

result, they emphasized the permanent, enduring, and unchanging nature of law, and insisted that government should be bound by law.⁶²⁶ Aristotle wrote:

Now there are some who take the view that the sovereignty of one man over all the other members of a city is not even natural in any case where a city is composed of equals... justice means being ruled as well as ruling, and therefore involves rotation of office... The rule of law is therefore preferable, according to the view that we are stating, to that of a single citizen... He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. Appetite has that character; and high spirit, too, perverts the holders of office, even when they are the best of men. Law is thus 'reason without desire'.⁶²⁷

Tamanaha cautions against putting too modern of a spin on Plato and Aristotle as neither were egalitarians. They believed in a society of classes based upon unequal talents and virtues in which those with superior talents should rule. They were not in favor of a popular uneducated democracy and preferred a 'good king' to law.⁶²⁸

While the UK Constitutional Reform Act 2005 (CRA) identifies and endorses the Rule of Law, it nowhere defines it. The Act specifically recognizes the continuing existence of both an independent judiciary and the Rule of Law. This Parliamentary non-definition appears to intentionally allocate the definitional task to the judiciary. Tom Bingham suggests that 'the authors of the 2005 Act recognised the extreme difficulty of formulating a succinct and accurate definition suitable for inclusion in a statute, and preferred to leave the task of definition to the courts if and when occasion arose'.⁶²⁹ The 2005 Act is an example of Parliament voluntarily relinquishing responsibility for defining the Rule of Law.

Tom Bingham's central premise defining the Rule of Law is that 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts'. Paralleling Lon Fuller's 'famous eight', Tom Bingham lists his fundamental precepts of the Rule of Law:

[T]he law must be accessible and intelligible; disputes must be resolved by application of the law rather than exercise of discretion; the law must apply equally to all; it must protect fundamental human rights; disputes should be resolved without prohibitive cost or inordinate delay; public officials must use power reasonably and not exceed their powers; the system for resolving differences must be fair. Finally, a state must comply with its international law obligations.⁶³⁰

5

THE RULE OF LAW

THE LATE TOM Bingham presented the Sixth Sir David Williams lecture at Cambridge University in 2006. He chose 'The Rule of Law' as his subject 'because the expression was constantly on people's lips, but I was not quite sure what it meant, and I was not sure that all those who used the expression knew what they meant either'.⁶²⁵

Since September 11, 2001, much has been said about the Rule of Law, often by the Bush and Blair governments while disingenuously claiming to be defending freedom at the point of a gun. But judicial review of US and UK government actions reveals that the Rule of Law does not support the idea that might makes right. The judicial identification and enforcement of the Rule of Law forms the implicit basis of the Law Lords' four *Belmarsh* decisions and the US Supreme Court's decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*. These decisions collectively manifest the meaning and history of the due process of law, fair trial, the role of the courts, equality, habeas corpus, and the separation of powers—all core touchstones of the Rule of Law. The US Supreme Court focused on the constitutional due process concept of habeas corpus, and the Law Lords focused on HRA/ECHR equality and proportionality. This book argues that the Rule of Law requires such judicial activism for its meaningful identification and preservation.

The origins of the Rule of Law are traceable to the ancient Greek philosopher Plato and his student Aristotle. When Plato's teacher Socrates was condemned to death, both Plato and Aristotle became concerned about the element of tyranny in a populist democracy. As a

⁶²⁶ B Tamanaha, *On the Rule of Law* (Cambridge University Press, Cambridge 2004) 6.

⁶²⁷ Aristotle, *Politics*, Book III, Part XVI, 1287a1, 23 (trans E Barker, Oxford University Press, Oxford 1995) Page 127–128.

⁶²⁸ Tamanaha (n 626) 9–10.

⁶²⁹ T Bingham, 'The Rule of Law' (The Sixth Sir David Williams Lecture, Cambridge, November 16, 2006) 4.

⁶³⁰ M Kettle, 'We need leaders who better understand the rule of law', *Guardian* (November 26, 2006).

A. A. M. DICEY

Tom Bingham credits A. V. Dicey with coining the expression 'the rule of law' albeit 'he did not invent the idea lying behind it'.⁶³¹ Albert Venn Dicey (1835–1922) is described as England's most influential writer on the English Constitution.⁶³² He first published *Introduction to the Study of the Law of the Constitution* in 1885, a treatise that was succeeded by multiple editions. Dicey is well known for his outline of the principles of Parliamentary sovereignty that have been popularly distilled into the sound bites: 'Parliament can do anything but make a woman a man, a man a woman'; 'Parliament can forbid smoking in the city of Paris, France'; and 'No man or body can overrule Parliament'.⁶³³ While these quips are often uttered, they are incomplete and somewhat misleading reflections of Dicey's actual positions. Dicey himself conceded that the English Constitution is an evolving document, and his views are reflective of his time. Consequently, Dicey was strongly opposed to women's suffrage⁶³⁴ and proportional representation.⁶³⁵ He was adamantly dismissive of Home Rule for Ireland.⁶³⁶ His views are Anglo-centric, and in detailed comparison of the legal systems of England and France, he is highly critical of the latter. Placing Dicey's views of Parliamentary sovereignty in historical perspective, they preceded the horrors of World War I, the Holocaust of World War II, and the emergence of 20th-century positive international law, the United Nations, the European Union, the ECHR, and various attendant Conventions.

Dicey's book was written for the purpose of providing students with a manual identifying that day's leading constitutional principles, which would enable 'proper study' of Blackstone's Commentaries and like treatises.⁶³⁷ In the 1938 Preface to the Ninth Edition, Emlyn C. S. Wade states that the 'rule of ordinary law' is at the core of Dicey's analysis and that 'Certainly the rule of law, the doctrine upon which the most reliance has been placed, assumes that the purpose of the constitution is to protect individual rights'.⁶³⁸ Wade describes in his Preface how the Constitution has evolved and how Dicey's reputation as a constitutional lawyer has 'suffered from the attempts by his successors to erect the constitutional ideas which he expounded into axiomatic principles which must abide for all time'.⁶³⁹

Dicey's orientation is apparent on the first page of his work. Here he quotes from Hallam's *The Middle Ages*, wherein England's uninterrupted and increasing prosperity is praised as 'the most beautiful phenomenon in the history of mankind', and 'the spirit of its laws, from which, through various means, the characteristic independence and industriousness' of England

accounts for its great success.⁶⁴⁰ England is described as manifesting a government above that of all others, and its constitution as 'the most perfect of human formations'.⁶⁴¹

In chapter 4, Dicey describes his view that parliamentary sovereignty has evolved from what once was the divine sovereignty of the king before the English Civil Wars to the *created* sovereignty of Parliament. As such 'England is a country governed, as is scarcely any other part of Europe, under the rule of law'.⁶⁴² He states that it is impossible to think of the English as living under any but a free government.⁶⁴³

Yet, even if we confine our observation to the existing condition of Europe, we shall soon be convinced that the 'rule of law' even in this narrow sense is peculiar to England, or to those countries which, like the United States of America, have inherited English traditions.⁶⁴⁴

When Voltaire came to England, 'his predominant sentiment clearly was that he had passed out of the realm of despotism to a land where the laws might be harsh, but where men were ruled by law and not by caprice'.⁶⁴⁵ Voltaire had been falsely imprisoned in a French gaol, and his entire adult life was set against the arbitrary use of power. Dicey explains how the evils of despotism, which were well known in France, also infected Spain, Italy, and Germany in an even far worse, albeit less visible, form.

Dicey defines the Rule of Law as

A characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here 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.⁶⁴⁶

Dicey then describes how every official from the prime minister down to the tax collector was *accountable* to the law and subject to the same responsibility. Most significantly Dicey holds that the *source* of the English constitution is *the courts*. For example:

[T]he general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts... Our constitution, in short, is a *judge-made constitution* and it bears on its face all the features, good and bad, of judge-made law.⁶⁴⁷

⁶³¹ Bingham (n 7) 3.

⁶³² J Beatson, S Grosz, T Hickman, and R Singh (eds), *Human Rights: Judicial Protection in the United Kingdom* (London, Sweet & Maxwell 2008) 3.

⁶³³ T Bingham, 'Dicey Revisited' [2002] Public Law 39, 44–46.

⁶³⁴ RS Raitt, *Memorials of Albert Venn Dicey* (Macmillan, London 1925) 86.

⁶³⁵ Bingham (n 633) 49.

⁶³⁶ Dicey (n 261).

⁶³⁷ AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, London 1902).

⁶³⁸ *Ibid* xii.

⁶³⁹ *Ibid* xv.

⁶⁴⁰ Hallam, H, *View of the State of Europe During the Middle Ages* (12th ed John Murray, London 1868) vol II, 267.

⁶⁴¹ Stanhope, *Life of Pitt* (2d ed 1862), vol. I, App x.

⁶⁴² Dicey (n 637) 184.

⁶⁴³ *Ibid* 186.

⁶⁴⁴ *Ibid* 188.

⁶⁴⁵ *Ibid* 189–90 (footnote omitted).

⁶⁴⁶ *Ibid* 193 (emphasis added).

⁶⁴⁷ *Ibid* 195–196 (emphasis added).

Dicey gives another example of the role of the courts: 'In England the right to individual liberty is part of the constitution, because it is secured by the decisions of the courts, extended or confirmed as they are by the Habeas Corpus Acts.'⁶⁴⁸ Dicey sees the Habeas Corpus Act as being constitutional:

The Habeas Corpus Act may be suspended and yet Englishmen enjoy almost all the right of citizens. The constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.⁶⁴⁹

The Constitution's purpose then is to protect fundamental rights. It is a creation of the courts—not Parliament—and taking away such rights, insofar as that can even be conceived, would be a 'revolution'. And finally,

the rule of law 'may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, *as defined and enforced by the courts* ... thus the constitution is the result of the ordinary law of the land'.⁶⁵⁰

Dicey identifies some of the rights that have been held to exist, defined and enforced by courts as including 'the right to personal freedom; the right to freedom of discussion; the right of public meeting; the use of martial law; the rights and duties of the army; the collection and expenditure of public revenue; and the responsibility of Ministers'.⁶⁵¹ Parliament is not part of the mix as far as these fundamental rights are concerned. These fundamental rights are court created, court defined, and court enforced; their compromise would constitute revolution. Dicey speaks here like a constitutionalist, and his views are surprisingly concordant with the modern concept of judicial review wherein the courts define and enforce fundamental rights.

In chapter 8, Dicey discusses the relationship between parliamentary sovereignty and the rule of law, noting that these may at first appear to be in opposition to each other or 'to be at best only counter-balancing forces'.⁶⁵² He sees any such perceived conflict as being 'delusive':

[T]he sovereignty of Parliament, as contrasted with other forms of sovereign power, favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise, and this increases the authority, of parliamentary sovereignty.⁶⁵³

The law emanating from the courts is supreme and is the 'law of the land'. Parliamentary sovereignty favors the supremacy of this law. Parliament in turn legislates in accordance with this law, thereby increasing its authority. There is no conflict.

When Dicey speaks of Parliament he speaks of its then three distinct constituent parts: the Crown and Government, the House of Lords, and the House of Commons. He accordingly asserts that 'the command of Parliament can be uttered only through the combined action of its three constituent parts, and must, therefore always take the shape of formal and deliberate legislation'.⁶⁵⁴ Dicey sees in this trinity an appropriate operation of checks and balances. However, since 1911, the House of Lords can only delay legislation, but cannot stop it. The Crown by convention today has no actual power and is required to assent to any Act of the Commons, and in turn the government is part of Parliament. This post-Dicey lack of checks and balances is both a reason and a justification for the rise of the courts and the emerging phenomenon of judicial review to ensure continuing checks and balances and the recognition of those judicially created fundamental rights that are 'the law of the land'. Dicey agrees however that in times of insurrection or invasion the rule of law may be broken,⁶⁵⁵ mirroring the wording of Article I, Section 9 of the US Constitution regarding suspension of habeas corpus.

Dicey himself emphasizes the responsibility and the power of the courts to interpret. He argues that the English judge should not consider anything that may have passed in debate to divine 'intent' but simply look at the words of the act in question and interpret. A particular characteristic that Dicey saw in his time is that ordinarily, except in periods of revolution, Parliament would not exercise direct executive power over appointed officials of the executive government.⁶⁵⁶

But the government today is part of Parliament. The prime minister and thereby the ministers are members of Parliament chosen by the party in power. It is difficult to follow Dicey's reasoning today that the government is separated from Parliament and is in a position to somehow check its actions. This can be said of the Crown and the House of Lords as well. Dicey's trinity is now in fact a unity—the Unitary Executive, so beloved by George W. Bush and the neoconservatives. Addressing the subject of judicial interpretation, Dicey says

Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, *that will becomes subject to the interpretation put upon it by the judges of the land*, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament if the Houses were called upon to interpret their own enactments. In foreign countries, and especially in France, administrative ideas—*notions* derived from the traditions of a despotic monarchy—have restricted the authority and to a certain extent influenced the ideas of judges.⁶⁵⁷

⁶⁴⁸ Ibid 197.

⁶⁴⁹ Ibid 202.

⁶⁵⁰ Ibid 202–203, (emphasis added).

⁶⁵¹ Ibid 204.

⁶⁵² Ibid 406.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid 407.

⁶⁵⁵ Ibid 412.

⁶⁵⁶ Ibid 408.

⁶⁵⁷ Ibid 413–414 (emphasis added).

Judicial authority and independence are thus recognized by Dicey. For Dicey, acts of Parliament are 'subject to interpretation' by the courts.

Dicey's treatise proved to be an instant success and dominated constitutional discussion for the following 100 years. It has been described as 'a splendidly persuasive and well-argued work of simplification'.⁶⁵⁸ While Dicey took silk becoming a QC in 1890, he was not the conventionally successful barrister that he secretly yearned to be, as well as a having the desire to be a judge to follow in the footsteps of Blackstone.⁶⁵⁹ Like many lawyers, he also had a latent desire to succeed in politics. In a 2002 article Lord Bingham elaborated:

Dicey, on the other hand, and increasingly as time went on, was strongly opposed to almost any change, even (as I shall suggest) changes which one might have expected him to welcome, adopting a somewhat narrow, nationalist, dichard position. Perhaps this only shows how easily, in some, the liberal enthusiasms of youth are transmuted into the conservative prejudices of old age.⁶⁶⁰

The judicial power to interpret was a very real one in Dicey's day, and it is even more so today as is discussed in chapter 9. The Law Lords, now Supreme Court, have adopted a procedure of judicially amending a statute so that it is in conformance with fundamental rights of the HRA and the ECHR. Dicey recognized the judge-created Rule of Law, the independence of the judiciary, and the power and responsibility of the courts to interpret primary legislation. This is a far cry from the axiomatic inflexible absolute parliamentary sovereignty ascribed to him by some. These Dicean interpretive concepts are in fact the fulcrum of emergent constitutional judicial review in the United Kingdom.

Dicey's views actually parallel those of Tom Bingham as to the function and reality of interpretation:

[W]hen attempting to ascertain what is the meaning to be affixed to an Act of Parliament, [the judges] will presume that Parliament did not intend to violate the ordinary rules of morality, or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality.⁶⁶¹

Given this, Tom Bingham points out that in his view *Anismimic* is actually Dicean 'orthodox doctrine'. It will come as a disturbing surprise to some that Dicean orthodoxy is actually at the root of emergent judicial review.

B. MAGNA CARTA & HABEAS CORPUS

The conceptual origins of due process and fair trial components of the Rule of Law are inevitably traced to chapters 39 and 40 of the Magna Carta 1215:

39. No free man shall be seized, or imprisoned, or disscised, or outlawed, or exiled or injured in any way, nor will we enter on him or send against him except by the lawful judgment of his peers, or by the law of the land.

40. To no one will we sell, to no one will we deny or delay right or justice.

The principles of the Magna Carta were in fact being discussed and applied long before 1215—the Magna Carta was not a 'sudden intrusion into English society and politics'.⁶⁶² It was not a peace treaty, but rather an articulation of what was generally believed.⁶⁶³ While there is no mention of juries or habeas corpus, this was unquestionably the beginning of formal recognition of one of the most significant aspects of the rule of law—due process. The Magna Carta also has a significant presence in American jurisprudence; it has been cited by the US Supreme Court in 180 cases.⁶⁶⁴

The original Magna Carta was declared invalid by the pope because it was signed under duress. Just a month after King John's death in 1216, a substantively identical first new edition was created by his son, followed by further editions in 1217 and 1225. The Petition of Right 1628, precipitated by the 1627 King's Bench opinion in *The Five Knights' Case*, stated that 'no free man in any such manner as is before mentioned be imprisoned or detained... and that hereafter no commissions of like nature shall issue forth to any person or persons whatsoever'.⁶⁶⁵ It is at this moment that the Rule of Law 'came of age'.⁶⁶⁶

The Habeas Corpus Act 1679 was precipitated by the actions of King Charles II's chief minister, the Earl of Clarendon, who dispatched prisoners to outlying areas where habeas corpus was not available as it was then a remedy only in England and Wales. Clarendon was subsequently impeached because he had sent persons to 'remote islands, garrisons, and other places, thereby to prevent them from the benefit of law'.⁶⁶⁷ A ready connection can be drawn with the United States government's detention of terror suspects at Guantanamo Bay beginning in 2002. Both Clarendon and Bush were seeking black holes. In direct contravention of Antonin Scalia's repeated assertions that habeas corpus is historically not extraterritorial, Tom Bingham states: 'Much litigation, and much suffering, would have been avoided if the rule of law had been observed at Guantanamo from the start *as it was required to be in the UK in 1679*'.⁶⁶⁸

⁶⁶² JC Holt, *Magna Carta* (Cambridge University Press, Cambridge 1992) 295.

⁶⁶³ Bingham (n 7) 12.

⁶⁶⁴ Westlaw database search statistics; also see DV Stivison, 'Magna Carta in American Law,' in Stivison, ed., *Magna Carta in America* (Gateway Press, Inc. Baltimore 1993) 103.

⁶⁶⁵ Petition of Right 1628 [X].

⁶⁶⁶ Bingham (n 7) 20.

⁶⁶⁷ Proceedings in Parliament Against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and Other High Crimes and Misdemeanors: 15 and 19 Charles II. A.D. 1663–1667, 6 State Trials 291, 330, 396 (1668).

⁶⁶⁸ Bingham (n 7) 23 (emphasis added).

⁶⁵⁸ Bingham (n 633) 40, citing N Johnson, 'Dicey and his Influence on Public Law' [1985] *Public Law* 717, 718.

⁶⁵⁹ *Ibid.* 40.

⁶⁶⁰ *Ibid.* 42.

⁶⁶¹ *Ibid.* 47, citing AV Dicey, *The Law of the Constitution*, 60.

The Habeas Corpus Act 1679 was followed by the adoption of the Bill of Rights 1689, which focused primarily on the rules to which the Crown would be subject. The Monarch could not again assert 'divine authority' in order to evade the law. The authority and independence of Parliament was officially established. Excessive fines, excessive bail, and the infliction of 'cruel and unusual punishment' were specifically prohibited. In 1701 the Act of Settlement was passed by Parliament to provide for Protestant succession to William of Orange's wife, Queen Anne. This, coupled with an older rule that rendered the judiciary immune from civil suit or criminal prosecution for acts done in a judicial capacity, laid a foundation for judicial independence. Tom Bingham asserts that this judicial independence 'is one of the strongest safeguards against executive lawlessness'.⁶⁶⁹

C. RULE OF LAW IN JURISPRUDENTIAL DISCOURSE

The Rule of Law has often been analyzed and discussed as a concept of jurisprudential thought. Some of the leading legal philosophers of this generation have addressed the subject, and their representative views relevant to this discussion are briefly explored. Taken together they present a current consensus regarding the fundamental moral imperatives embraced by the Rule of Law.

1. Lon Fuller

For Lon Fuller the Rule of Law requires the following:

1. Laws are to be generalized as rules.
2. Laws are to be made known.
3. Laws are to impose liability for acts prospectively and not retroactively.
4. Laws should be sufficiently clear to serve as standards for decisions made in their name.
5. Laws are to avoid practical contradictions.
6. Laws ought not to require what is impossible.
7. Laws are to be sufficiently constant to enable reliance on them.
8. Laws are to be implemented according to their terms.⁶⁷⁰

These eight 'famous' precepts are value neutral and could easily apply to a nondemocratic government.

2. Joseph Raz

Joseph Raz adds to Fuller's eight a requirement that judicial review be consistent and accessible. But Raz also finds these eight to have no attendant morality.⁶⁷¹ In this sense, Fuller's

eight is simply a rule of rules. The rules can be totalitarian or democratic. But this makes no sense. A law that authorizes slavery cannot be said to be consistent with the Rule of Law as slavery denies equal protection, due process of law, and basic humanity.

3. Jeffrey Jowell

Tom Bingham turns to Jeffrey Jowell who looks to the bill of rights in other countries and the European Convention on Human Rights as necessary components of the structure of the Rule of Law, concluding that 'The rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental'.⁶⁷² This sub-rule, when taken in connection with the Parliamentary-sanctioned judicial responsibility to define the Rule of Law, endorses for judicial interpretation and enforcement those rights the courts determine to be fundamental.

4. Jeremy Waldron

Jeremy Waldron describes the Rule of Law as containing the following normative legal concepts:

1. a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology;
2. a requirement that there be general rules laid down clearly in advance, rules whose public presence enables people to figure out what is required of them, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned;
3. a requirement that there be courts, which operate according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved, and allowing people an opportunity to present evidence and make arguments before impartial and independent adjudicators to challenge the legality of official action, particular[ly] when it impacts on vital interests in life, liberty, or economic well-being;
4. a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.⁶⁷³

5. John Locke & Thomas Paine

A source for these core principles is John Locke, who in 1690 wrote 'Were-ever law ends, tyranny begins'.⁶⁷⁴ Tom Bingham also looks to British-born American patriot Thomas Paine who stated in 1776 that 'in America THE LAW IS KING. For as in absolute governments

⁶⁶⁹ Ibid.

⁶⁷⁰ I. Fuller, *The Law in Quest of Itself* (Beacon Press, Boston 1966).

⁶⁷¹ J. Raz, *The Authority of Law* (Oxford University Press, Oxford 2009) 223 et seq.

⁶⁷² Bingham (n 629) 20.

⁶⁷³ J. Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2009). New York University Public Law and Legal Theory Working Paper, Paper 115, 2.

⁶⁷⁴ Citing J. Locke, *Second Treatise of Government* (Hackett, Indianapolis 1980) § 202.

the King is law, so in free countries the law *ought* to be King; and there ought to be no other.⁶⁷⁵

6. Tom Bingham

Describing the equal protection of the Rule of Law's application to aliens, Tom Bingham cites the case of *Khawaja v Secretary of State for the Home Department*,⁶⁷⁶ the rule of which Antonin Scalia failed to apprehend in *Boumediene*. Bingham criticizes Parliament for providing, in Part 4 of ATCSA, for the indefinite detention of nonnationals without charge asserting that Parliament *was bound* by the previous judicial recognition of the international scope of habeas corpus and *could not legislate to the contrary*. The court has thus, like the US Supreme Court, set legal limits for the legislature.

Tom Bingham confirms that '[t]he historic role of the courts has of course been to check excesses of executive power, a role greatly expanded in recent years to due to the increased complexity of government and the greater willingness of the public to challenge governmental... decisions.'⁶⁷⁷ There is an inevitable tension between the government and the judiciary. This tension 'is greater at times of perceived threats to national security, since governments understandably go to the very limit of what they believe to be their lawful powers to protect the public, and the duty of the judges to require that they go no further must be performed if the rule of law is to be observed.'⁶⁷⁸ Bingham cites with illustrative approval US Supreme Court Justice William Brennan's 1987 caution:

There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security... After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.⁶⁷⁹

Another sub-rule is that procedures followed by the government adjudicating rights must be 'fair'.⁶⁸⁰ Fairness is an undefined component of the undefined Rule of Law. It too is left to judicial interpretation and enforcement. The Rule of Law then is a concept that is recognized, created, and defined by the courts, made applicable to the government, and now upon Parliament. Its primal sources are ancient Greek philosophers, the Magna Carta, all that it represents, and the Common Law. Bingham asserts that the judiciary clearly has the authority to enjoin governmental action that conflicts with judicial interpretation of the scope of the Rule of Law, fairness, and fundamental rights. Now read into Parliamentary acts is that

⁶⁷⁵ T Paine, *Common Sense* (W & T Bradford, Philadelphia PA 1776) ¶ 49.

⁶⁷⁶ [1984] 1 AC 74.

⁶⁷⁷ Bingham (n 629) 23.

⁶⁷⁸ *Ibid* 25.

⁶⁷⁹ *Ibid* 25–26, citing WJ Brennan Jr, 'The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises' (1988) 18 *Israel Yearbook of Human Rights* 11.

⁶⁸⁰ *Ibid* 26.

Parliament is presumed to intend that legislation comply with a judicially defined concept of the Rule of Law, including the right to a fair trial. As will be seen in chapter 9, the Rule of Law will thus be applied to any statute affecting fundamental rights unless Parliament specifically says the purpose and intent of its act is to deny a fundamental right and to violate the Rule of Law. While Parliament may officially retain the power to do so as a matter of theoretical sovereignty, it seems extremely unlikely it would actually say such a thing as a matter of British politics, participation in the ECHR, and participation in the European Community.

7. Lord Woolf, Lord Lester, and Lord Steyn

Lord Woolf and Lord Steyn have presented public lectures on the evolution of the Rule of Law, the CRA, and the court's role in enforcing the Rule of Law. Lord Woolf was the chief negotiator of the CRA on behalf of the judiciary. Speaking at the Squire Centenary lecture at Cambridge in March 2004, he addressed the then-impending 2005 constitutional changes creating a new separate Supreme Court and formally recognizing judicial independence and the Rule of Law:

Over recent years, recognition of the importance of the rule of law and the significance of the independence of the judiciary has increased dramatically. One of the most important of the judiciary's responsibilities is to uphold the rule of law, since it is the rule of law which prevents the Government of the day from abusing its powers. Ultimately, it is the rule of law which stops a democracy descending into an elected dictatorship. To perform its task, the judiciary has to be, and seen to be, independent of government. Unless the public accepts that the judiciary are independent, they will have no confidence in the honesty and fairness of the decisions of the courts.⁶⁸¹

Lord Woolf's reason for supporting the 2005 constitutional change is that it was necessary:

It is becoming increasingly clear that the independence of the judiciary requires increased statutory protection.... Separating the House of Lords in its legislative capacity from its activities as the Final Court of Appeal, could act as a catalyst causing the new court to be more proactive than its predecessor.⁶⁸²

He sees the CRA as 'a new constitutional settlement giving effect to the rule of law' that recognizes rights that 'control and constrain how sovereignty is exercised'.⁶⁸³ The Magna Carta is seen as a source of the Rule of Law and 'a symbol for the values of the common law'.⁶⁸⁴ Most important, the executive and the legislature must act in accordance with the Rule of Law and are subject to it. Lord Lester in turn has described another aspect of how significant the now

⁶⁸¹ Lord Woolf, 'The Rule of Law and A Change in the Constitution' (2004) 63 *Cambridge Law Journal* 317, 321.

⁶⁸² *Ibid* 322.

⁶⁸³ Woolf, H, 'Magna Carta: A Precedent for Recent Constitutional Change' Speech delivered at Royal Holloway, University of London, Surrey (June 15, 2005).

⁶⁸⁴ *Ibid*.

physical separation from Parliament is: 'No more gossiping among the Lords about cases and the Judges will no longer debate in Parliament as Lord Hoffmann did in the fox hunting case.'⁶⁸⁵

In the November 2006 Annual Lecture of the Law Reform Committee of the Bar Council entitled 'Our Government and the International Rule of Law since 9/11', Lord Steyn points out that there was a widespread view before World War II that however cruelly governments treated their own citizens and people within their borders was not properly a concern of international institutions. However, after the experience of the Third Reich and the Holocaust, followed by the Nuremberg and Tokyo trials in 1945, the United Nations was established, and the Universal Declaration of Human Rights 1948 (UDHR) was adopted. The UDHR, together with the International Covenant on Civil and Political Rights 1966 (ICCPR) and International Covenant on Economic, Social and Cultural Rights (1966) is truly an 'international bill of rights'.⁶⁸⁶

The Geneva Conventions 1949 and Article 75 of the First Protocol render it unlawful to coerce a prisoner to confess by the use of torture and inhuman or degrading treatment. Article 75(4) is particularly significant:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence relating to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognised principles of juridical procedure.⁶⁸⁷

Lord Steyn asserts that this now-customary international law binds both the United States and Britain. As will be seen, the US Supreme Court agreed in *Hamdan*. Not reluctant to name names, Lord Steyn described how these noble ideals have been corrupted in both the United States and the United Kingdom since 9/11:

For neoconservatives the target of Iraq, strategically pivotal and rich in oil reserves, was irresistible. With this target as the principal agent, the Bush Administration set out to undermine international institutions and refashion international law. In this endeavour, President Bush found in the present British Prime Minister an ever compliant ally. Our Prime Minister backed the Bush Administration in regard to its so-called war on terrorism, however lawless and outrageous the means adopted. Encouraged by the excesses of the war against terrorism many countries have adopted repressive policies, believing them now to be justified.⁶⁸⁸

Lord Steyn focuses particularly on Guantanamo Bay. His strong feelings are not concealed:

Dick Cheney stated that the Guantanamo detainees '...are living in the tropics. They are well fed. They have got everything they could possibly want'. But you may

⁶⁸⁵ A Lester, Lecture given at The Human Rights Law Conference 2008 (October 21, 2008) Notes in author's possession.

⁶⁸⁶ Lord Steyn 'Our Government and the International Rule of Law since 9/11' [2007] *European Human Rights Law Review* 1, 2

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.* 1–2.

have heard a recent radio broadcast in which the Vice President approved the technique of water boarding, which is a form of torture by feigned drowning. The circumstantial case that torture was and is widespread on Guantanamo Bay is cogent. In any event, under the Geneva Conventions the detention of the prisoners in that black hole is unlawful. The approach of the Blair Government to the lawlessness at Guantanamo Bay is not secret. The Defence Secretary said positively on January 15, 2002 that: "There is no doubting the legality in the way these combatants [at Guantanamo Bay] have been imprisoned. There is no doubting the legality of the right of the US... to remove them for trial [to Guantanamo Bay]." Our Government endorsed Guantanamo Bay. Our Prime Minister has not been prepared to go further than to say that Guantanamo Bay is an understandable anomaly. As a lawyer who admires American democratic values, I feel compelled to describe Guantanamo Bay as a stain on American justice. But due to the conduct of our Government we share in the shame.⁶⁸⁹

Lord Steyn is equally critical of the system of extraordinary rendition practiced by the United States in which Britain has been willingly complicit:

In operating the system of secret rendition the Bush Administration placed itself above the law and placed the individuals concerned beyond the protection of the law. Since Nuremberg such kidnapping has constituted a war crime under international law. Those consciously involved are subject to the universal criminal jurisdiction of international law.⁶⁹⁰

Lord Steyn urges that 'we must move on from the tragedy of 9/11, we must move on from the total obsession with the war on terror, and we must try to restore the foundations of international rule of law worthy of the name'.⁶⁹¹

Ronald Dworkin goes even further. For him the Rule of Law relates first and foremost to integrity and equality. Political integrity means equality before the law—equal protection of the law—beyond simply law being enforced as written 'but in the more consequential sense that government must govern under a set of principles in principle applicable to all'.⁶⁹² Dworkin sees this fundamental precept of equality and integrity as the fountainhead source of human rights.⁶⁹³ This conception of the Rule of Law takes the view that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. These moral and political rights are recognized in positive law, so that they may be judicially enforced by individual citizens. The Rule of Law is an enforceable framework of liberty, equality, and due process upon which a democratic government is built.

⁶⁸⁹ *Ibid.* 3.

⁶⁹⁰ *Ibid.* 4.

⁶⁹¹ *Ibid.* 7.

⁶⁹² R Dworkin, *Justice in Robes* (The Belknap Press of Harvard University Press, Cambridge MA 2006) 176.

⁶⁹³ *Ibid.* 176–186.

D. THE RULE OF LAW AND SEPARATION OF POWERS

The doctrine of the separation of powers, also originating with Aristotle,⁶⁹⁴ became influential with the writings of Montesquieu and John Locke. Examining the English system of government, Montesquieu saw clearly that in order to defend against government abuses of power and to protect individual liberties there must be a separation of legislative, executive, and judicial powers.⁶⁹⁵ In the United States, separation of powers is articulated in the Constitution—Article I (legislative), Article II (executive), and Article III (judicial). The US Supreme Court has had the authority since 1803 to invalidate both executive and congressional acts when it determines there is a violation of the Federal Constitution. This power was established by constitutional judicial decision—*Marbury v Madison*. The United Kingdom has now followed suit. The CRA 2005 bestows upon the new Supreme Court of the United Kingdom confirmation of the power to interpret legislation. It is unquestioned in the rational mainstream United States that ‘It is emphatically the province and duty of the judicial department to say what the law is.’⁶⁹⁶ As will be chronicled in chapter 9, the same reality has now effectively emerged in the United Kingdom insofar as the fundamental right to a fair trial is concerned.

The importance of an independent judiciary in the United Kingdom is even greater now that the courts have responsibility for protecting human rights and fundamental freedoms from action by the commingled executive and legislative branches that would restrict rights and freedoms in the name of national security. Lord Phillips, former chief justice and now president of the UK Supreme Court, presented his paper ‘Judicial Independence’ to the Commonwealth Law Conference 2007 in Nairobi, Kenya. Looking back to the time when he started practicing law nearly 50 years ago, he explained that

[J]udicial review was in its infancy. Judges were reluctant to review the exercise of discretionary powers vested by the legislature in the executive. All of this changed with the application of the *Wednesbury* test and, more recently, the requirement that has arisen as a result of the Human Rights Act 1998 for the judge himself to apply a test of proportionality to executive action that interferes with human rights.⁶⁹⁷

Lord Phillips views an independent judiciary as essential to the Rule of Law, which in turn ‘the bedrock of a democratic society’ and the only basis by which public bodies and the executive can exist. He welcomes the ‘dramatic changes’ that have ‘important implications

for the independence of the judiciary’ as a result of the CRA in which Parliament both identifies and endorses the ‘rule of law’ while separating the judiciary from Parliament:

The rule of law requires that the courts have jurisdiction to scrutinise the actions of government to ensure that they are lawful. In modern society the individual citizen is subject to controls imposed and enforced by the executive in every aspect of life. The authority to impose most of these controls comes, directly or indirectly, from the legislature. The citizen must be able to challenge the legitimacy of executive action before an independent judiciary.⁶⁹⁸

In his October 2007 address to the American Bar Association at Grosvenor House, London, Lord Phillips described how, as recently as 1977, the Law Lords had been extremely deferential to any actions of the government and in particular the Home Secretary. The Law Lords’ position then was essentially that decisions and discretion of the Home Secretary were not reviewable. Despite the new threats of terrorism, the UK courts now are not showing the traditional deference to action taken by the executive in the interests of national security.⁶⁹⁹ This change is attributed primarily to the HRA:

We cannot strike down legislation that conflicts with the Convention, but we can make a declaration that it is incompatible with the Convention. *This is just about as good*, because the Government up to now has always responded to a declaration of incompatibility by changing the offending law. More significantly we now have to scrutinise executive action to ensure that it does not infringe human rights. We can no longer hold that actions taken in the interests of national security by the executive are not justiciable if those actions are alleged to infringe individual human rights.⁷⁰⁰

Even though the English Constitution’s unwritten status may have some advantage allowing evolutionary flexibility, Jeffrey Jowell acknowledges that there are the accompanying disadvantages of incoherence and inaccessibility, noting that during the evolution of the welfare state, discretionary power was increasingly conferred upon ministers and other public officials ‘untroubled by any judicial oversight or review.’⁷⁰¹ Jeremy Bentham opposed not only a bill of rights but also “the licentiousness of interpretation” of legislation by judges.⁷⁰² But Parliament has now directly conceded that judges can review its acts under European Community law and the offending legislation can be ‘disapplied’—which Jowell describes as a polite term for being struck down.

⁶⁹⁴ Aristotle (n 627) *Politics*, Book VI, Chapter 2, tr. by EB Baker (Oxford University Press, Oxford 1995) 231.

⁶⁹⁵ Montesquieu, *The Spirit of the Laws* [Book XI, Chapter 6] translated and edited by A Cohler, B Miller and H Stone (Cambridge University Press, Cambridge 1989) 157.

⁶⁹⁶ *Marbury* (n 12) 177.

⁶⁹⁷ NA Phillips, ‘Judicial Independence’ Speech delivered at the Commonwealth Law Conference 2007, Nairobi, Kenya (September 12, 2007) 10.

⁶⁹⁸ *Ibid* 2.

⁶⁹⁹ NA Phillips, ‘Impact of Terrorism on the Rule of Law’ (Speech given at American Bar Association Conference, Grosvenor House, London, October 3, 2007) 2.

⁷⁰⁰ *Ibid* (emphasis added).

⁷⁰¹ J Jowell, ‘Politics and the Law: Constitutional Balance or Institutional Confusion?’ (2006) 3 (2) *Justice Journal* 19.

⁷⁰² *Ibid*, citing J Bentham in LJ Hume, *Bentham and Bureaucracy* (Cambridge University Press, Cambridge 1981) 82.

Declarations of incompatibility ultimately have the same effect as disapplication as they have always been accepted by the government. Jowell disputes claims that this has happened because of activist judges. He asserts that Parliament has done this itself and in his lifetime. He disputes that there has been a usurpation of power by the judiciary; rather the changes have come directly from Parliament. The Constitutional Reform Act 2005 reinforces the separation of powers and the independence of the judiciary. Jowell endorses Isaiah Berlin's beliefs that the tyrannies of Nazi Germany, which occurred with clear public support, necessarily 'altered the lives and viewpoints of virtually all of mankind... democracy and majority rule could no longer be regarded as synonymous'.⁷⁰³

It was surely the lessons of that period that convinced even the most ardent majoritarian or utilitarian that democracy goes beyond just representative government. Popular will is important, but should not invade certain fundamental rights and liberties.⁷⁰⁴

'[T]he opportunity should not easily be available to subvert what Lord Steyn has called the 'new constitutional hypothesis'—which, by definition, seeks to protect unpopular causes or minorities from dominance of the majority.⁷⁰⁵ Because courts can disapply legislation that offends the European Union, usually with issues of fair trade, 'surely the courts are even better equipped to adjudicate whether there has been a trespass on the necessary elements of our domestic democratic order'.⁷⁰⁶ A central component of democracy and of the Rule of Law is that there must be an independent arbiter to make sure that the Rule of Law 'if it is indeed to bend, does not break', and 'as a matter of principle, Parliament should not be permitted to make that judgment in its own cause'. Such an assertion would have been 'almost unthinkable' even at the end of the 20th century when the perceived concept of absolute Parliamentary sovereignty was still officially accepted. Jowell cites *Jackson v Attorney General*⁷⁰⁷ 'for the fact that at least three of the judges in that case suggested, albeit in obiter, that in certain circumstances judges might have the authority to outright disapply legislation, even outside of the Parliament acts and Human Rights Act'. In endorsing this position, Jowell starts with Lord Steyn's comments in *Jackson* that as Parliamentary sovereignty is a Common Law construct, it can be changed by its makers. This is compatible with Dicey's assertion that fundamental rights are judge created. Jowell cites extreme examples such as Parliament postponing or eliminating elections, creating a one-party state, or prohibiting criticism of the government:

[I]t forfeits the condition upon which its sovereignty is based. The legitimacy of Parliament's claim to absolute sovereignty collapses because it is seeking to undermine its representative nature—to cut off the bough on which Parliamentary sovereignty sits.⁷⁰⁸

⁷⁰³ Ibid 22.

⁷⁰⁴ Ibid.

⁷⁰⁵ Ibid 23.

⁷⁰⁶ Ibid 24.

⁷⁰⁷ [2005] UKHL 56, [2006] 1 AC 262.

⁷⁰⁸ Jowell (n 701) 26.

Additional hypothetical examples are Parliament's attempts to abolish judicial review, authorizing torture of terrorist suspects, and indefinite detention without trial. Such legislation 'would be regarded as undermining those values and "fundamentals" of the new, rights-based democratic order that we now inhabit and which require respect for human dignity, equality and the rule of law'.⁷⁰⁹ By disapplying such legislation the judiciary would be fulfilling its duties as guardians of this new order.

Lord Hoffmann describes this new reality of judicial constitutional review:

[T]he courts of the United Kingdom, though acknowledging the sovereignty of Parliament [will] apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.⁷¹⁰

The establishment of the new UK Supreme Court was a watershed constitutional moment, not only because 'the old doctrine of untrammelled parliamentary sovereignty has received another knock' but perhaps more important because 'the more modern and more liberal doctrine of human rights, of which the rule of law is an integral part, has been strengthened'.⁷¹¹ Lord Pannick commented that

For many observers, recognition that the law lords should have no political role was the culmination of the process of transformation of the final court of appeal into an independent institution. But for others, acknowledgement that the law lords were judges whose functions are distinct from those of the legislature was the prelude to the last stage of maturity: the creation of a supreme court outside Parliament.⁷¹²

The CRA endorsed the argument advanced in 1867 by Walter Bagehot: 'The supreme court of the English people ought to be a great conspicuous tribunal' and 'ought not to be hidden beneath the robes of a legislative assembly'.⁷¹³ The CRA gave effect to the package of constitutional reforms announced in June 2003, and with that announcement, 'the Government indicated its view that the existing constitutional conventions which regulated the role of the Law Lords within the legislative work of the House of Lords were insufficient'.⁷¹⁴

During the last week in July 2009, the judicial committee of the House of Lords began winding up 133 years of continuous business in the Palace of Westminster. The Law Lords would next meet as Supreme Court justices in the new UK Supreme Court housed in the refurbished building that used to be the Middlesex Guildhall. While some observers might suggest this change in the styling and accommodation was more show than substance, this is clearly not the case. Twelve chief justices from around the world, a number of other senior

⁷⁰⁹ Ibid 9.

⁷¹⁰ *R v Secretary of State for the Home Department ex parte Simms* [2002] 2 AC 115.

⁷¹¹ M Kettle, 'It took 142 Years, but at last Bagehot has got his way', *Guardian* (July 31, 2009).

⁷¹² D Pannick, 'Farewell to the Law Lords', *The Times* (July 30, 2009).

⁷¹³ W Bagehot, *The English Constitution* (The Echo Library, Teddington, Middlesex 2005) 86.

⁷¹⁴ Speech given by Jenny Rowe, Chief Executive of the UK Supreme Court, to the British and Irish Association of Law Librarians (June 19, 2009). Paper in author's possession.

British and foreign appellate judges, and a group of senior law professors from the United Kingdom, Europe, and the United States were in the gallery to witness the historic occasion. They were participants in a conference on the role of supreme courts organized by the Judiciary Office and King's College London to mark the event.⁷¹⁵ Such a conference is testimony to the pan-national importance of role of an independent judiciary in upholding the Rule of Law and the international significance of a new and truly independent UK Supreme Court.

E. A NEW SOVEREIGN: THE RULE OF LAW

Former President of the International Court of Justice Judge Rosalyn Higgins points out that the new British sovereign—the Rule of Law—is the founding principle of the European Union of which the United Kingdom is a signatory and a member.⁷¹⁶ Article 6(1) of the EU Treaty states: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.⁷¹⁷ The European Court of Justice has made the link between the Rule of Law and fundamental rights even more direct:

The European Community is ... a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.⁷¹⁸

Jeffrey Jowell identifies the Rule of Law as a principle of institutional morality that limits the abuse of power, requires that power be fairly exercised, and one that is enforced through judicial review.⁷¹⁹ The scope of the Rule of Law is broad, covering both the substance and procedures of official decisions.⁷²⁰ The right to a fair hearing necessarily includes notice of the offense, opportunity to prepare a defense, disclosure of evidence, impartial tribunal, assistance of counsel, and an appropriate standard of proof.⁷²¹ These procedural protections 'whether established by statute or the common law, is a concrete expression of the Rule of Law'.⁷²² An important aspect of the Rule of Law, particularly in the United Kingdom, which does not have a written constitution, is that it prevents the abuse of government power.⁷²³

⁷¹⁵ J Waldron, 'Passing Judgment', *Guardian* (1 August 2009).

⁷¹⁶ Speech at LSE (notes in author's possession).

⁷¹⁷ Treaty on European Union (Consolidated Version) article 6. < http://eur-lex.europa.eu/en/treaties/dat/12002M/htm/C_2002325EN.000501.html >

⁷¹⁸ *Unión de Pequeños Agricultores v Council (Agriculture)* [2002] EUECJ C-50/00P.

⁷¹⁹ J Jowell and D Oliver, *The Changing Constitution* (5th edn Oxford University Press, Oxford 2004) 5.

⁷²⁰ *Ibid.*

⁷²¹ *Ibid.* 15.

⁷²² *Ibid.* 17.

⁷²³ *Ibid.* 19.

While some 20th-century tyrannies claimed 'legitimacy' because of majority support, there is now a new direction:

Britain, like so many countries in this new century, is moving steadily to a model of democracy that limits governmental power in certain areas, even where the majority [Parliament] may prefer otherwise. The Rule of Law supplies the foundation of that new model.⁷²⁴

Lord Steyn points out that the history of unfettered majority rule in the 20th century is bleak, citing Nazi Germany, South Africa, and Chile where human rights outrages were sanctioned by law. He maintains these great tyrannies of the 20th century contain important lessons: 'They demonstrate that majority rule by itself, and legality on its own, are insufficient to guarantee a civil and just society'.⁷²⁵ Citing Lord Hailsham's 1978 description that the United Kingdom's post-World War II Westminster system is 'an elective dictatorship', Lord Steyn observes:⁷²⁶

The public is now increasingly looking not to Parliament, but to the judges to protect their rights. In this new world, judges nowadays accept more readily than before that it is their democratic and constitutional duty to stand up where necessary for individuals against the government. The greater the arrogation of power by a seemingly all-powerful executive which dominates the House of Commons, the greater the incentive and need for judges to protect the rule of law.⁷²⁷

In 2002, the Law Lords ruled in *Anderson*⁷²⁸ that the Home Secretary's traditional right of setting the tariff for prisoners convicted of murder was no longer acceptable. The rationale was that it was contrary to the Rule of Law.⁷²⁹

Under our constitution the separation of powers protecting judicial independence is now total and effectively so. This constitutional principle exists not to eliminate friction between the executive and judiciary. It exists for this reason only: to prevent the rise of arbitrary executive power. The importance of this exposition of this core principle in our constitution is enormous. The foundation of this development was broadly based: it was anchored on the rule of law.⁷³⁰

The criminal law of sentencing and the setting of tariffs are clearly within the court's specific area of competence. The Law Lords found in *Anufrijeva* that an uncommunicated

⁷²⁴ *Ibid.* 25.

⁷²⁵ Steyn (n 98) 244.

⁷²⁶ *Ibid.* (footnote omitted).

⁷²⁷ *Ibid.* 247.

⁷²⁸ *Anderson, R (on the application of) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837.

⁷²⁹ Steyn (n 98) 247.

⁷³⁰ *Ibid.* 248.

notification of decision was without any legal effect. This is not just enforcement of a technical rule. It is an application of the right of access to justice.⁷³¹

Lord Steyn describes *Belmarsh I* as a decision 'of fundamental importance'.⁷³² He approves Lord Bingham's description that 'the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself'.⁷³³ Lord Steyn concludes that 'The decision goes to the very heart of our democracy. It anchors our constitutional system on the Rule of Law. Britain has become a constitutional state'.⁷³⁴

Attorney General Lord Goldsmith, QC, while still in office, spoke to the meaning of the Rule of Law and the Constitutional Reform Act 2005. Somewhat surprisingly, he states: 'Instead it seems to me clear that the Rule of Law comprehends some statement of values which are universal and ought to be respected as the basis of a free society'.⁷³⁵ He says quite clearly that 'Certain rights—for example the right to life, the prohibition on torture, on slavery—are simply non-negotiable'.⁷³⁶ He argues that

There are other rights such as the presumption of innocence or the right to a fair trial by an independent and impartial tribunal established by law, where we cannot compromise on long-standing principles of justice and liberty, even if we may recognise that there may sometimes be a need to guarantee these principles in new or different ways. These principles are not just short-term objectives—they are the permanent foundations of a free society.⁷³⁷

Yet Lord Goldsmith was part of the Blair government that instituted ATCSA detentions without fair trial and the use of secret evidence. Lord Goldsmith's again-surprising final precept is that the law has universal application and that there are no 'outlaws':

Second, determining if a particular person is or is not a terrorist requires more than mere assertion on the part of an authority, however genuine and well-intentioned that authority may be. Our tradition requires such an assertion to be subject to testing by an independent and competent tribunal.⁷³⁸

But ATCSA took a decidedly different course. As to who enforces the Rule of Law—courts or Parliament—Lord Goldsmith asserts that 'no one' would take issue with the concept that courts are responsible for upholding the Rule of Law. Lord Goldsmith cautions however that 'from my experience as attorney general' he believes that the courts do not have a monopoly for upholding the Rule of Law. He adds that 'there are still some no-go areas for the courts

⁷³¹ *R. (Abusifrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604 [26].

⁷³² Steyn (n 98) 249.

⁷³³ *Ibid* 250.

⁷³⁴ *Ibid*.

⁷³⁵ PH Goldsmith, 'Government and the rule of law in the modern age' (2006) 3(1) *Justice Journal* 7, 12.

⁷³⁶ *Ibid*.

⁷³⁷ *Ibid* 12–13.

⁷³⁸ *Ibid* 14.

referred to by Lord Phillips as "forbidden areas".⁷³⁹ 'One such area relates to certain decisions taken under the prerogative, such as to whether or not to go to war'.⁷⁴⁰ Lord Goldsmith describes judicial review of antiwar protestors questioning the decision to go to war—not attempting to enjoin the decision itself but seeking damages—as not justiciable. Even where the courts do have jurisdiction over Parliament, the doctrine of deference or judicial restraint means that they should be very circumspect about overriding the decisions of the democratically elected bodies.⁷⁴¹ There is no issue to be taken with these words. But this judicially chosen deference does not mean that either legislative or executive actions are not subject to the Rule of Law and judicial review.

F. THE HUMAN RIGHTS ACT 1998 & PARLIAMENTARY SOVEREIGNTY

The Human Rights Act 1998 (HRA) is an enhancer of both the Rule of Law and judicial review and adopts the principal requirements of the European Convention on Human Rights into domestic UK law. Addressing the role of the HRA as it relates to Parliamentary sovereignty, Nicholas Bamforth asserts that the HRA falls within the Common Law system and simply replicates preexisting norms.⁷⁴² UK courts are required to interpret all statutes to ensure compatibility with the HRA. Insofar as possible, statutes must be interpreted so as to be consistent with the ECHR. If a statute cannot be read to be consistent (and courts have gone to great lengths to do so) a declaration of incompatibility may be issued. This does not affect the parties. However, the government is required to submit to Parliament alternative legislation that is deemed to be compatible. Parliament is then free to do what it wishes and can adopt, modify, reject, or ignore. In all cases to date, Parliament has in fact changed the offending law. It would be extremely difficult politically, as a member of the EU and as an author of and signatory to the ECHR, for Parliament to act in defiance of a declaration of incompatibility, and it has never done so. Nonetheless, Bamforth believes it is premature to conclude that the HRA has constitutional status, albeit it does have constitutional impact. But this seems a distinction without a significant difference.

Jeffrey Jowell is a direct status proponent. Jowell's thesis is that the HRA marks a fundamental shift in the nature of democracy. Democratic principle can no longer be simply equated with majority approval. The new rights-based understandings 'have at their heart a limited but significant catalogue of rights even against overwhelming popular will'.⁷⁴³ Even though Parliament retains the theoretical power to legislate contrary to convention rights, it is the courts that determine the scope of the rights in the new constitutional order.

Implementation of the Human Rights Act 1998 in the year 2000 has been identified as an enabling source of constitutional judicial review and has spawned much discussion as to the role of the HRA as a 'super statute' confirming that it is within the authority of the courts to

⁷³⁹ *Ibid*.

⁷⁴⁰ *Ibid*.

⁷⁴¹ *Ibid* 15.

⁷⁴² N Bamforth, 'Understanding the Impact and Status of the Human Rights Act 1998 Within English Law' (2005) New York University Global Law Working Paper 10/04.

⁷⁴³ J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity' [2002] *Public Law* 591, 597.

enforce the Rule of Law. While some token obeisance continues to be made to the concept of Parliamentary sovereignty, much judicial and extrajudicial discussion focuses on the ultimate authority, responsibility, and competence of the courts. Lord Steyn in particular has extrajudicially discussed the court's responsibility and duty to act to ensure that the Rule of Law is followed not only by the government but by Parliament. In the renowned *Jackson* dicta, there is open discussion as to whether the concept of Parliamentary sovereignty is to be replaced by the view that *all* legislative power is directly subject to enforceable legal constraints

This latter theory is referred to as constitutionalism, and it is the focus of this section of this book. The argument is that fundamental values such as human rights are now firmly embedded and entrenched within the Rule of Law—and thus in the English Constitution—and are subject to judicial oversight. The Law Lords have established that fundamental rights cannot be invaded except by the clearest of specific Parliamentary expression and actively suggest that there is substantive limitation on the competence of Parliament to so legislate.

Lord Steyn wrote in *Turkington v Times Newspapers Ltd* that '[t]he Convention [ECHR] fulfils the function of a Bill of Rights in our legal system. There is general agreement that the Human Rights Act 1998 is a constitutional measure.'⁷⁴⁴ Laws LJ's dicta in *Thoburn v Sunderland City Council*⁷⁴⁵ suggest the HRA is of a constitutional rather than an ordinary variety, and that its special status renders it immune from the possibility of implied repeal by subsequent legislation. David Feldman is clear that '[as] a matter of constitutional law, the Act already has a status rather different from, and superior to, that of most other legislation (except perhaps the Acts of Union and the European Communities Act of 1972)'.⁷⁴⁶ Jeffrey Jowell asserts that the HRA 'is no ordinary law. It is a fundamental, constitutional measure of greater contemporary significance to the protection of human rights than any previous constitutional measure'.⁷⁴⁷

Sir Stephen Sedley describes a new 'bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable—politically to Parliament, legally to the courts'.⁷⁴⁸ It is hard to see how this redefinition of the court's presence does not reflect upon Parliament's sovereignty. A similar phenomenon seems to exist with an attempt to distinguish status from impact. Impact requires status and status begets impact. Since sovereignty is a Common Law principle, many judges have stated extrajudicially that legislation that violates the Rule of Law will not be recognized by the court. As will be discussed in chapter 9, this is no longer just an extrajudicial view or mere *obiter dicta*.

Lord Steyn views the HRA as 'a constitutional measure ranking in importance with other milestones in the evolution of our country towards becoming a fully fledged constitutional state'.⁷⁴⁹ He describes the HRA as a Bill of Rights, adopting Jowell's view that although Parliament retains the theoretical power to legislate contrary to Convention rights, it is the courts—using section 3 and 4—who now determine the scope of those rights and of the new constitutional order to say what the law is.⁷⁵⁰

Much has changed within a short passage of time. The Law Lords have literally jumped far ahead of academic arguments and analysis, imposing a *Marbury* style fair trial due process clause requirement upon Parliamentary legislation affecting fundamental rights under the rubric of interpretation. The Constitutional Reform Act 2005 approved this process.

G. THE COMMON LAW & FUNDAMENTAL RIGHTS TODAY IN THE UNITED KINGDOM

The Common Law has traditionally protected human rights in the United Kingdom. It still does. One way in which human rights were protected before the HRA and before the ECtHR was through tort law. For example, liberty and security can be protected in part by the actionable torts of trespass, assault, battery, and false imprisonment. Likewise, freedom of speech can in part be protected by the law of defamation. The HRA itself makes it clear in section 11 that the rights it sets out do not affect any other individual rights or remedies. The HRA simply lays down a floor, not a ceiling, for the protection of human rights. Significantly:

[T]he common law may be influenced by the rights set out in those international human rights treaties which have been ratified by the United Kingdom but (unlike the European Convention) have not been given domestic effect through legislation. The position even before the HRA came into force was that the European Convention was relevant to domestic law, although it was not directly enforceable.⁷⁵¹

The authors of *Human Rights: Judicial Protection in the United Kingdom* specifically note:

In recent years, particularly in the years leading up to the enactment of the HRA, this common law approach to the protection of individual rights was greatly developed, in particular by the recognition of [common law based] explicit constitutional and fundamental rights.⁷⁵²

The source of the common law of constitutional rights originates from the principle of the right of access to the courts.⁷⁵³ In *Watkins v Home Office*, Lord Rodger expressed the view that fundamental rights are 'constitutional' in the sense that 'they are seen as part of the British constitution which Parliament would not change except on due deliberation leading to express enactment'.⁷⁵⁴ Fundamental rights are founded in the Common Law and are applicable to decisions taken by public authorities whether or not they are taken pursuant to statutory powers.⁷⁵⁵ In a separate line of cases, UK courts have recognized that some rights are 'fundamental' and should be treated as such by the common law.⁷⁵⁶ There is a Common Law

⁷⁴⁴ *Turkington v Times Newspapers Ltd* [2000] UKHL 57, [2001] 2 AC 277.

⁷⁴⁵ [2002] EWHC 195 (Admin).

⁷⁴⁶ D Feldman, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 *Legal Studies* 165, 178.

⁷⁴⁷ Jowell (n 719) 73.

⁷⁴⁸ S Sedley, 'Human Rights: a Twenty-First Century Agenda' [1995] PL 386, 389.

⁷⁴⁹ Lord Steyn, 'Deference: A Tangled Story' [2005] *Public Law* 346, 349.

⁷⁵⁰ *Ibid* 357.

⁷⁵¹ Beatson (n 632) 3.

⁷⁵² *Ibid* 5.

⁷⁵³ *Chester v Bateson* [1930] 1 KB 829.

⁷⁵⁴ [2006] UKHL 17, [2006] 2 AC 395 [59].

⁷⁵⁵ Beatson (n 632) 7 (footnotes omitted).

⁷⁵⁶ *Ibid*.

judicial presumption that Parliament does not intend to abrogate such rights. This presumption is overturned *only* if Parliament says that it is its specific intent and purpose to violate a specifically identified fundamental right.⁷⁵⁷

Fundamental rights include right of access to the court, right to property, freedom of speech, freedom of assembly,⁷⁵⁸ all of which are of particular importance to this book and, most important,

The right to a fair hearing before an unbiased court or tribunal has been recognised at common law for so long that it hardly requires citation of authority. It is deeply embedded in domestic law and should be regarded as fundamental... as it was put by Fortescue J. in *Bentley's Case* in 1723, 'even God himself did not pass sentence upon Adam, before he was called upon to make his defence'.⁷⁵⁹

The principles found in customary international law provide a parallel source for the Common Law. 'Customary international law' is

a reference to that body of public international law which is not contained in treaties but which is combined with *opinio juris*... It has long been regarded as being (in general) part of the common law without the need for incorporation by Act of Parliament (as is required by treaty law).⁷⁶⁰

Treaties may be looked to as a source of international law as was done in the United Kingdom prior to the incorporation of the ECHR. Between 1964 and July 1999 the ECHR, though unincorporated, was referred to in over 650 English cases.⁷⁶¹ Even prior to the HRA if there were two possible interpretations, the one most consistent with the Convention was adopted. The presumption was that Parliament intended to act in conformity with the ECHR as the United Kingdom was a signatory.⁷⁶²

The situation is more straightforward in the United States. Fundamental rights are articulated and codified in the text and are the first 10 Amendments to the Constitution. Since 1803 a function of the US Supreme Court has been to say what the law is and to determine if congressional legislation and executive actions are constitutional—striking down what is deemed unconstitutional.

H. A NEW AND TRULY INDEPENDENT UK SUPREME COURT

The Parliamentary creation of a new Supreme Court and the constitutional restructuring of 2005 are overt acknowledgments and endorsements of the critical importance of judicial

review. As of October 2009 the highest court in the United Kingdom was no longer part of Parliament. It is no longer the Appellate Committee of the House of Lords. The Law Lords have become Supreme Court justices, and they have their own building. There is now a separate and distinct Supreme Court. The position of Lord Chancellor has been restricted. The chancellor was at once a representative to government, a member of the House of Lords, and an agent of the government. The 12 Law Lords could in fact participate in the debates of the House, and other members of the House of Lords could be present when the Law Lords delivered their judicial opinions. All no more. The Constitutional Reform Act 2005 recognizes both the importance of the Rule of Law and the independence of the judiciary. There has been a voluntary divestiture of sovereignty and recognition of the increased role of the judiciary. The Act itself announces that

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
[Chapter 4, Part One]

The Act further specifically guarantees *continued* judicial independence: The Lord Chancellor, other Ministers of the Crown, and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the *continued* independence of the judiciary.⁷⁶³

The Appellate Jurisdiction Act 1876 had created the Appellate Committee that functioned as the United Kingdom's Supreme Court. It was originally comprised of a number of senior judges who were already members of the House of Lords plus an expanding number of what were known as Lords of Appeal in Ordinary who were appointed specifically to serve as judges and thereby became life peers. Members of the legislative House of Lords could not participate in any way in the performance of the Law Lords' judicial function, but the Law Lords were free to participate in legislative functions. Anthony King noticed a change in language at the millennium wherein the term 'executive' was replacing 'the government', and the judiciary was spoken of as a separate branch. Impetus for this change also came from the ECtHR in the case of *McConnell v United Kingdom*⁷⁶⁴ in 2000 where the court questioned the validity of any judicial involvement in the making of legislation or executive orders.⁷⁶⁵

In 2003, Prime Minister Tony Blair abruptly replaced the Lord Chancellor and announced an entire constitutional reorganization of the appellate legal system. There would be a new Supreme Court that would be initially composed of the existing Law Lords. The Lord Chief Justice would remain the head of the judiciary, but there would be a new physical residence for the Supreme Court distinctly separate from Parliament, and a Judicial Appointments Commission would replace the 'tap on the shoulder' and recommend the appointments of judges in the future. The Lord Chancellor announced that '*the time had come for "the UK's*

⁷⁵⁷ Ibid 8, citing *Morris v Beardmore* [1981] AC 446, 464.

⁷⁵⁸ Ibid 14–15.

⁷⁵⁹ Ibid 16–17, citing *R v University of Cambridge* (1723) 1 Str 557.

⁷⁶⁰ Ibid 18, citing I Brownlie, *Principles of Public International Law*, 5 edn (OUP 2003), generally chpt 1.

⁷⁶¹ Ibid 25.

⁷⁶² Ibid.

⁷⁶³ Constitutional Reform Act Chpt 4, Part 3(1). (emphasis added)

⁷⁶⁴ 28488/95 [2000] ECHR 62, (2000) 30 EHRR 289, [2000] ECHR 62, 30 EHRR 289

⁷⁶⁵ A King, *The British Constitution* (Oxford University Press, Oxford 2007) 146.

'if the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive.'⁷⁸⁰

King sees the Human Rights Act 1998 as driving the 'stake through the heart of Parliamentary sovereignty'. The United Kingdom's ratification of the European Convention on Human Rights in 1951 and the subsequent amendment in 1966 permitting direct citizen access to the ECtHR had an 'enormous impact' on both British law and the role of Britain's courts and judges. 'Not only were the terms of the Convention significant in their own right, but the rulings of the European Court of Human Rights, like the rulings of the European Court of Justice, came to be seen as an important source of British law.'⁷⁸¹ The United Kingdom was often an unsuccessful party before the European Court of Human Rights dealing with issues ranging from the inhuman treatment of terror suspects in Northern Ireland⁷⁸² to corporal punishment in schools.⁷⁸³

In October of 1997 the Labour government, true to its campaign promise, published a white paper, 'Rights Brought Home,'⁷⁸⁴ urging domestic adoption of a Human Rights Act. The HRA was passed shortly thereafter and received the royal assent in November 1998, coming into full force and effect in October 2000. Even if the terms of the Act were not legally entrenched, 'they were nevertheless politically entrenched and therefore, in constitutional terms, entrenched in all but name.'⁷⁸⁵ In the words of Lord Lester, one of the Act's pioneers, 'The Act weaves Convention rights into the warp and woof of the common law and statute law.'⁷⁸⁶

Quoting Lord Browne-Wilkinson, King foresees:

In large part the Convention is a code of moral principles which underlie the common law... As these cases come before the courts in Convention cases the courts will be required to give moral answers to moral questions. Moral attitudes which have previously been the actual but unarticulated reasoning lying behind judicial decision will become the very stuff of decisions on Convention points. The silent true reason for decisions will have become the stated *ratio decidendi*.⁷⁸⁷

During the 1990s, senior ministers in John Major's conservative government and a number of senior judges had disputed the role of the courts. A book has been written about this period entitled *A Trial of Strength: A Battle Between Ministers and Judges Over Who Makes the Law*.⁷⁸⁸ The conflict involved Michael Howard who was conservative Home Secretary

⁷⁸⁰ Ibid [45].

⁷⁸¹ King (n 765) 128.

⁷⁸² *Ireland* (n 436).

⁷⁸³ *Williamson, R v Secretary of State for Education and Employment & Ors* [2005] UKHL 15, [2005] 2 AC 246.

⁷⁸⁴ Great Britain, Home Office, 'Rights Brought Home: The Human Rights Bill' (London, Stationery Office 1997).

⁷⁸⁵ King (n 765) 132.

⁷⁸⁶ A Lester and L Clapinska, 'Human Rights and the British Constitution' in Jowell (n 685) 82.

⁷⁸⁷ King (n 765), citing R Stevens, 'Government and the Judiciary', in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (Oxford University Press, Oxford 2003) 365.

⁷⁸⁸ J Rozenberg, *Trial of Strength: A Battle Between Ministers and Judges Over Who Makes the Law* (Richard Cohen, London 1997).

between 1993 and 1997, and it is thought this is part of the *raison d'être* of the Human Rights Act 1998. Another factor in the rise or coming out of the judiciary was the rescinding in 1987 of the prohibition against judges appearing on radio and television. Judges have since increasingly made their views publicly known in various interviews, lecture, and speeches.⁷⁸⁹ Many such substantive lectures have been cited in this book. In an example of such a speech, Lord Steyn, while still serving as a Law Lord, said in a 2003 lecture:

Ill-conceived, rushed legislation is passed granting excessive powers to executive governments which compromise the rights and liberties of individuals beyond the exigencies of the situation... Even in modern times terrible injustices have been perpetrated in the name of security on thousands who have no effective recourse to law. Too often the courts of law have denied the writ of the rule of law with only the most perfunctory examination.⁷⁹⁰

King concludes: 'Except in a vacuous, purely Diceyan sense, not only did the British Parliament cease to be sovereign: Britain itself ceased to be an old-fashioned sovereign state.'⁷⁹¹

The judges... have ceased to be, in effect, the servants of the government of the day and have instead become its assertive and sometimes unruly tormentors. They still know their place, but their conception of their place has changed. They have effectively rewritten their own brief so that it now encompasses not only procedural due process but substantive due process.⁷⁹²

I. RECENT COMMENTARY ON THE RULE OF LAW & THE ROLE OF THE COURTS

Joshua Rozenberg writes in the *Times Literary Supplement* that 'A new constitution is being created in the United Kingdom' involving 'fundamental constitution reforms' when the Supreme Court commences in October 2009.⁷⁹³ Lord Falconer is quoted as saying that this indeed will have a significant positive substantive effect on the recognition of individual rights. Rozenberg relies on Vernon Bogdanor's book *The New British Constitution* for the proposition that 'the constitution as analyzed by Dicey and Bagehot no longer exists at all.'⁷⁹⁴ Lord Collins is quoted as saying that this will be a different type of body, 'perhaps not so pivotal as the American Supreme Court, but certainly playing a much more central role in the legal system and approaching the American ideal of a government of laws and not of men.'⁷⁹⁵ Rozenberg also cites Louis Blom-Cooper's *The Judicial House of Lords 1876-2009*⁷⁹⁶

⁷⁸⁹ King (n 765) 140.

⁷⁹⁰ Steyn (n 34) 3.

⁷⁹¹ King (n 765) 346.

⁷⁹² Ibid.

⁷⁹³ J Rozenberg, 'Britain's New Supreme Court', *Times Literary Supplement* (September 2, 2009).

⁷⁹⁴ Ibid.

⁷⁹⁵ Ibid.

⁷⁹⁶ L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press, Oxford 2009).

for the proposition that the sovereignty of the people is best asserted 'through the final court of appeal'. In effect the Constitutional Reform Act 2005 is a new constitutional settlement.

Richard Tur asserted in his 2008 Oxford Constitutional Law Moderations lectures that the Constitution of the United Kingdom is presently in a sea change from absolute Parliamentary sovereignty in which the only rule was that Parliament could do anything anywhere and was only prohibited from binding its successors. The role of the courts then was simply to apply whatever Parliament had decided. The new concept of 'secular rights-based judicial reasoning' is not entirely new. In 1628 Sir Edward Coke stated 'Reason is the life of the law; nay, the common law itself is nothing else but reason... the law... is [the] perfection of reason...'.⁷⁹⁷ Similarly, in *R v Love*, 'Whatsoever is not consonant to the Scripture in the Law of England, is not the Law of England'.⁷⁹⁸ The oft-quoted *Dr. Bonham's case* reads:

[I]t appears in our books, that in many cases the common law will control Acts of Parliament and sometime adjudge them to be utterly void: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an Act to be void.⁷⁹⁹

But this was all boldly said before the English Civil War and the subsequent constitutional settlement establishing the power and supremacy of Parliament. In the late 19th and most of the 20th century there was seemingly universal agreement that 'All that a court of law can do with an Act of Parliament is to apply it'.⁸⁰⁰ Tur argues that this view is really 'the corpse of the doctrine of parliamentary sovereignty though, rather like Bentham, it has been stuffed and is wheeled around by some minders as if still alive and kicking'.⁸⁰¹

Tur points out in a subsequent lecture, 'Parliamentary Sovereignty', that in fact Parliament has never been actually absolute. The Act of Union 1707 between England and Scotland provides in article 18 that '...no alteration be made in laws which concern private right except for the evident utility of the people of Scotland' and contains Articles expressly preserving the Scottish Church, Education and Legal System.⁸⁰²

Another example of relinquished sovereignty is The Northern Ireland Constitution Act 1973 that provides a specific limitation on Parliament that Northern Ireland shall not cease to be part of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a 'border-poll'. Parliament has either limited itself or acknowledged a higher law. Joining the European Commonwealth and signing the Maastricht Treaty in 1972 accomplished the same end, that is, *Factortame*. The HRA and CRA are only the latest examples. While perhaps Parliament could theoretically repudiate the Union with Scotland and abolish the HRA, abandon Northern Ireland, withdraw from the EU, and

⁷⁹⁷ RHS Tur, 'Rights and Rights-Based Reasoning' (Law Moderations Lecture HT 2008) 6, citing Sir Edward Coke, *First Institute* (1628) 1. Paper in author's possession.

⁷⁹⁸ *Ibid.*, citing (1653) 5 S T 43, 172 per Keble, J.

⁷⁹⁹ (1610) 8 Coke's Reports 114, 118.

⁸⁰⁰ Tur (11 797) 7.

⁸⁰¹ *Ibid.* 8–9.

⁸⁰² RHS Tur, 'Parliamentary Sovereignty' (Law Moderations Lecture HT 2008). Copy in author's possession.

abolish the Supreme Court, actually doing such seems politically impossible, economically catastrophic, and fraught with legal peril.

Lord Woolf confirms:

Lacking a written constitution and without the European Convention on Human Rights being part of our domestic law until 2000, judicial review expanded its reach to fill what would otherwise have been a gap in the safeguards available to protect the public against unlawful executive action.⁸⁰³

Shortly before his death, Bingham stated that it would be very difficult to 'put the Genie [of judicial review] back in the bottle'.⁸⁰⁴

Lord Woolf praises the labour government for adopting the Human Rights Act 1998 and incorporating the European Convention into domestic law. 'This has proved to be the catalyst, transforming the availability of protection for breaches of human rights in this jurisdiction'.⁸⁰⁵

The improvements in the effectiveness of Judicial Review and in the use of human rights jurisprudence, after the ECHR became part of our domestic law, were fortunately well timed. The UK had always been considered to be a bastion of the freedom of the individual and a champion of the rule of law. Magna Carta may have been undervalued by the country but its spirit has never been extinguished.⁸⁰⁶

Lord Woolf endorses the holding of the House of Lords in *Belmarsh I* emphasizing 'the process was inadequate and was rightly *struck down* by the House of Lords'.⁸⁰⁷

There is now a partnership that Lord Woolf is committed to between the judiciary and the government. 'The rights of the public and detainees should be protected equally'.⁸⁰⁸ It is not that there should be a balance struck between the two, rather that both are important and both must be addressed.

The HRA has precipitated 'a considerable change of culture in the role of judges' and that 'additional tension has arisen between the courts and the executive. It calls for the different arms of government to work in partnership together and play a full role in promoting the observance of human rights around the globe'.⁸⁰⁹

In effect, Lord Woolf is saying that the United Kingdom is now a rights-based society where rights are recognized and enforced by the judiciary:

As Lord Hoffmann has explained, the HRA was intended to strengthen the rule of law without inaugurating the rule of lawyers. The HRA has strengthened our democracy

⁸⁰³ Sir Harry Woolf, *The Pursuit of Justice* (Oxford University Press, Oxford 2008) 7.

⁸⁰⁴ T Bingham, 'The Rule of Law', Times Literary Festival Lecture, March 25, 2010. Notes in author's file.

⁸⁰⁵ Woolf (11 803) 8.

⁸⁰⁶ *Ibid.*

⁸⁰⁷ *Ibid.* 10, citing *Belmarsh I* (11 2).

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *Ibid.* 209.

by giving each member of the public the right to seek the help of the courts to protect his or her human rights in a manner that was not previously available.⁸¹⁰

Human rights are, as Dicey has said, the central purpose of the judge-created Constitution:

It was part of the long-established culture of this country that what could loosely be regarded as human rights values were observed both by government and Parliament. Furthermore, human rights were recognised by the courts as part of the common law, 'the birthright of the people' and part of the compact between the monarch and Parliament.⁸¹¹

The Rule of Law has come out of the background and emerged as the true principal foundational sovereign of the state. Since World War II the Rule of Law has become an international concept that embraces procedural and substantive due process, furthers the separation of powers, and then highlights the importance of judicial review. Although the role of international law in US jurisprudence is the subject of much debate, and there are those who assert international law is meaningless and virtually unenforceable,⁸¹² and that international sources have been misused by the courts when interpreting the constitution,⁸¹³ international law is nonetheless playing a significant role in the decision-making process. The next chapter explores this significant emergent phenomenon that has played such an important, if not decisive, role in the Guantanamo and Belmarsh judgments.

⁸¹⁰ Lord Woolf, 'The Impact of Human Rights' (Speech at the Oxford Lyceum, March 6, 2003).

⁸¹¹ *Ibid.*, citing Halsbury's Laws of England, 4th ed. Vol 8(2) para. 101 and *Derbyshire County Council v Times Newspapers Ltd* [1993] A C 534.

⁸¹² J Goldsmith and E Posner, *The Limits of International Law* (Oxford University Press, Oxford 2005).

⁸¹³ RP Alford, 'Misusing International Sources To Interpret the Constitution' (2004) 98 *American Journal of International Law* 57.

6

AN APPLICABLE INTERNATIONAL RULE OF LAW

A. AN IDEAL WORTH STRIVING FOR

The late Tom Bingham spoke eloquently of the Rule of Law's crucial role in the international arena:

[I]n a world divided by differences of nationality, race, colour, religion and wealth [the Rule of Law] is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large.⁸¹⁴

In pursuit of 'an ideal worth striving for', the highest court judges of many countries, particularly those with similar common law heritage, have been meeting in recent years to discuss issues of common interest facing the courts. These face-to-face exchanges occur through delegations led by current justices, institutionalized exchanges, and at informal meetings sponsored by various aid agencies, nongovernmental organizations, and law schools. The participants in these conferences and seminars exchange precedents and personal experiences, creating judicial networks that are powerful channels for cross-fertilization.⁸¹⁵

⁸¹⁴ Bingham (n 7) 174.

⁸¹⁵ A Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191, 216.