

MAGNA CARTA LECTURE: 15 JUNE 2006:

THE SOVEREIGNTY OF PARLIAMENT OR THE RULE OF LAW? ¹

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I

Thank you for the great if not excessive honour you have done me by inviting me to deliver the second Magna Carta lecture. The first, delivered last year, was given by that most distinguished former Lord Chief Justice, Lord Woolf, who was not only a great judge but also a great writer on the law. Indeed, he combines, so it has always seemed to me, the best qualities both of the lawyer and of the academic. When I reread his lecture, I was reminded of a comment made by the greatest of American novelists, Henry James, who, to our immense benefit settled on these shores, and who says of one of his characters, that he had 'the wisdom of learning and none of its pedantry'.

Lord Woolf is a difficult act to follow, especially for someone, like myself, who is not a lawyer. Admittedly, I was promoted, inaccurately, by 'The Times' in a recent article, to be 'a leading constitutional lawyer' Sadly, I am not. F.E.Smith once said that the law was an arid but remunerative mistress. In me, I fear, you will see only the arid side.

I am in fact a Professor of Government. But, of course, no one can hope to understand modern government without at least a smattering of legal knowledge. I am therefore, in a sense, a parasite battenning upon lawyers, since my understanding of government has been so much influenced and enriched by the writings of lawyers – both the practitioners and the academics. I only wish that I could have given back as much as I have taken.

To understand our constitution, we have to understand not only our law, but also our history. Historians, it has been said, remember the future and imagine the past. Our understanding of the past changes not because the past changes but because the present does. For our understanding of the past is always, and perhaps inevitably, influenced by our standpoint in the present. Like scavengers, we take from the past what is relevant for us today. But we also try to make sense of the present in the light of the past; and indeed, perhaps the best way of understanding the present and also the future is to look at the past. Why, it has been asked, look at the crystal ball when you can read the book? So it is that our constitutional history takes on a new relevance as we seek to grapple with the problems of a new age.

Lord Woolf, in his lecture last year, gave a magisterial analysis of the Magna Carta, an analysis which I could not hope to rival or emulate. Instead, I want to look at a vital conflict in our constitutional history, a conflict which can be traced back to the 17th century, that formative period in the development of our system of government. The conflict I want to consider is that between the sovereignty of Parliament and the rule of law. But I want to use the term 'rule of law' in a different sense from that given to it by the great 19th century constitutional lawyer, A.V.Dicey.

For Dicey, the rule of law was seen primarily as a check upon the abuse of Crown or executive or police powers. It meant that no claim to authority would be recognized unless there was some legal backing for it. Only Parliament could confer that backing. For Dicey, therefore, there could be no conflict between parliamentary sovereignty and the rule of law. In our own times, however, the rule of law has a much broader meaning. It means recognition of those basic human rights which ought to be acknowledged in any liberal society; and in this sense of the term, there can of course be a conflict between parliamentary sovereignty and the rule of law. For much of our history, and especially in the 17th century, Magna Carta was used as a weapon by one side in that conflict, by those who favoured a declaration of fundamental rights or even a written constitution so as to limit the sovereignty of Parliament.

¹ I am grateful to Stefan Vogenauer, Professor of Comparative Law at Oxford University, for commenting on an earlier draft. But he is not responsible for my arguments or conclusions.

In this context, the present lecture could not be more brilliantly timed. It occurs just two weeks after an opinion poll which suggests that most people believe that today, Magna Carta day, 15th June, should be our national holiday. What significance should be attached to this choice? Many of us thought perhaps that the Magna Carta had been largely forgotten, and that, if it was remembered at all, it was only through Tony Hancock's immortal quip, 'Magna Carta – did she die in vain?'

But perhaps the result of this opinion poll indicates a yearning for a basic principle of constitutionalism, the idea that those who govern are granted allegiance only in return for recognizing reciprocal duties towards their citizens, an idea given powerful expression in the metaphor of the social contract. For we live in an age of some disenchantment with the workings of our political institutions, a disenchantment which has found expression in a renewal of interest in constitutional reform.

We have been passing, since 1997, through an era of constitutional reform. The years since 1997 have seen an unprecedented and perhaps uncompleted series of reforms. What we have been witnessing has been a quiet revolution, but a revolution just the same. Reforms such as the Human Rights Act, the Constitutional Reform Act, the House of Lords Act, removing all but 92 hereditary peers from the upper house, devolution and freedom of information make striking changes in our constitutional arrangements, changes of great significance which are, almost certainly, permanent. They are unlikely to be reversed by any future government, whether of the Left or the Right.

It is a striking feature of these reforms that they all transfer power away from the government of the day to others, whether politicians, officials or judges. It is true that, formally, the sovereignty of Parliament has been maintained; nevertheless, all of the reforms serve to limit the power of an otherwise omniscient government.

The reforms were introduced by a government of the Left whose main professed aims have traditionally had less to do with the constitution than with the transformation of society. For much of the 20th century, indeed, socio-economic matters comprised the main agenda of politics, and the political parties competed with each other in promising social and economic improvement. For those on the Left, social reform meant using the power of the state to redress inequalities. Only the state

could secure social justice, because only the state could secure the equitable distribution of resources on the basis of need. Those in charge of the state, therefore, needed to retain their hold on the levers of power. Constitutional reform, by contrast, would mean limiting the power of the state, or dissipating it through such measures as Home Rule or devolution. The aim of governments of the Left, by contrast, was to remove obstacles to the effective working of democracy.

In 1909, the House of Lords, a clumsy and one-sided, but nevertheless genuine check upon government, rejected a major measure of social reform, Lloyd George's 'People's Budget'. The response of the Liberals was to weaken the power of the Lords through the 1911 Parliament Act, removing entirely the power of the House of Lords to amend or reject a money bill, and replacing its absolute veto with a delaying power on non-money bills for three sessions. This Parliament Act was described by Dicey as 'the last and greatest triumph of party government', for it underlined the fact that party government was 'not the accident or corruption, but, so to speak, the very foundation of our constitutional system'.²

In 1949, the Attlee government passed a second Parliament Act, further reducing the delaying power to just one session because it feared that the Lords would reject the nationalization of iron and steel. There seemed to be a profound affinity between the conceptual presuppositions of the British Constitution, which legitimised the overweening powers of government, and the ideals of parties of the Left, parties which sought, through using the power of government, to transform society and the economy. The two great reforming administrations of Asquith and Attlee thus unwittingly hastened the development of the condition famously identified by Lord Hailsham as 'elective dictatorship'. These governments acted with the best of intentions, but, as Isaiah Berlin once said to me, the task in life of the wise is to undo the damage done by the good.

For the Right, the defence of the sovereignty of Parliament was, in a sense, more clear-cut, and drew heavily upon the writings of Dicey – not just *The Law of the Constitution*, but also his polemical writings against Irish Home Rule. But, of course, the intellectual ancestry of the idea of the sovereignty of Parliament lies much further back in English history, and can be traced back to the time of Hobbes,

if not beyond. Indeed, Dicey suggests that the doctrine, rather than having been derived from political theory was a generalisation drawn from the practice of English law, possibly going back to mediaeval times.³

For those who accepted the doctrine, the notion of divided sovereignty was a contradiction in terms. Sovereignty, and also power, had to be located in one specific place. To divide power, in response perhaps to the demands of Irish nationalists, or Scottish or Welsh Home Rulers, would lead to the end of the United Kingdom. For a similar reason, any genuine engagement with a supranational organization such as the European Union was also impossible. Either sovereignty would remain with Westminster, in which case the European Union could never be more than a Gaullist *union des patries*, or, it would come to be located in a European superstate whose headquarters would be in Brussels, and that would mean the end of the United Kingdom as an independent country. It was not possible, on this view, to envisage a situation in which sovereignty was divided so that power could be shared between Westminster, Brussels and Edinburgh

Thus the ideologies of both Left and Right legitimized the concentration of power in Westminster and Whitehall. The Right was concerned primarily with sovereignty, with the preservation of the United Kingdom. The Left, by contrast, was concerned with power, the power of the state to redress social and economic inequalities. Today, however, we can see that the ideological tides of the 20th century are receding. The battle between Left and Right is taking on new forms. A party of the Left, if it is to be successful, cannot be built on the old sociological certainties of class; for the industrial working class now comprises but a small minority of the population. A party of the Right, conversely, cannot hope to succeed simply by repeating the parrot-cry of anti-socialism. The old tribalisms have gone, and society is both more diverse and more complex than was foreseen by most 20th century prophets.

So it is that constitutional reform has come to fill what might otherwise have proved an ideological vacuum. With the collapse of the old certainties, we see, not the end of history, but the

² A.V.Dicey, Introduction to 8th edition of *Introduction to the Study of the Law of the Constitution*, Macmillan 1915, p. ci.

³ Dicey, *Law of the Constitution*, 10th edition, p. 72.

emergence of new themes, or rather the re-emergence of old themes. For what seems to me so striking about the constitutional reform agenda is that, although it is seen by its protagonists as part of a programme for modernising Britain, it represents also a reversion to much older motifs, motifs eclipsed in the 20th century, but powerfully present in the 17th century, that century of massive constitutional turbulence, in which some of the conflicts which we now see re-emerging, were first played out.

II

One of these themes is the clash between the idea of the sovereignty of Parliament and the idea that there is some fundamental law superior to Parliament. This fundamental law was, supposedly, based upon the Magna Carta; and indeed 17th century reformers derived from the Magna Carta the idea of fundamental law. This was of course quite anachronistic since much of the Magna Carta had already been altered by subsequent legislation. Nevertheless, the Magna Carta came to be 'transformed from a baronial charter of privileges into a declaration of the rights of all free Englishmen'.⁴ It became a myth, perhaps a necessary myth⁵. Indeed, in the 17th century it became 'something of a cult'.⁶ Whigs and radicals derived strength from their view of English history. They argued that they were merely resurrecting principles of Anglo-Saxon freedom, principles which had been reaffirmed in the Magna Carta. Thus reformers were able to argue that, far from being revolutionaries, they were appealing to principles already enshrined in English history. 'The appeal to the past, to documents (whether the Bible or Magna Carta) becomes a criticism of existing institutions, of certain types of rule. If they do not conform to the sacred text, they are to be rejected'.⁷

Whigs and radicals were frequently to refer to the Magna Carta in opposing the claims of royal absolutism, the theory of divine right. For the Magna Carta had supposedly laid down principles so fundamental that no king and no government could ever override them. What these fundamental principles actually were remained somewhat vague. When, in 1641, the Earl of Strafford was being impeached for breaking the fundamental law of the kingdom, and the Commons was about to vote on

⁴ Christopher Hill, *Intellectual Origins of the English Revolution Revisited*, Clarendon Press, 1997, p. 211.

⁵ Hill, *Intellectual Origins* p. 225.

⁶ J.P. Kenyon, *Stuart England*, second edition, Penguin 1985, p. 38.

the issue, the MP and poet, Edmund Waller, asked what these fundamental laws actually were. There was an embarrassed silence. But then a fellow MP, perhaps significantly a lawyer, rose and said that if Mr. Waller did not know what the fundamental laws of the kingdom were, he had no business to be sitting in the House of Commons at all.

It was in terms of these fundamental laws that Charles I was to be accused of treason. In 1649, the House of Commons declared that 'Charles Stuart, the now King of England --- had a wicked design totally to subvert the ancient and fundamental laws and liberties of this nation, and in their place to introduce an arbitrary and tyrannical government'. The idea of fundamental law survived the Restoration. In 1681, Parliament sought to impeach the Chief Justice – a precedent which will not, I hope, be followed today. He was charged with having 'traitorously and wickedly endeavoured to subvert the fundamental laws and the established religion and government of this kingdom'. Finally, as is well known, when the Commons condemned James II in 1689, one of the charges against him was that of 'having violated the fundamental laws'.⁸

Many of those who preached the doctrine of fundamental law believed it to be embodied in the common law, a body of judicial doctrine based upon principle. For those who thought in this way, a statute declared what the law was; it did not create it. The task of the common law judges was 'to act as ultimate court of appeal in constitutional matters, as a supreme court. The law itself was sovereign; and the judges alone understood its mysteries'.⁹ There was, therefore, so it was believed, a common law constitution, an idea resurrected in our times, most notably by Lord Justice Laws.

Many have seen the origins of the idea of fundamental law to lie with Sir Edward Coke, Chief Justice under James I; and Coke declared of the Magna Carta in 1628 that it 'is such a fellow, that he will have no sovereign'. In fact, however, Coke's ideas were confused, and it never occurred to him that there might be a clash between the common law and Parliament. His hostility was directed at the prerogative not at Parliament. It was not Coke but the 17th century Levellers who used the Magna Carta

⁷ Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution*, (1972), Penguin edition, 1991, P. 95.

⁸ J.W.Gough, *Fundamental Law in English Constitutional History*, Clarendon Press, 1955, Pp. 1-2.

⁹ Christopher Hill, *The Century of Revolution*, (1961), Routledge 2002, p. 66.

as a weapon against the sovereignty of Parliament, and it is to them that we owe the idea of fundamental law, indeed of a written constitution. ¹⁰

In 1647, the Levellers drew up the first of three Agreements of the People, according to which Parliament was to be limited by fundamental law which was unalterable. Under the terms of the first Agreement, Parliament could not legislate against the freedom of religion, it could not exempt anyone from the due process of the law, it could not abridge the freedom to trade abroad, and it could not impose the death penalty except for murder. Above all, perhaps, it could not abolish trial by jury. The third Agreement of the People, drawn up in 1653, went further and declared that 'all laws made, or that shall be made contrary to any part of this Agreement, are thereby made null and void'. This third Agreement can perhaps justifiably be regarded as the first written constitution in modern European history.

That title of the first written constitution is often given to Oliver Cromwell's constitution of 1653, the Instrument of Government. Cromwell indeed told the first parliament of his protectorate, in 1654, that 'In every government there must be somewhat fundamental, somewhat like a Magna Carta, that should be standing and be unalterable'; and the Instrument did certainly contain unalterable provisions, such as that providing for freedom of conscience in religion. Another such provision was that 'parliaments should not make themselves perpetual'. For, as Cromwell argued, 'Of what assurance is a law to prevent so great an evil if it line in one and the same legislator to unlay it again?' ¹¹

Yet the Instrument of Government gave supreme power to Parliament, if not to the Lord Protector himself, who had abolished the House of Lords, and was to refuse to summon the Commons. It provided no mechanism by which limitations upon the power of Parliament or the Lord Protector could be enforced upon them; and the judges declared their acceptance of the actions of Parliament as manifestations of sovereign authority.

In fact, during the great constitutional struggle which preceded the civil war, the parliamentarians had not questioned the doctrine of sovereignty. Their quarrel with the king concerned

¹⁰ Hill, *Intellectual Origins*, p. 225.

not the existence of sovereignty, but its location; they believed that it lay with the king-in-parliament, not with the king alone. They were seeking to achieve what we would now call responsible government – control of the Crown by Parliament – rather than seeking to limit the sovereignty of parliament. The struggle was over who should hold undivided power, not whether it should be divided; and today we can perhaps see that what the king and the parliamentarians had in common was more important than what divided them.

Under the terms of the Agreement of the People, by contrast, the people themselves would create their government by means of a constitutive act. ¹² ‘An Agreement of the People’, declared John Lilburne, the Leveller leader,

‘is not proper to come from Parliament, because it comes from thence --- with a command --- it ought not so to do, but to be voluntary and free. Besides, that which is done by one Parliament --- may be undone by the next --- but an Agreement of the People begun and ended by the People, can never come justly within the Parliament’s cognizance to destroy’. ¹³

The Levellers, however, faced the problem of who was to judge that a law was contrary to the Agreement. They implied that there should be judicial review. But they believed that judges could not be relied upon to undertake such review. They could not be relied upon to be impartial, since they were likely to be subject to improper influence, and would be fearful of losing their jobs. Therefore, the task of review would fall, in accordance with the Leveller doctrine of the sovereignty of the people, to ‘the whole People of England’, to juries, who were, for this purpose, to act as judges. ¹⁴

¹¹ Gough, *Fundamental Law*, Pp.129-30.

¹² Perez Zagorin, *The English Revolution: Politics, Events, Ideas*, Ashgate 1998, p. x.

¹³ Perez Zagorin, *A History of Political Thought in the English Revolution*, (1954), Thoemmes Press, 1997, P. 14.

¹⁴ T.C.Pease, *The Leveller Movement: A Study in the Historical and Political Theory of the English Great Civil War*, (1916), Peter, Smith, 1965, Pp. 317-8.

After the Restoration, the idea of fundamental law receded. But it was to be resurrected across the Atlantic by the American revolutionaries, and some of the ideas of the Levellers were to be embodied in the American constitution. In Britain, however, following the Glorious Revolution of 1689, the Whig triumph was symbolized by the Bill of Rights. This Bill of Rights was very different from the American Bill of Rights. It did not serve to entrench fundamental rights against legislative majorities. Instead, it was a statute guaranteeing the rights of Parliament against the King. No limitations were placed upon the King in Parliament, whose powers remained unlimited, but the balance of power was altered, in favour of Parliament and against arbitrary rule by the King. The Bill of Rights secured the power of the legislature against the king. It emphasised the doctrine of the undivided sovereignty of Parliament. Perhaps the time has now come to de-emphasise it.

In the 18th and 19th centuries, ideas of fundamental law and natural rights came to be superceded by Utilitarianism. The Utilitarians were heirs of a scientific age for whom the whole idea of rights as a standard by which to judge positive law was a superstition, 'nonsense on stilts' in Jeremy Bentham's famous words. Today, however, utilitarianism is in headlong retreat. The dominant philosophies of law, such as those of John Rawls, Robert Nozick, and, perhaps especially, Ronald Dworkin, all repudiate it and find themselves more sympathetic to older ideas of fundamental rights. These thinkers have all been champions of human rights. It is difficult, however, to accommodate rights within the utilitarian scheme of things; and indeed, as Bentham noticed, if Parliament is sovereign, how can individuals have rights against Parliament. There is a conflict between utility and rights, and, for the thinkers I have just mentioned, the claims of human rights trump those of utility. Thus, the intellectual climate in which we live today makes it easier to understand what perhaps neither Hobbes nor Dicey ever quite understood, how the ideas of parliamentary sovereignty and the rule of law could come to be in opposition to each other.

III

This opposition is, I think, implicit in the Human Rights Act which is of course but one element in the modern programme of constitutional reform. We have in fact been engaged in a process unique

in the democratic world of gradually giving ourselves a constitution. We have been transforming a hitherto uncodified constitution into a codified one, but in a piecemeal and ad hoc way, there being neither the political will to do more nor any degree of consensus as to what the final resting-place should be.

The cornerstone of our new constitution will be the Human Rights Act. It is the nearest that we have to a bill of rights in a codified constitution. The Act is transforming our understanding of rights and of the relationship between government and the judiciary.

Our traditional understanding of these matters owes much of course to Dicey, who would surely have been horrified by the Human Rights Act. For Dicey was proud of the fact that we had no bill of rights. 'There is', Dicey declares, 'in the English constitution (*sic!*) an absence of those declarations or definitions of rights so dear to foreign constitutionalists'. Instead, the principles defining our civil liberties are 'like all maxims established by judicial legislation, mere generalizations drawn either from the decisions or dicta of judges, or from statutes'. 'With us', he says, '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'. By contrast, he says, 'most foreign constitution-makers have begun with declarations of rights'. 'For this', Dicey adds, 'they have often been in no wise to blame'.

The consequence, however, was that 'the relation of the rights of individuals to the principles of the constitution is not quite the same in countries, like Belgium, where the constitution is the result of a legislative act, as in England, where the constitution itself is based on legal decisions – the difference in this matter between the constitutions of Belgium and the English constitution may be described by the statement that in Belgium individual rights are deductions drawn from the principles of the constitution, whilst in England the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to the rights of given individuals'.¹⁵

¹⁵ Dicey, *Law of the Constitution*, 10th edition, Macmillan, 1959, Pp. 144, 203.

Following the Human Rights Act, however, our rights are no longer based on inductions or generalizations. They are coming, instead, to be derived from certain 'principles of the constitution', that is the European Convention on Human Rights. For judges are now charged with interpreting legislation in the light of a higher law, the European Convention. Dicey, however, famously declared that there can be no such higher law in the British Constitution. 'There is no law which Parliament cannot change. There is no fundamental or so-called constitutional law', and there is no person or body which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution'.¹⁶

Of course, the Human Rights Act formally preserves the sovereignty of Parliament. It does not empower judges to strike down Acts of Parliament. All that judges can do, if they believe that legislation contravenes the European Convention of Human Rights is to issue a declaration of incompatibility. All that they can do is to make a statement. It is then up to Parliament to amend or repeal the offending statute or part of a statute by means of a special fast-track procedure if it wishes to do so. It is worth making this clarification since a leading public figure told 'The Observer' newspaper a few weeks ago that the Human Rights Act empowered judges to strike down Acts of Parliament. This leading public figure was in fact the Prime Minister who seems not to have understood the import of legislation introduced by his own government.

The Human Rights Act preserves the sovereignty of Parliament, but provides for Parliament, ministers and the courts to play a much more important role in the protection of human rights. Ministers have to declare, when introducing legislation, that, in their opinion, it conforms to the European Convention. They are required, therefore, to scrutinize human rights legislation carefully before introducing it into Parliament. In addition, Parliament has established a Joint Select Committee on Human Rights, which is charged with scrutinizing all legislation in relation to its human rights implications.

The Human Rights Act, then, proposes a compromise between the two doctrines of the sovereignty of Parliament and the rule of law. This compromise depends upon a sense of restraint on

¹⁶ Ibid, Pp. 88, 91.

the part of both the judges and Parliament. Were the judges to seek to invade the political sphere and to make the judiciary supreme over Parliament, something which critics allege is already happening, there would be considerable resentment on the part of ministers and MPs. Conversely, were Parliament ever to ignore a declaration of incompatibility on the part of a judge, and refuse to repeal or amend the offending statute or part of a statute, the Human Rights Act would have proved of little value.

Thus, the Human Rights Act seeks to secure a democratic engagement with rights on the part of the representatives of the people in Parliament. But, of course, the main burden of protecting human rights has been transferred to the judges, whose role is bound to become more influential. Many human rights cases concern the rights of very small minorities, minorities too small to be able to use the democratic machinery of party politics and pressure groups very effectively. Moreover, human rights cases often involve the rights of highly unpopular minorities – suspected terrorists, prisoners, asylum-seekers, even perhaps suspected paedophiles. Life would be much simpler if the victims of injustice were always attractive characters or nice people like ourselves. However, our legal system was probably already fairly good at securing justice for nice people. The Human Rights Act, however, seeks to provide rights for all of us, whether we are nice or not. Perhaps indeed there is no particular virtue in being just only to the virtuous.

The compromise on which the Human Rights Act is based is, as I have suggested, a tenuous one, dependent as it is upon self-restraint by judges, ministers and MPs. I argued at the time the Act was passed that the compromise was likely to be shaky, and that there was a very real likelihood of a conflict between government and the judges. I thought, however, that this conflict would not occur for some considerable period of time, and that the main effects would be long-term.

I was wrong. The conflict has occurred much sooner than I thought. Already, only six years after the Human Rights Act came into effect, the Prime Minister has suggested that there should be new legislation limiting the role of the courts in human rights cases. This presumably means amending the Act. The Prime Minister was angered by the decision in the case of the Afghan hijackers, which he seems to have misunderstood, when he implied that the High Court judge had prevented their deportation. In fact, the Home Secretary was not proposing deportation and the judge did not rule that

the hijackers could stay in Britain indefinitely. They were granted six months Discretionary Leave which would be renewable.

The Prime Minister's comments were, however, supported by the Leader of the Opposition who renewed the pledge in the Conservative Party's 2005 election manifesto to 'reform, or failing that, scrap' the Human Rights Act. I have to confess that the Leader of the Opposition was, some years ago, my undergraduate pupil at Oxford. I fear that I was not very successful in teaching him the importance of preserving human rights in a democracy. The fact remains that both the leader of both the government and the opposition are united on the proposition that the Human Rights Act needs amendment.

What is to my mind remarkable is the speed with which the Human Rights Act has led to a conflict between government and the judges. In the United States, it took 16 years from the drawing-up of the constitution in 1787 to the first striking down of an Act of Congress by the Supreme Court – the landmark case of *Marbury v Madison*, 1803. After that, no further Act of Congress was struck down until the famous *Dred Scott* case in 1857, a case which unleashed the Civil War. Not until after the Civil War of 1861-5 did the Supreme Court really come into its own as a court which would review federal legislation.

In France, the 5th Republic established a new body, the *Conseil Constitutionnel*, in 1958, empowered to delimit the respective roles of parliament and government. Yet the *Conseil* did not really assume an active role until the 1970s. The impact of the Human Rights Act has been much more rapid.

The radical implications of the Human Rights Act were not noticed in large part because we do not have a codified constitution. In a country with a codified constitution, such as, for example, France or Canada, the Act might have required a constitutional amendment or some special process of legislation to enact it. In a country with a codified constitution, the Act would almost certainly have given rise to a great deal of public debate and discussion; for a country with a codified constitution would have become accustomed to the idea that legal modalities were of importance in the public affairs of the state.

In Britain, by contrast, with our uncodified constitution, constitutional change tends to go unnoticed – in Bagehot’s words, ‘An ancient and ever-altering constitution [such as the British] is like an old man who still wears with attached fondness clothes in the fashion of his youth; what you see of him is the same; what you do not see is wholly altered’.¹⁷ Under our system, the government of the day can alter the constitution as it wishes, with the same ease as it can alter laws on any other matter. This has the advantage that we can alter our constitutional arrangements easily, without fuss or difficulty. But, precisely because it is so easy, we perhaps do not always reflect sufficiently on what it is that we are doing. We have therefore not noticed that we have in effect made the European Convention on Human Rights, in practice, if not in form, part of the fundamental law of the land. It is the nearest we have to a Bill of Rights or a codified constitution.

IV

There is, as we have seen, a basic conflict between the principle of the rule of law, as interpreted by the judges, and the principle of the sovereignty of parliament. The Human Rights Act sought to muffle this conflict by proposing a dialogue between the judiciary, Parliament and government. They are required to act together to protect human rights. It is the judges who issue a declaration of incompatibility, but it is Parliament and the government who have to put things right.

The Human Rights Act sought to avoid the question – what happens if there is a clash between the two principles – the sovereignty of Parliament and the rule of law. Indeed, when I asked a very senior judge - what happens if there is a conflict - he replied, ‘That is a question that ought not to be asked’.

The Act presupposes a basic consensus on human rights between judges on the one hand, and the government, Parliament and people on the other. The Act assumes that breaches of human rights will be inadvertent and unintended and that there will therefore be little disagreement between the government and the judges.

¹⁷ Walter Bagehot, *The English Constitution*.

But there is clearly no such consensus when it comes to the rights of unpopular minorities. Two matters in particular – issues concerning asylum-seekers and issues concerning suspected terrorists – have come to the fore, since the Human Rights Act came into force. Of course, the problem of asylum long predated the Act, but it has grown in significance since the year 2000 and is now a highly emotive issue, capable, so politicians believe, of influencing many voters in a general election, and so determining the political character of the government.

Terrorism also has taken on a different form since the horrific atrocity of 9/11. The form of terrorism to which we were accustomed, that of the IRA, was, in a sense, an old-fashioned form of terrorism with a single specific and concrete aim, namely the reunification of the island of Ireland. Global terrorism, by contrast, of the kind championed by Al-Qaeda, is quite different. It is a new and more ruthless form of terrorism with wide if not unlimited aims, amongst which is the establishment of a new, Islamic empire, and the elimination of the state of Israel. It apparently has terrorist cells in around 60 countries. To deal with this new form of terrorism, so the government argues, new methods are needed, and these new methods may well infringe human rights. The judges, however, retort that we should not compromise our traditional principles – habeas corpus and the presumption of innocence – principles which have been tried and tested over many centuries and have served us well.

Some senior judges, however, have gone further. They have suggested that a natural consequence of the Human Rights Act should be an erosion of the principle of the sovereignty of Parliament. They argue that the sovereignty of Parliament is but a judicial construct, a creature of the common law. If the judges could create it, they can now, equally justifiably, supercede it. In *Jackson v Attorney-General*, 2005, the case that dealt with the validity of the Hunting Act, judges for the first time declared, obiter, that Parliament's ability to pass primary legislation is limited in substance. Lord Steyn declared, obiter, that the principle of the sovereignty of Parliament, while still being the 'general principle of our constitution' was:

`a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances

could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism’.

He then went on to say in words which have already been much quoted:

‘In exceptional circumstances involving an attempt to abolish judicial review of the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish’. ¹⁸

Lord Steyn has since elaborated by saying that ‘For my part the dicta in *Jackson* are likely to prevail if the government tried to tamper with the fundamental principles of our constitutional democracy, such as 5 year Parliaments, the role of the ordinary courts, the rule of law, and other such fundamentals. In such exceptional cases the rule of law may trump parliamentary supremacy’. ¹⁹

In another obiter dictum from *Jackson*, Lady Hale of Richmond said, ‘The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers’. ²⁰

In another obiter dictum in the same case, another law lord, Lord Hope of Craighead, declared:

‘Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled --- It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute

¹⁸ [2005] UKHL 56. Para. 102.

¹⁹ The Attlee Foundation Lecture: 11 April 2006: Democracy, The Rule of Law and the Role of Judges, P. 20.

legislative sovereignty of Parliament --- is being qualified’.

He then said: ‘The rule of law enforced by the courts is the ultimate controlling actor on which our constitution is based’. ²¹

It may be significant that Lord Hope is a Scottish law lord, for the Scots have always shown more skepticism than the English towards the absolute sovereignty of Parliament which they find difficult to reconcile with the Acts of Union of 1707.

The implication of these remarks by the three law lords is that the sovereignty of Parliament is a doctrine created by the judges which can also be superceded by the judges. At present, the rule of recognition of the British constitution, its ultimate norm, remains the sovereignty of Parliament, provided that we ignore complications arising from the European Communities Act of 1972. Some of the senior judges, no doubt, would like to see the sovereignty of Parliament supplanted by an alternative rule of recognition, the rule of law. In the mid-1990s, before the Human Rights Act was enacted, Sir Stephen Sedley, as he then was, declared that parliamentary sovereignty was being replaced by ‘a new and still emerging constitutional paradigm’ comprising ‘a bi-polar sovereignty of the Crown in Parliament and the Crown in the courts’. ²² The difficulty with such a paradigm, of course, is that the two poles of the new bi-polar sovereignty, far from collaborating in the sharing of authority, can all too easily come into conflict.

But, in any case, does the question of the rule of recognition rest with the judges alone, or is not the doctrine of the sovereignty of Parliament part of our very constitutional history? Dicey, whom I have already quoted extensively, believed that the roots of the idea of parliamentary sovereignty, ‘lie deep in the history of the English people and in the peculiar development of the English Constitution’. ²³ If he is right, then the judges alone cannot supercede the principle of parliamentary sovereignty, unless Parliament itself, and perhaps the people, as well, through referendum, agree.

²⁰ Para. 159.

²¹ Paras. 107 and 120.

²² Cited in Jeffrey Goldworthy, *The Sovereignty of Parliament: History and Philosophy*, Clarendon Press 1999, p. 2.

²³ Dicey, *Law of the Constitution*, p. 69fn.

In chapter 6 of his classic work, *The Concept of Law*, H.L.A.Hart suggests that the rule of recognition of a legal system, the ultimate norm, is not itself a norm but a complex matter of sociological and political fact, and that it is constituted by the practice of legal officials, though presumably not by judges alone. But legal officials cannot alter a practice in a sociological or political vacuum. Surely, parliamentary and popular approval are also required for any explicit alteration in the rule of recognition. At the present time, the politicians would clearly not agree to give the judges the powers which they might seek to supercede the sovereignty of Parliament. What about the people?

Survey evidence indicates – you will not be surprised to hear – that judges are trusted more than politicians. A YouGov survey earlier this year found that 77% trusted the judges ‘a great deal’ or ‘a fair amount’, 9% more than in early 2003, and a percentage exceeded only by the degree of popular trust in family doctors and schoolteachers. But, just 20% trusted ministers in the Labour government ‘a great deal’ or ‘a fair amount’, 5% fewer than in early 2003. Leading Conservative politicians, I should add, were trusted by just 19%, while leading Liberal Democrat politicians were trusted by 25%.

These figures would seem to indicate that the public might well be prepared to accept the supercession of the doctrine of the sovereignty of Parliament. That would be a striking development. For, after all, the House of Commons is now more democratic and, in socio-economic terms, more representative than it has ever been. Yet, a hundred years ago, when around 60% of males had the vote and no females, I would suspect that Parliament was trusted much more than it is now to protect our civil liberties.

Nevertheless, a degree of caution is needed, I suspect, before we can conclude that the public would be on the side of the judges. For the public might not, in a referendum, support the judges in some of the highly emotive cases we have seen recently, which involve deeply unpopular minorities. The Labour government’s White Paper, ‘Bringing Rights Home’ introduced together with the Human Rights bill, declared that there was no evidence that the public wanted judges to have the power to

invalidate legislation.²⁴ It would be unwise to assume that anything has changed in the intervening period.

V

But, whatever the state of public opinion, it is clear that there is a conflict between these two constitutional principles, the sovereignty of Parliament and the rule of law. This conflict, if not resolved, could generate a constitutional crisis.

What I mean by a constitutional crisis is not simply that there are differences of view on constitutional matters. That is to be expected in any healthy democracy. What I mean by a constitutional crisis is that there is a profound difference of view as to the method by which such differences should be settled. There is a profound difference of view as to what the rule of recognition is, or ought to be – perhaps the two are indistinguishable.

In any society, a balance has to be drawn between the rights of the individual and the needs of society for protection against terrorism, crime etc. But who should draw the balance – the judges or the government.

Senior judges would, I suspect, claim that they have a special role in protecting the rights of unpopular minorities, such as, for example, asylum-seekers and suspected terrorists. They would say that in doing so they are doing no more than applying the Human Rights Act as Parliament has asked them to do.

The government and, one suspects, most MPs and much of the press, would disagree. The government and MPs would say that it is for them, as elected representatives, to weight the precise balance between the rights of the individual and the needs of society. For they are elected and accountable to the people, but the judges are not. They will say that the Human Rights Act provides for the judges to review legislation. But this should not be made an excuse for the judges to seek judicial

²⁴ *Rights Brought Home: The Human Rights Bill Presented to Parliament By the Secretary of State for*

supremacy. If the judges, or indeed anyone else, believes that there is a case for a Supreme Court along American lines, they should make that case publicly and seek the explicit approval of Parliament and people. The judiciary should not seek to expand its role by stealth – although, it is only fair, to say that both the American Supreme Court and the French *conseil constitutionnel*, both acquired their powers by stealth, since, in neither case are their powers explicitly laid down in the constitution. Neither the American constitution of 1787 nor the 5th Republic constitution of 1958 has anything to say about the judicial review of legislation.

There is thus a profound difference of view as to how issues involving human rights should be resolved. The government believes that they should be resolved by Parliament. The judges believe that they should be settled by the courts. Because they are coming to disagree about the rule of recognition, both government and the judges are coming to believe that the other has broken the constitution. Government and Parliament say that judges are usurping power and seeking to thwart the will of Parliament. Judges say that the government is infringing human rights, and then attacking the judiciary for doing its job in reviewing legislation for its compatibility with the Human Rights Act. The British Constitution is coming to mean different things to different people. It is coming to mean something different to the judges from what it means to government, Parliament and people. The argument from Parliamentary sovereignty points in one direction, the argument from the rule of law in another. There will therefore be a conflict and a struggle. How will it be resolved?

There are, clearly, two possible outcomes. The first is that Parliament succeeds in defeating the challenge of the judges, and parliamentary sovereignty is preserved. But the logical corollary of such an outcome would be that Parliament might well, on some future occasion, refuse to take notice of a declaration of incompatibility. The second possible outcome is that the Human Rights Act comes to trump Parliament, and that, in practice, a declaration of incompatibility by a judge comes to be the equivalent of striking down legislation. It is too early to tell which outcome is more likely to prevail. What seems to me unlikely is that the compromise embodied in the Human Rights Act can survive over the long term.

It is, of course, possible that, like almost every other democracy, we come to develop a codified constitution. After all, so much of the constitution has been codified in recent years, that it may not now seem such a great step as once it did to codify the remainder. It might even be that, as part of such a codified constitution, judges, as in the United States, will be given the power to strike down laws which offend against human rights. Were that to happen, we would finally have become a true constitutional state.

We are, at present, I believe, in a transitional period. Eventually, no doubt, a new constitutional settlement will be achieved. But that could prove a painful process. The path towards a new constitutional settlement could prove a difficult one, and there may be many squalls, and indeed storms on the way.

Those who seek a quiet life should steer clear of the constitution.

VI

Different members of my audience will no doubt have different views as to how the constitutional conflict should be resolved; and it is perhaps no part of my function to persuade you how you should decide. Yet, at the very beginning of my lecture, I tried to show that the political presuppositions of the doctrine of the sovereignty of Parliament, and, in particular, the doctrine that the state could secure radical improvement in social and economic conditions, were no longer held with the same tenacity. But, it also seems to me that the constitutional presuppositions of the doctrine have been undermined. So, for my part, I find myself on the side of the judges. In the 17th century, constitutional reformers repudiated the doctrine of the divine right of kings. Did we repudiate that doctrine only to substitute for it that of the divine right of governments against which the doctrine of parliamentary sovereignty offers no protection? Why should we proceed to yield to governments what we refused to yield to kings, namely untrammelled power.

But governments, so it might be said, are unlike kings in that they are democratically elected. Surely the people, through their representatives in Parliament, can be trusted to exercise their supreme

power responsibly. The whole of 20th century history seems to me to argue against that proposition. For we now know, what 19th century thinkers like Tocqueville had predicted, that a democracy can be as despotic, if not more despotic, than a traditional authoritarian government. We should always remember that the worst dictatorship in the 20th century, the worst perhaps in human history, that of Adolf Hitler and the Nazi party, came to power as a result of free elections, and was sustained by the enthusiastic support of the majority of the German people until very nearly the end of the regime. In January 1941, Hitler could enthusiastically say that 'the National Socialist Revolution defeated democracy through democracy'. Earlier, before he came to power, in December 1931, he had told the then German Chancellor, Heinrich Brüning, 'You refuse, as a 'statesman' to admit that if we come to power legally we could then break through legality. Herr Chancellor, the fundamental thesis of democracy runs: 'All Power from the People' .²⁵ For believers in the rule of law, however, ultimate power should lie neither with parliament nor with the people, but with the constitution.

Of course, this very example shows that constitutions and institutional forms alone are not sufficient to protect human rights. The Weimar constitution, which Hitler repudiated, contained much of the institutional paraphernalia of modern liberal and social democratic thought – proportional representation, a federal system of government, use of the referendum and so on. But constitutions, while perhaps necessary to secure better protection of our rights, cannot of themselves be sufficient to preserve them. The condition of society matters also. John Stuart Mill famously criticised Bentham for believing that a constitution is a mere set of rules or laws, rather than a living organism representative of an evolving political morality. Dicey too noticed that the quality of a legal system depended upon the quality of the society which it served. He once said that 'the rule of law or the predominance of the legal spirit may be described as a special attribute of English institutions'.²⁶ That may seem at first sight an arrogant statement. But what Dicey meant was that our laws rested essentially upon a public opinion that supported the protection of human rights. It is often forgotten that Dicey also wrote, besides the *Law of the Constitution*, *Law and Public Opinion in the 19th Century*, a book which he regarded as an essential complement to the *Law of the Constitution*. For Mill and for Dicey, the protection of human rights depended not only laws and institutions but upon a spirit favourable to human rights.

²⁵ Cited in John Lukacs, *The Hitler of History* (1997), Vintage Books, 1998, Pp. 94 and fn.

That spirit has been well described by the American moral philosopher, Martha Nussbaum, as being an `ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions and wishes and desires that someone so placed might have'.²⁷

It may take some effort to see in the Britain of 2006 even an approximation to this admirable ideal. But, were it to fail here, that would, so it seems to me, amount to a repudiation of the very essence of our constitutional history, that history, beginning with the Magna Carta, which has made us what we are, and which we are celebrating today.

²⁶ .Dicey, *Law of the Constitution*, p. 195. I owe this insight to Nick Barber.

²⁷ Cited in Ian Ward, *The English Constitution: Myths and Realities*, Hart, 2004, p. 203.