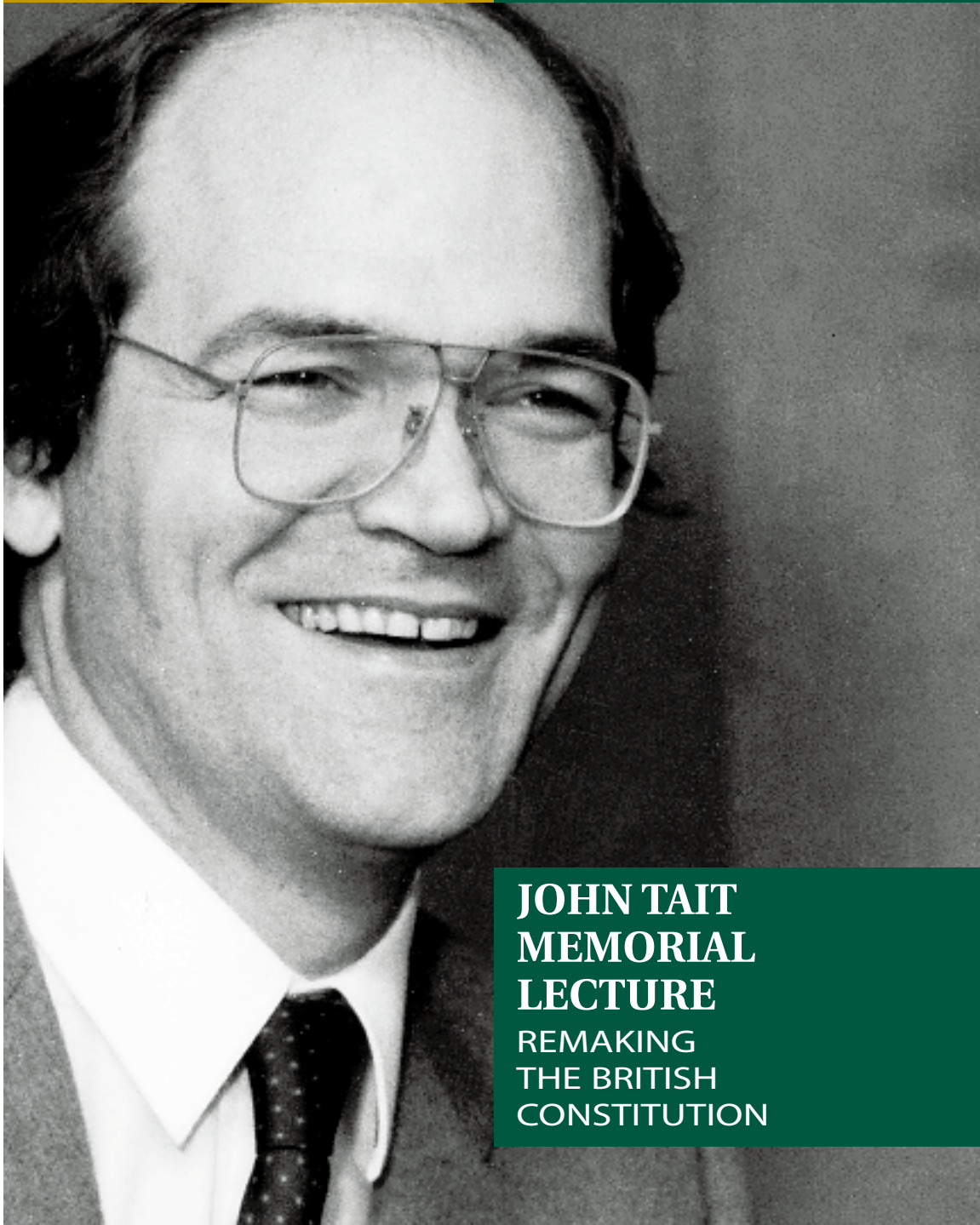


S E R V I N G C A N A D I A N S



**JOHN TAIT  
MEMORIAL  
LECTURE**  
REMAKING  
THE BRITISH  
CONSTITUTION

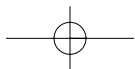
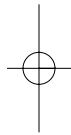
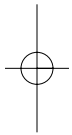


Department of Justice  
Canada

Ministère de la Justice  
Canada



**McGill**



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**John Tait Memorial Lecture**

**Remaking the  
British Constitution**

A Special Lecture

delivered before

The Faculty of Law  
McGill University  
Montreal, Quebec

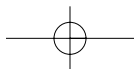
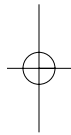
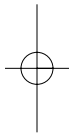
Thursday, October 5<sup>th</sup>, 2000

by

**Dr. Geoffrey Marshall, F.B.A.**

Emeritus Fellow of The Queen's College, Oxford

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Remaking the British Constitution

Stephen Scott

My lords, ladies, and gentlemen, my name is Stephen Scott and I teach in this Faculty. On behalf of the Department of Justice, represented this evening by the Deputy Minister, Morris Rosenberg, and the Faculty of Law at McGill University, represented by the Dean, Peter Leuprecht, I bid you a warm welcome.

At certain celebratory dinners of The Queen's College, Oxford, where our lecturer, Geoffrey Marshall, has served for more than forty years, there is a ceremony in which an ancient Saxon drinking horn, filled with ale and mead, is passed from hand to hand. Each one, before drinking, says to his neighbour:

*"In memoriam absentium. In salutem praesentium."*

In other words, "In memory of those who are absent, and in salutation of those who are present." At this first lecture in memory of our distinguished alumnus, John C. Tait, some of whose family are with us tonight, we are particularly fortunate to have with us the present Deputy Minister of Justice to say a few words about John Tait's life and work. Mr. Rosenberg.

McGill University  
Oct. 5, 2000

**PRINCIPALS:**

**Moderator:** Stephen Scott, Professor, Law Faculty, McGill University  
Morris Rosenberg, Deputy Minister, Department of Justice  
Peter Leuprecht, Dean, Law Faculty, McGill University  
**Lecturer:** Dr. Geoffrey Marshall, Fellow of the British Academy

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Morris Rosenberg

JOHN TAIT MEMORIAL LECTURE

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Thank you, Professor Scott.

Members of the judiciary, colleagues of John's, ladies and gentlemen, I would like to welcome you to the first John Tait Memorial Lecture. I would especially like to welcome John's wife, Sonia Plourde; his parents, Jack and Eleanor Tait; and his brother, David.

Before Professor Scott introduces our very distinguished speaker, I would like to say a few words about how this event came about and what it represents.

This first lecture, co-sponsored by the federal Department of Justice and McGill's Faculty of Law, is in memory of John Tait, who was a friend, a colleague, and a mentor to many of you.

Let me tell you a little bit about John's background.

John Tait was a distinguished scholar and public servant. He was a graduate of the McGill Law School, as well as of Princeton and Oxford. So it is fitting that two of these three institutions are involved in this first lecture of the series that bears his name.

John came from a distinguished family of public servants who combine a deep love of Canada with a devotion to the use of reason in administering the affairs of state. His ability to rigorously assess the merits and weaknesses of public policies allowed him to make outstanding contributions to many important government files, including the federal Access to Information and Privacy legislation, the *Official Languages Act*, and the early stages of the *Canadian Charter of Rights and Freedoms* and its application to the Government of Canada.

John Tait earned the respect of the Aboriginal community during his term at the Department of Indian Affairs and

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Northern Development from 1981 to 1983. He worked in close collaboration with the James Bay Cree during a time marked by distrust and lack of respect, and John brought with him a sense of values and renewed respect.

As Deputy Minister of Justice from 1988 to 1994, John Tait was a huge presence in the Department, in the government as a whole, and in Canada's legal community. He was involved in many of the key issues of the day, ranging from relations with First Nations to rethinking the government's approach on environmental assessment, and to efforts to modernize the constitutional framework within which the Canadian federation operates — to give you a small sample of the issues with which he was involved.

John Tait had many excellent qualities, including a great commitment to the principles and to the practical applications of public law, a great affection for Quebec and for Montreal, where he grew up, and a passion for his country. So we thought it would be appropriate that McGill University should organize this lecture. When we discussed it with Peter Leuprecht, he accepted our suggestion quickly and generously, and I would like to thank him and his colleagues, particularly Professor Stephen Scott, for their cooperation.

I'm very happy, as John would have been, to see so many people turn out for this evening's lecture. I look forward to a stimulating talk and a lively discussion afterwards. No doubt, during the proceedings, many of us will think of John and perhaps even feel his presence among us, listening attentively, making illegible notes to himself, and asking penetrating questions.

Thank you.

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Stephen Scott

JOHN TAIT MEMORIAL LECTURE

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Thank you, Mr. Deputy Minister.

A native of the north of England, Geoffrey Marshall was educated at Arnold School, Blackpool, and at Manchester University, and earned his PhD at Glasgow. A Research Fellowship at Nuffield College brought him to Oxford in 1955, where he has remained ever since – first as a Fellow and tutor in politics at The Queen’s College from 1957 to 1993, and thereafter as Provost of the College, its head of house, until August of 1999. He is now an Emeritus Fellow of the College and, since 1971, a Fellow of the British Academy.

Tonight, however, we do not welcome Dr. Marshall only as a distinguished scholar from abroad. He is also a former member of this Faculty, having spent the Fall term of 1977-78 with us, teaching Statutory Interpretation and Legal Theory. I must resist almost entirely the temptation of enumerating our guest’s many talents and distinctions. You may care to know, however, that he was for a time a soccer player on a Blackpool team. He also knew the rough-and-tumble of politics on the Oxford City Council, from 1965 to 1974, as a councillor chosen by the University. In 1970-71, he was the last-ever University Sheriff of the City of Oxford before, as he puts it, University councillors were abolished, in 1974, as “a danger to democracy.” As Sheriff, it was his annual duty to round up horses and cattle illegally grazing in the Port Meadow. As he explains, “The Sheriff traditionally led a posse of horsemen. Not having a posse or a horse, I think I used a bicycle.” You will all agree that this is a first-class example of practical initiative and economy in hands-on government.

Author of many scholarly works, mainly on constitutional



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theory, law, and practice, Dr. Marshall has also penned occasional satirical and comic sketches. His writing is characterized by subtle humour, perceptiveness, clarity, and lightness of touch. Sometimes, his satirical essays amuse readers of scholarly journals like the *McGill Law Journal* where, in 1978, his piece "Cultural Sovereignty in the U.K.: A Glance Ahead" imagined a Scottish *Official Garment Act*, modelled on Quebec's *Charter of the French Language*. Tonight, he will bring us up to date with a *tour d'horizon* on constitutional developments in the United Kingdom.

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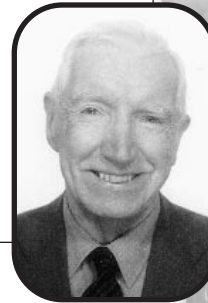
JOHN TAIT MEMORIAL LECTURE

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## Remaking the British Constitution

## Re-Making the British Constitution

### Dr. Geoffrey Marshall



When the *British North America Act* said in 1867 that Canada should have a constitution similar in principle to that of the United Kingdom, what it no doubt intended was that its executive government and parliamentary system should be based on what used to be called, not very precisely, the Westminster model. The Westminster model, though, is not what it was. It has been undergoing a process of significant and accelerating change from some point in time way back in the twentieth century, which for convenience we may as well call 1972.

I should like to say something about this process and perhaps to consider first of all why it took so long. A part of the answer is that neither of the two major political parties has been very radical in its attitudes to constitutional reform. The Labour Party has had a strong institutionally traditionalist wing, and the Conservative Party, for some considerable time, had Mrs. Margaret Thatcher. Between the two of them, the Labour Party and Mrs. Thatcher were irresistible. I do not wish to say that Mrs. Thatcher was opposed to all institutional change. She forced radical changes on local government and also on the civil service, hiving off a large part of its activity into semi-detached executive agencies. She also adjusted the British cabinet system and the mores of collective ministerial responsibility to fit her own conception of governance. Indeed, some who attended her first cabinet meeting have said that it put them in mind of the Duke of Wellington meeting his cabinet colleagues. ("It was an extraordinary affair," the Duke said. "I gave them their orders and they wanted to stay and discuss them.") At one time, commentators were

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inclined to say that the notion of government by prime minister was more natural to the deferential philosophy of the Conservative Party than to the pluralist factionalism to be expected of Labour. But who can believe that now? The British cabinet system in its traditional shape appears to have taken on a similar form, whichever party is in power. Of course, it is true — as the mortality of Mrs. Thatcher teaches us — that, in a parliamentary system, prime ministers can survive only with the support of their party. Nevertheless, in terms of operational style, both parties have shown themselves willing to tolerate and support a system of decision-making that it is fair to call presidential and that appears in unabashed form in the Blair administration. One of its manifestations is a form of bilateralism in ministerial dealings. A senior cabinet minister has described it in managerial terms. “The Prime Minister is operating as chief executive of a number of subsidiary companies and you are called in to account for yourself.”<sup>1</sup> Although this is a change of constitutional significance, I do not think that the suppression of collective decision-making is a legitimate matter for constitutional complaint or a violation of the doctrine of ministerial responsibility. Provided that it is clear to Parliament which ministers are answerable for which part of the government’s program, it is not required that those who answer should be the designers or initiators of the relevant policies.

It was clear from the beginning that the legislative programme of the Blair administration would be dominated

<sup>1</sup> Mr. Jack Straw (Home Secretary), quoted in Peter Hennessy, *The Prime Minister: The Office and its Holders since 1945* (2000), at p. 523.

by constitutional issues. In its first year in office, twelve constitutional bills were introduced and more have followed. They include devolution of powers to Scotland, Wales and Northern Ireland, reform of the House of Lords, changes affecting electoral law and political parties, and enactment of a *Human Rights Act* intended to incorporate the *European Convention on Human Rights*. Taken together, they represent an attempt to remodel the constitutional landscape of the United Kingdom, changing its unitary nature, the character of its legislature, the relations between the branches of government, and some of the basic elements of its legal system. We should not suppose, however, that constitutional change began in 1997. The current legislation is only the latest stage in a process of transformation that has other sources and inspirations than Mr. Blair and the new-model Labour Party.

### The Commonwealth Influence

One such influence, in many ways unnoticed, has been the Commonwealth. In the first half of the twentieth century, the trade in political institutions was mainly thought of in terms of the export of the Westminster model. In the second half of the century there has been a significant inspirational flow in the opposite direction. Think, for example, of the three key aspects of the British system that were set out in Professor A.V. Dicey's classic work on the constitution<sup>2</sup> — the sovereignty of Parliament, the conventions of the constitution,

<sup>2</sup> *Introduction to the Study of the Law of the Constitution* (1st ed., 1885), 10<sup>th</sup> ed., edited by E. C. S. Wade (1959).

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and the rule of law. It is evident that their present shape has been strongly influenced by constitutional developments in Canada, New Zealand, Australia, and South Africa. Let me give some examples. The landmark decisions of the South African Supreme Court in the 1950s, beginning with *Harris v. Minister of the Interior*,<sup>3</sup> that defined the sovereign powers of the South African Parliament, together with decisions on legislative entrenchment powers in Australia,<sup>4</sup> stimulated a revision of the traditional theory of sovereignty in the United Kingdom Parliament. This affects the vital issue of Parliament's ability to place procedural restraints on the future exercise of its own powers. This is an ability that even sovereign parliaments — perhaps especially sovereign parliaments — ought to have. The British courts, unfortunately, have yet had no occasion to tell us whether the Queen in Parliament has it or does not.

If we turn to the topic of constitutional conventions, we find again something that no British court has given us — namely a principled exposition in the Supreme Court of Canada's patriation decision in 1981<sup>5</sup> of the nature of conventions and their relation to rules of law. These principles may well be of relevance to the consideration of

3 (1952) (2) S.A. 428 (Appellate Division of the Supreme Court). See also *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172 (P.C.).

4 Especially *Attorney-General for New South Wales v. Trethowan*, (1931) 44 C.L.R. 394 (H.C. of A.), on appeal from *Trethowan v. Peden*, (1930) S.R. (N.S.W.) 183 (S.C. of N.S.W.). On appeal to the Privy Council, [1932] A.C. 526.

5 *Reference Re Amendment of the Constitution of Canada*, (1982) 125 D.L.R.(3d) 1 (S.C.C.). Also *Re. Attorney-General of Quebec and Attorney-General of Canada*, (1982) 140 D.L.R. (3d) 385 (S.C.C.). The best detailed analysis of the character of convention is by a Canadian political scientist, Dr. Andrew Heard, in *Canadian Constitutional Conventions: The Marriage of Law and Politics* (1991).

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the Westminster Parliament's relationships with the Scottish Parliament and the organs of the European Community.

Consider now the rule of law. Here, Canada's enactment of the *Charter of Rights and Freedoms* and the adoption of a Bill of Rights by New Zealand in 1990 were events that reinforced the tide of opinion in Britain that supported the incorporation into United Kingdom law of similar guarantees. Consider further, the increasing submission of the administration to parliamentary and judicial control in the 1960s. An important step in that process was the adoption by the Wilson government of an ombudsman regime that was directly stimulated by, and modelled on the New Zealand Parliamentary Commissioner. Here, the Commonwealth example and nomenclature were followed in preference to the alternative models on offer in France and Scandinavia — perhaps because no one could pronounce the words “Conseil d'état” or knew what the plural of “ombudsman” was.

As a final example we could also say that British governments have been taught lessons by Australia and Canada in legislation for freedom of information and in the democratic supervision of intelligence and security activities. The decision of the Australian courts in the *Spycatcher* affair certainly affected the attitude adopted by British courts in subsequent official secrecy cases.<sup>6</sup> In this area, it must be said, British governments of all stripes have been slow to follow Commonwealth wisdom. It is of course possible, though unlikely, that the British government knows more

6 E.g., *Lord Advocate v. Scotsman Publications Ltd.*, [1990] 1 A.C. 812.

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secrets than the Australian or Canadian governments — or bigger or more complex secrets. Some secrets, they will tell you, are merely simple secrets. A simple secret is something you know you don't know. A complex secret is something you don't know you don't know. Select Committees of the House of Commons can possibly be trusted with the first kind of secret, but not the second kind.

### The European Community and the Constitution

The second and most obvious source of constitutional change since the 1970s has been Britain's membership in the European Community. United Kingdom law now experiences a continuous injection of rules promulgated by the organs of the European Community, or created by decisions of the European Court of Justice. The implementation of Community regulations and directives is, to a considerable degree, by statutory instruments that amend existing law. From January to September 2000, for example, more than 140 sets of regulations were issued in England, Scotland, and Wales. They dealt, amongst other things, with local government, value added tax, merchant shipping, television broadcasting, pesticides, explosive substances, town and country planning, misleading advertisements, sea-fishing and genetically modified foods. All of this extends considerably the range of legal materials that must be consulted by those who need to know what is permitted by United Kingdom law — in this genetically modified form. You would, for example,



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if you were a food importer, be acting at your peril if you, or your legal advisors, failed to consult, say, the Food (Peanuts from Egypt) (Emergency Control) (England and Wales) Order, giving effect to European Community Directive No. 49 of 2000. Community legislation is, in theory, imbued with the notion of subsidiarity — namely the idea that local matters should be left for local legal regulation. But subsidiarity, whatever else it embraces, seems not to extend to peanuts. Nor, for that matter, to cucumbers. See Regulation 1677 of 1988, which prescribes that good-class cucumbers must not have a curvature of more than 10 millimetres for every 10 centimetres.

Sea-fishing is perhaps a non-subsidiary issue and it was at the centre of the litigation in *R. v. Secretary of State for Transport, ex parte Factortame*,<sup>7</sup> in which the House of Lords, after a ruling from the European Court, held in 1991, for the first time, that an Act of Parliament — the *Merchant Shipping Act, 1988* — should be treated as ineffective, or disapplied, as being incompatible with Community law. This has led many to pose the question of whether the sovereignty of Parliament has been abandoned or withered away. The answer, I think, is that parliamentary sovereignty is alive but unwell, some violence having been offered to it. It can be argued that cases such as *Factortame* merely involve judicial application of the will of Parliament, expressed in the 1972 *European Communities Act*, that required future British legislation to conform to Community law. The strong presumption that Parliament, in 1972, intended all

7 [1991] 1 A.C. 603 (H.L.).

its legislation to conform, might well ground a practice of attempting to interpret all legislation as being conformable to Community law, and even straining to do so. But in traditional sovereignty theory, the provision for future conformity, enacted in 1972, would not have been treated as more fundamental than the intention in a later enactment, if clearly expressed, to give effect to provisions inconsistent with Community law. In fact, the courts have treated the 1972 Act as if it contained a legally effective provision, analogous to section 33 of the Canadian Charter, so that only an express provision in a later statute, indicating that it should have effect notwithstanding anything to the contrary in Community law, would be allowed to prevail against it. An Act simply repealing the *European Communities Act* would, at least as a matter of United Kingdom law, be a valid exercise of Parliament's sovereignty.

A further and more fundamental question can be asked at this point. What is now the legal foundation, or legal root, of the British Constitution? On the assumption that the 1972 Act can be repealed and that Parliament can, if it expressly states its intention to do so, legislate inconsistently with Community law, the legal root of the constitution is unchanged. Whatever the Queen in Parliament enacts is law. The second assumption is, however, denied in express opinions of the European Court,<sup>8</sup> which regards the

8 E.g., *Van Gend & Loos v. Nederlandse administratie der belastingen*, [1963] E.C.R.1 and *Costa v. ENEL*, [1964] E.C.R.585. The competing claims are discussed in Neil MacCormick, *Questioning Sovereignty: Law State and Nation in the European Commonwealth* (1999) Chap. 7. See also P. Craig and G. de Burca, *EU Law: Text, Cases and Materials*, 2<sup>nd</sup> ed., 1998, Chap. 6.

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Community as being a superior and independent legal order, entitled to decide the limits of its own jurisdiction and to which all national legislation must yield. But if that is really so, how did it get to be so? What is in issue here are two irreconcilable theories about the origins and character of the Community legal order. In a way, they resemble competing theories of the origins of the universe. In the continuous legal creation theory, there was no discontinuity in the birth of the Community. It was created by, and rests on the authority of, the founding legal instruments by which each member state conferred or delegated legislative authority under the Treaty. In the Big Bang theory, there was a spontaneous creation of a new order, existing in its own right and now encompassing the inferior systems that form its parts — though exactly how, when, and where this happened is not vouchsafed in the Court's jurisprudence. I incline to the view that the European juristic Big Bang is as superstitious a theory as the cosmological Big Bang. Regrettably, there is no guarantee that future members of the House of Lords will not give credence to European doctrinal superstitions.

## Labour's Constitutional Programme

Time, perhaps, to leave juristic theory and turn our gaze on the current exercises in constitutional engineering. Prime Minister Tony Blair has described the measures in the Labour manifesto as "the biggest programme of change to democracy ever proposed." Putting aside for the moment the rival claims of, say, the American Founding Fathers

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and the post-war re-making of Germany and Japan, we may concede some truth in this. Certainly we are seeing some basic changes in the framework of British government — especially the new quasi-federal structure, the reform (or whatever it is) of the House of Lords, and the new *Human Rights Act*. Of these I believe the last is by far the most important, and, in implementing it, there are obvious lessons to be learnt from Canadian experience. For Charter veterans, it may, perhaps, have a certain degree of morbid interest.

As to Lords reform, that has been pending for some time — in fact, since 1911, when the preamble to the *Parliament Act* of that year said that it was intended to create a second chamber constituted on a popular rather than a hereditary basis. But apart from an adjustment of the House's power to delay legislation from two years (as the 1911 Act had provided) to one year (under the *Parliament Act*, 1949), and the creation of life peerages in 1958, the only serious attempt at reform was by the Wilson government in 1968. That was defeated for reasons common enough in politics. That is to say that, on many questions, there are three groups — the moderate reformers, the no-reformers, and the radical reformers. When these groups are evenly balanced and the radicals prefer no reform to moderate reform, an alliance of the no-reformers and the radical reformers can often outvote the moderate reformers. It is a perfect recipe for inaction, which has helped to make the British party system what it is today. Thirty years on from the last attempt, however, New Labour has girded its loins and implemented, in part at least, the reform proposal of 1911, namely the abolition of

hereditary peers. Or at least they would have implemented it if the hereditary peers had not worked themselves into a fearful rage and threatened to scream the House down. The Upper House, that is. So ninety-two of them have been permitted to keep their seats<sup>9</sup> until a Royal Commission has reported on the future powers and composition of the second chamber. The Royal Commission has now reported.<sup>10</sup> It says future life peers should be appointed by an independent Appointments Commission and that they should be marked by personal distinction, breadth of experience and wide-ranging expertise. All of that. Moreover, they should be authoritative, but not so authoritative as to challenge the authority of the House of Commons. Summing it up, one might say that after ninety years of deliberation we have finally succeeded in creating a blueprint for an Upper House worthy of abolition.

About devolution of power within the United Kingdom, I will say only a word or two. In theory, the programme was for decentralisation in all directions. Even England was to have it in the shape of regional assemblies. But they are, praise the Lord, nowhere to be seen, to the great relief of the English who anyway do not admit to living in regions. So the design is patchy and asymmetrical. The Welsh have been given an assembly without legislative powers, in which they can speak Welsh without let or hindrance, and

9 The *House of Lords Act, 1999* provides that no one shall be a member of the House of Lords by virtue of a hereditary peerage, with the exception of the Earl Marshal, the Lord Great Chamberlain and ninety hereditary peers elected in accordance with Standing Orders of the House by the party groupings and the cross benchers.

10 Report of the *Royal Commission on the Reform of the House of Lords*, Cm. 4534.

in Ireland the process is stalled by factional intransigence. Only in Scotland has a genuine transfer of power from Westminster taken place, with a Parliament in Edinburgh that can legislate on all matters, with important exceptions that include foreign policy, defence, national fiscal policy and the constitution — whatever that may be.<sup>11</sup> They are also disabled from legislating on immigration, no doubt to prevent them from imposing a *Sassenach* immigration quota. In theory, the power of the Westminster Parliament to legislate for Scotland on all matters is preserved, but since any future attempt to exercise it would provoke a flight of Scottish Labour voters to the Scottish Nationalist Party and calls for total independence, it seems fair to say that we now have a system of quasi-federalism, tempered by consultation, especially on European Community law affecting devolved powers, which has to be implemented by the United Kingdom.

Since the new human rights legislation is already in operation in Scotland, but only from October 2<sup>nd</sup>, 2000, in England and Wales, the Scottish courts have had a flying start in measuring current practices against the requirements of the imported European Convention. Some of them have been found wanting. In *Starrs v. Ruxton*,<sup>12</sup> it was held that trial before temporary sheriffs appointed for a relatively limited period did not provide an independent or impartial tribunal as required by Article 6 of the Convention. In an even more chastening proceeding — *Hoekstra v. H. M. Advocate*<sup>13</sup> — the Appeal Court of the High Court of Justiciary

11 *Scotland Act*, 1998, sections 29, 30.

12 2000 S.L.T. 42, (H.C.J.).

13 *The Times*, April 14, 2000.

held that a judge should not hear an appeal involving human rights pleadings because his impartiality had been put in question by a strongly worded article he had written a month earlier about the incorporation of the Convention, and about the Canadian Charter — of which he appears to have disapproved on the ground that its provisions provided “a field day for crackpots, a pain in the neck for judges, and a goldmine for lawyers.” This intemperate Scottish summary (which I quote solely in the interests of historical integrity) is certainly not one that is generally endorsed by the judges of England and Wales. What they will make of our own Charter, however, is not easy to say.

### *The Human Rights Act, 1998*

*The Human Rights Act, 1998*, now in force, had its operation postponed for two years to allow the judiciary to prepare themselves for the expected forensic shock wave. An appropriate word to describe the Act is “idiosyncratic.” Its first idiosyncrasy is that it does not carry out the undertaking made in the Labour election manifesto to incorporate the *European Convention on Human Rights* into the law of the United Kingdom. What the Act says is that the Convention rights contained in its first schedule are to have effect for the purposes of the Act — a more cautious and lawyerly phrase. If the Convention were truly a part of United Kingdom law, it would, by the normal rules of construction, take precedence over all pre-existing law. But the Act provides that the validity and continued operation of all Acts of Parliament, whenever enacted, is to be preserved. In other

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words, the Act is, like the New Zealand *Bill of Rights* on which it is modelled, a so-called interpretive measure. All legislation, it says, “must be read and given effect in a way which is compatible with the Convention rights” — “so far as it is possible to do so.” It is thought that “possible” means “fairly possible,” or perhaps “possibly possible,” rather than “barely possible” or “just conceivably possible.”

What the courts — or at least the superior courts — can do is to make a declaration of incompatibility if they are satisfied that a provision is incompatible with a Convention right. This is a second major idiosyncrasy — in this case a home-made one, not derived from New Zealand or any other existing Bill of Rights. Such declarations offer to litigants no legal remedy and have no effect on the validity of legislation. The only reason for asking for them is that they are said to be designed to trigger a parliamentary remedy sometimes dubbed a “fast-track remedy.” The track is not guaranteed to be a smooth or fast one, however, since it depends upon a minister of the Crown laying an order before Parliament to change the law in a way that removes the incompatibility. He need only do so if he thinks that there are compelling reasons for doing so, and the members of the majority party need only vote in favour of the order if they feel inclined to. This means, essentially, that a decision as to whether a remedy is provided in these circumstances for an infringement of citizens’ rights depends upon the politicians who may be responsible for infringing them in the first place. It is not clear that this situation is compatible with the effective remedy for everyone whose rights and



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freedoms are violated that is guaranteed by Article 13 of the European Convention. Unfortunately, this argument cannot easily be advanced under the *Human Rights Act*, since the Convention rights scheduled to the Act have been prudently arranged to run from numbers 2 to 12 and on to 14. There is no Article 13. The draftsman (or somebody else) seems to have mislaid it.

Where the Act will bite, though, is through section 6, which provides that it will be unlawful for any public authority to act in a way that is incompatible with a Convention right. This will provide a new ground of judicial review for all administrative acts within the public sphere. What this sphere is and who is to count as a public authority are not easy to determine, however, and the Act offers little help beyond saying that any person is a public authority, if certain of his functions are of a public nature, but where the acts of such persons are of a private nature they will not be public functions. It is difficult to know on these definitions whether, say, Oxford University or Virgin Airlines or Marks and Spencer or Eton (the well-known public school) are public authorities. Some say that it will not matter, since the term "public authority" includes courts and tribunals, and, if these are under a duty to comply with the Convention, they will have to apply it when adjudicating in suits between private parties. So the Act will have complete horizontal application as between private citizens, as well as in relations between citizens and government. Others say that such an interpretation would make nonsense of the Act. Both arguments, of course, could be correct.

## Some Problems

So how will the British courts approach the *Human Rights Act*? What form, for example, will their judgments take when making incompatibility declarations? Will they be brief or will they be fully reasoned? A satisfactory judgment on a compatibility issue must surely require a process of reasoning analogous to that of the Canadian Supreme Court in applying the limitations provisions in Section 1 of the Charter. The comparable permissible limitations on the Convention rights are, in one respect, differently phrased. The rights to privacy, freedom of expression, and freedom of assembly are subject to restrictions prescribed by law that are *necessary* in a democratic society. The Charter rights, on the other hand, are subject to limitations that are demonstrably *justified* in a free and democratic society. On the face of it, that seems very different, since what is justified is hardly the same as what is necessary. A great many things that are reasonable and justified are not necessary. It might be reasonable and justified to increase income tax by 10 pence to improve the National Health Service, but it is not necessary to do so. Necessity seems a higher hurdle for legislation to negotiate, since few things are necessary; at least not absolutely necessary. Perhaps “necessary” should be interpreted as “reasonably necessary,” or “fairly necessary,” or “possibly necessary.”

Another possible difference is that the Canadian Supreme Court’s two-stage approach to Charter adjudication may not be needed. Except for the purpose of asking whether, in the first place, there is anything in the Convention that bears on the issue at all, it seems needless to divide the

inquiry into two — one question directed to whether rights are invaded, and the other to whether the invasion can be justified. The Convention rights not being absolute, the only rights that can be said to exist in the Convention are the qualified entitlements defined by the limitations contained in each article. So no answer can be offered to the first question until the second question has been resolved. There is, in other words, only a single question, namely whether the restrictions on action contained in a particular legislative measure are consistent or compatible with the right as defined and qualified in each article. That question is complex enough, involving sufficiency of legislative purpose, rational relationship, and degrees of judicial deference — or in European terms, the margin of appreciation for legislative judgment. To add to the coming perplexities, there is the issue of deference to the judgments of the European Court of Human Rights. British courts are not bound by that court's judgments, but only have to take them into account, which is happily consistent with not following them at all.

A further question is whether section 3 of the *Human Rights Act* has changed the rules of statutory interpretation. The injunction to interpret legislation in a way that is compatible with Convention rights, so far as possible, was alleged in the debates on the Bill, and on many occasions by the Lord Chancellor, to have provided a parliamentary mandate to make interpretation, where rights are involved, no longer a search for the intended or true meaning of a statute but an attempt to impress on, or import into it, a meaning that will promote rights (or an alleged claim of right) even if this means straining the language of the

statute, or, as the Lord Chancellor has suggested, “reading in words that are not there.”<sup>14</sup> This might be called reading the statute down — or perhaps up or sideways — and it is said to be in the interest of broad or generous or purposive interpretation. But neither generosity nor purpose is to the point. Statutes should be interpreted not generously but correctly, in relation to their true meaning and intention, and there is nothing in s. 3 of the *Human Rights Act* to provide parliamentary authorization for any other approach. The only parliamentary purpose derivable from s. 3 is that all legislation should be presumed consistent with Convention rights unless its clear terms indicate that Parliament has decided that it should not be. That purpose cannot assist interpretation when the issue is whether, in a particular case, Parliament has so decided. Advocates of the new approach are inviting the judiciary to manipulate statutes rather than interpret them. With luck, some judges will strap themselves to the mast of parliamentary intention and resist the Lord Chancellor’s siren song. Others, alas, may be seduced by it.

All of this suggests that there are going to be two paths of argumentation in human rights cases. One is the path of interpretation. The other is the path of direct contestation between statute and Convention rights. Litigants in Britain are likely to pursue the former path and seek interpretive solutions rather than declarations of incompatibility, since these offer no immediate legal remedy and are, in effect, an expensive kind of booby prize. In Canada there is presumably

<sup>14</sup> See 584, *House of Lords Debates* 1292 (January 19, 1998).

less pressure to pursue interpretive arguments since statutes can be held inoperative if found to infringe Charter rights. Reliance on the interpretive option is undesirable for a number of reasons. One is that it involves a potential abuse of the judicial process. Another is that it may deprive the legislature of the opportunity to have its challenged enactment upheld as demonstrably justified in a democratic society.

### Implications and Conclusions

What are the consequences for the British Constitution of this new human rights regime? Some clues can be gathered from the anticipatory murmurings of the human rights advocates now preparing themselves to face the rigours of a new, and hopefully not entirely unprofitable, specialism. It seems fair to predict that there will be an immediate impact on the criminal process, with defendants arguing that numerous aspects of police investigation procedure and prosecutory activities infringe the right to a fair trial guaranteed by Article 6 of the Convention. Challenges are promised to fixed-penalty tickets, roadblocks, stop-and-search provisions, and the use of CS gas. Meanwhile, defendants in *Official Secrets Act* prosecutions for unlawful disclosures are pleading the Convention's free-expression right as a defence. Actions are also being prepared to challenge inheritance legislation on the ground that it benefits married couples at the expense of unmarried same-sex cohabitators. In addition, another special interest group is, in the view of the civil rights organization Liberty, being penalized by the ban on publication of information about the identities of

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sperm donors. The Convention right in issue is that to privacy and family life — presumably that of the beneficiaries rather than the donors. If we turn to the public sphere, some trepidation has also been provoked by the decision of the European Human Rights Court in *McGonnell v. United Kingdom*.<sup>15</sup> There it was held that Article 6 was violated by the position of the Deputy Bailiff of Guernsey, who has judicial functions as well as acting in the legislature as presiding officer. What then of our own Lord Chancellor? What then is the position of the law lords who sit as legislators in the Upper House? Lord Chancellor Irvine was quick to allege that his own position was unaffected by the *McGonnell* case, on the ground that he would never sit in any case concerning legislation in the passage of which he had been directly involved. But that practice might mean that no law lords were available to hear some appeals. And have not both the Lord Chancellor and the law lords already taken active parts in the passage of the *Human Rights Act*? Are they to recuse themselves in any case in which the provisions of the Act are pleaded, or in any case where a point arises on which they have expressed an opinion in the Lords debate on the Bill? It may be that we shall have to expel the law lords from the Upper House and reconstitute them as a separate, superior, appellate body. Their and the Lord Chancellor's multiple roles, in defiance of the separation of powers, have always been treated as a whimsical peculiarity of the British Constitution. But are we now allowed to be peculiar?

Is the Crown, moreover, allowed to be arbitrary? The

<sup>15</sup> *The Times*, February 22, 2000.

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Prime Minister and the Crown, between them, terminate the employment of ministers without any pretence of due process. Admittedly, few ministers complain — though one exception was Sir David Maxwell Fyfe (Viscount Kilmuir), when sacked from the cabinet by Harold Macmillan in 1962. He told the Prime Minister that he had been given less notice than was needed to dismiss a cook. Macmillan told him that that was fair enough, since it was more difficult to find a good cook than a Lord Chancellor.

Some other traditional pieces of the constitutional structure may also, conceivably, be under threat. Think of the privileges of Parliament — a traditional battleground between the rights of citizens and the immunities and perquisites of legislators. The House of Commons and its Privileges Committee have always made adverse findings against witnesses without affording them a right of legal representation, and have exercised summary contempt powers in a similar way. In addition, some statutes that regulate the affairs of non-parliamentarians have been held to be inapplicable within Parliament. Moreover, the absolute privilege of free speech in Parliament, conferred by Article 9 of the 1689 *Bill of Rights*, permits citizens to be defamed without redress, whilst in Britain, under recent legislation, members are permitted to waive privilege<sup>16</sup> and sue newspapers that are bold enough to allege that taking bribes in brown paper bags is a form of unparliamentary conduct. How does all this square with fair trials, effective remedies, and equality before the law? Though controversial, especially at Westminster, it

<sup>16</sup> *Defamation Act*, 1996, section 13. See also *Report of the Joint Select Committee on Parliamentary Privilege*, H.L. 43-1; H.C. 214-1 (1998-99).

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is no longer unthinkable to say that members of Parliament should have no more rights or privileges than any other citizens, and be subject to the jurisdiction of the courts whenever their activities impinge on the rights of others.

All of this could be summed up by saying that there is now a new tension in our constitutional arrangements. In the last century, the British political system operated with a group of traditional concepts that we could sum up as parliamentary sovereignty, Crown prerogative, legislative privilege, and administrative discretion. But we are now in a situation where all such notions of privilege and discretion are under a process of constant questioning, stemming from the belief that no power can be absolute, or unreviewable, or immune from challenge in the light of rights based on notions such as fairness, natural justice, rationality and legitimate expectation — all now written into national and international legal instruments. A spectre, you might say, is haunting Europe — the spectre of proportionality. One European commentator, writing of the expansion in European states of constitutional justice, dubs it “the repudiation of Montesquieu.”<sup>17</sup> Even the French have come near to abandoning the idea that judicial review is forbidden by the separation of powers. Of course Canada, in its adoption of the Charter, acknowledged this twenty years ahead of the United Kingdom, and the British government has not acknowledged it yet. Be that as it may, the real revolution in our polity has deeper roots than Labour’s present reform menu. Politicians are now less, and judges more, in charge

<sup>17</sup> Mauro Cappelletti. *The Judicial Process in Comparative Perspective* (1989), Chap. 5.



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of our affairs. That is a considerable sea change for a nation whose tradition and culture have respected the rule of law whilst distrusting lawyers. See Dickens; see Jeremy Bentham; see Shakespeare. I hesitate to predict how things will be five or six years on. At that time, if you are still curious, you might do well to invite a senior judicial person to tell you what the judges of England have made of our new constitutional settlement. Its authors profess to believe that the new human rights regime is an elegant and successful compromise between the protection of rights and the doctrine of parliamentary sovereignty. But that compromise is, I believe, impossible of attainment. There is in the *Human Rights Act* and its surrounding assumptions an incoherency of principle that time will expose and in due course transform. It may not be willingly changed by politicians. But in Europe, a terrible truth is beginning to dawn on governments and legislators — that constitutional change and the shape of the political system are no longer entirely in their hands or under their control.

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Question

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Dr. Marshall, it would appear that the new constitutional approach goes beyond trying to balance sovereignty and human rights, but rather suggests that the judiciary are better protectors of something called civil society than elected parliaments. So this raises some more profound questions than just simply the question about the part of the judiciary, but rather the nature of democracy. I wonder if you might have some comments that perhaps are speculative, but go a little beyond what your most-articulate speech had to offer.

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Dr. Marshall

Yes, if you give me about three-quarters of an hour.

That is obviously a vital question. It's so extensive that it's really the history of western political philosophy, isn't it? I mean, you are absolutely right that there has been a tension between what some people have called "civil society" and government, and the two have always been in contestation. What I was suggesting is that, in some ways, the outcome is going to be a victory for the civil society and for rights protection. Ultimately. If you look at Canada, superficially, there is a kind of balance between sovereignty and rights. But the rights principle is ultimate. It dictates the terms on which the sovereignty principle is allowed to operate.

We in Britain are inconsistently trying to cling to the opposite principle, and I was suggesting that I don't think it's possible. I think the consensus of moral and political thinkers since the 18th century has really been against the sovereignty principle. Civil society and the rights principle will dominate in the end. And I think what you say is right. But what is there to say about it, except that this has been the struggle that has operated throughout modern society, and in modern legal systems, and I believe that one side is going to win.

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Supplementary Question

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I'm going a little beyond that — just a clarification — and asking, do you think that the judiciary are going to turn out to be better protectors of democracy than the elected legislatures? Because that is the direction we are heading. What are the prospects of that happening? You are obviously saying it's not going to happen.

## Dr. Marshall

No. You see, my view is a curious one. I'm against the present U.K. *Human Rights Act* because it doesn't go far enough. I think that we needed a proper *Human Rights Act*. Now, you say, obviously the question is: are the judges going to be better protectors of human rights? You can't generalize about that question. On some issues, they will be, and it depends on what kind of political system you are looking at.

If you are looking at a political system like the British, where the legislature is dominated by one political party at most times, and that political party is dominated by a cabinet and a party caucus, you are not comparing equivalent things. The classical way of putting this question is: "Why should unelected judges make decisions of policy, rather than elected persons in representative bodies such as Parliament?" But when you look at the reality of what goes on in representative bodies, so-called, it is not pure democracy. If all your parliaments were purely elected democracies, representing the people who sent them there, then you would say, "Well, we would prefer certain issues to be decided that way." But the reality is that these issues are decided by party caucuses.

Now, if that is what you are comparing judicial decisions with, then I would say, on certain kinds of issues, particularly those affecting legal and constitutional rights, the judges will be better protectors than party caucuses. Think of an issue like capital punishment or abortion. Think how that matter is debated in, say, a constitutional court in the United States, in Italy, in Spain, or wherever it is. You have a long series of fairly rational debates. You have decisions. You have those criticized. You have further cases brought

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up. The arguments are put forward and balanced. Compare that with the way in which the question of capital punishment, say, might be settled in the British Parliament, in a single afternoon, with hardly anybody in the chamber, on a whipped vote. Which is the better and more rational way of deciding that issue? I would obviously say, well, I would rather have the judges decide. However, there are some issues on which I don't know that the judges are any better than members of Parliament in deciding things.

So it's not a question on which you can generalize. But I would, on most civil and constitutional issues, trust the judges with the power of judiciary review of a full-blown kind. What I have against the British system, or the New Zealand system, is that neither trusts the judges sufficiently.

## Peter Leuprecht

Ladies and gentlemen, dear guests, dear friends. It is indeed my pleasure to express thanks. First of all, thanks to Dr. Marshall for presenting a brilliant, subtle, non-parochial lecture. As a former “Eurocrat,” I may not agree with a number of his points, but his lecture has been not only brilliant, but sparkling with delightful humour.

Secondly, I wish to thank wholeheartedly the Department of Justice, and Deputy Minister Morris Rosenberg, in particular, for suggesting that we should launch the John Tait Memorial Lectures at McGill University, beginning our alternation with Ottawa.

May I add a rather personal remark. I have a tender spot for the Department of Justice, because one of the most rewarding and positive experiences of my life was the privilege of working there for two years. I met extraordinary people, remarkable public servants.

I have seen what is best in the public service; the nobility of public service that John Tait embodied. He was a great servant of the state.

He inspires me to think, when I see our students and graduates look to their futures, that the public service is one of the options they should seriously contemplate. There are some contemporary “slogans,” which I sometimes call “hot air *du temps*,” in which I cannot believe — phrases such as “the withdrawal of the state,” “the limp state,” or “the minimal state.”

I also wish to thank Professor Stephen Scott, who has put a lot of energy and commitment into the preparation and organization of this lecture. He is also one of those who knew John Tait personally, and I believe this has been a very

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fitting way of honouring his memory.

I wish also, of course, to thank all of you for having come. Particularly, I wish to thank the members of the family of John Tait. And I wish to thank the many colleagues and friends, especially those from the Department of Justice, and the Deputy Minister, Mr. Rosenberg, who came from Ottawa.

I will keep my remarks brief, although I am tempted to say a number of things. Early this morning, I thought I would look to Thomas Paine. I think that some of Paine is still very refreshing. He wrote things about the United Kingdom, about England and constitutional matters. I will quote just two short passages to show that things have changed, and are changing.

“In England,” Thomas Paine writes, “it is not difficult to perceive that everything has a constitution, except the nation.”

And, here is the other: “The continual use of the word ‘constitution’ in the English Parliament shows there is none; and that the whole is merely a form of government without a constitution, and constituting itself with what powers it pleases. If there were a constitution, it certainly could be referred to, and the debate on any constitutional point would terminate by producing the constitution. One member says this is constitution and another says that is constitution. Today, it is one thing and tomorrow, it is something else, while maintaining the debate proves there is none.”

I think those words, placed against what we have heard today, show that the United Kingdom is changing, albeit slowly, as you have said yourself, Dr. Marshall.

I would like to make four remarks.



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First of all, you mentioned, and I quote, “a new tension in our [that is, the United Kingdom’s] constitutional arrangement.” This is true. Thomas Paine would probably say there is more and more of a constitution in the United Kingdom. I believe that one of the factors contributing to this phenomenon has been Europe. I have European beliefs. And what I see is that the United Kingdom has been pushed, has been shaken by Europe to a considerable degree. You referred to the medical term “injection.” You said there is a continuous injection. The United Kingdom is constantly receiving shots. My feeling is that this has contributed to the health of the United Kingdom.

I sometimes say, and people in the Department of Justice will remember, that here in Canada we are receiving no similar injection. I think it’s a pity. When, for example, you look into the question of domestic implementation, or non-implementation, of international law, particularly human rights law, you may think that perhaps some “injections” would be healthy for this country.

But you also said, and I found it a very interesting point, that politicians are now less and judges are more in charge of our affairs. I do believe that the developments you have described do put an increased responsibility on the shoulders of judges — domestic judges and European judges — and this makes certain fundamental principles of the judiciary — its independence and its impartiality — even more important than they were before.

Secondly, I don’t see the United Kingdom in isolation, any more than Europe is isolated because there is fog on the English Channel. I see this process taking place in the

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United Kingdom as a part of building a European constitution. This is a fascinating process. We talked about it earlier this week in connection with the launching of our new Institute for European Studies. You said, Dr. Marshall, that the traditional sovereignty theory was shaken. Indeed, I think you are moving more and more in Europe towards shared sovereignty, a shared exercise of sovereignty. And I think we are all well-advised to rethink our concept of sovereignty, not only in Europe, I believe, but also in this country.

My third remark concerns your description of the British evolution towards a quasi-federal system. That is an extremely interesting phenomenon, because we see it in Europe and elsewhere. The strength of the concept of federalism can be seen in the reality of its spreading in many parts of the world. I think federalism has a great future and it's a point that we could campaign for in Canada and Quebec.

In my fourth remark, I will address the point that interested me most in your lecture; what you said about the *Human Rights Act*. I would say firstly, remembering so many debates over so many years, that it really was time for legislation, even if it is not perfect. I also believe, and you raised this point, that the British courts have an obvious interest in interpreting the *European Convention on Human Rights* in accordance with the judicial precedents of the European Court of Human Rights. Otherwise, what will happen is what has happened so often — there will be a flood of British cases before the European Court in Strasbourg. After all, one of the United Kingdom's motivations for its new legislation was the somewhat desperate desire to reduce the number of cases brought against the United Kingdom,

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which, over the years, may be seen to have been the court's best client by far. And, I remind you of the many legislative changes in the U.K. that were prompted by decisions in Strasbourg.

It has been said that "l'Angleterre est une île, l'Anglais un continent." I would say now that both parts of that are less and less true. However, Dr. Marshall, no matter what may happen, I think it would be very difficult to prevent you, your countrymen, or your country from being "peculiar" — to use an adjective you employed yourself — but only in that other meaning of peculiar, that is, individual and special, and charmingly so.

You suggested, Dr. Marshall, that in a few years' time we might do well to invite a senior judicial person to tell us what the judges of England have made of your new constitutional settlement. It is a good idea. I think it would also be a good idea if you, yourself, came again in a few years' time to provide your reflections on those developments. But, for the time being, I thank you very much, once again.

We will see you next year in Ottawa, many of you, I hope, at the John Tait Memorial Lecture. Now, I have the pleasure of informing you that a cocktail will be served in the Atrium of the Faculty.

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