law Lords were part of the House of Lords and in the fact that there was no independent judicial selection body. The changes in the Act were meant to address these issues as well as help the public understand the system of judiciary better.<sup>158</sup>

In the previous model, the Lord Chancellor played the important role of guardian of the judicial independence. The role has now moved to other guardians such as the Attorney General, the Government Legal Service, and the Parliamentary Counsel. The new Lord Chancellor, Chris Grayling as of 2012, has much less power which is due to the fact that he is not a lawyer, politician or a Lord.

In Parliament, the gap has been filled by two new Select Committees – the Constitution Committee in the Lords and the Justice Committee in the Commons and the Clerks who make sure that the judges are not criticised improperly in Parliament.

In the judiciary, the guardians are now the Lord Chief Justice who delegates functions to senior judges; the Senior Presiding Judge; the Senior President of Tribunals; the President of the Supreme Court; the chief executive of the Supreme Court and guardians for specific functions (e.g. the judge in charge of parliamentary relations). The task of the Judicial Communications Office is to inform the press about the actions of the judiciary, to fight any unjustified criticism and to clarify any possible misunderstandings. Its task is of great importance as ultimately the independence relies on the support of the public and very much influenced by the media.<sup>159</sup>

#### 6.1.1.1 Is the judiciary more independent under CRA?

The research conducted by Robert Hazell<sup>160</sup> and presented in Brno in 2014 showed that the judiciary feel that the change had actually weakened their independence and that they miss the old Lord Chancellor who they described as a strong figure in the government responsible for representing the judiciary

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<sup>158</sup> DAKOLIAS, Maria. Are We There Yet?: Measuring Success of Constitutional Reform. *Vanderbilt Journal of Transitional Law*[online]. 2006, Vol. 39, Iss. 4 [cit. 2015-02-28]. Dostupné z: <http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Dakolias.pdf>

<sup>159</sup> HAZELL, Robert. *Judicial Independence and Accountability in the UK* [pdf]. 2014 [cit. 26.2.2015]. Dostupné z: [https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference Paper Judicial Independence and Accountability in the UK jun14](https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference%20Paper%20Judicial%20Independence%20and%20Accountability%20in%20the%20UK%20jun14)

<sup>160</sup> Professor of British Politics and the Constitution , Director of the Constitution Unit

to the Cabinet. According to the professor, their view is clouded as the old Lord Chancellors did not always protect the judiciary as well as they should have nor is it a post which could have survived in the 21<sup>st</sup> century, mainly because of the international pressure.

In the professor's opinion, the judiciary is much stronger in many ways. Firstly, the courts have expanded significantly under the CRA and under the Tribunals Courts and Enforcement Act 2007. All appointments made to Tribunals are made independent from the government and thanks to their incorporation the judiciary grew by more than a half to about 5,600 judges.

Secondly, the judicial appointments are no longer the responsibility of the executive (the Lord Chancellor) but one of the judiciary. Even though it is the new Judicial Appointments Commission who makes the recommendations, the whole process is heavily influenced by the judiciary via the consultation with the Lord Chief Justice. It is the judges who prepare the qualifying tests, write the references and sit on the panels that interview candidates.

The creation of the Supreme Court has also helped the independence by separating the Law Lords as part of Lords, and helped make the judiciary into a self-governing branch of government.<sup>161</sup>

#### 6.1.1.2 Judicialization of politics

The process of judicialization of politics is a phenomenon in all advanced democracies. It can be explained as, "*...the growing influence of the courts on public policy and political decision making, fuelled by the growth of international and European as well as domestic law.*" The judges have become much more publicly exposed to the media and to Parliament. A great help in the communication with the public was creating new websites for the judiciary and the Supreme Court and the use of twitter on which they explain their role or the significance of their decisions. Sometimes, when these means of communication fail to work, the judiciary use a public occasion to express an opinion that the government did not take into consideration.

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<sup>161</sup> HAZELL, Robert. *Judicial Independence and Accountability in the UK* [pdf]. 2014 [cit. 26.2.2015]. Dostupné z: [https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference\\_Paper\\_Judicial\\_Independence\\_and\\_Accountability\\_in\\_the\\_UK\\_jun14](https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference_Paper_Judicial_Independence_and_Accountability_in_the_UK_jun14)

The judiciary must now more than ever be politically aware in order to gain the public support. This may prove difficult as statistically there are fewer lawyers in the Commons and less MP's now become judges.

The judiciary may feel the need to isolate themselves from the world of politics especially now since they are a separate body but they do in fact depend on the politicians for support and resources and so they should increase their effort to become closer with the political branches. As for the politicians, they should also seek more communication with the lawyers and the courts in order to understand the role of judiciary better.<sup>162</sup>

In conclusion, the increased separation of politics from the judiciary brought by the CRA was a necessary step needed to achieve greater independence from the government<sup>163</sup>. This greater separation should not, however, be a reason for the judiciary to cease communication with other branches of power as such communication is necessary in order for the whole system of government to function.

#### 6.1.1.3 Judicial accountability

Even though judicial accountability is required it should not mean that the judges would be directly accountable to the executive or Parliament for their decision. Accountability is secured instead by public court hearings, adversarial judicial proceedings, judicial decisions which deal with the submissions presented by individuals parties of the dispute and the fact that most decisions may be appealed. On the matter of the Supreme Court, the accountability is secured by proceedings at the European Court of Human Rights.<sup>164</sup>

Another way to identify means of judicial accountability was created by Andrew Le Sueur. These are “*publication of an annual report by the court*;

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<sup>162</sup> HAZELL, Robert. *Judicial Independence and Accountability in the UK* [pdf]. 2014 [cit. 26.2.2015]. Dostupné z: [https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference\\_Paper\\_Judicial\\_Independence\\_and\\_Accountability\\_in\\_the\\_UK\\_jun14](https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference_Paper_Judicial_Independence_and_Accountability_in_the_UK_jun14)

<sup>163</sup> Was the 2005 Constitutional Reform Act Necessary?. HAWKINS. *DDO BlogSpot* [online]. 2012 [cit. 2014-09-03]. Dostupné z: <http://debateorg.blogspot.cz/2012/04/was-2005-constitutional-reform-act.html>

<sup>164</sup> BRADLEY, Anthony. Appendix 4: The new constitutional relationship between judiciary, government, and Parliament, Changes in the machinery of government affecting the Department for Constitutional Affairs and the Home Office. *Www.parliament.uk* [online]. 2007 [cit. 2015-02-25]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15111.htm>

*rights of appeal to higher courts; academic commentary on particular judgments and the conduct of courts; scrutiny of the judicial appointments process; robust and accurate reporting on judgments in the news media; and, education by the Bar and other legal professional organisations.*”<sup>165</sup>

The judiciary has become more accountable under the CRA. The judicial system is now much more transparent and the judges themselves are more accountable in the disciplinary sense as well. Annual reports are required from the Courts and Tribunals Service, the annual Judicial and Court Statistic, the Judicial Appointments Commission, the Office for Judicial Complaints, Judicial Appointments and Conduct Ombudsman, the Supreme Court and the Senior President of Tribunals. Between 2003 and 2013, 148 appearances by the judges mainly as expert witnesses have been recorded.

As for the complaints about judges coming from the litigants, the Judicial Conduct Investigation Office took place of the Judicial Correspondence Section of the Lord Chancellor’s Department. It can impose sanctions such as a dismissal or a formal warning. The National Audit Office is responsible of the investigations on the administrative conduct of the judiciary.

Other ways to secure accountability are the judicial review and in the matter of judicial appointments the Judicial and Conduct Ombudsman.

Richard Hazell considers two shortcomings of the new system. First of these being the failure of the Lord Chief Justice to provide an annual report. Second is the lack of Parliament’s involvement in the judiciary in cases of their failings. This could only be fixed by changing the Parliament’s approach and the will to scrutinise the judiciary in case they do fail in fulfilling their duties.<sup>166</sup>

### 6.1.2 Diversity in the judiciary

As mentioned above, the fact that British judiciary consisted almost exclusively of older white males from similar backgrounds was a centre

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<sup>165</sup> HORNE, Alexander. HOME AFFAIRS RESEARCH SECTION. *The Changing Constitution: A Case for Judicial Confirmation Hearings* [pdf]. London, 2010 [cit. 25.2.2015]. Dostupné z: <http://www.studyofparliament.org.uk/spg-paper-1.pdf>

<sup>166</sup> HAZELL, Robert. *Judicial Independence and Accountability in the UK* [pdf]. 2014 [cit. 26.2.2015]. Dostupné z: [https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference\\_Paper\\_Judicial\\_Independence\\_and\\_Accountability\\_in\\_the\\_UK\\_jun14](https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/Conference_Paper_Judicial_Independence_and_Accountability_in_the_UK_jun14)

of criticism. Many of them were considered biased and out-of-touch by the public.<sup>167</sup>

The CRA itself implemented Section 64, encouraging the diversity of judges. In 1998, 10% of judges were black or Asian and 10% were women<sup>168</sup>, in 2006, about 14% of judicial posts were given to black and Asian applicants, 41% to women. In 2008, after the Judicial Appointments Committee took over it was 8% to black and Asian applicants and only 34% to women. Lord Irvine, the last Lord Chancellor before the implemented changes, made sure to encourage minority candidates<sup>169</sup> but the Commission has not had a great success so far when it comes to senior judiciary. That in turn affects the applications for appointment to the Supreme Court. In 2011 out of 12 judges, only one was a woman. Since the Supreme Court decides matters important for the whole of society, it would be appropriate to have a more balanced composition.<sup>170</sup>

Concerns about the new selection system have been raised since the diversity, especially the diversity of the newly appointed senior judges, seems to have reduced. Another issue is the length of the process and the fact that currently the President and the Deputy President of the Supreme Court actually select their own successor.<sup>171</sup>

Between 2009 and 2013, nearly half of appointments made by the Committee were women but in 2014, the report by the Council of Europe showed that women were still only 25% of judges in England and Wales.<sup>172</sup> When ethnicity is considered, in 2014 2% Asian 0,8% black judges are employed

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<sup>167</sup> MAUTE, Judith L. English reforms to judicial selection: Comparative lessons for American states. *Fordham Urban Law Journal*[online]. 2006, Vol. 34, Iss. 1 [cit. 25.2.2015]. Dostupné z: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1949&context=ulj>

<sup>168</sup> DAKOLIAS, Maria. Are We There Yet?: Measuring Success of Constitutional Reform. *Vanderbilt Journal of Transitional Law*[online]. 2006, Vol. 39, Iss. 4 [cit. 2015-02-28]. Dostupné z: <http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Dakolias.pdf>

<sup>169</sup> HORNE, Alexander. HOME AFFAIRS RESEARCH SECTION. *The Changing Constitution: A Case for Judicial Confirmation Hearings* [pdf]. London, 2010 [cit. 25.2.2015]. Dostupné z: <http://www.studyofparliament.org.uk/spg-paper-1.pdf>

<sup>170</sup> LORD PHILLIPS. *Judicial Independence & Accountability: A View from the Supreme Court* [pdf]. 2011 [cit. 25.2.2015]. Dostupné z: [https://www.supremecourt.uk/docs/speech\\_110208.pdf](https://www.supremecourt.uk/docs/speech_110208.pdf)

<sup>171</sup> BENWELL a Oonagh GAY. PARLIAMENT AND CONSTITUTION CENTRE. *The Separation of Powers* [pdf]. n.d. [cit. 25.2.2015]. Dostupné z: [www.parliament.uk/briefing-papers/sn06053.pdf](http://www.parliament.uk/briefing-papers/sn06053.pdf)

<sup>172</sup> BOWCOTT, Owen. Women make up only 25% of judges in England and Wales. *Www.theguardian.com: Judiciary* [online]. 2014 [cit. 2015-02-28]. Dostupné z: <http://www.theguardian.com/law/2014/oct/09/uk-lags-europe-gender-balance-judiciary>

at Courts and 7,3% Asian and 1,8% black judges are employed at the Tribunals. All together 9,4% court and tribunal officeholders are from an ethnic minority background.<sup>173</sup>

As of 2015, the Supreme Court still only has one female.<sup>174</sup>

## 6.2 Lord Chancellor

The CRA originally intended to remove the post of Lord Chancellor altogether but it settled for removing him as the head of judiciary and the Speaker of the Lords. Under the CRA, the Lord Chancellor only needs to be a member of the Parliament but it is no longer required for him to be a member of the Lords or to have a legal career. In order to achieve a greater separation of powers many of his functions have been transferred to the Lord Chief Justice.

Even though many of his powers have been stripped away, he retained many important executive functions.

The Lord Chancellor is the Cabinet minister and the head of the newly created Ministry of Justice and a Secretary of State for Justice. As such, he is responsible for the administration and funding of courts and, as of 2007, also for the prison service. He also has a duty to respect and maintain judicial independence.<sup>175</sup>

The Select Committee on the Constitution in their 11<sup>th</sup> report stated that they do not think that the posts of Lord Chancellor and Secretary of State for Justice should be separated in future. They support the idea of Lord Chancellor who would follow the rule of law and support the judiciary with the proper authority of the post.<sup>176</sup>

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<sup>173</sup> Judicial Diversity Statistics 2014. *Www.judiciary.gov.uk* [online]. Crown Copyright, 2015 [cit. 2015-02-28]. Dostupné z: <http://www.judiciary.gov.uk/publications/judicial-diversity-statistics-2014/>

<sup>174</sup> Biographies of the Justices. *The Supreme Court* [online]. Crown Copyright, 2015 [cit. 2015-02-28]. Dostupné z: <https://www.supremecourt.uk/about/biographies-of-the-justices.html>

<sup>175</sup> LEYLAND, Peter. *Constitution of the United Kingdom: : A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 2nd Revised edition, s.198. ISBN 978-1849461603

<sup>176</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary, and Parliament: Follow-up Report* [pdf]. 2008 [cit. 3.3.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/177/177.pdf>



In the past, the position of the Lord Chancellor was the peak of a legal and political career. After gaining such a position there was no further advance in the terms of career and its holder had nothing to gain or lose by defending the judiciary in front of the executive. Now the Lord Chancellor could be seeking to gain a higher office. Since the requirements on the person of the Lord Chancellor had changed, it is also possible that the future Lord Chancellors will be rather mediocre in performing their duties. It is also questionable whether the future Lord Chancellors will be willing to defend the judiciary as vigorously as in the past.<sup>177</sup>

Section 2 of the Act also says that the Lord Chancellor may be appointed if the Prime Minister considers him to be qualified by experience. This does not prevent the Prime Minister from appointing whomever he pleases. It could also make it even more difficult for the Lord Chancellor to stand up for the judiciary as he may need to confront other ministers and disagree with them publicly.<sup>178</sup>

#### 6.2.1 Relationship between judiciary and executive

With regards to the changing post of the Lord Chancellor, the Select Committee on the Constitution in its 6<sup>th</sup> report focused on the relationship between the executive and judiciary. The Committee conducted a series of interviews with various Lords and members of the Lords. Their opinions varied but they mostly agreed that to a certain degree a bit of tension between the two branches of government is healthy or even proper.

Even though a certain amount of pressure is acceptable, means for its management must exist. The Lord Chancellor was historically a bridge between these two powers and now this responsibility is anchored under section 17 of the CRA as the need to respect the rule of law, defend the independence of the judiciary and to ensure the provision of resources for the efficient

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<sup>177</sup> MALLESON, Kate. *APPENDIX 3: The effect of the Constitutional Reform Act 2005 on the relationship between the judiciary, the executive and Parliament*. [www.parliament.uk](http://www.parliament.uk) [online]. 2007 [cit. 2014-09-03]. Dostupné z:

<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15110.htm>

<sup>178</sup> WOODHOUSE, Diana. United Kingdom: The Constitutional Reform Act 2005-defending judicial independence the English way. *International Journal of Constitutional Law* [online]. Oxford University Press and New York University School of Law, 2007, Volume 5, Number 1 [cit. 2015-03-19]. DOI: doi:10.1093/Acon/mo1039. Dostupné z: <http://www.heinonline.org/HOL/Page?handle=hein.journals/injcl5&div=11&collection=journal&set as cursor=0&men tab=srchresults&terms=United|Kingdom|The|Constitutional|Reform|Act|2005|defending|judicial|independence|the|English|way&type=matchall>

and effective support of the courts.<sup>179</sup> I have introduced the topic of funding in the previous chapter and now I will focus on the need to defend the independence of the judiciary.

The duty of the Lord Chancellor to uphold the independence is stronger than of any other minister or a member of the government. The Lord Chancellor must take steps to prevent an action contrary to the rule of law or other constitutional principle. He must defend the judiciary against any restriction of independence proposed by Government and explain to the Cabinet how such restriction could undermine it. The Lord Chancellor must also prevent any personal attacks on the judges, especially those coming from the ministers. It was the opinion of Lord Phillips that it is in fact necessary for the Lord Chancellor to be the one making public statements defending the judiciary, rather than for the Lord Chief Justice since that would risk a high profile dispute.<sup>180</sup>

#### 6.2.1.1 Craig Sweeney case

Shortly after the CRA was enacted, Lord Falconer was put to the first big test when it comes to the relationship of judiciary and executive. Unfortunately, this test resulted in a failure.

In 12 June 2006, Craig Sweeney was sentenced to life imprisonment for abducting and sexually assaulting a three-year-old girl. Judge Griffith Williams granted him a parole with a minimum of five years and stated that Sweeney would only be released in case that there was no more risk of him re-offending. The Home Secretary John Reid attacked this sentence and asked the Attorney-General, Lord Goldsmith, to re-examine the case. This was in fact a non-direct attack on the competence of Judge Williams. The spokesman of the Attorney-General stated, “The Attorney will make a decision purely on the merits of the case and not in response to political or public pressure” and criticised John Reid’s comments.

Lord Goldsmith stated that „*The judge did what he could to protect the public from this dangerous man by passing a life sentence on him. This means*

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<sup>179</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4. Part 2, Section 17. 2005*

<sup>180</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary and Parliament: Report with Evidence*. London: The Stationery Office Limited, 2007. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

*he will not be released unless and until the Parole Board is satisfied that it would be safe to do so. It will now be its responsibility to make that judgment. The judge was, however, also required to set a "minimum term", that is to say a term before the Parole Board could even consider that question. In setting that term, he acted within existing sentencing guidance and law. Given his history, Sweeney may never be released.* <sup>181</sup>

While the Attorney-General and the former Attorney-General Lord Morris of Aberavon both defended judge Griffith, the Prime Minister's spokesman, Jack Straw the Leader of the Commons as well as other MP's defended John Reid and the media branded the judiciary as deluded and out-of-touch. It wasn't until 15 June that the Lord Chancellor appeared on the BBC's Questions Time and finally defended Judge Griffith. However, at the same time he also defended John Reid stating that he did not in fact attack the judge. Lord Falconer also had to make his junior minister Vera Baird apologise for her comments on the case.

The Sweeney case showed that the relationship between the executive and judiciary was not at the time working as well as it should have mainly because of very much delayed response of the Lord Chancellor and because of the inappropriate behaviour of the ministers who are not supposed to be commenting on decisions of individual judges in such a manner. The Committee also recommended that the Prime Minister insert stronger guidelines which would set out the principles governing public commentaries of the ministers on the judiciary.<sup>182</sup>

In his letter to the Circuit judges from 19 June 2006, Lord Phillips shared with them his concern about the media coverage of the case. In his opinion, the judiciary was not supposed to be accused and expressed his sympathy for Judge Griffith. He admitted that the media should be given the opportunity to criticise judiciary but only if such criticism is accurate and objective.<sup>183</sup>

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<sup>181</sup> LORD GOLDSMITH. Sentencing: Craig Sweeney. *Www.theyworkforyou.com* [online]. 2006 [cit. 2015-03-01]. Dostupné z: <http://www.theyworkforyou.com/wms/?id=2006-07-10b.29.8>

<sup>182</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary and Parliament: Report with Evidence*. London: The Stationery Office Limited, 2007. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

<sup>183</sup> LORD PHILLIPS. Letter from the Lord Chief Justice, Lord Phillips of Worth Matravers, to Circuit judges, 19 June 2006. *Www.parliament.uk* [online]. © Parliamentary copyright 2007, 2006 [cit. 2015-03-01]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15114.htm>

### 6.3 Supreme Court

In October 2009, the Supreme Court took the place of the Appellate Committee of the House of Lords, as well as of the Judicial Committee of the Privy Council. It is completely separate from the Government and Parliament and consists of 12 Justices.

The task of the Court is to hear appeals for the most important cases concerning public for both civil and criminal cases as well the cases on devolution matters. The decisions of these cases have a great impact on the public as well as the official bodies of the government.<sup>184</sup>

The Supreme Court and the Appellate Committee are broadly similar and the Court overtook the jurisdiction of the Committee. It was not set up as a constitutional court even though it hears cases which may raise constitutional issues and it does not have the power of constitutional review. The Justices are appointed by a special selection commission with the consultation of the First Minister in Scotland, the Welsh Assembly and the Secretary of State for Northern Ireland. The Lord Chancellor then approves the commission's choice unless he decides to use his power of veto. The Justices have the title of Lord but they are not able to sit in the Lords.<sup>185</sup>

About 50% of the cases it hears are public law cases which make the independence of the Court very important as some of the cases challenge the legality of the actions of executive. The Court is responsible for maintaining balance between the executive and judiciary. The ministers have been questioning the power of judicial review and Lord Howard<sup>186</sup> stated, "*The power of the judges, as opposed to the power of elected politicians, has increased, is increasing and ought to be diminished. More and more decisions are being made by unelected, unaccountable judges, instead of accountable, elected Members of Parliament who have to answer to the electorate for what has happened*". In Lord Phillip's view, this is a failure to understand the judiciary.

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<sup>184</sup> The Supreme Court. *Www.supremecourt.uk* [online]. Crown Copyright, 2015 [cit. 2015-03-01]. Dostupné z: <https://www.supremecourt.uk/about/the-supreme-court.html>

<sup>185</sup> LEYLAND, Peter. *Constitution of the United Kingdom: : A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 2nd Revised edition, s.202-203. ISBN 978-1849461603

<sup>186</sup> Former leader of the Conservative Party

The independence of the Court must be balanced by the accountability of the judges. Under the CRA, a new disciplinary system has been implemented and no sanction can be imposed without the agreement of the Lord Chancellor and the Lord Chief Justice.

The decisions of Supreme Court are not subject to appeal within the UK but an appeal is possible to the Strasbourg Court.<sup>187</sup>

### 6.3.1 Parliamentary sovereignty and the Supreme Court

In 2004, the Government introduced new legislation proposing the exclusion of the judiciary from deciding certain appeal cases concerning asylum and immigration. The senior judges and academics protested and suggested that if that came to pass, they would be entitled, for the first time, to ignore an Act of Parliament and questioned the purpose of courts which would be effectively inaccessible under this legislation. In 2005, another case questioned the sovereignty. The Appellate Committee decided that even though the Hunting Act 2004 was a valid statute under the 1949 Parliament Act it also concluded that the Parliament's power to make laws was limited in case it attempts to abolish judicial review and stated that "*the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a compliant House of Commons cannot abolish.*"<sup>188</sup>

This rather important judgment raises a question whether there is a transition from the doctrine of parliamentary sovereignty to the doctrine of constitutional supremacy.

The constitutionalization of public law, especially under the HRA and the devolved legislation, is also raising questions about the role of the higher profile judiciary.<sup>189</sup>

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<sup>187</sup> LORD PHILLIPS. *Judicial Independence & Accountability: A View from the Supreme Court* [pdf]. 2011 [cit. 25.2.2015]. Dostupné z: [https://www.supremecourt.uk/docs/speech\\_110208.pdf](https://www.supremecourt.uk/docs/speech_110208.pdf)

<sup>188</sup> MALLESON, Kate. *APPENDIX 3: The effect of the Constitutional Reform Act 2005 on the relationship between the judiciary, the executive and Parliament*. Wwww.parliament.uk [online]. 2007 [cit. 2014-09-03]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15110.htm>

<sup>189</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)*. Oxford: Hart Publishing, 2012, 2nd Revised edition, s.239. ISBN 978-1849461603

#### 6.4 Ministry of Justice

On 9 May 2007, the Ministry of Justice was created and it took over some of the responsibilities of the Home Office and the entire Department for Constitutional Affairs. The responsibilities of the MoJ include criminal law and sentencing, the prison system, probation, and reducing re-offending.

Even though the agenda to create MoJ has been around since 2004, the creation itself took the judiciary by surprise as the leak in *The Sunday Telegraph* on 21 January 2007 was the first acknowledgment on the part of the Government that the Ministry was about to be created. According to Professor Bradley, this was not a long term policy of the Government but rather a reaction to the problems of the Home Office. Both the Select Committee and the judiciary felt it was once again reckless of the Government not to inform them of this change earlier on. As with the CRA, the MoJ would have an impact on the functioning of the judiciary which the Government failed to acknowledge.

Questions arose about possible conflict between the Lord Chancellor's duty to defend the independent judiciary, and the duties he would perform as the Secretary of State for justice. Further questions asked would include if the existence of MoJ would influence the validity of the Concordat, if constitutional affairs will get the attention they need and whether there would be enough money in the budget for the courts. In case these issues were addressed, the judiciary stated that they would have no objections to the Ministry.

As a response, Lord Falconer, with the support of the judiciary, put together a list of parameters for the working group which was charged with dealing with these issues. These parameters included no changes to legislation, the Concordat, executive agency status of the Her Majesty's Court Service, nor any ring-fencing of HMCS budget, and lastly that it would be for the Lord Chancellor to decide on budgetary issues. The working group continued to reach an agreement with the MoJ even after it came into being. The Lord Chief Justice even suggested he would exercise his powers under section 5 of the CRA - (1) the chief justice of any part of the United Kingdom may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise

to the administration of justice, in that part of the United Kingdom.<sup>190</sup> He stated that the judiciary concluded that there should be a “*fundamental review of the position in the light of the creation of the Ministry of Justice*”. Lord Falconer however did not support this view.<sup>191</sup>

Jack Straw, the new Lord Chancellor, and the Lord Chief justice reached an agreement on the funding of courts in January 2008.

The Government reacted to the recommendation of the Select Committee that they should always consider the significance of the constitutional implications by saying that they did not perceive the establishment of the MoJ, unlike the CRA, as having “significant” implications. The Government also agreed on introducing safeguards which would protect the independence of judiciary, ensured the Committee and the judiciary that the constitutional affairs would remain a high priority for the Ministry and agreed on the involvement of the judiciary in the process of making a budget for the courts.<sup>192</sup>

#### 6.5 Rule of law, separation of powers and parliamentary sovereignty under CRA

The principle of the rule of law is, under the CRA, for the first time included under a statute and it is the obligation of the Lord Chancellor and the judiciary to uphold it. By the international standards, the government and the society should also follow the principle to achieve a functioning democratic state.

Even though the Parliament is still sovereign in the UK, the judiciary can limit its sovereignty in judicial review since the clauses which attempt to expressly prevent the courts from fulfilling their duties, such as in the Hunting Act, would be ineffective. Not only existing Acts but also the future ones are subjected to the rule of law. As showed in chapter 5.3.1. when the Government withdrew an Act which would have effectively limit the access to courts.

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<sup>190</sup> United Kingdom. Constitutional Reform Act 2005. In: *Chapter 4*. Part 2, section 5(1). 2005

<sup>191</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary, and Parliament: Report with Evidence* [pdf]. London: The Stationery Office Limited, 2007 [cit. 25.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

<sup>192</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary, and Parliament: Follow-up Report* [pdf]. 2008 [cit. 3.3.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/177/177.pdf>

The balance between the principles governing the British Constitution has changed greatly during the era of the constitutional reforms. The sovereignty of Parliament has been for a long time the fundamental and the most important principle of the Constitution but now the power of the rule of law, enhanced by the judicial independence, has increased. The CRA (and the HRA) both imposed limitations upon Parliament which now has to comply with the rule of law.

The CRA was designed to ensure a more formal separation of powers by altering the position of the Lord Chancellor and creation of the Supreme Court and so it decreased the traditional overlapping powers. The relationships between the powers, which were previously governed by conventions, are now governed by the Act itself.

The separation of powers, especially between the executive and the judiciary, was bound to happen since the judiciary demanded a further separation and it followed the trend set out by northern Europe to give the judges more responsibility and control for managing the service of courts.<sup>193</sup> While the rule of law has been strengthened by the CRA and HRA, the need for greater separation of powers is, according to professor Bogdanor, the central theme of the reforms and the British Constitution is now characterized not by the parliamentary sovereignty but by a separation of powers. The doctrine of parliamentary sovereignty is growing weaker but for now remains.

*“Britain is in the process of becoming a constitutional state one marked by checks and balances between the different organs of government and a state in which the judiciary now has a crucial role to play in the determination of individual rights and in determining the scope of government action. It is the beginning of the transformation of Britain into a constitutional state that forms the deepest significance of the era of constitutional reform.”*<sup>194</sup>

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<sup>193</sup> SELECT COMMITTEE ON THE CONSTITUTION. *Relations between the executive, the judiciary, and Parliament: Report with Evidence* [pdf]. London: The Stationery Office Limited, 2007 [cit. 25.2.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

<sup>194</sup> BOGDANOR, Vernon. *The New British Constitution*. Oxford: Hart Publishing, 2009, s. 289. ISBN 978-1841136714.



## 7 Future of the Constitution of the United Kingdom

This long process of modernizing the democratic principles and reforms has not only changed the British Constitution but it has also created a base for further reforms to take place. The CRA was amended by the Crime and Courts Act 2013, which changed the position of the judiciary once again, and the Scottish Referendum in 2014 is of great significance for the future constitutional development of the UK.

The Politics and Constitutional Reform Select Committee of the House of Lords has also been publishing research regarding codifying the Constitution. According to the Fixed-term Parliaments Act 2011 there is also to be a General election to the House of Commons on 7 May 2015.

### 7.1 Acts of constitutional importance enacted after the CRA

Since 2005 when the CRA was enacted more bills of constitutional importance were adapted.

#### *Constitutional Reform and Governance Act 2010*

The Act received Royal Assent on 8 April 2010 after the Bill went through extensive amendments in Parliament. The Act is important mainly because it established statutory basis for the civil service. It also introduced various provisions relating to the judiciary and the option to remove the Prime Minister from the process of appointing the Justices of the Supreme Court. The Bill originally included provisions which were supposed to reform the House of Lords, such as the end of by-elections of hereditary peers or provisions to allow the suspension, resignation, or expulsion of the Lords, but those were removed in the process.<sup>195</sup>

A new power for the Parliament was also introduced in part 2 of the Act under which Parliament now also has the right to control the ratification of the treaties for the United Kingdom. This change increased the transparency

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<sup>195</sup> Constitutional Reform and Governance Act 2010. *Www.parliament.uk* [online]. © Parliamentary Copyright, n.d. [cit. 2015-03-06].  
Dostupné z: <http://services.parliament.uk/bills/2009-10/constitutionalreformandgovernance.html>

of the ratification process and effectively replaced the Ponsonby Rule a convention which previously governed the ratification of treaties.<sup>196</sup>

#### *The Fixed-term Parliaments Act 2011*

This Act has an impact on the parliamentary elections in the UK as well as the devolved institutions. It sets the times for the elections to take place on 7 May 2015, 5 May 2016 for the Scottish Parliament and the National Assembly for Wales and afterwards every fifth year on first Thursday in May. This will not apply in case the whole House agrees on an earlier date or in case that Commons pass the motion of no confidence and no alternative, government is created within 14 days.<sup>197</sup>

#### *Succession to the Crown Act 2013*

This very short Act only comprises of 5 sections. The Act removed the dependence of the succession on gender and the disqualification of a person who married a person of the Roman Catholic faith. The person who is one of the next six persons in the line of succession and marries without the consent of Her Majesty will be disqualified from the line of succession.<sup>198</sup>

#### *Crime and Courts Act 2013*

In 2012, the Crime and Courts Bill introduced amendments in its Schedule 13 which influenced the CRA. These amendments were supposed to remove whole sections on judicial appointments procedure and introduced measures to assist in increasing of the diversity of the judiciary.<sup>199</sup>

The Bill also proposed the option of the Lord Chancellor to sit as a member of the Judicial Appointments Commission and influence

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<sup>196</sup> BARRETT, Jill. THE UNITED KINGDOM AND PARLIAMENTARY SCRUTINY OF TREATIES: RECENT REFORMS. *International and Comparative Law Quarterly* [online]. 2011, roč. 2011, vol 60 [cit. 2015-03-19]. DOI: 10.1017/S0020589310000734. Dostupné z: <http://web.a.ebscohost.com/ehost/detail/detail?vid=3&sid=a229f682-5f2f-40ee-8d11-f1dece205f56%40sessionmgr4001&hid=4204&bdata=Jmxhbm9Y3Mmc2l0ZT1laG9zdC1saXZl#db=a9h&AN=57593536>

<sup>197</sup> Fixed-term Parliaments Act 2011: Commons Library Standard Note. *www.parliament.uk* [online]. © Parliamentary Copyright, 2014 [cit. 2015-03-06]. Dostupné z: <http://www.parliament.uk/business/publications/research/briefing-papers/SN06111/fixedterm-parliaments-act-2011>

<sup>198</sup> United Kingdom. Succession to the Crown Act 2013. In: *Chapter 20*. Section 1-5. 2013.

<sup>199</sup> Constitutional Reform Act 2005: Amendments on judicial appointments proposed 2012. *Thinking Legally* [online]. 2012 [cit. 2014-09-03]. Dostupné z: <http://thinkinglegally.wordpress.com/2012/05/25/constitutional-reform-act-2005-amendments-judicial-appointments-proposed-2012/>

the appointments of the president of the Supreme Court and the Lord Chief Justice. This was opposed by Lord Pannick who proposed amendments to the Bill. Lord Pannick was against the idea of the Lord Chancellor's further involvement in the process of judicial appointments. According to the Bill, the Lord Chancellor would be able to sit as a member of the commission for the Lord Chief Justice and the president of the Supreme Court. Lord Pannick stressed the importance of the separation of powers and suggested that this change would effectively go back to the state prior to enactment of the CRA. The involvement of the Lord Chancellor during the appointment process could undermine the authority of the president of the Supreme Court or the Lord Chief Justice in the eyes of the public as they could be seen as the Lord Chancellor's man or woman.<sup>200</sup>

The Act attempted to increase the number of women in the judiciary but as shown in the chapter about diversity in the judiciary, the impact was not such as was hoped for. Another way of introducing the diversity in judiciary was the proposal of the Act to insert a new section into the CRA. The CRA says that the appointments of judges should be made on merit. In case there would be two candidates of equal merit, the candidate who would increase the diversity is to be chosen. The composition of the Supreme Court was also altered as the Act states that no more than the equivalent of 12 judges would sit at the Court (previously 12 judges exactly).<sup>201</sup>

## 7.2 Codifying constitution

Since the recent development of the British Constitution caused significant parts of it to be codified and permanently undermined the doctrine of sovereignty of Parliament, not very many reasons remain for the Constitution to stay unwritten. The process of the reforms is also not final and many institutions, such as the House of Lords, will still need to be changed. The on-going process of the constitutional change could also be considered the constitutional moment leading to enactment of a new constitution.

Professor Martin Loughlin compares the process of the change to an old building which is constantly being renovated in different and incoherent styles.

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<sup>200</sup> Lord Pannick opposes plan for Lord Chancellor to sit on judicial appointments panels. *Thinking Legally* [online]. 2012 [cit. 2014-09-03]. Dostupné z: <https://thinkinglegally.wordpress.com/tag/constitutional-reform-act-2005/>

<sup>201</sup> United Kingdom. Crime and Courts Act 2013. In: *Chapter 22*. Schedule 13. 2013.

In order to start anew there would need to be an authority with a clear vision as to what is to be achieved. In Loughlin's opinion, the people responsible for drafting new constitution should be lawyers, while in professor Bogdanor's view it would be difficult to find someone deemed acceptable to all the branches of government.

Both professors, however, agree that the new constitution should be written down, include constitutional principles, and be protected by law.

In 2014, the House of Commons published a report called *Constitutional role of the judiciary if there were a codified constitution* in which they concentrated on different models of codification and the changes in judiciary this would cause. The models they considered were the constitutional code, consolidation act and a fully written constitution. With consultations from Lord Phillips and many professors of law, they came to conclusion that the judiciary's role would definitely change but the change itself is difficult to assess since there is no definition of the current role of the judiciary.<sup>202</sup>

In 2014 a New Magna Carta paper was published as well by the Political and Constitutional Reform Select Committee of Commons as another report on the theme of whether to have a codified constitution. The Committee also asked the public to consider these papers and include their opinion on whether the UK needs codified constitution and which of the presented options would be the best as well as what should be included in such constitution.<sup>203</sup>

In my opinion, the fact that the Commons published this report and discussed the matter in length must only mean that codifying constitution is being seriously considered. The opinions of various professors of law I introduced previously also support this claim.

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<sup>202</sup> POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE. *Constitutional role of the judiciary if there were a codified constitution* [pdf]. London: The Stationery Office Limited, 2014 [cit. 6.3.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/802/802.pdf>

<sup>203</sup> POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE. *A new Magna Carta?* [pdf]. London: The Stationery Office Limited, 2014 [cit. 6.3.2015]. Dostupné z: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/463/463.pdf>

### 7.3 Scottish Referendum

The Scottish Independence Referendum Act 2013 was passed after an agreement between the Scottish and the UK governments was reached and set the referendum took place on 18 September 2014. The referendum divided Scotland and the UK and drew attention to constitutional issues and the constitutional development for the UK. Even though the referendum was not successful, new powers and resources were promised to the Scottish Parliament by the Westminster. Debates following the referendum also brought up the need to involve the public more in the politics.<sup>204</sup>

After the devolution of Scotland, Northern Ireland and Wales, a debate in the Commons about the possible impact and options for different voting systems took place. Since the devolved Parliament and Assemblies now had the power to legislate in certain areas, the proposals included reduction of Scottish, Welsh, and Northern Irish representation at Westminster and the option to limit the Scottish, Welsh and Northern Ireland MP's to only vote on matters which were not transferred to their respective Parliament or Assemblies. In 2013, the McKay Commission considered governing arrangements for England after the devolution. The West Lothian Question deals with the asymmetric devolution. Since England has no devolved body, there is an asymmetry where Scottish and Irish MP's can vote at Westminster whereas the English MP's have no say in the devolved bodies. The Commission came up with a constitutional convention which would affect the voting in Parliament in such a way that if the proposed legislation were to affect mainly England only the majority of English voters would be sufficient to pass it.<sup>205</sup>

The English votes for English Laws question came up again on 19 September 2014 only a day after the Scottish referendum, when David Cameron

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<sup>204</sup> The debate on the future of the British constitution must involve civil society. TIZARD, John. *www.democraticaudit.com* [online]. © 2015 Democratic Audit UK, 2014 [cit. 2015-03-06]. Dostupné z: <http://www.democraticaudit.com/?p=8367>

<sup>205</sup> OONAGH, Gay. *The McKay Commission: Report of the Commission on the consequences of devolution for the House of Commons* [pdf]. 2014 [cit. 6.3.2015]. Dostupné z: <http://www.parliament.uk/business/publications/research/briefing-papers/SN06821/the-mckay-commission-report-of-the-commission-on-the-consequences-of-devolution-for-the-house-of-commons>

declared, "*The question of English votes for English laws - the so-called West Lothian question - requires a decisive answer.*"<sup>206</sup>

Gordon Brown<sup>207</sup> responded to the proposal of limiting the power of Scottish MP's by presenting a petition to the House of Commons. This petition was aimed against the Prime Minister's statement and demanded that the vows made to Scotland prior to the referendum be kept. He argued that there is no country in the world with a Parliament with two classes of representatives, one of which would be excluded from voting.<sup>208</sup>

The Smith Commission was set up by the Prime Minister and led by Lord Smith in cooperation with the five parties represented in the Scottish Parliament to reach an agreement about new devolved powers for Scotland. Lord Smith also asked civic institutions and groups as well as the public to suggest proposals and their views which the Commission would take into consideration in its negotiations. The Commission put together an Agreement with three key pillars; providing for a durable but responsible constitutional settlement for the governance of Scotland; delivering prosperity, a healthy economy, jobs, and social justice; strengthening the financial responsibility of the Scottish Parliament.<sup>209</sup>

The draft clauses of the Agreement were published in January 2015 by the Government. A new Scotland Bill will come to force in 2015 and 2016 and will ensure that the Scottish Parliament will be funded mostly by Scotland which will increase its accountability. The Scottish Parliament will also have the most powers of all devolved parliaments in the world when it comes to taxes. The Sewel Convention, which was until now governing the practice of the UK Parliament to respect the power of the Scottish Parliament, will now become a statute. The Scottish Parliament and Government will become permanent parts

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<sup>206</sup> MORRISON, David. The West Lothian Question: The McKay Commission's Answer. *Www.huffingtonpost.co.uk* [online]. 2014 [cit. 2015-03-06]. Dostupné z: [http://www.huffingtonpost.co.uk/david-morrison/west-lothian-question\\_b\\_5935992.html](http://www.huffingtonpost.co.uk/david-morrison/west-lothian-question_b_5935992.html)

<sup>207</sup> Labour Party politician, Prime Minister 2007-2010

<sup>208</sup> House of Commons Debates 16 October 2014: UK Government: Scotland. *Www.parliament.uk* [online]. Volume No. 586, Part No. 43. © Parliamentary Copyright, 2014 [cit. 2015-03-06]. Dostupné z: <http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm141016/debtext/141016-0004.htm#14101687000003>

<sup>209</sup> *The Smith Commission: Report of the Smith Commission for further devolution of powers to the Scottish Parliament* [pdf]. Edinburgh: Published by The Smith Commission, 2014 [cit. 6.3.2015]. Dostupné z: [https://www.smith-commission.scot/wp-content/uploads/2014/11/The\\_Smith\\_Commission\\_Report-1.pdf](https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf)

of the constitutional arrangements of the UK. The Scottish Parliament will also have powers to alter its own internal arrangements and the internal arrangements of the Scottish Government.<sup>210</sup>

Even after this report has been published, Gordon Brown remains certain that in case the UK is going to fall apart, as many Scottish people believe it will, it will not be because of the referendum itself but because of the proposed solution of the West Lothian Question.<sup>211</sup>

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<sup>210</sup> HM GOVERNMENT. *Scotland in the United Kingdom: An enduring settlement* [pdf]. © Crown copyright 2015, 2015 [cit. 6.3.2015]. Dostupné z: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397560/Scotland\\_Settlement\\_print\\_ready.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397560/Scotland_Settlement_print_ready.pdf)

<sup>211</sup> WATT, Nicholas. Gordon Brown warns David Cameron he is in danger of blowing UK apart. *www.theguardian.com* [online]. © 2015 Guardian News and Media Limited, 2015 [cit. 2015-03-06]. Dostupné z: <http://www.theguardian.com/politics/2015/feb/03/gordon-brown-warns-david-cameron-danger-blowing-uk-apart>

## 8 Conclusion

The traditional British Constitution is a product of history and it has been evolving for many centuries. It is an unwritten constitution comprising of many sources including legal as well as non-legal. Even though it is not written down, it does comply with the description of a constitution as the main law of the state. The constitutional change has been most rapid and influential since 1997 when the Labour Party won the election. Since then, numerous reforms have taken place including the enacting of the Human Rights Act in 1998 and devolving powers to Scotland, Northern Ireland, and Wales. In 2003, without previous discussion with the judiciary or the Parliament, the Government introduced the Constitutional Reform Bill which proposed a great amount of changes including the abolishment of the post of the Lord Chancellor, creation of the Judicial Appointments Committee and the Supreme Court. The Bill was amended greatly after a debate in the Parliament. The CRA sought to address issues regarding the unclear separation of powers. It brought essential changes to the relationship between the executive, legislative and the judiciary. The independence of the judiciary was increased greatly by removing the influence of the executive on the process of judicial appointments and modifying the post of the Lord Chancellor.

The position of the Lord Chancellor has been greatly reformed leaving the new Lord Chancellors, who no longer need to be lawyers nor members of the House of Lords, with limited powers. The Lord Chief Justice gained powers as the new head of the judiciary. The creation of the Supreme Court alternated the entire system of courts in the UK and replaced the highest appellate court – the Appellate Committee of the House of Lords and its Law Lords - with a body separated from Parliament. The judicial appointments are now in the hands of the Judicial Appointments Committee, an independent body which is attempting to choose judges solely on the basis of merit whilst also increasing their diversity.

The balance of the constitutional principles was altered and the previously fundamental principle of the sovereignty of Parliament is now being overpowered by the separation of powers, itself greatly strengthened by the CRA, and the rule of law which is now for the first time included in a statute. As a result,



the Constitution does conform to the European standards more than it did previously.

The CRA was amended in 2013 by the Crime and Courts Act which changed the appointment of judges and set the number of the Justices of the Supreme Court to 12.

The institution which is yet to be adjusted is the House of Lords as the alteration of its composition, which has been planned for many years, is not yet finished.

The future of the British Constitution will be, in my opinion, very much influenced by the Scottish Referendum which forced many questions of the constitutional future to be discussed. The English votes for English laws question will surely be discussed in more length as it is highly controversial and angered many Scottish, Irish, and Welsh MP's. Sinn Fein, who have also been attempting to gain independence for Northern Ireland will, in all likelihood, use the Scottish Referendum and the Scotland Act to pursue its own agenda. I also agree with the opinion of the Scottish people that the United Kingdom may fall apart in the near future.

Parliament has also conducted research on the possibility of codifying the constitution and considered three ways of doing so. Even though it claims that such change is not yet being planned, it seems to me that the simple fact these options are being explored could mean that, in the near future, the British Constitution will be wholly codified. On the other hand, the reform of the House of Lords has been planned and discussed thoroughly and has yet to pass so it is entirely possible that the codifying of the Constitution could take a very long time or not happen at all.

The focus of this thesis was to introduce the impact the CRA had on the British Constitution. By analysing the relevant legal literature I showed the changes the Act brought to the British legal system. I focused mainly on the development of the post of the Lord Chancellor, creation of the Supreme Court and the Judicial Appointments Commission as well as on the shift of the power of the doctrines guiding the British Constitution. I offered a view of the possible future scenarios for the British Constitution while taking

into account the Scottish referendum and the debate it had caused in the United Kingdom.

## 9 Resumé

This thesis focuses on the impact the Constitutional Reform Act 2005 had on the British Constitution. The author uses the method of an analysis of legal literature to describe the impact.

The thesis comprises of eight chapters. In the first chapters the author introduces the unwritten flexible British Constitution, its history, sources and ruling principles – the separation of powers, parliamentary sovereignty and the rule of law.

The fourth chapter summarizes the development of the Constitution from 1997 when the Labour Party won the election which ultimately led to the proposal of the Constitutional Reform Bill in 2003. It describes the circumstances under which the Bill was introduced to the judiciary and the difficult and lengthy process which the Bill had undergone in Parliament.

The two consecutive chapters are concerned with the description of the Act itself and the changes it brought to the legal system of the United Kingdom. The author mainly describes the changes to the post of the Lord Chancellor, the creation of the Supreme Court and the Judicial Appointments Commission. The modification of the principles of the separation of powers, parliamentary sovereignty and the rule of law are also described here.

The final chapter offers the possible future scenarios for the British Constitution in the light of the recent Scottish Referendum and the research regarding codified constitutions conducted by the Parliament.

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