
Ruling Law
Parliamentary Sovereignty and Judicial Activism

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At the end of the Twentieth Century, as the theory of legalism in the common law lost its grip, it had been suggested that the idea of Parliamentary Sovereignty was an outdated model for British constitutionality, and that the practice of *Judicial Activism* should be permitted to expand. Based upon this premise, this thesis proposes that the Courts should adopt the legal title of Sovereign, based on evidence of their actively both making and overturning laws and statutes in the United Kingdom.

Based on accounts gathered from case law from both the United Kingdom and other jurisdictions, and interviews with Judges of the Supreme Court of the United Kingdom, it shall be shown that Parliament's relationship with the courts has changed radically since Parliamentary sovereignty was first popularised, and that in the United Kingdom Parliament is subject to the will of the judiciary, and not the other way around.

However, this thesis will also demonstrate that this system is not without its own flaws. Examples of judicial corruption, widely criticised decisions and a lack of democratic transparency in jurisdictions can be found across the world; all tarnish judicial sovereignty as a viable alternative to that of Parliament, and erode the public's trust in the Courts to protect and defend the ideals of justice and the Rule of Law. Without these principles, the courts become a black-robed agency of the Government or worse, a publicly funded old-boys network that principally protects its own interests and its grip on authority.

Though the ideals that the courts claim to uphold are virtuous, history has shown the worrying consequences of Judicial complacency as Governments ignore the rule of law and the concept of Justice, most prominently observed in the dictatorships of Nazi Germany and the Soviet Union. If Judicial Sovereignty is to survive, it must learn from, and overcome, the mistakes of the past, and harmonise their role as appointed public figures with ideas of popular democratic government. To do this, it must accept Parliament's rule-making capacity, but doing this in a way that preserves their Legal Sovereignty is the central challenge the Judiciary must face.

Chapter One - *Judicial Activism and the New Sovereignty of the Courts*

Introduction: Perspectives on the Sovereign

“Most contemporary political philosophers have little use for the idea of ‘unlimited’ or ‘absolute’ power. Modern political theories ... start from a fundamental assumption that persons share equal rights and responsibilities so that those appointed to offices of power are bound by legal and moral duties ... There does not appear to be any room for absolute power in modern law and politics.”

Pavlos Eleftheriadis¹

According to Theodor Geiger, the law can be described as an “inclusive community... based on a sanction-apparatus implemented monopolistically by particular organs.”² It is the goal of this work to identify the courts as being that organ, operating monopolistically in its application of sanction, and who are capable of being called sovereign in the UK. Currently, although there is much confusion surrounding the issue, there is an understanding in the jurisprudential world that the Sovereign (i.e. the lawmaker) is Parliament, or the Head of State, or whoever it is who issues edicts and whose will is to be obeyed by the population. However, the idea that Parliament is the sovereign in the English legal system is only valid if one assumes that the ‘will’ of Parliament is obeyed, that what they legislate is obeyed to the letter, and the rules they write are enforced universally. As is to be expected in legal academia, there are many differing views of what the Sovereign constitutes and who, or what, the Sovereign is in a real legal system. It is the intention of this thesis to use the courts as model for the sovereign in the United Kingdom. This is because there is ample evidence to support this theory, though the evidence does leave some questions unanswered. However, much like Darwin’s theory of evolution, the evidence gathered in its support is robust enough to be convincing, and it will take more than one critique of sovereignty to answer every question to all peoples’ satisfaction.

Pavlos Eleftheriadis points out above that no institution or body can be imbued with absolute power. Attempting to identify one person or organisation in a western democracy as having been given absolute authority, whether theoretical or actual, would be both politically and legally challenging to any sensible-minded person, but it is an unlimited institution, body or individual that we take to mean the legal Sovereign in any system. The courts, rather than a law- or policy-making body, instead might be seen as an instrument to guarantee checks on the power of institutions, and to maintain the rule of law which seeks to remind institutions of government that “be you never so

¹ Law and Sovereignty (Draft Paper) Cambridge 2009 (see appendix)

² Geiger, T *Vorstudien zu einer Soziologie des Rechts*, Duncker & Humblot (1987)

high, the law is above you.”³ It is upon this principle that the challenge to Parliamentary Sovereignty rests, and that this thesis seeks to address. The objective of this thesis is to prove that the Courts have the ability to overturn statute, and thus play a significant part in the creation and development of law in the United Kingdom⁴; far more than the currently accepted view. It is the object of this work to prove that the courts not only make law, as is expected in a common law system, but also unmake law⁵ and that the supposed Sovereignty of Parliament expounded by Dicey is a dated and outmoded model in need of redevelopment itself, or of its context, with greater focus on the role of the judiciary.

In order to carry out this objective, the first task must be to define what is meant by Sovereignty in the legal and political systems of the United Kingdom, and to properly apply this meaning to the institutions of power in Britain. As it is commonly understood, “Sovereignty is the absolute and perpetual power of a commonwealth, which the Latins call *maiestas*; the Greeks *akra exousia*, *kurion arche*, and *kurion politeuma*; and the Italians *signoria*, a word they use for private persons as well as for those who have full control of the state, while the Hebrews call it *tomech shevet*; that is, the highest power of command”⁶.

The theory of sovereignty can be traced as far back as Aristotle, who wrote in *The Politics* that in a state there is a supreme authority, and that such power to make law must lie with one, a few or many people⁷. It is necessary therefore to examine many different organs of authority to reach any conclusive answer to the question of sovereignty of the United Kingdom. It is also necessary to examine constitutional theory as well as definitions of sovereignty, and the distinction between the Political and Legal sovereign. This distinction is extremely important, and helps to distinguish the purely political role of Parliament and the government, from the influence, intentional or otherwise, they also have in the legal system.

The legal and political systems of the United Kingdom are distinct, but intertwined. One cannot be explored without understanding its relationship with the other. It is also important to explain here too that the institutions of power are constituted by The Legislature, the Executive and the Judiciary. Between them, they form the basis of any state government, and in the following chapters I shall be exploring their roles in the law-making process, their effect on the definition of sovereignty, and how their operation changes and shifts the title of legal sovereignty from one institution to another, or to all, or to none.

³ Thomas Fuller

⁴ It is important to distinguish here between the United Kingdom as a State, and the distinct legal systems of England and Wales, and that of Scotland and Northern Ireland. These states enjoy an independent legal jurisdiction and a degree of Law-making power, and are considered separate jurisdictions. Considering its importance in the British Constitution, Devolution will be explored in greater depth in later chapters, but since a vast proportion of the theory I have mentioned is derived from observation of the legal system of England, where I refer to the United Kingdom in a legal sense, I will inevitably be referring to the legal system of England and Wales.

⁵ de facto, if not de jure.

⁶ Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, edited and trans. by Julian H. Franklin (Cambridge: Cambridge University Press, 1992) 1

⁷ Aristotle, *The Politics*, Penguin Classics (2000)

Equally important is the distinction between ‘Politics’ and ‘the political’, as demonstrated by Carl Schmitt in his short but influential essay, *The Concept of the Political*.⁸ In this work, Schmitt points out the distinction between these two concepts; describing the way politics functions as being defined by conflict, our state or social group *versus* (in one sense or another) a political foe; while the *political* is described as being the force or energy that drives societies into adversarial groups. Schmitt uses the example of pacifism, arguing that “If pacifist hostility toward war were so strong as to drive pacifists into a war against nonpacifists, in a war against war, that would prove that pacifism truly possesses political energy because it is sufficiently strong to group men according to friend and enemy.”⁹ As Schmitt says, “The specific political distinction to which political actions and motives can be reduced is that distinction of friend and enemy.”¹⁰ Obviously, this essay concerns itself with the law, and as many professional judges will testify (as well as some prominent legal theorists) that the law does not concern itself with politics. However, Schmitt has already explained that ‘the political’ is concerned with the friend-enemy distinction. Even superficially, we see this concept of the Political in Law, this is the adversarial system that is employed in litigation. Thus, we can see the application of the political in the law, that helps to shape political policy by creating and altering precedent. In this regard, we can see that “contrary to crude separation of powers accounts of the role of the courts, the UKSC [United Kingdom Supreme Court] does make policy, sometimes in significant ways.”¹¹

A significant pitfall faced whenever we might attempt to solve the problem of the definition of sovereignty is that various definitions can each be applied to one, two or all three of these institutions at once. In jurisprudence, a definition of sovereignty that applies to one organ of government effectively and properly, in a way that fits not only with the theoretical powers and responsibilities of that organ, but also with its actual, exercised powers, has so far been elusive, although several theories of sovereignty have been proposed.

John Austin, in his work, *The Province of Jurisprudence Determined*¹² proposed a list of prerequisites a person (or body of persons) must meet in order to be called sovereign in a legal system. I have chosen deliberately to focus on the Austinian model of Sovereignty, which was expanded and updated for the twentieth century by H.L.A. Hart, because his model was principally a theory based upon principles of Natural Law. This system is one in which the morality of law is inherent to their validity. The opposing school of thought, Legal Positivism, attaches no moral conditions upon the rules of a legal system. For Positivists, there is only *pure* law. The morality of a rule should attach to the rule-maker, and not the instrument of law which he creates. In particular, natural law theory works well with the concept of Judge-made law, because it is the judges who must make decisions on the application of rules in a legal system; and to do this, they must base

⁸ Schmitt, C, *The Concept of the Political*, University of Chicago Press 1996 pp36

⁹ Schmitt, C, *The Concept of the Political*, pp26

¹⁰ *ibid* at pp26

¹¹ Aitken R, Smallwood H and Stirton L, *Judicial Politics: Reigning Supreme?* *New Law Journal* 02/12/11

¹² Austin, J *Province of Jurisprudence Determined*, (ed. W. E. Rumble) Cambridge University Press, 1995

their decisions on more than the mere application of statute. As Hart says in *The Concept of Law*¹³ “the judge, in punishing, takes the rule as his *guide* and the breach of the rule as his *reason* and *justification* for punishing the offender.” For Hart, clearly, the role of a judge was not to simply apply a rule when it is proscribed by circumstance, and that in fact Judges play a vital part in the interpretation, evolution and wider application of rules in a legal system by using more than just the statute. The Judge must use reason and morality, gauging the effect of a statute as well as the judgment itself to determine how he should rule. In this regard, one could see interpret the role of the judge as being one principally concerned with the school of Natural Law. The two most prominent writers on the validity of rules, whose work we have already explored, are H.L.A Hart in his book *The Concept of Law* and John Austin in *The Province of Jurisprudence Determined*. Both were Positivists who, to put it briefly, believe that if a rule is valid (i.e. the source of law is one that forms 'legitimate' rules in a legal system, or is from the 'Sovereign', and the rule itself was created using the proper procedure) then it is a proper law, regardless of its ethical or moral implications or consequences.

Applying ethics to the law is a case of observing the intentions of the Sovereign, and not judging the consequences of the law directly. That is to say, a law might produce an inherently ‘bad’ result, but it is the sovereign who is at fault for producing the law, not the law itself. The rule is inert, has no motive and no conscience. In Natural Law, a statute can be ‘good’ or ‘bad’ depending upon its effect, and Judges such as Lord Chief Justice Coke (who shall be discussed in later chapters) take an active role in the control of statutes through more liberal interpretation. For more active judges than Coke, this can extend to even declaring an act void altogether. This has been made even easier in recent years through a greater abundance of directly effective European Union law, along with the introduction of the Human Rights Act. This interpretation means accepting that the Sovereign, whether Parliament or another person or body, whose morality is fallible if not his will, can be responsible for the consequences of the laws he enacts. Equally so, the Judiciary must accept responsibility for the rules that they create in the common law, and how they manipulate the language of Statutes in order to change their meaning. When a judicial decision alters the meaning of a Statute, as was done in *Anisminic*, for example, the Judiciary must account for the impact that change will have on society.

To Austin, the sovereign must act as a determinate common superior, who is habitually obeyed by the bulk of the population but who does not need to obey any other body or person. When viewed alongside Hart’s perspective on the role of the courts, it becomes more clear that the Courts do and must take a primary role in the law-making process.

A further reason for choosing to begin by examining Austin’s definition is that it is easy to understand, and is a useful starting point at defining the sovereign. It is unfortunate however that it is impossible to apply his definition to any one person or body in a legal system. This is because in

¹³ 2nd Ed, 1997, Oxford University Press

a democratic society any one body with law-making authority must have its power checked by another to ensure that no one institution can act autocratically.

That is a significant flaw in Austin's definition of the Sovereign: how a person or body of persons can have unlimited power, and not be constrained by any other person or body. In the United Kingdom, Parliament is regarded as the sovereign, bearing all the hallmarks of a body unconstrained by any other. However by its definition it must be constrained¹⁴ (in a legal and political sense¹⁵) by the population, since it is made possible by democratic process. It is through the electorate that Parliament can be challenged, and through the electorate that Parliament legitimizes its claim to sovereignty.¹⁶ This theory, of *legitimacy*, However, if Parliament is dependent on the will of the people, it cannot be sovereign, since it is at the mercy of the electorate. This forms a part of Austin's theory, who said in *Lecture IV of Province of Jurisprudence*, "speaking accurately the members of the Commons House are merely trustees for the body by which they are elected and appointed: and consequently the sovereignty always resides in the King's Peers and the electoral body of the commons.¹⁷" The people too cannot be sovereign according to Austin's definition, because they are bound by the will of Parliament, which enacts laws that are directly enforced upon the population. Is it, then, that Parliament is sovereign by the will of the people, who devolve authority to make and apply law to Parliament itself? Sir Francis Jacobs observed in his *Hamlyn Lecture*, that, "Legally, it is difficult, if not impossible, to identify today a State in which a 'sovereign' legislature is not subject to legal limitations on the exercise of its powers. Moreover, sovereignty is incompatible, both internationally and internally, with another concept which also has a lengthy history, by which today is widely regarded as paramount: the rule of law."¹⁸

It has become quite clear that Austin's theory, though it may not deserve to be disregarded, at least needs to be updated, or explored in a new, more modern context. The theory must be made to fit the politics of the age, rather than attempting to bend the definitions of politics to fit an aged, incompatible theory. Fortunately there is an alternate theory that could be applied when attempting to define the sovereign in the United Kingdom. A.C. Gray, in his work, *Nature and Sources of the Law*, said that it is judges who breathe life into "dead statute."¹⁹ To Gray the Courts, who are responsible for creating and guiding common law, and interpreting statute, are actually law-makers in themselves, and serve as a potential candidate for the title 'sovereign'. If this were true, then the relationship between Parliament and the courts would need to be closely re-examined.

¹⁴ A number of Statutory examples of these constraints exist, including the Representation of the People Act 1985, used recently in the judgement against the MP Woolas, who won his seat by making false allegations against his competitor in the election, contrary to the Act. On the other hand, the new system for examining MPs' expenses is only one example of the Judiciary controlling the activities of Parliament.

¹⁵ Whereas for example a Military Junta rules only with a monopoly of force, in a democratic system a government rules with a monopoly on public support.

¹⁶ "The argument ... is that the government is not legitimate unless it is carried on with the consent of the governed." Ashcraft, R (ed.) *John Locke: Critical Assessments* London: Routledge, 1991 pp524

¹⁷ Nowadays we would more accurately refer to this as Representative Democracy.

¹⁸ *The Sovereignty of Law: The European Way*, Hamlyn Lectures 2006 (Cambridge University Press 2007), pp5

¹⁹ Gray, A.C. *Nature and Sources of the Law*

Austin's theory, though applicable to the courts, is not usually applied to the judicial system. Judges, it seems, are modest, and do not wish to be accused of making law. Austin does assert that the Sovereign is that person or body of persons whose will is habitually obeyed by the majority of the population the majority of the time (it must be the *majority*, or else the idea of crime would be a fiction). If Members of Parliament (especially in a majority government) vote based on pressures from their whips, and the cabinet, then Parliament itself is controlled by the cabinet. This is the guiding principle behind the working of government in the United Kingdom. If, however, the Cabinet controls parliament, then could it not be argued that the Executive, in the United Kingdom known as the Cabinet, is Sovereign?

This problem will be more thoroughly explored in chapter four, but the answer to this question is no. Aside from the obvious rebuttal that Parliament, sharing its capacity as legislature between the Members of the Commons and the King's Peers, can vote down a bill proposed by the Cabinet, the Cabinet cannot be sovereign because even if Bills they propose are enacted into statute it is inevitable that, at one stage or another in its application, it will be challenged by judicial review. Judicial Review, the process whereby the courts decide on the applicability and importantly, the legality, of any Act of Parliament, is a right reserved exclusively by the courts, and plays a vital part in ensuring that the power of the legislative and executive branches is controlled and not allowed to become arbitrary.

Since so many potential candidates exist that may fit the definition proposed by Austin, albeit superficially, that undertaking to discover who has the most legitimate claim to Sovereignty is extremely difficult, and to make an informed decision, we must understand the term before we attempt to apply it. Austin confusingly calls the population both the sovereign and the subject, being at once ruled over and also the rule-maker by virtue of elections to Parliament. Historically, this has always been the case: "from the end of the 13th century it was an axiom of political theory that the justification of all government lay in the voluntary submission of the community ruled."²⁰

We, as the electorate, devolve the authority to make decisions on our behalf to the members of Parliament that we select to represent us. Blackstone, in his *Commentaries*, makes this point, that "In a free state, every man, who is supposed a free agent, ought to be, in some measure, his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people."²¹

The problem with this is that the system itself has been put in place non-democratically, and even in a way that is detrimental to the basic freedom of democracy in the United Kingdom. Parliament, the Grandfather of the modern democracy, was historically not a House for the representation of the

²⁰Gierke O, Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien (1902) 78

²¹ Blackstone, Commentaries on the Laws of England, Book 1 Chapter 2

people. Even *Magna Carta*, hailed as a document guaranteeing the freedoms of the people, did this only accidentally. Historically, *Magna Carta* was authored by the Barons of England, building on historical rules established by the Saxons (such as *Kine Ine*), in response to the imprisonment of a nobleman at King John's pleasure and without trial. This led to an uprising of the Barons, and John was forced to sign the document under duress.²²

This story creates many problems. The first is, if the *Magna Carta* was authored by, and applied only to the Barons, how can this be a democratically supportive document? First, it is vital to note that as a statute and an act of positive law, the principles contained in *Magna Carta* were thereafter applicable to everyone. Moreover, as a statute that received royal assent, it became binding, and the words became open to interpretation by the courts. As a result, it became very simple for socially minded Justices to interpret the universal applicability of the act, and to make the act applicable to the serf population of Britain, the peasant class that had, until that point, not enjoyed the now historic right to *habeus corpus*. It was also applicable to the growing middle classes and merchants, who gradually came to dominate the lower house.

The second and more important question of course is that, if an act is signed into law by a king under duress, can it be a legally binding act of the Crown?²³ It is important to note that *Magna Carta* was reissued a number of times, suggesting that although it was an act assented to at first begrudgingly, it nonetheless became an accepted part of the English legal system. However, the nature of *Magna Carta*'s first inception invites a number of concerns regarding the legitimacy of acts signed into law by the Crown. If *Magna Carta* is valid, then it is possible for a sovereign to be pressured into assenting to acts. If this were true, then he would no longer be the sovereign.²⁴

This does highlight the concern that the crown, even the Crown of King John, whose authority was far wider than those who succeeded him, is not Austin's 'sovereign', but is in fact a mere figurehead, a shadow-king whose presence is decorative yet unnecessary in a functional government²⁵. Of course, the Sovereign as we understand it did not truly exist in the time of King John. His reliance upon his Council to legitimise his rule made the term 'sovereignty' somewhat alien to our modern understanding; perhaps in that sense there was no real sovereign at all. Despite Blackstone's assertion in his *Commentaries* that the King "is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness,"²⁶ King John, existing as he did in a time when Parliament as we know it now was unthinkable, was an autocratic ruler, and so his authority was absolute. But even Kings such as John

²² Bingham, T, *The Rule of Law*, Penguin 2010

²³ Since duress normally invalidates agreements, even ones as authoritative as *Magna Carta*.

²⁴ We shall discuss this issue in greater depth in chapters five and six.

²⁵ See Bagehot, W, *The English Constitution* (Cambridge University Press: 2001). As well as casting more light on Henry III in particular, Walter Bagehot also provides a thorough and engaging discussion on the historical development of the English Constitution.

²⁶ Blackstone, *Commentaries*. I, ch.7, p. 239

were constrained by the tide of public opinion. For example, Henry III's coronation speech served as a sort of non-election manifesto²⁷, promising lower taxes and greater freedoms for his subjects.

The monarch, when viewed in this way, carries out a defunct and perfunctory role in the political and legal system. It is more a question of tradition. That we have had a monarchy for so long breeds the question, why be rid of them now? Although this is a discussion on subject of Sovereignty in the United Kingdom, the topic inevitably moves toward a discussion of the monarchy. The monarch acted as the legal and political sovereign for hundreds of years, and the influence of the Royal Family is still evident in the practices and procedures of Parliament and government. Ministers, for example, are all 'Of the Crown;' acts of Parliament require Royal assent, and this is not just true of the United Kingdom. Sixteen nations of the Commonwealth recognise the Queen as their official Head of State (the rest regard her merely as Head of the Commonwealth), despite the fact that it is their respective Parliaments that pass their laws, and any question of a foreign monarch deciding on the validity of domestic law is simply ignored. It would be as if all acts of our Parliament in the United Kingdom required the assent of the Dutch Royal Family. The assertion itself totally defies the idea of the sovereignty of Parliament, and places that same sovereignty into the hands of the Crown.

However the monarch cannot be sovereign. This has been proven by countless acts and historical legal documents, beginning with *Magna Carta* in 1215. The legacy of this document lasts even to this day, and the freedoms of the people, as well as the restrictions on the sovereign, last even in modern bills, and modern rhetoric. It is from this document that the principle of *Habeas Corpus* is derived, one of the most important rights in the history of the English legal system. The *Bill of Rights*, of 1650 laid down principal rights that should be inherent in all legal systems. It constrained the monarch, removing the power to levy taxes without the consent of Parliament, enshrining in law the final subjugation of the People to the Monarch's will. *Magna Carta*, as valid a legal and constitutional document now as it was then, if not more so, must apply its spirit not just to the monarch but also to Parliament should it act *ultra vires*. In defence of *Magna Carta*, and any document that seeks to check absolute power, it has been argued that, "[i]f Parliament ... can change any law at any moment ... then the rule of law is nothing more than a bad joke."²⁸ Constitutional documents and the power wielded by the courts ensure obedience to the Rule of Law by the law-makers, and this clearly makes the courts, the constitutional interpreters, the Sovereign in Law²⁹.

And yet, we are no closer to understanding who the sovereign is in the British Legal and Political systems. We have so far ruled out the population, because they are bound by laws enacted by Parliament. We have ruled out Parliament, because it is bound by the will of the people, and that

²⁷ For more on this discussion, see Bingham, T, *The Rule of Law*, (Penguin: 2009), whose historical account of the development of the rule of law is covered in greater depth.

²⁸ G. de Q. Walker, *The Rule of Law, Foundation of Constitutional Democracy* (Melbourne: Melbourne University Press: 1988) p159

²⁹ This idea, expounded by the formidable Australian Jurist Sir Owen Dixon, as well as the famed New Zealand Appellate Judge Lord Cooke, in greater depth in later chapters. Further reading on this topic can be found in Dixon's "Law and the Constution" (1935 51 LQR 590), and Cooke's "The Suggested Revolution Against the Crown" (in Joseph, *Essays on the Constitution* (1995), 28-40)

individual MPs are made to follow the party line by their respective whips. We have ruled out, too, the executive branch, the Cabinet, because when bills are sent through Parliament MPs can vote them down, and so the Cabinet's will is subject to the will of Parliament.

As we have already seen, however, the will of Parliament is subject to the will of the people who are subject to the will of the Government which is subject to the will of Parliament which is subject to the will of the people... etc, etc.

Clearly, this circular logic negates the present definition of the sovereign, as applied in its current, Austinian form. It is obvious that there is no defined, authoritative sovereign in the United Kingdom. However, by saying this, we omit one of the most vital branches of government, the Judiciary.

The courts do not rely on the population and elections. Moreover, the courts operate within a common law system, as well as applying Acts of Parliament. This means that the courts have the authority to create law where no statute exists on the subject, or to expand on rules already created by previous judicial decisions. Judges are also able to expand on statutes where there is little or no supporting instruction on how the statute is to be applied, or if its application is impossible except through further interpretation. This role of judicial review and statutory interpretation is supported by the statement of Baroness Hale, a Supreme Court Justice and one of the most senior appellate judges in the United Kingdom, who said, "the court would require incredibly plain language to make the actions of government non justiciable, not subject to judicial review in some form or other."³⁰ This, therefore, enables the court to fit Austin's definition of sovereignty neatly, by using Gray's theory, that "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them"; *a fortiori*, whoever hath absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver."³¹

However, this is not the recognised theory among conventional scholars of jurisprudence. Since Blackstone, there has been a total shift in consensus from recognising the Courts as having their own authority to decide on the constitutionality of the executive and legislative branches of government, to an attitude derived principally from the sovereignty of Parliament. Even Judges themselves refuse to acknowledge their own authority against Parliament, yet their decisions frequently influence the power and jurisdiction of the executive and legislative branches. Baroness Hale said "We have two guiding principles in our constitution. One is the rule of law but the other is the Sovereignty of Parliament ... the rule of law would tend to say that the sovereignty of Parliament must be respected. And all exceptions to that ... come from the European treaties ... The

³⁰ Interview with Baroness Hale, 30/03/2011, Tom Graddon (see appendix)

³¹ Gray, A.C, Nature and Sources of the Law

theory is that Parliament could unmake those exceptions.”³² This is true, but only so long as those exceptions are derived from principles of the Rule of Law.

This statement implies that Parliament has the right, at its will, to decide on all matters without question. Although this adheres to the commonly held belief in modern jurisprudence in the absolute sovereignty of Parliament, in practice this dated understanding of the interrelationship between the three organs of government is totally unworkable. Parliament has no such authority, because important matters of state are more often than not governed by the relevant government department and minister. As a result, the Cabinet (or rather, the Executive) curtails the actual power of “parliament” as a whole. It is possible to argue that Parliament itself has devolved its authority to individual ministers, and that such devolved authority could be reclaimed; but in practice Parliament is actually constrained by a system of rules created under principles of the Rule of Law.

The next logical question, of course, is from where does the authority of the cabinet arise? Unlike Parliament members of the cabinet do not need to be elected, beyond becoming an MP³³, to become cabinet ministers. It is possible, then, to say that although Parliament is sovereign *de jure*, it is not the *de facto* sovereign.

The key to understanding the origin of sovereignty in the United Kingdom is to understand what we mean by the Rule of Law. Despite the Parliamentary Sovereignty rhetoric, the Rule of Law runs superior to common legal sovereignty, and only “tends” to lend sovereignty to Parliament. More than this, the rule of law shapes the political and legal landscape of not only our government, but all democratic government systems. Baroness Hale added that “The anxiety of the judges to maintain the rule of law i.e. everybody has got to obey the law whatever the law is, is a common thread that goes through.”

John Austin said that the sovereign enforces his authority with a monopoly on “state-sponsored violence.”³⁴ Never has this been proven truer than in the last three decades. Since 1980, the police and security forces in the United Kingdom have demonstrated their willingness to apply this violence, in particular during the Brixton Riots of 1981, the Poll Tax Riots of 1990, the G20 demonstrations of 2008, the Student Demonstrations of 2010, the Austerity Marches and the Riots of 2011. The riots, in fact, actually support the notion that the Sovereign is the judiciary, because in sentencing offenders in the aftermath the Judiciary showed a surprising heavy-handedness against those convicted.³⁵ There is, however a misconception as to the relationship between the Judiciary and the Police. According to Justice J M Priestley,

³² Ibid, interview with Baroness Hale

³³ Of course, a Cabinet member may also come from the House of Lords.

³⁴ Perhaps Austin was guilty of a tautology here, since violence against the population can only ever be sanctioned by the Sovereign. Any other person or body is constrained by law, whereas he is not and thus is able to commit acts of violence without risk of punishment.

“In the public mind judges are seen as part of [The State’s] law enforcement apparatus. Several times a month television presents powerful images of criminal trials, where judges and courtrooms appear in the same stories as prison vans, police officers, Department of Corrections escorts, and lawyers. It is common knowledge that judges are lawyers. They must be selected from the pool of practitioners. They are regarded as lawyers. What these images and impressions miss is that a judge, on appointment, is no longer a member of the bar. A judge is instead part of an arm of government, independent, and performing a vital constitutional role.”³⁶

In the aftermath of the London Riots, the role of the courts became one of both judicial impartiality and appeasement of public and political feeling against the rioters. As a result, the Judiciary was forced to become politicised. Whereas the Police were only required to quell the rioting, to the point of requesting extraordinary riot suppressant tools (such as rubber bullets and water cannon), the Judiciary must consider the repercussions of their judgments, and as a result, must enter the political fray, if reluctantly. In *MacDonald Inc v Attorney General of Canada*, La Forest J said that “Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be.”³⁷ As much as Judges would like to avoid questions of constitutional conflict with Parliament, it is inevitable that questions of policy will be debated in the halls and chambers of Justice, and so the justices themselves must accept that, since all questions of law that come before the Supreme Court will affect domestic law, all questions of law must also be questions of policy in some regard.

The police, however, are free from the fetters of judicial impartiality, and instead are only required to implement criminal law policy issued by Government³⁸. Where this happens, with no review by the judiciary, infringement of rights and liberties can occur in the name of government policy. One such example could be that of the Royal Wedding on the 29th April 2011. Although on the day there was widespread celebration, it is natural to expect that not everyone shared in the festive atmosphere. However, any attempt to demonstrate on this day was highly regulated, and permitted only outside a designated area in central London. Even outside this zone, demonstrators were met with hostility by the Metropolitan Police, who announced that they would be enforcing “section 60s.”³⁹ Protesters were told that if they did not disperse from their gatherings the police would treat

³⁶ Priestly, J CHIPPING AWAY AT THE JUDICIAL ARM? Harkness Henry Lecture, University of Waikato Law School. P 3

³⁷ [1995] 3 SCR 199 at 68

³⁸ That is, they are authorised to pursue a criminal investigation into a person, persons or an organisation, in order to attribute blame for wrongdoing, and ensuring that the body of evidence against that person is strong enough to ensure a conviction.

³⁹ S. 60 Powers to stop and search in anticipation of violence.

If a police officer of or above the rank of inspector reasonably believes—

(a) that incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence, or

the situation as being imminent of a breach of the peace⁴⁰, and would make arrests against anyone demonstrating.

This is a clear misuse of the Criminal Justice and Public Order Act, which only gives officers the right to search members of the public, or gives officers the right to make an arrest where he believes a breach of the peace is imminent. However, for this to be the case, there must be an act committed, or threatened, which puts a person in fear of harm. According to the charity *Liberty Advice Service*, whose advice would have been publicly available to the protesters, “Something which merely distresses or offends someone will not normally amount to a breach of the peace.”⁴¹ As a result, they could not have anticipated that their actions would have amounted to a criminal breach of the peace.

The police, it must be noted, are granted independent constabulary powers, and may have been acting independently of government. Nonetheless, this (mis)use of the Act in these circumstances is not only disproportionate, but contrary to the will of both Parliament (acknowledged politically and legally, and perhaps falsely, as the sovereign), and the population itself which is granted the right to gather and protest under the Human Rights Act 1998. If this is the case, and the will of Parliament was ignored by the police, an organization whose duty is to uphold the will of the sovereign, then Parliament is not to be habitually obeyed. Moreover, these actions contradict the will of the Courts who, as I shall show below, defend the right to protest, and rule harshly where the police misuse their powers, use them disproportionately or in a way that is not in the way that Parliament had intended the act to be used. This is all part of the process of Judicial Review, and can also include measuring an act's compatibility with the Human Rights Act, and with European conventions and treaties.

The reported case of *R (Laporte) v Chief Constable of Gloucestershire Constabulary*⁴² lends itself well to the assertion that the Police enforce the will of the Government, but not necessarily the Sovereign. The facts of the case state that a coach full of protesters, on their way to a demonstration, were stopped on their route by the police and, fearing a potential breach of the peace, the constable in charge deemed it appropriate under section 60 to detain the protesters and have them return on the coach to London, and were not allowed to step off the bus until it returned (a journey time of approximately 2½ hours). The court decided in this case that although the police were within their right to order the passengers not to continue their journey, they were not at liberty to send the coach back to its point of origin, and nor was it a legitimate order to disallow any passenger to leave the coach for the duration of the journey. The courts decided that in this case, the

(b) that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason, he may give an authorisation that the powers [to stop and search] conferred by this section are to be exercisable at any place within that locality for a specified period not exceeding 24 hours

⁴⁰ Video Recording, 29/04/2011, Tom Graddon (see appendix)

⁴¹ www.yourrights.co.uk/yourrights/the-right-of-peaceful-protest/other-police-powers-to-restrict-right-to-protest.html Accessed 28/06/2011

⁴² *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55

police were clearly acting beyond their jurisdiction, as May LJ stated in his judgment when he said that “(a) there was no immediately apprehended breach of the peace by her sufficient to justify even transitory detention, (b) detention on the coach for two-and-a-half hours went far beyond anything which could conceivably constitute transitory detention such as I have described, and (c) even if there had been, the circumstances and length of the detention on the coach were wholly disproportionate to the apprehended breach of the peace.”⁴³

These examples of disproportionate application of police power require exploration in order to fully understand for whom these powers are operating, and to what end. The Police, like many other government institutions, operate on behalf of the Crown. However, as has already been seen, the Crown is not sovereign, because it lacks the authority to make law at its leisure.

Then surely, sovereignty must belong to Parliament, since it is they who make the statutes that the police enforce; thus, it is the police exercising the state-sponsored violence in the name of enforcing the will of Parliament? Yes and no. Although the police do enforce statutes enacted by Parliament, they also enforce common law decisions made by *the courts*. Murder, for example, is a common law offense, defined by Lord Chief Justice Coke as being “the unlawful killing of any man *in rerum natura*, with malice aforethought.”

As a result, the police are, in fact, enforcing the will of the courts, who act in their capacity as a law-making body. Moreover, where a suspect is charged, the right of *Habeas Corpus* is instantly put into effect, and the police must bring the suspect before a court to be tried for the crime of which he is accused. This writ, one of the oldest in the English legal system, is one of the most fundamental rights in English law, and is enshrined historically, and still in contemporary legal documents, that everyone “is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁴⁴

The European Convention on Human Rights, enshrined in English law by the Human Rights Act 1998, guarantees a fair and impartial judiciary, though historically this is a right already enjoyed by citizens of the United Kingdom. Traditionally, the courts have been outspoken in their criticism of the government, particularly Lord Chief Justice Coke who, in *Dr. Bonham’s Case (1615)*, said that if ever an act was “anathema” to the public good, the courts should render it not law.

Baroness Hale commented that, “you might when you read the case and think about it, think that there was a certain commonality, not complete consistency, but a commonality in Coke's saying the common law of England is a stronger thing than the power of the king.”⁴⁵

⁴³ *ibid* at 15

⁴⁴ European Convention on Human Rights, Article 6, §1

⁴⁵ *Ibid*, Baroness Hale

Naturally, this assertion is correct; one couldn't say for definite that Coke meant the power of anyone but the King in this case. However, given that his approach was normally to challenge absolute power, even of the sovereign, it is logical to interpret that when he made this comment he was referring to anyone that claimed absolute law-making power, including Parliament. After all, wherever power is derived from it is power nonetheless, and must be checked to prevent it from becoming absolute and arbitrary. Logically, anyone who claims absolute law-making power is in a very dangerous position; because it is possible to apply the will of the Sovereign arbitrarily, it is possible that the enactment of his will could lead to an abuse of power. It could be argued that this is what happened in 2005 when the *Freezing Order*⁴⁶ case came before the Supreme Court. This case was the application of the Terrorism Act passed previously, which allowed security services to hold terror suspects indefinitely in detention before a burden of proof had been met, thus depriving suspects of their right to be presumed innocent, and their right to a fair trial. In that circumstance, the House of Lords held that the law was incompatible with the Human Rights Act, and the Government reacted by allowing the statute to lapse and subsequently replaced it. The Government did not need to comply with the declaration, because they allowed this to happen and replaced the legislation appropriately.

A further example of the court exercising their powers of judicial review and power to prevent the legislature and executive from arbitrary rule came with the case of Control Orders and Special Advocates.

The legislation as drafted said that if the closed material was sufficient for the court to uphold the control order the court should do so, even if it couldn't be disclosed to the controlled person and he wouldn't have a fair hearing without its disclosure. The Supreme Court could have made a declaration of incompatibility, saying it was incompatible with Article 5 or Article 6 depending upon whether it was a deprivation of liberty (because it was not supposed to be a deprivation of liberty). But they chose not to do that; Instead, the court interpreted the act so that it meant the opposite of what it actually said. That is, that the home secretary can't be forced to disclose the closed material if he didn't want to, but if the person couldn't have a fair hearing without it being disclosed, the home secretary would not be able to rely on it for the purposes of persuading the court to make the order. As a result, the home secretary was forced to choose between disclosure and the order. This decision was effectively the reverse of what the parliamentary language said.

When the case next came to the Supreme Court, because there was still a problem about how disclosure was necessary to ensure a fair trial. The Home Secretary could have said that the prior decision was an impermissible use of section 3 of the Human Rights Act, and could have demanded a declaration of incompatibility so that the Act could continue to operate in its original form. However, the Home Secretary chose not to do that.

⁴⁶ Treasury v Ahmed and Others [2010] UKSC 2

In many ways, this is a curious approach by the Government, and almost reinforces the assertion that the Courts are sovereign over Parliament. If the Government had so wished, the Home Secretary could have pressed for the court to make a declaration of incompatibility, so that the Act could be normalised (the convention that politicians do not interfere in the decisions of the courts is well-established, though they sometimes criticize the decisions afterwards). However, the courts had reinterpreted the statute into something totally removed from the parliamentary language, and totally different from the will of Parliament. The courts had manipulated the language of the statute on the subject of control orders, and had bested Parliament at making law. If the courts were not sovereign, the Executive could have pressed for a redrafting in the Commons of the Act as it stood, so that the language was non-justiciable and clear, but instead the Government was faced with an act that had been almost rewritten by the Supreme Court, in a case that, coming from the most superior appellate court, made a ruling not just in one case, but a common law rule that would subsequently affect all cases whose points of law were homogenous to this one.

This is where the real power of the court lies. No court could simply create a law; not because there is some prior stated convention that prevents the court from doing so, but simply because attempting to do so would create so many political arguments that it is impractical to try. As Sir Robert Howard said, “the king ought to be under no man, but under God and the law, because the law makes the king. If any prerogative is disputed, the courts must decide the question of whether or not it exists in the same way as they decide any other question of law.”⁴⁷

Already, there have been arguments between the Executive and the Judiciary on the subject of law-making authority. In January of 2011 David Cameron, the Prime Minister, made a statement⁴⁸ condemning a Supreme Court ruling on the subject of the sex offenders register⁴⁹. The court had found that it is disproportionate and contrary to article 8 of the Convention on Human Rights for a person to be placed on the sex offenders register in perpetuity, where circumstances make this so. The case that went before the Supreme Court surrounded two complainants, who argued that their continuing registration was an unfair breach of their right to a private and family life. The first complainant had been convicted of rape at 14, arguably at a time when he was not fully responsible for his own actions. As a result of his crime, he was placed on the sex offenders register for life, with no opportunity for appeal to be removed. The court accepted that this was disproportionate, and that it should be permissible for a person to appeal for his removal from the register after an appropriate period of time.

The Executive and Legislative branches of government complained that the courts had exceeded their jurisdiction, and had gone about making a law in a way that was not constitutional. This was,

⁴⁷ Howard, R

⁴⁸ <http://www.dailymail.co.uk/news/article-2003408/Human-rights-gives-sex-offenders-chance-names-taken-register.html> Accessed 16/06/2011

⁴⁹ R v Secretary of State for the Home Office, Ex Parte JF & A Thompson [2009] EWCA Civ 792

in fact, false, and even the criticism itself was unconstitutional⁵⁰, as it could be construed as an attempt to pervert the independence of the court. However, despite the complaints from Government, the decision made by the court will be upheld, and the Executive have said that they will amend the statute accordingly so that the court's decision can be put into practice. This shows that the Government feels compelled to follow the direction of the court, even when it disagrees fundamentally with the decision.

I shall now briefly explain the format of my reasoning in the coming chapters, and explain how I shall use the materials available to me to establish a legitimate line of argument in support of my thesis that the Courts are Sovereign in the legal system of England and Wales.

Approaching an Argument for Judicial Sovereignty

It is key to the argument that the courts are sovereign that the definitions of what it is *to be* Sovereign are explored. This work relies principally on the work of modern jurisdictions outside the United Kingdom, including that of the United States, Australia and New Zealand. However, there are certain philosophical theories that must be explored as well as instances of actual judicial activism. Thomas Hobbes' *Leviathan* is a foundation stone to understanding the definition of the Legal and Political sovereign. His work, alongside that of A.C. Gray and Austin, shall be explored principally in chapter 2. Furthermore, we shall also explore the work of H.L.A. Hart, and other modern legal philosophers' explorations of the Sovereign.

Once it has been shown that the Courts have authority over the law-making branches of Government, we then need to explore just how far this power can be exercised practically in the real world. To do this, we shall look at some practical examples. These will be explored in depth in chapters five and six, but for now we shall briefly explore the principal cases surrounding the issue, and the questions which arise therein.

I shall now explain how I intend to structure my argument. I shall first engage in a study of the established theory, and historical cases which have been established in the common law as demonstrating actual examples of how the courts have asserted their sovereign authority over Parliament. So, for chapter three we shall focus on direct historical examples, as the chapter's title suggests. We shall then move on to modern examples of judicial activism, and explore how the courts exercise their authority in the modern world, as well as the tools they use to do this. Following this, I shall explore two jurisdictions that bear similar hallmarks to our own, but with radically different views on judicial activism. These jurisdictions are the United States and New Zealand, in both of which judges have taken on a more active role as policy-makers either through their defined roles in the constitution or because of their own will to activism. A more detailed explanation of what shall be examined can be found below. After this, I shall conduct a thought

⁵⁰ Constitutional Reform Act 2005

experiment, drawing on examples from Pakistan and Thailand, to build an idea of what would happen if the Judiciary and Parliament clashed over judicial review of statutes. There shall then follow the concluding chapter of this work that shall reiterate the points made in the initial chapters, and finally establishing that the courts are sovereign in the legal system of England and Wales.

The first historical case to be explored is, of course, *Dr. Bonham's Case*⁵¹. This case is noteworthy because of the obiter statement made by Coke which was mentioned above. Coke ruled that

“in many cases, the common law will controul [sic] Acts of Parliament, and sometimes 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 controul it, and adjudge such an act to be void.”

This attitude was not uncommon for its day, but was nonetheless indicative of a Judiciary that was prepared to clearly define its independence, and its role in the law-making process. The key issues raised by this case is simply who Coke was referring to in his statement. As Baroness Hale explained above, his language identifies the King in that particular case, but, as I mentioned, why should this not be extended to whomever is in charge and claims sovereignty? If one tries to apply the same statement in the modern day, it becomes obvious that it doesn't apply to the Monarchy, since their role is to act as figureheads, and only continue to exist because the extent to which the constitution was reformed after the Civil War and the Glorious Revolution gave us a constitutional Monarchy rather than the complete abolition of the Royal family all together. Could it be, therefore, that Lord Chief Justice Coke's statement would apply to Parliament?

Besides which, even if Coke's statement would not apply to Parliament it was, for its time, a particularly extreme statement to make, given that the Judiciary derived its authority from a devolution of justice from the Sovereign, originally named as the monarch, who ruled autocratically and was, thus, the sovereign according to the Austinian definition. The question to be asked later is, therefore, how is this statement to be applied, and could it be relevant in a modern legal-political landscape?

The next case to be examined is *The Case of the Sheriff of Middlesex*⁵². This case, from the nineteenth century, concerned the separation of power between Parliament and the Judiciary. Its impact was greatly significant, as the case cemented the doctrine that where there is a breach of the law, it is the Judiciary that has sole responsibility for hearing arguments and adjudging on points of law, whereas prior to this the House of Commons was able to exercise authority as a court for Parliamentary procedure. This case could be seen as the first real and significant challenge made by

⁵¹ Court of Common Pleas, 1612

⁵² (1840) 11 Ad.&E. 273

the courts against the sovereignty of Parliament, as it was a direct challenge to Parliamentary authority. As sovereign, despite devolving its judicial functions to the Courts, Parliament should be able to adjudicate on points of law that it creates, whereas this case laid down clear divisions in the power of the separate arms of government, and stated unequivocally that the role of Parliament is to draft and enact statute, and the role of the Judiciary is to interpret statute and apply the law in all circumstances. In many ways, this case could be seen as the Judiciary ring-fencing itself, and defining its own limitations, but nonetheless, the case raises the question, if the courts apply and interpret the law, but also innovate common law rules, then is the judiciary legitimately responsible for making law itself?

We shall also, in our pursuit of the Sovereign in the United Kingdom, examine the roles of courts in other jurisdictions, paying particular attention to the Supreme Court in the United States, and its role in the law-making process. We shall in particular examine the case of *Marbury v Madison*, which famously established the US Supreme Court as one with jurisdiction to strike down statute that is incompatible with the US Constitution. We shall then focus on a case study, that of the President of the United States and his role as the potential Sovereign in their legal system. Two presidents in the past century have declared themselves to be above the law, using a number of legal arguments, in their attempts to evade the implementation of the Rule of Law to curtail their authority. Nixon, in the nineteen-seventies, declared that “if the President does it, that means that it is not illegal”, and similarly George W Bush Jr. stated that as Commander-in-Chief, he had the authority to ignore the law and to act without judicial review. This is a position, as we shall explore, that the courts will not allow, and will decide accordingly, limiting the power of the President to what they consider to be appropriate and within the confines of the Constitution.

The United States does in fact operate in a similar fashion to the United Kingdom: it has a common law system alongside its statute law; however the United States has a constitution which, one could argue, is the sovereign in itself. Would it be appropriate for the United Kingdom to adopt a constitution, in order to avoid issues of sovereignty? Already in commonwealth countries, the United Kingdom has had a great deal of experience in drafting constitutions, and the Privy Council is well versed in deciding cases of constitutionality, so it could be that enacting a formal constitution, and forcing government to ensure statutes are compliant with it, is an appropriate means of balancing the power of the court with the authority of parliament. It does, however raise the question, who decides on the constitutional power of the different arms of government, and could the constitution itself be the subject of (mis)interpretation by the Supreme Court in Britain?

Following this, we shall examine the attitudes of foreign jurisdictions that bear yet closer similarities to our own legal system. In particular we shall be examining the concept of sovereignty in New Zealand and Australia. We shall also be examining the role and development of law surrounding the Treaty of Waitangi. This is a significant legal document in New Zealand, and amounts almost to a form of Constitution, the terms of which ensure protection of lands and

freedoms belonging to the indigenous Suomi people, and outline procedure for land transfer from the Suomi to the Crown, and in reverse. This document has achieved a kind of importance unparalleled in the United Kingdom, especially since the terms for the treaty were expanded upon and defined in a judgment by the courts. This is an example of the courts directly influencing political policy, and is a dramatic departure from the position the courts in the United Kingdom would rather inhabit. Moreover, we shall be examining in detail the work of the distinguished jurist Robin Cooke, who wrote extensively on the influence and work of the courts in defining and creating laws and policy.

Furthermore, we shall go on to explore the *Anisminic Case*, which concerned compensation from the nationalisation of the Suez Canal. In this case, a committee was created to divide the compensation fund, and the statute declared that all decisions made by the committee will be final. The House of Lords, however, decided that where that decision was incorrect on points of law, it could come under the scrutiny of the courts. This could be seen as a continuation of the *Sheriff of Middlesex*, as it effectively puts all questions on points of law to the jurisdiction of the court where those questions are raised in the course of proceedings in Parliamentary committees and tribunals. The question raised here is, to what extent could this power be applied by the court to other aspects of Parliamentary procedure? Could the courts, theoretically, call into question the validity of Commons and Lords decisions where a point of law is incorrect? And should a statute be passed by virtue of an error of law, could the courts subsequently overturn the act's validity and have the decision reviewed?

The more modern cases to be examined are all concerning the power of government to curtail rights viewed as fundamental in law. These include the Freezing Order Case⁵³ (Also known as *Ahmed v the Treasury*, or the *Treasury Order Case*). This case concerned the power of the treasury to rely on the United Nations Act 1945 to freeze the assets of terror suspects. In one of its first decisions as the Supreme Court, the highest appellate court in England and Wales decided that without Parliamentary scrutiny, such orders were invalid, and thus overturned the orders themselves. This is significant because the Supreme Court is making clear that unless Acts, orders and Statutory instruments are given proper scrutiny by Parliament, then they cannot be allowed to operate. Moreover, the court is making clear that it will uphold wherever necessary the rights and freedoms laid out by the Human Rights Act and European Convention on Human Rights. This case, as well as the Belmarsh cases and Control Orders cases, which are mentioned above, raise obvious questions as to the power of the Courts, and the extent to which they are permitted to challenge the authority of Parliament. So long as the courts are able to challenge the authority of parliament, then Parliament cannot claim sovereignty.

The final cases to be examined shall be the *Woolas* and *Parliamentary Expenses Cases*. These cases concern Members of Parliament who commit acts of criminal wrongdoing, and so present a legal

⁵³ Ahmed v The Treasury 2005

question of jurisdiction, inviting conflict between Parliament and the Court. For Woolas, the wrongdoing was straightforward: during the course of his election campaign, he made a series of false allegations against his opponent, violating section 108 of the Representation of the People Act.⁵⁴ As a result, a special Election Court was convened to decide on the legitimacy of his election, and how best to apply the law. In this case, the court decided to remove Woolas from his seat, and declared the election void. The court, effectively, overturned a democratic election, and implied its superiority over democracy, effectively making it greater than the political system.

In the case of Parliamentary Expenses, three MPs were prosecuted for fraudulently claiming expenses for personal expenditure. When challenged in court in criminal proceedings, they attempted to claim that their expenses were covered by Parliamentary privilege and so inadmissible as evidence. Moreover, they tried to claim that it was Parliament's jurisdiction to discipline MPs, and not the courts; a claim that was dismissed by the judiciary.

These cases all present different points of law and procedure when trying to identify the sovereign in the United Kingdom. They can be grouped together into themes however, and in the following chapters I shall discuss these cases according to their themes, beginning with direct challenges to the sovereignty of Parliament, in *Bonham*, and *Middlesex*. Furthermore, we shall discuss the implications of challenging the procedural authority of Parliament, in *Anisminic*, *Freezing Orders* and *Woolas*. Finally, we shall examine the authority of the courts to adjudicate on matters concerning European Union legislation, and how not only its influence, but also the manner in which the courts interpret and apply that legislation, affects the sovereignty of Parliament. These cases are, of course, *Concerning the Sex Offenders' Register*⁵⁵, the question of prisoner voting⁵⁶, and *Control Orders*⁵⁷.

We shall also be examining contemporary issues of sovereignty in the United Kingdom, with reference to changes in foreign and domestic policy, and how 9/11 has fundamentally changed the British legal/political landscape, and how the relationship between Parliament, the Cabinet and the Courts has been perhaps irreversibly changed as a result of the measures put in place by Parliament in order to prevent acts of terrorism. According to the Telegraph, "Laws rushed onto the statute book were judged inimical to ancient British liberties because they allowed terrorist suspects to be

⁵⁴ Representation of the People Act 1989, (106) reads as follows:

(1) False statements as to candidates

A person who, or any director of anybody or association corporate which—

(a) before or during an election,

(b) for the purpose of affecting the return of any candidate at the election,

makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, that statement to be true.

⁵⁵ R (on the application of F) v Home Secretary, [2010] UKSC 17

⁵⁶ Hirst v United Kingdom (No 2) [2005] ECHR 681

⁵⁷ Home Secretary v AP (Appellant) [2010] UKSC 24

held without trial. Yet they had been passed by Parliament in the full knowledge that they were illiberal and discriminatory: MPs and peers decided that, on balance, the threat from suspected terrorists outweighed their human rights.”⁵⁸ A legitimate concern would be that, in that current climate of fear, the words of Thomas Fuller, “be you never so high, the law is above you,” are being overlooked or even ignored by Parliament. How threatened is the Rule of Law, and as a result the power of the courts over the other two pillars of government, to guarantee compliance with the principles of the Rule of Law?

This attitude toward the law by the executive and the legislature has been expounded by policy changes by the United States, which has adopted an exceptionalist attitude⁵⁹ toward violations of human rights and the rule of law, for example in their use of Abu Ghraib, Guantanamo and Bagram Airbase⁶⁰, which are used to detain people without adherence to the principle of *Habeas Corpus*, and in their continued use of extraordinary rendition, which strips terror suspects of the basic human rights guaranteed by the United States by proxy.

Lastly, I shall conduct a thought experiment to try and explore the implications of a direct challenge to the authority of Parliament by the Judiciary. A serious concern raised by the *Sheriff of Middlesex’s Case* was that the courts could, if they wished, stop co-operating with Parliament, and refuse to uphold the convention of Parliamentary sovereignty. If this were to happen, the implications would be colossal. It would be impossible for Parliament to operate as both a legislative and judicial organ, and thus any breakdown in their relationship would mark a fundamental change in the legal-political landscape. In the course of this thought experiment, I aim to show that the Courts have an authority beyond mere interpretation of statute. They are the authority, to which the police subject criminal elements, but they are also law-makers, that protect and uphold our rights and liberties, and they are guardians of a fair and democratic society. In their capacity as justices, the courts prevent arbitrary rule, uphold basic maxims of *Habeas Corpus* and fundamental human rights, and administer fair and universal justice. Without independent common-law courts, society would be markedly different, and not for the better.

This work is intended to prove that the courts, through their dispensation of justice according to the rule of law, are the legal sovereign in the United Kingdom. I shall show, through the combined chapters described above, that Parliament is at the mercy of the Courts who, through their interpretation of statute, breathe life into otherwise “dead law,”⁶¹ and can overturn statute as they choose, so long as their decision to do so is supported by sound legal argument, firmly based in the Rule of Law, good precedent and principles of Natural Law. Though Parliament lays claim to authority to author statute, without the court it would be unenforceable, and the very nature of the

⁵⁸ <http://www.telegraph.co.uk/comment/columnists/philipjohnston/8001383/Do-we-want-to-be-ruled-by-judges-or-MPs.html> accessed 29/07/2011

⁵⁹ Aradau, C and Van Munster R, Exceptionalism and the ‘War on Terror’: Criminology Meets International Relations Br J Criminol (2009) 49 (5): 686-701

⁶⁰ We shall be examining Bagram Airbase in particular in Chapter 5, where in particular we shall focus on *Rahmatullah v Foreign Secretary*.

⁶¹ Gray, A.C, Nature and Sources of the Law

sovereign is that his will is obeyed and enforced. Without the Court, there can be no Sovereign, and if the Sovereign relies on another body to carry out his functions, then he cannot be defined as such in a legal system.

Chapter Two - *Historical Challenges to Parliamentary Sovereignty*

*"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."*⁶²

Justice Brandeis USSC

In this chapter we shall explore the historical context of judicial sovereignty and the prevalence of judicial opinion over statute in early modern British legal-political history. This topic is far-reaching, and so our discussion will need to be narrowly focused. Therefore, we will be examining a few of the most significant cases and examples in order to prove that, historically, the courts have enjoyed a Sovereignty which today they are unwilling to acknowledge.

Taken from his dissenting judgment in *Olmstead* in 1928, Justice Brandeis must have known that a statement such as the one above would have generated much controversy in jurisprudence. Government, as a teacher to the people, leads by example in its adherence to the Rule of Law. Any government that ignores the law so too indicates to the people that to do so is acceptable. The Courts, arbiters of the rule of law, set the rules by which government must play. If governments fail to listen to their judgments, and so fail to abide by the Rule of Law, then what good are the courts?

The Early Development of Judicial Sovereignty

The courts, through their judgment and interpretation, mediation and arbitration, become churches to the Rule of Law. There can be only one law for everyone, and everyone stands beneath it and must live within its confines. The Rule of Law is an abstract concept. It cannot ensure by its own volition that governments adhere to it, which the public keep within its bounds, and so the Courts use their authority to do this by proxy. Through the Seventeenth Century, in keeping with the idea of the courts as being almost mystics of the law, the role of 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."⁶³ And even earlier, the prominent jurist Henry de Bracton made note in his work, *On the Laws and Customs of England*, that "Though in almost all lands use is made of the *leges* and the *jus scriptum*, England alone uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved."⁶⁴

Obviously, the reality of this statement has changed since the seventeenth century. Dicey, Blackstone and others have all made their own contributions to rebutting the Courts in defence of

⁶² *Olmstead v. United States*, 277 US 438, pp 277

⁶³ Hill, C, *The Century of Revolution*, (1961) Routledge 2002, pp66

⁶⁴ Bracton H de, *De Legibus Et Consuetudinibus Angliae*, (Volume II) pp1 Harvard 1977

the sovereignty of Parliament⁶⁵. Even historically, however, the idea of the rule of law was used then as it is used now: not only in legal terms, but also as propaganda. For example, one need only turn to Oliver Cromwell who, on the establishment of his Protectorate, authored the Instrument of Government in 1653, which was to enshrine in law some unalterable principles.

Within the Instrument, Cromwell says, “In every government there must be somewhat fundamental, somewhat like a Magna Carta, that should be standing and unalterable.” The nobility of this phrase cannot be overlooked - effectively enshrining in law certain unalienable principles such as the right to religious freedom - Cromwell comforts us with the assurance that “parliaments should not make themselves perpetual” because “of what assurance is a law to prevent so great an evil if it lie in one and the same legislator to unmake it again?”⁶⁶

The problem with this assurance is that the Instrument gave supreme power to Parliament, if not to the Lord Protector himself,⁶⁷ as a result, even considering this to be the first modern European ‘constitution’ it is still flawed, since it denies the possibility of the rule of law over the rule of the sovereign⁶⁸. However, as a starting point, it still serves as a fine example of how a British constitution has been authored to reflect, if not to effect, a belief in the rule of law. But is it really necessary to have a constitution in order to give Judges the authority to make law? Jeremy Bentham felt it was an obvious fact that judges make law, and exercise private judgement in cases brought before them. He said that any judge who claims not to make the law, but instead, as Blackstone suggested in his *Commentaries*, serve as “depositories of the law; the living oracles who are bound by an oath to decide according to the law of the land,”⁶⁹ is resorting only to a “childish fiction.”

In modern English political history, it was not uncommon for politicians to leave matters of law to Judges themselves; “occasionally, it [Parliament] would pass a legal monument such as the Bill of Rights of 1689 or the Act of Settlement of 1701, but judges formulated most of the rules regarding torts, trespass, property, wills, contracts and obligations between employers and employees.”⁷⁰ It can be seen, therefore, that the concept of Parliamentary Sovereignty is not an antique notion. In fact, it was borne out of the nineteenth century, seemingly as a matter of necessity. While other nations were adopting constitutions, and building supreme courts to regulate policy against its sovereign laws, Britain lacked both. Canada granted its supreme court the power of constitutional judicial review of statutes in the late nineteenth century, Norway too, in the 1880s, granted this power to its supreme court, and the twentieth century saw Australia, Ireland, India and the Philippines grant this authority to their supreme courts. Variations of this judicial review can be

⁶⁵ “The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.” - A.V. Dicey *Introduction to the Study of the Law of the Constitution* (1885)

⁶⁶ Hill, *Intellectual Origins*, pp225

⁶⁷ Bogdanor, V: *Sovereignty of Parliament or the Rule of Law?*, Magna Carta Lecture 15th June 2006

⁶⁸ That is, so long as we assume that the sovereign must bend to the rule of law.

⁶⁹ Blackstone, *Commentaries on the Laws of England*, 1st Ed

⁷⁰ Murphy, F & Pritchett, C H, *Courts Judges and Politics* (2nd Ed) pp6

found in Switzerland, parts of Latin America, some African nations, and such formal, if not real, authority can be found in Pakistan and was witnessed in the former Yugoslavia. Argentina's *Corte Suprema* modeled itself after the United States Supreme Court and paid particular attention to its authority to review statute.

In the legal system of England and Wales, however, there is no such method of recourse. To illustrate this point, I would highlight the issue of Kenya's independence. In 1968, Kenya was granted its independence from the British Empire. When this occurred, the government of the United Kingdom offered British passports to all Asians domiciled in Kenya who refused Kenyan citizenship. However, when Kenya began expelling Asians with non-Kenyan citizenship, the number of non-white immigrants to the United Kingdom increased, and as a result, a limit was placed on the number of non-white immigrants that were permitted to enter Britain. If this same situation had arisen in the United States, and Congress had passed a similar bill refusing entrance to non-white immigrants, the Supreme Court would almost certainly have found this to have been unconstitutional, as it unfairly excluded immigrants with a legal right to enter the country bearing British passports.

The Privy Council, of course, has exercised the authority to decide on colonial constitutional issues, and continues to do so (though without the authority that it had during Britain's Commonwealth era) this Court does not have the jurisdiction to decide cases within the legal system of England and Wales. The Supreme Court too, refuses to reclaim the authority it exercised in the seventeenth and eighteenth centuries, and which was vehemently defended by Bentham.

According to Baroness Hale the United Kingdom has experience enough of drafting constitutions⁷¹ but without one for ourselves, we were in need of some means of justifying the origin of our laws. It was not uncommon thought at the time of Austin in the early nineteenth century that Judges did indeed make the law, and perhaps the most vocal of those who advocated the sovereignty of the courts was A.C. Gray, a contemporary of Austin's, whose treatise *The Nature and Origins of the Law* continues to be a persuasive manifesto for a Sovereign Common Law. His defence begins with criticism of the common law itself, asserting that,

“The Common Law has often been reproached with the lack of precision and certainty in its definitions, but, in truth, it is a great advantage ... that its definitions are never the matters resolved by the cases; they are never anything but dicta. If at the end of the sixteenth, or of the seventeenth, or even of the eighteenth century, there had been definitions binding by statute on the Courts; if the meaning of “contract,” and “malice,” and “possession,” and “perpetuities” had been fixed, what fetters

⁷¹ *ibid*, Baroness Hale interview, Tom Graddon 2011

would have been imposed on the natural development of the Law.”⁷²

In this assertion he is, of course, correct. The advantage common law holds over statute is that it is able to change, to direct its own natural evolution and to ensure that practitioners of law, and the citizens of its society who must be able to understand and live within it, are not “hampered by the cast-iron classification and definitions of a former generation, which, in the advancement of legal thought and knowledge, are now felt to be imperfect and inadequate.”⁷³

This is the balance that the current system attempts to strike when creating and adjudicating on statutes. Parliament creates law that, if the principle of Parliamentary Sovereignty is to be believed, should be fixed and immutable. However, the disadvantage of creating law that is unchangeable is that it is just that: unchangeable. Obviously, the custom that Parliament cannot bind itself plays its part in ensuring that laws are more flexible - if a government dislikes an act of Parliament passed by a previous government, it can simply draft a bill to replace it. But is this enough? Surely, it cannot be that Parliament must spend so much time drafting and redrafting replacement bills for statutes that have become dated and obsolete?

This is where the courts play their vital role, and take on their task as sovereign. They create the law, but not directly. As Baroness Hale pointed out, “You could say that the sovereignty of parliament is judge made, but it's probably a sensible approach to consider where the tanks are.” This is a view of legitimacy shared by political philosopher Max Weber, who wrote extensively on the “monopoly of legitimate physical coercion”⁷⁴ that the state is said to have. The courts must be careful not to upset their relationship with Parliament or make a direct challenge to the supremacy of Parliament when making law, and so a law’s creation comes not with drafting a statute, but with its *interpretation*.

There are two aspects to the interpretation and implementation of the law: the first comes in drafting statute, the second in its implementation. As was pointed out by Oliver Wendell Holmes Jr, “historically, legislation had failed to meet the requirements of change; given complex conditions of modern life it was inconceivable that legislators could write laws that would foresee and provide for all eventualities.”⁷⁵ Whereas Blackstone claimed that judges were not “delegated to pronounce a new law, but to maintain and expound the old one,” it becomes apparent as one examines the principle of statutory interpretation that the role of judges actually shapes the meaning of statutes, sometimes deviating entirely from the original purpose of the bill. The most obvious and recent

⁷² Gray, A.C. *Nature and Sources of the Law*, Columbia 1909, section 16

⁷³ *Ibid*, Gray AC, *Nature and Sources*

⁷⁴ Weber, M, *The Theory of Social and Economic Organization* (1964). p. 154

⁷⁵ Holmes, OW, *The Common Law*

example must be that of the Control Orders case⁷⁶, which was heard in what was then the House of Lords in 2005.

In this case, terror suspects were statutorily unable to see certain evidence against them, and particularly the use of closed evidence and special advocates. The legislation as drafted said that if the closed material was sufficient for the court to uphold a control order the court should do so, even if it couldn't be disclosed to the controlled person and he wouldn't have a fair hearing without its disclosure. The House of Lords (as it was then) could have made a declaration of incompatibility saying it was incompatible with article 5 or article 6 depending upon whether it was a deprivation of liberty, because control orders were supposed to be a *limitation*, and not a deprivation of liberty. but we the Law Lords interpreted the statute so that it meant the opposite of what it actually said. That is to say that the Home Secretary can't be forced to disclose the closed material if he didn't want to, but if the person can't have a fair hearing without it being disclosed, the home secretary can't rely on it for the purposes of persuading the court to make the order. So the home secretary was forced to an election between disclosure of the evidence and upholding the control order, which was the reverse of what the parliamentary language said. When the case next came for an appeal, because there was still a problem about how disclosure was necessary to make a fair trial, the home secretary could've said the decision had been wrong, that it was an impermissible use of section 3 of the Human Rights Act and that it was necessary to submit a declaration of incompatibility to continue using the act in its original form. The strange thing, however, was that the Home Secretary chose not to do that. Instead, the Government decided to uphold the decision of the court and, when the case returned for appeal, again on the question of disclosure, rather than argue over the same question of disclosure, instead the government chose to argue on how much disclosure was necessary.

This example shows quite plainly that the Executive will respect the rule of law, because in reality, Parliament is not the sovereign. In a statement to me on the issue, a spokesperson from the Ministry of Justice said, "The Government⁷⁷ fully acknowledges the ruling of the Supreme Court in this case and is unwavering in its commitment to both the independence of the courts and to the rule of law."⁷⁸ The Government, if it so wished, could have pushed for a change in legislation, or for an order of incompatibility, but despite its *theoretical* powers to act against the ruling of the courts, it did not. It could be argued that for Parliament, the truth of the matter is that "the survival of sovereignty is what it appears to be, just a mistake."⁷⁹

Direct Challenges to Parliament in Legal History

⁷⁶ mentioned in chapter 1, above

⁷⁷ Used in this sense to mean Executive

⁷⁸ From an email from the Ministry of Justice, (Suzanne Colley) received 6th April 2011

⁷⁹ Eleftheriadis, P, Law and Sovereignty Draft Paper pp 4

The first historical case that we will discuss is *Dr Bonham's Case*,⁸⁰ but first I would like to turn to an historical example of Courts' supremacy outside the bounds of the United Kingdom and earlier than *Bonham*. I would like to explore the development of the Legal System in Early Colonial America. The development of the legal system in Colonial society is of significant interest not only because of the role the courts played, but because of the manner of their inception.

The Plymouth Colony, established in December 1620 by the occupants of the *Mayflower*, was the first continuously and permanently occupied settlement in North America, and followed on from the failed colonies of Roanoke and Fort Raleigh further south along the coast in Virginia. Unusually, Plymouth was not granted a Royal Charter and so had no absolute source of English law to establish government and a legal system. As a result, the colonists themselves came together and authored the *Mayflower Compact*, which states,

“We, whose names are underwritten ... do by these Presents ... covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience.”

This established for the first time the *General Court of the Plymouth Colony*. This institution was to carry out all the functions not only of the Judiciary but also of the executive and legislative branches of government. It was able to draft and implement statutes, decide and act upon disputes, and appoint Government officers. As a result, this institution became exceptionally powerful and influential in the early days of the Colony. It could be said that this is the first clear example of a court adopting its role as a proper sovereign in the absolute sense of the word.

We shall now explore *Bonham's Case*, the facts of which will be familiar to any scholar of legal history or sovereignty, but for the benefit of those unaware, Dr Bonham was a graduate of St John's College, Cambridge, and was granted a medical doctorate from the University of Oxford. By 1602 he had finished his studies, and subsequently moved to London where he began practicing, and associated with the Barber-Surgeon's Company. However, due to a Royal Charter, medical practitioners in the City of London were regulated exclusively by the Royal College of Physicians. The charter, as well as a further Act of Parliament, the *College of Physicians Act 1553*, gave the College the authority to act as a court, and fine and to imprison indefinitely those they judged. For

⁸⁰ 8 Co. Rep. 114, Court of Common Pleas, 1610

Legal theorists, and those interested in the topic of Sovereignty, this case has been made famous by the obiter statement of Lord Chief Justice Coke, who said,

"One cannot be Judge and attorney for any of the parties... And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."⁸¹

This statement has become one of the most controversial in the study of the common law. Coke clearly defines here that the courts should and do have the authority to strike down statutes, provided that they are "against common right and reason, or repugnant, or impossible to be performed."

It should be remembered that, as Baroness Hale points out, "In a way *Bonham's* case is water under the bridge, because we have had a revolution since then. In another way of course, you might, when you read the case and think about it, think that there was a certain commonality; not complete consistency, but a commonality in Coke's saying that the common law of England is a stronger thing than the power of the King."⁸²

Naturally, the question to be raised is, when does an act of Parliament fulfill one of these requirements, and become repugnant, or contrary to right and reason? Regrettably, Coke did not elucidate on this point, although the question brings to mind the words of Isaiah Berlin who said, "the task in life of the wise is to undo that damage done by the good."⁸³

The necessity for definition is not insignificant. Without it, we are unable to decide how and when a judge can use the power given to him by Coke in *Bonham*. It is only in recent history that we have seen any shift toward the powers envisioned by Coke, and this has been made possible by the introduction of a law taken to be *higher* than that of an Act of Parliament.

By virtue of the Human Rights Act 1998, judges now derive definitions of citizens' rights and liberties from 'principles of the constitution', or the European Convention on Human Rights⁸⁴, and where a statute runs contrary to the European Convention, or European Union law, the court is able to issue a declaration of incompatibility. Of course, according to those who adhere to the principle of Parliamentary Sovereignty, the declaration lacks any real authority. Acting on this premise

⁸¹ Williams, Ian (2006). "Dr Bonham's Case and 'void' statutes". *Journal of Legal History* (Routledge) 27 (2) pp 111

⁸² Baroness Hale interview

⁸³ Bogdanor, Sovereignty of Parliament or the Rule of Law? 2nd Magna Carta Lecture, 2006, pp4

⁸⁴ *ibid*, pp8

Parliament is perfectly entitled, if it chooses, to ignore a declaration of incompatibility made by the court.⁸⁵ In practice, however, this is not so simple. Where Parliament has been issued with a declaration of Incompatibility, especially where concerning human rights, there has always been made an effort to change the law so that it complies with the declaration. Such examples include the Freezing Order case (*Ahmad v The Treasury*), Prisoners' Voting of 2011 and, of course, the sex offenders register case.

From this, we could infer that an act which is contemporarily contrary to right and reason could be one incompatible with the Human Rights Act, currently the closest example the United Kingdom has to a codified bill of rights.

Thomas Hobbes, in *Leviathan*, tells us that, "The law can never be against reason, our lawyers are agreed; and that not the letter, (that is every construction of it,) but that which is according to the intention of the legislator, is the law." This seems to support the idea of Parliamentary sovereignty dominating judicial sovereignty, but the idea that the law cannot be against reason, and that the law is imbued in the spirit, if not the letter of the law, is a fundamental principle that drives judicial review. Hobbes goes on to say that this reason is "an *artificial perfection of reason, gotten by long study, observation, and experience.*"⁸⁶ There can clearly be no other subject that fits this description better than the judiciary. Clearly, Hobbes was describing the common law, and it's evolution of rules through close observation of not only the law as it is written and interpreted, but also its human effect, and the impact of decisions, statutes and laws on present and future cases.

Thankfully, Hobbes does present to us a useful definition of the sovereign. He first points out that the sovereign can take his title in one of two ways, the first of which being by institution. This is where,

"a *multitude* of men do agree, and *covenant, every one, with every one*, that to whatsoever *man, or assembly of men*, shall be given by the major part, the *right to present* the person of them all (that is to say, to be their *representative*;) every one, as well he that *voted for it*, as he that *voted against it*, shall *authorize* all the actions and judgements, of that man, or assembly of men, in the same manner, as if they were his own, to the end, to live peaceably among themselves, and be protected against other men."

This is, in effect, the concept of the *social contract*, a social tool used to explain how societies are formed from the collective of individuals, who each agree to be governed together for their

⁸⁵ Baroness Hale Interview

⁸⁶ Hobbes, T, *Leviathan*, Oxford Classics 1996, pp179

communal, and individual, good. The idea of the social contract has been described and explored by a number of philosophers, including Locke, Hobbes and Rousseau, and a more detailed explanation of this concept can be found in their respective works.⁸⁷

The sovereign, to Hobbes, was simply “*one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence.*”

Naturally it was Hobbes and his contemporaries, who had become akin to philosophy’s celebrities in the age of the Enlightenment, who discovered the importance of identifying the seat of absolute authority in a state, and worked toward a definition of the powers and fetters imposed upon the sovereign, and the manner of his relationship with the population. It was in this age of enlightenment that Grotius rediscovered the principle of *Des Publica*⁸⁸, a feature of Roman law that passed responsibility to holders of office to act only in the public good. This could be considered as one of the earliest examples of a fetter against Sovereign power, and was so interwoven with the political system even at that time that to Locke, the idea of the *Des Publica* was ‘the most common of commonplace’, and in fact Locke dedicated little time on its consideration.⁸⁹

This idea of there being a ‘public trust’ conferred upon figures holding public office, created according to the theory of the social contract (a theory which held prominence throughout the age of the enlightenment), acts as a direct constraint on Parliamentary Sovereignty, and might be considered a convention due to its historic nature. It was, however, conveniently forgotten by the commentators of the nineteenth century such as Blackstone and Dicey, as they found it incompatible with their vision of an unfettered, solely Sovereign Parliament. These two, along with Hobbes, have been described as the “High priests of the mystery” of Parliamentary Sovereignty⁹⁰ RFV Henston describes the concept as being created “more by a series of obiter dicta by eminent persons, whether sitting on the bench or in the professorial study, than by clear judicial decision of binding authority.”⁹¹ According to one critic, “Dicey announced it was the law that Parliament was omnipotent, explained what this meant, and never devoted so much as a single line to fulfilling the promise he made to demonstrate that this was so.”⁹²

Hobbes, like many of his contemporaries defines identified certain distinct features unique to the Sovereign. Having been imbued with the authority of that title by means of a covenant of men in society, if any man should try to depose him then he is in breach of that same covenant, and takes away not the authority of the sovereign, but the sovereignty owned by the population themselves, having devolved that power to their representative. In removing that power from the sovereign, he

⁸⁷ Locke, J *Second Treatise of Government* (1689), Rousseau, J *Du Contrat Social*, (1762), Hobbes, T *Leviathan*, (1651)

⁸⁸ *Public trust*

⁸⁹ de Wilde, M, *Tijdschrift voor Rechtsgeschiedenis* 79 *Legal History Review* [2011] pp455

⁹⁰ RFV Henston, *Essays in Constitutional Law* (2nd Ed) 1964 pp1

⁹¹ *ibid* pp5-6

⁹² AWB Simpson “The Common Law and Legal Theory” in *Oxford Essays in Jurisprudence* (2nd ed) 1973 pp77

defies the collective will of the population. Moreover, Hobbes explains that the power of the sovereign cannot be forfeited. He says, “because the right of bearing the person of them all, is given to him they make sovereign, by covenant only of one to another, and not of him to any of them; there can happen no breach of covenant on the part of the sovereign; and consequently none of his subjects, by any pretense of forfeiture, can be freed from his subjection.”

What Hobbes means by this, is that the population agree among themselves who it is they wish to represent them, and make no such agreement with the representative himself. This means that the sovereign, “maketh no covenant with his subjects beforehand ... because either he must make it with the whole multitude, as one party to the covenant; or he must make a several covenant with every man. With the whole, as one party, it is impossible; because as yet they are not one person: and if he make so many several covenants as there be men, those covenants after he hath the sovereignty are void; because what act soever can be pretended by any one of them for breach thereof; is the act both of himself, and of all the rest, because done in the person, and by the right of every one of them in particular.”

Surely, this creates a very serious problem with future definitions of sovereignty. By saying that the sovereign cannot refuse his title, we bind him to certain rules, and according to later definitions (Austin for example) the sovereign cannot be bound by anyone. In fact, this later derivation toward the unlimited sovereign is an even further step toward a definition of the sovereign that is impossible to fit to a modern institution. There cannot be, at least not in Western democratic states, a limitless source of law and power, unfettered by any rules whatsoever. Hobbes, in telling us that the sovereign *is* limited in his power, actually presents to us a more accurate idea of what the sovereign is and must be. In the United Kingdom, the prevalent concept of Parliamentary Sovereignty remains unchallenged, despite the number of incidents in the common law that have seriously limited the power of Parliament as, for example, a court in its own right. Even *Bonham*, in its own way, identifies that it must be the courts, and no other body, that has such extensive power to decide on imprisonment and fines.

The next case we shall examine is that of the Sheriff of Middlesex⁹³. This case came to become one of the most significant in defining the limitations of Parliament and shifting the balance of power more favorably toward the courts. The case concerned a libel action by the claimant, Stockdale, who had published and edited under the pseudonym Thomas Little, a medical text called *On Diseases of the Generative System*. Stockdale was a notorious pornographer, and the plates printed in the book were of questionable decency. Upon discovery of the text in Newgate prison during an inspection, the House of Commons ordered that Hansard publish a report that an indecent book was circulating in Newgate. Although Parliamentary papers are included in Parliamentary Privilege, a movement began in 1835 to make such papers available to the public, and as a result the report by Hansard was released. Stockdale argued that such circulation of a Parliamentary Paper which

⁹³ (1840) 11 Ad.&E. 273

claimed a book he had edited and published had been obscene was libelous. The publisher for the Commons, Hansard, argued that the paper had been protected by Parliamentary privilege and so no action could be brought.

The court found that only the Crown in Parliament had the authority to make law, and so a declaration by the Commons that such papers were protected by privilege was not sufficient to constitute a rule unquestionable by the courts, opening the way for such rules on parliamentary procedure to be scrutinised in law. Moreover, the courts decided that Parliament did not have, as it had claimed, the ability to act as a court superior to any other, and that the House had no authority to order the circulation of libelous or defamatory publications outside of Parliament.

This judgement became a landmark in defining the roles of the organs of power in a legal-political system. Although Parliament was later able to protect such papers under privilege using the Parliamentary Papers Act 1840, the courts had irrevocably defined the limitations of the individual Houses of Parliament, and had fully defined the parameters of their authority by claiming the right to scrutinise publicly the rules and regulations protecting Members of Parliament.

This case follows *Bonham* quite neatly when considered for its constitutional consequences. As with *Bonham*, this case again decides in favor of the rule of law, and the authority of the courts over decisions of law. Coke said that, "One cannot be Judge and attorney for any of the parties..." It would appear in this case that Parliament sought to be a Judge to their own cause, which would be decidedly unconstitutional. As a result, it became necessary for the courts to redraw the boundaries of Parliamentary authority again, deciding that Parliament cannot attempt to usurp the jurisdiction of the courts in matters of public cases. Effectively, the courts decided that where Parliament breached the rights of non-members, the victim of such a breach, in this case Stockdale could seek redress through the courts, and not through Parliament.

This case effectively put an end to the idea of independent rule-making in Parliament governing procedures for the individual estates (i.e. The Upper House, The Lower House and The Crown), and enabled the courts to govern the operation of parliamentary rules where they had a negative effect on anyone outside the Palace of Westminster and built upon the common-law rules already developed in *Bonham*, limiting the power of the sovereign and can be viewed as a legal landmark as significant as the Bill of Rights (1689), outlining the powers and limitations of Parliament to be its own court, and shattered the illusion that the individual houses could write their own unquestionable rules, equally effective over non-members, without the scrutiny of the courts. The courts could finally claim that they were the final arbiters in matters of the law.

The Impact of *Marbury v Madison*

The final case I shall examine in this chapter is that of *Marbury v Madison*⁹⁴. This is a case from the United States Supreme Court, so has had little impact in the United Kingdom, except to act as a glimpse of an alternative development of the common law in Britain, shifting power from the executive to the judiciary in the United States in a way the English legal system could only hope to echo.

Marbury v Madison was a landmark case in the United States and provided their Supreme Court with the right to use the discretion of the court to choose “whether judges should follow a statute when it ran counter to their interpretation of the constitutional charter.”⁹⁵

The facts of the case are straightforward and begin with the American election of 1800, said to be one of the nastiest partisan campaigns in American history.⁹⁶ Although the Federalist government had lost the presidency and control of Congress, the incumbent president was, under the mandate of the constitution, permitted to remain in office until March 1801. The outgoing President, John Adams, appointed John Marshall, a revolutionary war hero and political veteran, to be the fourth chief justice upon the retirement of Oliver Ellsworth.

Moreover, the lame-duck Federalist congress passed the Organic Act, which permitted Adams to appoint forty-two justices of the peace for the District of Columbia. Marshall, at the time still acting as Secretary of State before taking on his new post as Chief Justice, instructed his brother James, acting as his assistant, to deliver the commissions, but in the final few days of Adams’ presidency, some of the commissions went undelivered and the incoming president, Thomas Jefferson, ordered his Secretary of State, James Madison, that the commissions not be delivered.

Jefferson explained afterward that,

“I found the commissions on the table of the Department of State... and I forbade their delivery. Whatever is in the Executive offices is certainly deemed to be in the hands of the president, and in this case, was actually in my hands, because when I countermanded them, there was as yet no Secretary of State.”⁹⁷

William Marbury, and three of the five who had been denied their commissions, asked the Supreme Court to issue a writ of Mandamus,⁹⁸ ordering Madison to deliver the commissions. This was done through Section 13 of the 1789 Judiciary Act, which authorised the Supreme Court to issue writs of mandamus to anybody holding federal office. Reacting to this, the Federalists in Congress abolished

⁹⁴ 1 Cr. 137 (1803)

⁹⁵ Murphy, Pritchett & Epstein, *Courts Judges and Politics* (5th Ed) McGraw Hill, 2002, pp59

⁹⁶ *Ibid* pp58

⁹⁷ Quoted in Warren, C, *The Supreme Court in United States History*, vol 1 (Boston: Little, Brown, 1922) pp244

⁹⁸ A writ issued by a superior court commanding the performance of a specified official act or duty.

the 1802 term of the court, effectively delaying the decision, and some began talking openly of impeaching Federalist judges, including John Marshall himself.

Marshall, aware as he was of the tense political climate, was faced with difficult circumstances. Wary of his cousin Thomas Jefferson's radical tendencies, he was keen to curb his power but, being a cautious man, was equally wary of a direct confrontation with the President, who had the support of both Congress and the electorate, and so could easily crush a judiciary which, up until this point, had not shown signs of defiance against the Executive.

When the case was finally decided, Marshall opened his decision with an assertion that Marbury, and the other three, were entitled to their commissions, and penned an attack on Jefferson's ethics for refusing to have the commissions delivered. Moreover, Marbury asserted that section 13 of the Judiciary Act 1789, upon which Marbury had relied when bringing his case to the Supreme Court, had expanded the jurisdiction of the supreme court as defined in the constitution under article III. This claim allowed Marshall to claim that the issue at hand was in fact whether the Supreme Court had the jurisdiction to decide if they should follow a statute when it differed from their interpretation of the constitution.

The case was and remains, one of the most significant constitutional landmarks in legal history. Marshall, in his opinion, told the court,

“[t]he constitution is ether a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other act, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.”

What barriers exist then, to limit the courts in England and Wales from such a landmark decision? Naturally, Marshall speaks of the constitution as being a “superior paramount law”, which in the United States is taken to be the sovereign, and the font of law. The Supreme Court, after *Marbury v Madison*, took on the role of the defenders of the constitution against the executive. To illustrate, in its 177 year history the Supreme Court has struck down eighty-six different provisions of federal law over the course of seventy-eight cases and have interpreted modifications into countless more.⁹⁹ It has become the primary mode of recourse against unjust federal laws which violate the constitution, but the key difference is just that. The United States has a constitution, enshrined as

⁹⁹ Dahl, R.A. Decision Making in a Democracy: The Supreme Court as A National Policy Maker, From 6 Journal of Public Law 279 (1958)

their highest form of law and an unquestionable pillar in the legal system. The United Kingdom has a constitution-in-pieces, broken into significant Acts of Parliament and common-law decisions. The question is not whether these documents, such as *Magna Carta* and the Bill of Rights are legally and culturally significant, of course they are, but the question that arises is are they held so highly in our regard that it would be impossible for us to dismiss them? Parliament claims absolute power to both make and unmake law, but no Parliament has ever challenged the authority of the Bill of Rights.

The most recent addition to the significant constitutional documents of the United Kingdom is the Human Rights Act 1998, which has been both supported and derided by Members of Parliament both for its benefits and for its flaws. Notably, in recent history its supposed leniency toward illegal immigrants, able to avoid deportation under Article 8, the right to a family life, has become notorious thanks in no small part to the Home Secretary, Theresa May, who described in detail a series of cases which she believed demonstrated the negative impact the Human Rights Act was having on our society.¹⁰⁰

The historical cases which have been outlined here serve a single purpose, which is to illustrate that the power of Parliament is not limited and has been directly challenged by the courts both historically and contemporarily (as reflected in chapter one). If the courts are able to challenge the will (and laws) of Parliament, this only serves to erode the position Parliament has enjoyed as Sovereign in the United Kingdom. If a sovereign's will can be challenged, changed or overturned, then clearly the definition cannot apply and Parliament must relinquish its title. In any given definition of the sovereign, and here I shall use both Austin and Hobbes' definitions by way of example, if the power of the sovereign can be challenged, then the definition cannot be applied. Hobbes explains that "every subject is by the institution author of all the actions, and judgments of the sovereign instituted; it follows, that whatsoever he doth, it can be no injury to any of his subjects; nor ought he to be by any of them accused of injustice."¹⁰¹

This statement, Hobbes' third part to his definition, claims that no subject can rightfully challenge the actions of the sovereign, however The Case of the Sheriff of Middlesex clearly shows Parliament's authority being challenged, and that same challenge, at least in part, being successful. Since this is the case, Hobbes' definition fails. Austin's definition requires that the sovereign's power be illimitable too, and so in this regard, the definition must fail.

The Influence of H.L.A. Hart

¹⁰⁰ <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full> - The speech itself caused a political scandal, when both the Judicial Office and the Minister of Justice, Ken Clarke, questioned some of the cases cited as examples, including one claiming a defendant was not deported because he owned a cat. The incident, known as 'Catgate' prompted a response from the Judicial Office stating that the cat had "nothing to do with" the ruling.

¹⁰¹ Leviathan, pp117

We have so far omitted the enormous significance of H.L.A. Hart's contribution to the topic of Sovereignty. Hart, whose work *The Concept of Law*, has become a staple for any student of jurisprudence, is helpful in understanding the Sovereign because he presents a neat and easily incorporated addition to the definition of the illimitable sovereign.

Hart states that "the sovereign may in fact defer, in exercising legislative power, to popular opinion either from fear of the consequences of flouting it, or because he thinks himself morally bound to respect it."¹⁰² Note that this bond to popular opinion is shaped not by a constitutional or legal requirement, but by a moral attitude that forces complicity by the Sovereign to the will of the populace. In Hart's definition, therefore, the Sovereign is still absolute in his power, but only chooses to defer to the will of the people for fear of his own moral caliber.

This reshapes our understanding of the sovereign, not least of all because Austin has become "the sacrificial dragon" in a profession "which is supposed to thrive on slaying the dragons of the past."¹⁰³ In fact, so outmoded is Austin's definition that Ireland challenges us to answer "why do we still teach students from lectures, notoriously unsuccessful in their own time, of a man who first published them one hundred and seventy years ago?" As developed from Austin by Hart, then, our understanding of the sovereign changes; now he may choose to allow popular opinion to make law in his stead, in much the same way as he chooses to devolve matters of justice to representatives, his judges. The only failing in this definition is that the sovereign could be forced to this deference of his authority. As was demonstrated in the signing of *Magna Carta*, it could be argued that a law would be valid even if the supposed sovereign enacted it under duress. A free and independent judiciary need not even consider devolving its authority to any other person or body, especially not the electorate.

Hart's contribution is useful in reflecting that the sovereign must be independent of the populace, existing outside the influence of public opinion and petty, partisan politics, in much the same way as the Judiciary does in the United Kingdom today. Whereas politics is for the most part anticipatory, enacting statutes to prevent or control behavior, the common law is, for the most part, reactionary. In order for a case to be brought, a wrong must have been committed. From there, the courts can begin the process of identifying and proving that a legal person has been wronged, finding a remedy and where the court has the authority, enacting the associated law- as a reported case. In the common law, enacting a law requires judicial opinion to create a new law and to describe the rule, or to reaffirm or reinterpret a decision made in a prior decision.

With the exception of the Supreme Court, judicial proceedings are not currently televised; reports in the media of high-profile cases are not shared with jurors, and judges must be impartial, regardless of public opinion. Moreover, until a decision is finally made, the influence of the press on the final

¹⁰² Hart, H.L.A. *The Concept of Law*, 2nd Ed (Oxford: 1997) pp66

¹⁰³ Ireland, Richard, John Austin, H.L.A. Hart... Oh and W. Jethro Brown!, 34 *Cambrian Law Review* 2006

decision must be minimal. Organisations can attempt to sway the court one way or another, but there can be no legitimate outcry until after the decision is made. How can it be that a newspaper can criticise a decision that has not yet been written? As a result, the pressures placed on Parliament to make decisions that appeal to the public, or a decision that is the least distasteful, become extremely high. This pressure, although it is exerted on the judiciary, is lessened given the freedoms allowed by virtue of judicial independence. Were the positions of judges to be elected instead, perhaps public opinion would have more influence over the decisions of the courts. As it stands however, our judiciary is appointed by the Judicial Appointments Commission, an independent body composed on the whole of members of the legal and judicial professions, as well as the magistracy and lay persons.

By removing the selection and appointment of judges from the hands of the Lord Chancellor, the appointment of judges can be impartial and independent which allows for a more balanced and fair Judicial system, as the judges themselves become less politicised while, it could be argued, the judges use their decisions to do the opposite: to expand their legal jurisdiction into politics. This is a feature of the legal system that we shall expand upon further in the next chapter, which concerns contemporary attitudes by the judiciary toward their increasing involvement in politics, and how they have used this involvement to expand their jurisdiction and further involve themselves in correcting a certain unfairness, most associated with the Natural Law, in the political system.

In this chapter we have addressed the historical influences on the Common Law rule-making responsibilities of the courts, and in the next we shall examine the ways that the courts in the United Kingdom can continue to create rules, by examining key cases and judgements that have defined their role in the 20th and 21st centuries.

Chapter Three - Contemporary Challenges to Parliamentary Sovereignty

“If Parliament is sovereign, there is nothing it cannot do by legislation; if there is nothing Parliament cannot do by legislation, it may bind itself hand and foot by legislation; if Parliament so binds itself by legislation there are things it cannot do by legislation; and if there are such things Parliament is not sovereign.”¹⁰⁴

Hamish R Gray

In this chapter we shall look to modern challenges to Parliamentary Sovereignty, and in so doing shall attempt to consolidate this collection into a coherent argument spanning the twentieth century, as the Judiciary in the United Kingdom developed its own means of exercising jurisdiction where Parliament would seek to exclude it. The *Anisminic*¹⁰⁵ case is one which is particularly significant in the authority of the courts overruling the statutory authority of parliament, and so we shall start here. The case is, according to William Wade, “the ultimate in judicial enterprise”¹⁰⁶, and has become the bread-and-butter citation for any argument regarding the authority of the Courts, with one New Zealand Supreme Court Judge declaring the case to be a “landmark”¹⁰⁷.

Further to such judicial challenges to Parliamentary Supremacy, Westminster must also contend with the rise of *devolution* in the United Kingdom, and the reality that the balance of political power is changing to the benefit of the home nations. Of course with greater devolved law-making power comes a marked change in the judicial system. Devolution in Wales, particularly after the 2006 Government in Wales Act and the referendum it proscribed in 2010 which gave Cardiff Bay full legislative authority, has led to the inevitable creation of a two new legal jurisdictions. As Wales is granted more expanded legislative authority the divisions between the laws of England and Wales, separated by a physical boarder, will become more and more apparent, and will inevitably necessitate the the recognition of an independent Welsh legal jurisdiction, and all which that entails. However, as was pointed out above, devolution in Wales will lead to the creation of *two* jurisdictions: the first is Wales, and the second is England. Once divided, the historic jurisdiction of England and Wales will become the jurisdiction of England and the jurisdiction of Wales, and will lead to radical changes on both sides of Offa’s Dyke.

¹⁰⁴ Gray, H.R. The Sovereignty of parliament Today, 10 UTLJ 1, 1953 pp54

¹⁰⁵ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

¹⁰⁶ Wade, W, *Constitutional Fundamentals*, Hamlyn Lectures 1989 pp81

¹⁰⁷ Cooke, J, in *Attorney General v Car Haulways* (1973) Auckland Registry A8/73

Anisminic and Its Long-Term Influence

The case concerns the Suez Canal and its transfer into public from private ownership. The Canal, which was owned by a joint British and French company, was granted a fund by statute for reimbursing shareholders for their losses in the transfer. The statute gave effect to a tribunal whose responsibility would be to divide the fund, and whose authority, according to the statute, could “not be called into question in any court of law.” The findings of the tribunal were, however, questioned in all the superior courts, and the House of Lords finally found that the decision had been invalid.

As Wade states, “the House of Lords, drawing on respectable precedents extending over several centuries, felt entitled to disregard the express ban on litigation in any case where the Commission was acting outside its jurisdiction ... The net result was that they had disobeyed the Act, although nominally they were merely construing it in a peculiar but traditional way.”¹⁰⁸ He goes on to explain the value of this ruling, and identifies why the decision was so valuable to the development of the British Constitution. He tells us the courts recognise that “to exempt any public authority from judicial control is to give it dictatorial power, and this is so fundamentally objectionable that Parliament cannot really intend it.”¹⁰⁹ If the Courts continue to usurp the authority of Parliament by avoiding terms of statutes excluding their jurisdiction then such terms, even those intentionally and deliberately expressed by Parliament will become meaningless, and “judges will be unable to deny that they are flatly disobeying Parliament.”¹¹⁰

Naturally *Anisminic* was divisive, but it presented to the courts an opportunity to significantly expand their jurisdiction and demonstrate not only their power to exclude a statutory clause using precedent, but also their authority to defy Parliament in any circumstances where there is a question of law. The argument in the case was that a statute cannot exclude the jurisdiction of the court on a point of law, and this meant that the courts were *not*, in fact, defying the statute, but were manipulating the case by questioning the ruling of the tribunal on a point of law. The argument of the judiciary was that you cannot exclude the courts from ruling on a point of law, although they may agree on points of fact. According to Baroness Hale, “They [the House of Lords] said if the Commission makes an error of law it makes its decision *ultra vires*, which means it’s not a proper decision at all ... After that, attempts to oust the jurisdiction of the courts to control the reality of governmental bodies and the lower courts have been treated with the gravest of suspicion and usually interpreted around in the courts.”¹¹¹

¹⁰⁸ Constitutional Fundamentals pp82

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ Interview with Baroness Hale

The purpose of establishing in the statute that the rulings of the Commission could not be questioned were simple and, from an administrative perspective, perhaps necessary. The Commission was required, promptly and effectively, to distribute a limited and pooled compensation fund to companies involved in the Suez Canal. As a result of this, it would have been inefficient to allow appeals against the Commission's decisions in court. However, in this case the Courts recognised that to allow the Commission to act without judicial scrutiny of any kind was to grant it the kind of dictatorial power that Wade mentioned, and this was found to be unacceptable. The result of this ruling was that the courts in fact disobeyed the statute, but did so in a way that was unquestionable. Using rational legal argument, and backed by the authority of the House of Lords, at the time the most superior court in the United Kingdom, the ruling deftly illustrates the ability of the court, when they are so inclined, to defy Parliament in a way that cannot be overruled except by statute which can, in turn, be interpreted into irrelevance by the courts if they should choose to do so.

This of course is because of the changing nature of language, which is a key part of the law. Judicial decisions, like statutes, must be interpreted by others, and be understandable if the law is to possess certainty but the very nature of language makes certainty in these judgements a time-sensitive business.

When ideas are expressed in language, they inevitably become distorted. This can be applied to legal and political ideas as well as to anything else. The expression of the concept of "justice" for example is so broad that it becomes ambiguous. Even expressed in particular context, the multiplicity of this idea means that it will take on various meanings to the different readers, and this will inspire a different decision depending on the personal view of the judge, advocate or layman. Shared language, in whatever field, brings with it shared ideas and understanding but also the ambiguity of personal perspective and understanding, not only of circumstances themselves but of the very words used to describe them.

The Courts and their Defence of Human Rights

We shall next examine *Liversidge v Anderson*¹¹². This case is particularly significant not because its ruling affected the nature of the courts or their relationship with Parliament, in fact it is a dissenting judgement with which we are concerned in this case. Of course, this is a strange choice of case when discussing the authority of the courts to create good law. Naturally, dissenting judgement doesn't have the calibre of a prevailing judgement, which would grant it the authority of law, but this case deftly illustrates the role taken on by judges as a social conscience, prepared to challenge statutes enacted by Parliament where they believe they infringe too far on our civil liberties or basic freedoms.

¹¹² [1942] AC 206

The case is primarily concerned with a bill presented to Parliament in the summer of 1939. At this time, Europe was not yet embroiled in conflict with Nazi Germany, but the threat of war was present in the United Kingdom and so, in order to prepare for the domestic threats war brings, such as foreign agents or Nazi sympathisers, a bill was read in Parliament that would provide certain Emergency Powers, and allow the enactment of Defence Regulations that would, “(a) *make the provision for the ... detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or defence of the Realm.*”¹¹³

Although there was some opposition to this clause in the House of Commons, the bill was enacted with this clause included, and the first application of these Defence Regulations was made; the wording of which was as follows:

“The Secretary of State, if satisfied with respect to any particular person that with a view to prevent him from acting in any manner prejudicial to the public safety or the defence of the Realm it is necessary to do so, may make an order.”

The danger is obvious. The Act gave the Secretary of State the authority to detain without trial any person *he believes* to be a threat to either Public Safety or the Defence of the Realm. This therefore granted the minister the authority to detain potentially innocent people for an indeterminate amount of time without their proper right to *Habeas Corpus*.

The Regulations, after war finally broke out, were issued 1,428 times between May and August 1940, so concerned was the Government at the prospect of there being subversive elements in the United Kingdom. One such order was used against Mr. Robert Liversidge, whose real name was Jack Perlzweig, and who was serving as a Volunteer Pilot Officer in the Royal Air Force. The application of these emergency powers against Mr Liversidge (Perlzweig) meant that he was imprisoned without charge or opportunity to prove his guilt or innocence.

Although the majority decision taken by the House of Lords was that Emergency Legislation in times of war should be given more, and not less effect, Lord Atkin, in his dissenting judgement, made an impassioned argument to reign in the power of the Executive by the Judiciary by applying appropriate safeguards against unlimited executive power, and proposed that the wording of the act, amended to read where the secretary of state has a *reasonable cause*, implied that there was an objective measure of reasonableness to apply this law, and that it was the court’s responsibility to determine this measurement and apply it accordingly. In his speech, Lord Atkin says,

“In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no

¹¹³ The Emergency Powers (Defence) Act 1939

respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.”¹¹⁴

It is vital to recognise the last phrase of this quotation, that it is the responsibility of the court to be “alert to see that any coercive action is justified *in law*.” Atkin identifies here that it is the responsibility of the courts to define where the government is acting in a way that inexcusably grants excessive power to Government and unlawfully penalises ordinary citizens without the availability of any legal recourse. This is, in fact, the same argument used in *Anisminic*: that the courts cannot be excused of their authority to rule whether a government body is acting outside, or making incorrect use of, the law through statute. As a result, Atkin’s speech is in fact quite significant.

Atkin went on to say , “I know of only one authority, which might justify the suggested method of construction. 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less'. 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master, that's all.' After all this long discussion, the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I have an opinion that they cannot and the case should be decided accordingly.”

The speech eloquently asserts that it is not the right of ministers to arbitrarily decide where someone should be imprisoned, and be deprived of their liberties. He argues that responsibility to prevent this behavior lies with the courts, who are empowered to decide how statutes should be interpreted when such a question is raised. This echoes A.C. Gray, mentioned above, who wrote that, ““Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them”; *a fortiori*, whoever hath absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver.”¹¹⁵

We shall now discuss the Freezing Order Case.¹¹⁶ In 1946 Parliament, by way of The *United Nations Act*, conferred upon the treasury certain powers which would allow them to enact orders, requiring no parliamentary scrutiny, which could freeze the assets of those suspected of being terrorists. One such Order, designed to prevent acts of terrorism, was implemented by the Treasury to freeze the assets of a terror suspect, and denying his family and associates the right to provide to him any financial assistance. The Treasury had, in effect, made the appellant an indefinite prisoner of the state.

¹¹⁴ [1941] 3 All ER 338

¹¹⁵ Gray, AC Nature and Sources of Law

¹¹⁶ Ahmed v The Treasury [2005]

This case is particularly significant, in that it demonstrates a modern example of the courts defying government policy using the same rhetoric as was used in *Liversidge* and *Anisminic* - i.e. that the courts are not defying the statute, only reinterpreting it in a way that ensures that the Act cannot be implemented by Government *ultra vires*. The key issue at the heart of *Ahmed* is that, like *Liversidge*, the application of the law as it stood created such a fundamental breach of a person's human rights by the state that it was inexcusable to allow the law to operate. As a result, the Supreme Court felt obliged to rule in favor of the appellant, but to do so would be to defy statute. For the Supreme Court there is, however, a simple remedy to this constitutional crisis. The Courts will, in this situation, often claim that they are reinterpreting the statute according to Parliament's *intent*, and not necessarily the wording of the Statute itself. Naturally, the Supreme Court followed the spirit of Atkin's speech from *Liversidge*, and reinterpreted the statute in a way that made the original order redundant. In this regard, it could be that the Supreme Court exercised its authority, as determined by Coke in 1612, to declare void any act which is determined to be anathema to the public good, but it did so in a way that avoided a constitutional crisis that would have led to a direct confrontation with Parliament.

The Freezing Order Case leads perfectly on to the next case to be considered, which is the *Belmarsh* case¹¹⁷. Once again concerning terrorism, this case was concerned with literal, rather than effective imprisonment by the state. In this case, eight men were arrested and held indefinitely in December 2001 under the *Anti-terrorism, Crime and Security Act 2001*, with a ninth in February 2002. The Act provides the Home Secretary with the authority to certify suspects as being threats to national security, and to imprison such persons indefinitely. Of the nine suspects certified by the Home secretary, two volunteered to exercise their right to leave the United Kingdom: one to Morocco and the other to France, on December 22 2001 and March 13 2002 respectively. One of the December detainees was held at Broadmoor Hospital on the grounds of mental illness; another released on bail (though under very strict conditions); and another had his certification under the act rescinded by the Home Secretary and was released without restriction.

All the appellants in this case questioned the legality of their detention, and argued that it deviated from the European Convention on Human Rights, incorporated into domestic law in the Human Rights Act 1998. This case is not unique, and the same circumstances had been witnessed in other cases heard in the past. In particular, *Lawless v Ireland (No 3)*¹¹⁸ reflects accurately the same facts and illustrates the position of the court concerning cases such as this one. Here, the case is concerned with low level IRA terrorist activity in Northern Ireland between 1954 and 1957. The Irish Government derogated from Article 5 of the European Convention¹¹⁹ on the 5th July 1957, and the applicant was held from July to December 1957. Although he could have accepted release

¹¹⁷ A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2004] UKHL 56

¹¹⁸ (1961) 1 EHRR 15

¹¹⁹ "(5)(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(f) the lawful arrest or detention of a person against whom action is being taken with a view to deportation"

on the condition that he undertook to observe the law and refrain from activities contrary to the *Offences Against the State (Amendment) Act 1940*, instead he chose to challenge the legitimacy of his detention by the Irish Government by claiming that to do so was contrary to Article 5 of the Convention, which subsequently failed. At paragraph 22, the court stated that “it is for the Court to determine whether the conditions laid down in Article 15 (art. 15) for the exercise of the exceptional right of derogation have been fulfilled in the present case,” being for these purposes whether there is or was the “existence of a public emergency threatening the life of the nation.”¹²⁰

The judgement in the *Belmarsh* cases, therefore, hinged on the same principle of law: whether the government could rely on a special exemption laid out in article 15 of the ECHR in order to legitimise holding terror suspects indefinitely without trial. Of course, the United Kingdom government was able to rely on two exemptions in this case, the first being the exemption where there exists a public emergency threatening the nation, and also the exemption where a suspect can be held indefinitely while involved in extradition or deportation proceedings. It was this exemption that the Government relied upon in the case of *Chahal v United Kingdom*,¹²¹ an ECHR decision which has been relied upon most recently in cases such as this one. In this case the then Home Secretary decided that the appellant, an Indian Sikh activist, should be deported on the grounds that his activities as a Sikh separatist was not conducive to the public good in the fight against terrorism. He resisted deportation on the grounds that if returned to India he faced a real risk of death or torture, forbidden under the European Convention, and challenged his detention, which had lasted a number of years, as being contrary to the United Kingdom’s obligation under the European Convention to his right to liberty. The United Kingdom sought to qualify the detention by relying on section 15, and on part (f) of section 5, which provides that where deportation proceedings are being carried out, the period of detention can last for the duration of these proceedings.

The European Court of Human Rights held that the United Kingdom had not deviated from its obligations under the European Convention, since the appellant was being held only for the duration of the deportation proceedings, but it reasserted that "any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress." As a result, the Courts reaffirmed that no state has the right to hold any suspect in detention indefinitely without good cause.

The qualification of detention where there is a public emergency¹²² was defined in the *Greek Case*¹²² where a public emergency was defined as having certain distinctive features:

"153. Such a public emergency may then be seen to have, in particular, the following characteristics:

- (1) It must be actual or imminent.
- (2) Its effects must involve the whole nation.

¹²⁰ ECHR (15)(1)

¹²¹ (1996) 23 EHRR 413

¹²² (1969) 12 YB 1

- (3) The continuance of the organised life of the community must be threatened
- (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate."

On this matter, the European Court of Human Rights ruled in *Ireland v United Kingdom*¹²³ that the test for a public emergency had been met, but also made important comments regarding the role of the judiciary, and in particular the role of the European Court of Human Rights in deciding cases of this nature. At 207 the Court ruled that "States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Art. 19), is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision."

In the *Belmarsh* case, the court recognised that it is the Government which is best suited to make decisions of policy, just as it is the Courts which are best suited to make decisions of law. As Lord Hope said in the judgement,

"The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions."

This is an opinion supported by many in the judiciary, and was echoed overseas in *MacDonald Inc v Attorney General of Canada*,¹²⁴ where it was held that "Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be."

In *Aksoy v Turkey*¹²⁵ the court, clearly referring to domestic as well as international courts, held that "Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law." Even in the United States, in *Korematsu v United*

¹²³ (1978) 2 EHRR 25

¹²⁴ [1995] 3 SCR 199, Per La Forest J at 68

¹²⁵ (1996) 23 EHRR 553, para 76

*States*¹²⁶ holds that “in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability” and in order to do this the citizen must rely on the courts to uphold the rule of law and ensure accountability for the actions of Government.

In his own judgement in *Belmarsh*, Lord Nicholls, at 79 said that “All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.” This is a reasonable response to the assertion that Parliament and Government are best suited to questions of policy, but it is vital to remember that the operation of government for the protection and well-being of citizens in that state relies upon questions of law equally as questions of policy. Commenting on this point, Lord Nicholls went on to say that, “Parliament has charged the courts with a particular responsibility. It is a responsibility as much applicable to the 2001 Act and the Human Rights Act 1998 (Designated Derogation) Order 2001 as it is to all other legislation and ministers' decisions. The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected.”

It is not the place of Parliament to make decisions that overlook rights enshrined in international treaties and in the domestic law of the state. It is up to the courts to ensure that the Government of the day does not, through its implementation of policy or in drafting statutes, intentionally or unintentionally violate the rights expressly granted to those within the confines of its borders and legal system, and to ensure that it's operations are carried out within the confines of the rule of law. But it is up to Government to ensure their compliance with protected rights and freedoms before the courts are required to step in. In this case, the Government failed to recognise that,

“the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period. With one exception all the individuals currently detained have been imprisoned now for three years and there is no prospect of imminent release. It is true that those detained may at any time walk away from their place of detention if they leave this country. Their prison, it is said, has only three walls. But this freedom is more theoretical than real. This is demonstrated by the continuing presence in *Belmarsh* of most of those detained. They prefer to stay in prison rather than face the

¹²⁶ 584 F Supp 1406 (1894) per Patel J at 21

prospect of ill treatment in any country willing to admit them.”¹²⁷

For the Belmarsh appellants, their rights were recognised and upheld by the courts, who defied the Government and ordered their detention to be quashed. They also issued a declaration against Section 23 of the Act, stating that it was incompatible with the Convention. This case was a direct challenge to Parliament, and the Court clarified its position that if ever Government disregarded the most fundamental rights of its citizens, or should it attempt to overturn centuries of established law, such as that of *Habeas Corpus*, the Judiciary will not turn a blind eye. As Lord Walker stated in his own, dissenting judgement, “Whether or not patriotism is the last refuge of the scoundrel, national security can be the last refuge of the tyrant. It is sufficient to refer ... to the show trial and repression which followed the Reichstag fire in Berlin and the terror associated with the show trials of Zinoviev, Bukharin and others in Moscow during the 1930s.”

Of course, this case was not unique in its ideological implications. Governments have always tested the bounds of their authority to infringe on the rights of their citizens. It is for this reason that the courts exist, and it is what gives them their most vital function: to protect citizens from their Government. Another example of the government overstepping their bounds is to be found in the *Control Orders* case.

The control orders case primarily concerned the use of special advocates and closed evidence in trial. In the aftermath of the September 11th Terror attacks in the United States, the Government of the day in the United Kingdom adopted a Canadian anti-terror measure where secret evidence, which was thought to be too sensitive to be released to the public, was used against a defendant, the evidence did not need to be disclosed to him. Instead, it could be revealed to a Special Advocate, who could represent the defendant without informing him of the evidence against him. This brought about a number of criticisms, not least of which that the evidence was not available to the defendant, as well as the defendant’s inability to instruct his Advocate properly, and so could not guarantee a fair trial. The main issue at hand was that the use of this closed evidence and special advocacy meant that it would be impossible for a defendant to have a fair trial should it be used, as access to information and evidence relied upon to convict would not be available to the defendant to answer. As a result, the courts felt it was necessary to alter the law in its original form so as to create something more just.

Their response was to reinterpret the legislation so that the Home Secretary could rely on the evidence, but only if it was disclosed to the defendant. In effect, the Home Secretary could not be forced to disclose the closed material if he didn't want to, but if the defendant would be unable to have a fair hearing without it being disclosed, the Home Secretary cannot rely on it for the purposes

¹²⁷ ¹²⁷ A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2004] UKHL 56 at 81

of persuading the court to make the order¹²⁸. In this way, and without forcing the court to issue a declaration of incompatibility, the Court was able to reverse the meaning of the legislation and effectively change the law. In his judgement in this case, Lord Hoffman said,

“The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him. The principle is easy to state, but its application in practice is likely to be much more difficult.”¹²⁹

This case is one of a series of recent cases that have directly challenged a rule enacted by Parliament, and represents a shift from the widely held position on Parliamentary Sovereignty. Unless an alternative theory on sovereignty, placing greater emphasis on the role of judiciary is proposed, this trend in judicial decision-making, to become more bold in their challenges to Parliament, will inevitably lead to greater conflict with government, and ultimately a constitutional crisis.

Jackson v HM Attorney General

The case of *Jackson v Attorney General* has been described as a “case of major constitutional significance.”¹³⁰ The case concerns the enactment of the Hunting Act 2004, and the procedure whereby the Commons gained royal assent for a bill without the agreement of the House of Lords. This was achieved with the Parliament Acts 1911 and 1949. These acts serve to increase the power of the Commons, curtail the authority of the House of Lords and provide for a means of enacting bills without the scrutiny of the Upper House by limiting the number of times the Lords can reject a bill¹³¹ to three in two years, and providing no means for the Lords to reject money bills. The 1949 Act further increased these limitations from three to two rejections in one year from two.

The Parliament Act 1911 was designed to solve a constitutional crisis. The Conservative dominated House of Lords had been throughout the nineteenth century opposed to successive liberal governments, and used its authority to defeat numerous attempts at implementing Home Rule in Ireland and the disestablishment of the Anglican Church in Wales. When the Lords rejected Lloyd-George’s ‘People’s Budget’ it was considered that the authority of an Upper House populated largely by hereditary peers must be curtailed until suitable reforms to the Lords could be made.

¹²⁸ interview with Baroness Hale

¹²⁹ Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action Per Lord Craighead at 85

¹³⁰ Mullen, T, *Reflections of Jackson v Attorney General: Questioning Sovereignty* 27 Legal Studies 1 2007 pp1

¹³¹ that is, return it to the Commons for further debate.

The Parliament Act 1911 passed the Commons vote, and was forced through the Lords despite opposition by threatening the creation of liberal peers *en masse*. The Act was used subsequently to pass those liberal measures so vehemently opposed by the Tory peers, such as Home Rule Act 1914 and the Church in Wales Act 1914.

The Parliament Act 1949 was drafted to amend the original Parliament Act by, as was mentioned above, further limiting the period in which the Lords can debate and reject bills from two years to one. The Parliament Act 1949, however, was passed using the powers of the original Act, and without the assent of the House of Lords. It was using the 1949 Act that the Labour government in 2004 passed the Hunting Act, which had been radically opposed in the House of Lords and by a vocal proportion of the population. However the bill was passed and the Hunting Act entered into force in 2005.

The question brought before the Court in *Jackson*, was whether or not, by using the Parliament Act 1949, the Hunting Act was in fact subordinate legislation, and so did not bear the same authority that statutes enjoy. The case was significant because it invited the Courts to consider whether an act of Parliament passed under the 1949 act could ever be invalid. Although the Courts did find in favor of the government, it was held by the judges that the case had inspired a serious constitutional issue: that “there was no absolute rule that the courts could not consider the validity of a statute and that the issue as to the validity of the Hunting Act 2004 was one of statutory interpretation.”¹³² If this were the case, then the courts would, in fact, be free to decide on the validity of Acts simply through interpretation and this would threaten the Sovereignty of Parliament.

The issue at hand, of course, is that the Courts could easily have found that the Act did not bear all the necessary hallmarks of a statute, and so was not good law. This would have complicated matters constitutionally, however, and questions regarding the validity of the 1949 Act, and any statutes passed as a result of of it, would be brought to the surface. This would only serve to make the law less certain, and so it was a matter of constitutional urgency that the courts did not find that the Act was void. It would seem appropriate to apply this same logic to other challenges to Parliamentary Sovereignty by the courts. This issue is not that the case must find in favor of the courts over Parliament, but to maintain the certainty of law and the continuation of government. The Sovereignty of Parliament may not be an accurate model, and though “It is no longer right to say that [Parliament’s] freedom to legislate admits of no qualification whatever” but it is a convenient means of providing a theoretical constant which allows the model to function.

The process is not unlike a physicist creating a theoretical simulation of the universe. The simulation has a number of variables that effect how the model will behave, and these are based upon known variables that we are certain will have an effect. However, in order to create an

¹³² *Jackson v Attorney General* per Lord Hope at 110

accurate model that works in a manner identical to our own universe, our physicist must fill in gaps in his knowledge by using theoretical variables that, although unproven or impossible in reality, cause the model to behave as expected in theory. This is much the same as the principle of Parliamentary Sovereignty. Although on paper it is unquestionably the nature of our legal and political system, in practice it is impossible to protect Parliamentary Sovereignty from erosion by the Courts and International Law.

The Courts vs Parliament: MPs Who Misbehave

We shall next turn our attentions to the *Woolas* case. As was described in chapter one, Woolas was a career MP who, after four prior successful election wins, stood as a candidate in the elections to the United Kingdom Parliament in 2010. The results of the election in his constituency led to his being re-elected to Parliament, but it was revealed that in his campaign, he had published statements which were not only inflammatory, but also libelous, and the victim of his statements challenged the validity of his electoral win. As a result, the judiciary was called upon to reach a decision, and so a special Electoral Court, first created in 1868 by the *Parliamentary Elections Act 1868* (though it did not acquire this name until the *Corrupt Practices (Municipal Elections) Act 1872*), was convened to hear evidence and decide on the most effective remedy. The Electoral Court, it was claimed by some, had assumed a position superior to democracy by deciding to remove Mr Woolas from his seat.

Historically, of course, the Courts have had no interest in deciding on matters of elections. When the 1868 bill was first proposed, the judiciary expressed its aversion to cases regarding elections in a letter from the Chief Justice to the Lord Chancellor stating that the public had a certain confidence in the impartiality of the judiciary, and that,

“this confidence will speedily be destroyed, if after the heat and excitement of a contested election, a Judge is to proceed to the scene of recent conflict, while men’s passions are still roused, and in the midst of eager and violent partisans, is to go into all the details of electioneering practices, and to decide on questions of general or individual corruption, not unfrequently supported or resisted by evidence of the most questionable character. The decision of the judge given under such circumstances will too often fail to secure the respect which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives that led to the judgement. Their sentiments may be echoed by the press. Such is the influence of party conflict, that it is apt to

inspire distrust and dislike of whatever interferes with party objects and party triumphs.”¹³³

The Bill’s success inevitably led to the creation of this Court, despite reservations from the Judiciary, and included an amendment to allow for appeals against decisions on points of law.

On Appeal, the High Court only examines points of law, and not points of facts; they were first whether a right to appeal existed (since it is ordinarily not possible to appeal an Election Court decision), whether the original ruling was incorrect in its interpretation of a false statement (the Administrative Court disagreed that such a statement could relate both to a candidate's public and personal character) and finally whether his statements were protected by the freedom of expression granted by the Human Rights Act.

The Court found that in these circumstances, despite the wording of the statute, Parliament must have intended that where there is an error in law, there must be an avenue for appeal. This echoes the *Anisminic* case, above. Moreover, it found that Woolas' statements had indeed been contrary to the Statute and that freedom of expression does not extend to making false statements. For these reasons, the Court upheld the judgement. However, since Woolas' case has moved from the Election Court to the normal procedures for Judicial Review, it was subsequently possible for Woolas to appeal to the Court of Appeal or, more likely in the circumstances, the Supreme Court, but given his comments after the failure of his appeal, he will not pursue this issue. The case was reported in the *Telegraph*, where Martin Beckford wrote that,

“The court has decided that an election should be overturned and an MP should lose his seat and be incapable of being elected to the House of Commons for three years because statements which attacked a candidate's 'political conduct' were also attacks on his ‘honour’ and ‘purity’.” The court decided that the Oldham election should be re-run, and that Mr Woolas should lose his seat and be barred from being elected to the House of Commons for three years.”¹³⁴

The reason why this case is so significant, and why the judgement was criticised, is that the Courts had unseated a Member of Parliament, but the House of Commons claimed that only it has the authority to discipline and, if necessary, remove MPs. Also, many claimed that in a democracy it should be the constituents who decide to remove Mr Woolas. The challenge to Parliament's authority bears similar hallmarks to the *Hansard* case of the nineteenth century, where the House of Commons was found not to have jurisdiction where its members break the law.

A further problem the judgement created is that after Woolas had been removed, Parliament would need to order a by-election, but if Woolas had been successful on appeal to the Upper Courts, the

¹³³ R (Woolas) v Parliamentary Election Court [2010] EWHC 3169 (admin) at 23

¹³⁴ Beckford, M and Hutchinson P, *Labour Minister Barred from Commons for Three Years*, *The Telegraph*, 05/11/2005

constituency could be left with two Members of Parliament. Fortunately in this case the Speaker of the House delayed the by-election until the appeals procedure had come to an end, but had Woolas appealed still further, the consequences could have been much more serious.

Of course it is natural to assume that the courts play a minor role in controlling Parliament, but the reality is that judges play a much wider part than was previously believed. *Woolas*, drawing from decisions like *Anisminic* have reshaped the way we perceive the role of the Judiciary when Parliament misbehaves, but it is much wider than that. *Woolas* is only one of several examples of a new attitude being adopted by the Judiciary, that leans more toward natural law, and sees a shift away from the ordinary, positivist position that the judiciary needed to adhere to if their unbending perspective on Parliamentary Sovereignty was to be perpetuated.

One of the most criticised decisions of the Supreme Court's short history has been that of Parliamentary expenses¹³⁵, significant not because it brought public attention to an inherent dishonesty displayed by MPs when using public money, but also because it shifted jurisdiction over MPs' behavior from the Commons, where many feel it should be, to the Judiciary. The courts were able to adopt this jurisdiction not because they have been given it constitutionally, but because they simply laid claim to it¹³⁶. The facts of this case are widely known, but I shall recount them here to provide some background.

In 2009, the Telegraph Group of newspapers leaked an un-redacted document listing all claims by Members of Parliament for expenses which are "wholly exclusively and necessarily to enable me to stay overnight away from my only or main home for the purpose of performing my duties as a member of Parliament."¹³⁷ The gravity and extent of the scandal led to fierce public backlash, and a number of MPs resigned or were banned from standing by their political party. A number of MPs were prosecuted for their fraudulent claims, but three (David Chaytor, Elliot Morley and Jim Devine) contested in the Appeal Court that the courts' jurisdiction did not include their case, claiming that as MPs they should be disciplined by the House, and that their expenses were covered by Parliamentary privilege and so could not be used in evidence. These were the first criminal prosecutions of Members of the House of Commons in relation either to a statement made in or to Parliament or its delegates, or based on a member's dealings with Parliament - for over 300 years. Their case was heard in the Court of Appeal by a tribunal of senior judges, including the Master of the Rolls, Lord Neuberger, and Sir Anthony May, the President of the Queen's Bench. Their appeal was dismissed, and they appealed again to the Supreme Court.

¹³⁵ R v Chaytor and Others [2010] UKSC 52

¹³⁶ Of course, this is a difficult position to argue, even for the Courts. In *Stockdale v Hansard* (1839) 9 Ad E 1 at 147 Lord Denman CJ said "it is perfectly clear that none of these courts could give themselves jurisdiction by adjudging that they enjoy it." Though this was in response to Parliament's own claim that the Commons could declare their jurisdiction over matters of Privilege, and since, as Lord Denman said, no court could simply declare that it enjoyed jurisdiction, the Courts claimed this role in matters of law.

¹³⁷ Form ACAS2, Fees Office of the House of Commons 2010 (see appendix)

Drawing from the doctrine laid out in *Anisminic*, the Senior Courts of Record are able to claim the right to hear appeals from final decisions, even where that finality is stipulated in an Act of Parliament, because the courts will always assert their right to decide on points of law. In this case the Courts have done more than simply decide that Parliamentary Privilege laid down in the 1688 Bill of Rights does not apply to Parliamentary expenses, they have redrawn the lines of jurisdiction to provide a means of redress where Members of Parliament who have committed a crime would otherwise hide behind Parliamentary privilege.

This assertion of jurisdiction is questioned even by Parliament itself. The Clerk of Parliaments wrote to the solicitor acting for one of the defendants stating that, “Article 9 limits the application of parliamentary privilege to ‘proceedings in Parliament.’ The decision as to what constitutes a ‘proceeding in Parliament’, and therefore what is or is not admissible as evidence, is ultimately a matter for the court, not the House.”¹³⁸ This letter received the approval of both the court and the Committee for Privileges in the House of Commons. Seemingly, jurisdiction on this matter was anything but historical.

The means by which the courts asserted their jurisdiction was through evidence, claiming that privilege did not attach to “criminal conduct within the House which was not connected to the activities of the House. Such conduct could be described as “ordinary criminal conduct”. This covered such criminal offenses as an assault in the corridors of the House, theft of another Member’s money, or a sexual offense, none of which related to parliamentary activity or proceedings in Parliament.”¹³⁹ As a result, the Supreme Court claimed jurisdiction over documents which were, it was claimed, covered by privilege, since if they were unable to see this documents, it would be impossible to determine whether this was “ordinary criminal conduct” or proceedings of the House, which would have been subject to privilege.

In the original judgement, Saunders J expressed that, “While an instinctive reaction might be that, while honest claims are covered by privilege, dishonest ones are not, the prosecution accept that, if the submission of forms by an MP is covered by privilege then dishonest claims are also covered. That is because, in order to prove dishonesty, the prosecution would have to question the document, which is not permitted if it is covered by privilege.”¹⁴⁰ In the final instance of Judicial activism that I shall demonstrate here, the courts’ impact on the relationship between themselves and Parliament was proportionally smaller than the political storm that it created in its aftermath.

In 2009 the Supreme Court ruled on an issue that had previously been sent to the European Court of Human Rights for consideration; the issue at hand was prisoner voting, and the political consequences of this decision verged on the unconstitutional, given the severity of the criticism leveled on the Supreme Court for its judgement. The history of the case is well known; the

¹³⁸ [2010] UKSC 52 at 15

¹³⁹ [2010] UKSC 52 at 18

¹⁴⁰ [2010] UKSC 52 at 17

European Court of Justice had found in an earlier case against Italy that a sentence that disenfranchised a person indefinitely was contrary to the European Convention on Human Rights, and as a result, ruled that certain prisoners should not be disenfranchised simply because they were incarcerated.

This decision prompted the Supreme Court in the United Kingdom to rule in a similar case in a way that made it necessary for the Government to alter the legislation to allow for prisoners exercising their right to vote while incarcerated. This led to a political maelstrom, and fed controversy that threatened the common-law system as we know it today. The response of Government was a fierce barrage of aggressive language against the courts, deriding the decision and accusing the Judges of making law in place of Parliament. Such accusations reflect the ignorance of politicians on the subject of the ancient English Common Law, but do nothing to change the Supreme Court's constitutional place, which is to play its part in creating and developing common law rules and, where necessary overturning statutes just as Lord Coke had intended the Courts do, and just as Supreme Courts in other Jurisdictions, such as that of the United States, do annually.

We shall now examine in greater depth the issue of devolution in the United Kingdom, how it will inevitably lead to the creation of a new jurisdiction for Wales and how this will effect the doctrine of Parliamentary Sovereignty.

Since Wales' devolution was put into motion by the Government of Wales Act 1998, Wales has enjoyed its greatest legal independence since the Laws in Wales Acts abolished the country's original legal system in 1535. After a referendum in 2011, in accordance with the Government of Wales Act 2006, the Welsh government was formally granted further-extended powers of governance over the 20 devolved areas¹⁴¹ which allowed the Assembly to pass legislation that has primacy in law within the political jurisdiction of Wales. However, this divergence from English law will only lead to a more urgent need for a separate and official jurisdiction for Wales in order to properly adjudicate in matters that relate only to Welsh law.

This Welsh law in fact already exists, having been created previously by the Assembly as *Measures*, which are proscribed by the Government in Wales Act 1998 Part 3. Although part 4 of the 2006 Act and the later referendum gave the Assembly the authority to pass Acts without scrutiny from Westminster, there has been a *de facto* Welsh jurisdiction since the Assembly began passing Measures in 1998. As a result, it could be argued that this jurisdiction would exist even had the Assembly been granted but the most minuscule of law-making powers.

¹⁴¹ Government of Wales Act 2006 Schedule 5, Part 1

Devolution and Wales: Past and Future

The Welsh legal system - until the passing of Laws in Wales Acts of 1535-1542, was distinct from that of the English and drew upon a rich history of tradition, common law rules and sovereign statutes. The most recent detailed source of Welsh law still available to us is the codified *Laws of Hywel Dda*, named for the Welsh King who, at some point between 942 and 950¹⁴², “summoned to him from every commote of his kingdom six men who were practised in authority and jurisprudence... to the place called the White House on the Taf in Dyfed. ... And at the end of Lent the king selected from that assembly the twelve most skilled laymen of his men and the one most skilled scholar who was called Master Blegywryd, to form and interpret for him and for his kingdom, laws and usages...”¹⁴³

These laws were detailed and progressive, allowing for extended rights for women, and an unconventional approach to criminal law. Moore comments that, “Welsh law fell into the juristic category of *Volksrecht* ("people's law"), which did not lay great stress on royal power, as opposed to the *Kaisersrecht* or *Königsrecht* ("king's law") of both England and Scotland, where it was emphasised that both civil and common law were imposed by the state.”¹⁴⁴

It was not until the Laws in Wales Acts, passed between 1535 and 1542 by Henry VIII, that Wales' legal system was completely replaced by that of England, and the two jurisdictions became one. Unlike the devolved systems of Northern Ireland and Scotland however, Wales still shares its legal system with England, and although acts passed in Wales are only applicable in the principality, Acts of the Assembly¹⁴⁵ nonetheless become a part of the law of England and Wales.

The 1997 general election saw victory for New Labour who, under the leadership of Prime Minister Tony Blair, set about fulfilling their manifesto pledge for “Devolved power in Scotland and Wales.”¹⁴⁶ The fruits of this effort were realised in 1998 when the Government of Wales Act was passed. This act proscribed the creation of a new Assembly for Wales, which was to be a democratically elected institution with the power to pass Assembly Measures. Although these Measures carried the same force as Statute, any Measure passed by the Assembly had to be approved by Parliament before it could receive Royal Assent, and applied only in Wales.

¹⁴² The Period in which Hywel was king of the majority of Wales.

¹⁴³ Richards, M *The Laws of Hywel Dda* p.23

¹⁴⁴ Moore, D *The Welsh Wars of Independence* p. 247

¹⁴⁵ Government of Wales Act 2006 Part 4 §107

¹⁴⁶ <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>

The Government of Wales Act 1998 was amended by the 2006 Act of the same name, but this new statute made allowance for a referendum¹⁴⁷ which would provide a mandate for the extension of Assembly powers to include Acts of the Assembly. This referendum was carried out in 2011 and resulted in a majority 'Yes' vote for the extension of Assembly powers. Unlike Measures, the Acts of the Assembly allowed for by the 2006 Act do not require Parliamentary approval in order to receive Royal Assent. This represents a major transfer of power from Westminster to Cardiff, and raises a number of constitutional questions, including whether the creation of an official Welsh jurisdiction would be appropriate.

Separate but Equal: Independent Jurisdictions in Scotland and Northern Ireland

For the other devolved states, a separate jurisdiction is already a reality. In Northern Ireland, a state which has enjoyed devolution since the Government of Ireland Act 1920, the legal system is distinct from that of England and Wales, and is made up not only of Acts of the British Parliament and common law rules, but its own distinct statutes, enacted by the Irish Parliament before the Act of Union of 1800, the Parliament of Northern Ireland between 1921 and the end of devolved government in 1972, and the more recent Northern Irish Assembly at Stormont, Belfast, created in 1998 as part of the Good Friday Agreement.

For Scotland, the situation is very similar. Following the Act of Union in 1707, the Parliaments of Scotland and England were merged, but the Act allowed the separate authority of the College of Justice, Court of Session and Court of Justiciary¹⁴⁸ to continue in the Scottish jurisdiction. As a result, the common law differs between that of Scotland and that of the English - for example; the lack of a distinct and separate law of Equity marks Scottish Law apart from that of the rest of the UK.¹⁴⁹ The Scottish Parliament was dissolved following the 1707 Act, but the Scotland Act of 1998 returned law-making power to the unicameral Scottish Parliament at Holyrood, which has full authority to create statutes on any of the issues fully devolved to it. When devolution was fully engaged in 1997, Scotland and Ireland already had separate legal jurisdictions and only lacked independent law-making authority, while Wales lacked any kind of legal or political independence from Westminster.

¹⁴⁷ Government of Wales Act 2006 Part 4 §103

¹⁴⁸ Article 19, Act of Union 1707

¹⁴⁹ Stair, vol. 22, para. 399: "*The historical place of equity in the development of Scots law is no mere replication of the English position. No separate equity court appeared in Scotland. The Scottish commentators were given to searching for parallels to contemporary Scottish arrangements in the texts of Roman law. 'Equity' does not obviously exist as a distinct branch of law at the present day. Nevertheless, the status of equity as a source of law is nowadays much the same in Scotland and England.*"

In Wales an average 100 additional potential clients are placed upon the normal legal practitioner compared to his English counterpart, but despite this the legal profession in Wales continues to adequately serve the needs of the Welsh population operating under the present system of jurisdiction, and so the question of whether there would be enough trained professional lawyers in Wales to justify the change should not be a bar to the development of a separate jurisdiction. A key concern regarding practitioners in drawing up a new jurisdiction for Wales was pointed out in an Assembly memo written by Cardiff Law School Professor Dan Wincott and Morgan Cole solicitors' partner Emyr Lewis, who raised the issue of "whether lawyers could normally continue to practice on both sides of Offa's Dyke after the creation of a distinct jurisdiction in Wales. Similar considerations would apply to the appointment of judges."¹⁵⁰

Therefore the expansion of Assembly powers to include Acts must also mean that professionals must demonstrate their ability to practise within the framework of the Welsh Assembly's new laws, and an understanding that these rules will only apply in Wales. Even without considering this expansion of power to the Senedd, Wales already has a *de facto* separate jurisdiction formed of tribunals created by Assembly Measures, even if not defined by an Act of Parliament. This is a view supported by Professor Wincott, who wrote in his memo that "In many areas, there are distinct Welsh Tribunals or other fora, with jurisdiction over Welsh cases. Some of these are administered by the Welsh Government, some are not. One tribunal has been created by legislation of the Welsh Assembly, and has no counterpart outside Wales."¹⁵¹ As a result, the competence of Welsh practitioners and judges is already being tested, but the jurisdiction lacks the legitimacy an Act of Parliament could provide.

The fundamental issue at the heart of Welsh law-making authority is that if the Assembly is granted the same law-making power as the Scottish Parliament or Northern Irish Assembly, as this referendum has guaranteed, then basic principles of law would become distinct from those of England, and by degrees the courts would be called upon to adjudicate upon those distinct and different principles. As a result, it would become necessary "for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions."¹⁵²

A New Jurisdiction for England?

¹⁵⁰ Wincott, D and Lewis, E *Memorandum to the Constitutional and Legislative Committee of the National Assembly's Enquiry into the Establishment of a Separate Welsh Jurisdiction*

¹⁵¹ *ibid*

¹⁵² Government of Wales Act 2006 Explanatory Notes paragraph 374

A further issue created by the introduction of a new Welsh jurisdiction is that to do so would inevitably create a new jurisdiction for England as well. This raises a number of questions; including whether the separate Welsh courts would have the authority to decide on matters outside of the 20 devolved areas - or, if their competence lies only in the matters controlled by Schedule 7. Moreover, along the populous land boarder between England and Wales, questions of geographical jurisdiction would become a serious issue, as questions brought before the Welsh courts would not only surround whether the court was competent to hear the complaint under schedule 7 (if this caveat were to apply), but also whether the complaint could be heard in Wales or England depending on where the parties lived.

For example, if a complaint was brought by a farmer in Powys against his neighbor in Herefordshire relating to the use of a pollutant pesticide that was affecting the quality and safety of his crops, it would be necessary to determine whether the complaint should be heard in Wales or England. Even if a separate Welsh jurisdiction was not officially instated (or rather, re-instated), the Assembly still has competence over food safety, animal welfare, agriculture and pollution, and so there should be distinct differences between the laws of England, that would operate in Herefordshire, and the laws of Wales, that would apply in Powys. The only absolute similarity between the two jurisdictions would be the supremacy of the Supreme Court as the highest court of appeal, as is the case for Scotland and Northern Ireland. However, as the Northern Irish and Scottish jurisdictions are allocated a representative on the bench in the Supreme Court, it may too become necessary to provide this same representation for Wales as the deviation between English and Welsh law becomes more apparent, and the impact of such a deviation is more forcibly felt.

Of course, as devolution transfers greater power to Cardiff, Stormont and Holyrood, the Westminster Parliament will find itself legislating on matters that concern only England, and as a result Wales may find itself in a separate jurisdiction more out of consequence than intentional constitutional reform.

The Assembly's New Powers and the Changing Legal Landscape

Last year's referendum can be considered as the 'switch' for Part 4 of the Government of Wales Act 2006. Had the result been different, then Part 3 would have continued to operate and the Assembly would not have been able to legislate independently of Parliament. However, Part 4 now grants the Assembly the authority to legislate "in respect of matters which relate to subjects under headings in

Schedule 7.”¹⁵³ If the Assembly is able to legislate in relation to any matter that *relates* to subjects under Schedule 7, then the authority of the Assembly to legislate is considerably expanded. Rather than only legislating very narrowly on matters that relate directly to the headings under Schedule 7, the Assembly now has the power to legislate on a wide array of topics and can legitimise this legislation so long as it relates in some way to the devolved areas. A test for how related a law must be has not yet been proposed, but it must presumably be within the spirit of the devolved area, and be directly affective upon the industry or sector that it seeks to legislate under. Again, this legislation will apply only in Wales, and therefore can be seen to be the Assembly creating legislation on a wide range of issues that apply only within the strict legal jurisdiction of Wales. A competent legal profession, well-versed in these laws must also be created, in order for clients in Wales to be satisfied that their legal representation is properly able to argue under this separate Welsh law, and this is a matter to be addressed once the question of separate jurisdiction has been settled at Westminster.

The framers of the 2006 Act may find that the Welsh Assembly is able to go far beyond the initial intentions of Parliament, presumably to legislate within the Schedule 7 devolved areas, and may take advantage of the wording of the Act to allow legislation passed by the Assembly to go beyond strict adherence to the 20 devolved issues, and may begin passing legislation that is only related to one of the issues, even only tenuously. For example, the Assembly may decide to legislate in order to make export of livestock a criminal offense where this would lead to the animal suffering unnecessarily. As a result, farmers in Wales would be more cautious to deliver livestock to farms in England whose rules on animal cruelty differ from that of Wales. Where England and Wales have differing definitions on what constitutes cruelty to animals, this would lead to a conflict with Westminster as it negatively affects cross-boarder trade between England and the Principality. This issue further invites questions of whether people suspected of committing Welsh crimes, but who are domiciled in England, could be extradited to the Principality. If such a scenario were to happen, the Assembly would be opening a political Pandora’s Box that they may not be able to close. If the Assembly pushes too far the authority granted to them by Parliament, they may find that a separate jurisdiction becomes impossible, especially if the Westminster Parliament, acting as Sovereign, were to decide that the Assembly were acting *ultra-vires* by enacting legislation not closely enough related to the devolved areas. However, this could only be successful if the sovereignty of Parliament over the Welsh Assembly was recognised in both jurisdictions. Such a situation can only still continue to be possible while the Welsh Assembly Government is only permitted minimal

¹⁵³ Government of Wales Act 2006, s 4.5.1

legislative authority. Inevitably however, the question of the validity of Welsh law over English law, or the question of exceeding authority, must be decided by the courts.

It is clear that the creation of a separate Welsh jurisdiction is inevitable, though it could be asserted that a separate *de facto* jurisdiction already exists in Wales; created by the development of separate Welsh law when devolution in Wales began in 1998. The issue at hand is, therefore, not whether or not this jurisdiction will come to exist, but how it will continue to colour the constitutional landscape of England and Wales, and how it's development will change the makeup of the Union as a whole. The primacy of Welsh legislation in Wales was intended to give Wales a separate legal system to that of England, or else devolution as a whole was an exercise in futility. However, the continued expansion of Welsh Assembly powers must lead to a conflict with the Sovereignty of Parliament as the expansion of the Welsh Jurisdiction begins to The only way that devolution can continue, aside from an expansion of the powers of the Assembly beyond the 20 devolved areas, is to categorically provide for a separate Welsh jurisdiction, with competence over issues directly relating to devolution, which can be allowed to decide based upon the primacy of Assembly legislation and with a specifically Welsh perspective, i.e. That decisions are made based on the Rule of Law as it exists within a Welsh jurisdiction, and not the jurisdiction of England and Wales.

Of course, as was mentioned above, it is possible for the United Kingdom to avoid granting complete sovereign independence to home nations, despite a growing trend in devolution amongst the political classes in Scotland, Wales and Northern Ireland. The proposed solution is to create a federal state, composed of the Home Nations and England, each with their own legislative bodies, and all working within a framework of layered statutes. The first layer, state law, will be good law in the state in which it was passed, but is inferior to the second layer, or federal law, which operates across the nation. The United States of America is one of the most successful examples of a federal system of government, and it is the USA that shall be examined in the next chapter alongside New Zealand, a unitary state, which shall serve as a point of comparison.

Chapter Four - *“If the President Does it, that means that it is not illegal”*¹⁵⁴

This chapter is concerned with the Sovereign as a concept in other jurisdictions. In order to examine this topic adequately, we shall be examining two jurisdictions, that of the United States and that of New Zealand. Although they are very different culturally, they share certain attributes that make them ideal for comparison. The United States, like both New Zealand and the United Kingdom, uses the Common Law. However, the US benefits from a written constitution, unlike the United Kingdom and New Zealand. New Zealand, on the other hand, has a more radical judiciary, unafraid to take on a more direct political role. As a result, these two case studies give us the opportunity to examine two separate systems, which bear the same hallmarks as the United Kingdom’s legal system, yet also enjoy some fundamental differences which serve to highlight the authority of judges in other jurisdictions.

The President/Commander-in-Chief Dichotomy

Thomas Fuller’s quote, “Be you ever so high, the law is above you,” is one nearly inescapable in any text on the Rule of Law, or any discussion of sovereignty. The term is well-worn, but remains an important illustrative axiom, which serves to remind the traditional leaders of the past, such as monarchs and presidents, as well as the powerful and influential leaders of today (media moguls and political lobbyists, for example), that nobody can escape the Rule of Law. Though for lawyers it may be a phrase impossible to forget, in politics there are countless examples in modern political history demonstrating that to politicians it is a phrase easily overlooked. Nixon, for example may be glad to know that the Bush Administration would, in the space of ten years, vindicate the title quote so completely, and aim to dismiss Fuller’s phrase so totally, in their pursuit of victory in the War on Terror.

Bush, a president whose term was marred with accusations of illegal spying, wiretapping, rendition, human rights abuses and the ongoing debate over the invasion of Iraq in 2003, pursued a political philosophy that “asserts a conception of executive power which is unlimited; which cannot be constrained by the other branches of government, by Congress or by the Courts, when the president is acting as Commander-in-Chief.”¹⁵⁵ In short, Bush sought a presidency fused with legal sovereignty. Both Americans and observers overseas would be familiar with this perspective, since it was shared by Richard Nixon during his term in office and afterward.

Nixon, who was also dogged by accusations of at least questionable, at most illegal practices while in office, believed that as President he had absolute authority to authorise actions which would otherwise have been statutorily criminal. The difference is that Nixon believed that the President

¹⁵⁴ Nixon, R, M, Interview with David Frost, May 20th 1977

¹⁵⁵ Cole, D Is the Commander-in-Chief Subject to the Rule of Law? Chicago 2006, University of Chicago Human Rights Program

was beyond the rule of law in all circumstances. As was demonstrated in the quote above, Bush's perspective mirrored Nixon's, but was different in one crucial respect: that the unlimited power of the President was granted only when acting as Commander-in-Chief.

Whatever the differences in their philosophy, both assumed that as President they adopted the role of Sovereign in the legal-political system of the United States of America. The legitimacy of this claim is, of course, not possible to assume. Just as Nixon learned following the Houston plan and the Watergate scandal, Bush found that there are no circumstances in which the President is granted absolute authority to act beyond the law.

The fundamental difference, of course, between the United States and the United Kingdom is that the United States has a formal constitution, which outlines the fundamental rights and responsibilities of government, and is defined in *Eakin v Raub*.¹⁵⁶ In this case Gibson, dissenting, states "What is a Constitution? It is an act of extraordinary legislation, by which the people establish the structure and mechanism of their government; and in which they prescribe fundamental rules to regulate the motion of the several parts."¹⁵⁷ The United Kingdom does not have a formal constitution, but instead, as was explained above, has a number of leading cases and 'ordinary' legislation, which defines the powers and limits of the Government, as well as the most fundamental rights and responsibilities of subjects. The case for Britain adopting a constitution will be discussed in further chapters.

The Constitution of the United States, in the Fourth Amendment, guarantees the right of Americans against unlawful search and seizure, and this has, alongside the development of more sophisticated communications technology, been expanded to include controls over the use of wiretapping, interception of email and the monitoring of internet use. The Bush administration however decided that the President, while acting as Commander-in-Chief, could exercise his Constitutional role to protect the United States from threats by issuing orders to tap the communications of domestic citizens of the United States without a warrant, where their communications were with a recipient outside the country. According to *The Foreign Intelligence Surveillance Act (FISA)*,¹⁵⁸ the president has the authority to authorise wiretaps without a warrant where they are directed at persons who are not citizens and are outside the United States. It also provides that the President can issue orders for warrantless wiretaps within fifteen calendar days of a declaration of war by Congress. The Congressional Research Service, however, reported in 2006 that,

“...media revelations that the President authorized the National Security Agency (NSA) to collect signals intelligence from communications involving U.S. persons within the United States, without obtaining a warrant or court order, raise

¹⁵⁶ 12 Sergeant Rawles (Pa.) 330 (1825)

¹⁵⁷ *Ibid.*, 347-48

¹⁵⁸ 50 U.S.C. ch36

numerous questions regarding the President's authority to order warrantless electronic surveillance. Little information is currently known about the full extent of the NSA domestic surveillance, which was revealed by the New York Times in December, 2005, but allegedly began after the President issued a secret order in 2002."¹⁵⁹

These revelations came when an article published in the New York Times claimed that Bush ordered the NSA (National Security Agency) to carry out wiretaps against domestic American citizens without a court order¹⁶⁰. Given that this is illegal under FISA, except within fifteen calendar days of a declaration of war, this should ordinarily have attracted the attention of the courts (thus leading to a constitutional stand-off between the Judiciary and the Executive). However in these circumstances the Bush administration argued that the President, acting in his capacity as Commander-in-Chief, was granted unlimited power to carry out any intelligence gathering he saw fit to engage the enemy (in this case, potential terrorists and other threats).

The article asserts that "Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of ... perhaps thousands of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda."

In 2002, a supplemental brief for the US Department of Justice for the US Foreign Intelligence Court (herein referred to as 'the brief') was authored by the US Department of Justice outlining the authority of the Executive to engage in illegal wiretapping activity against domestic US citizens, which asserted that, "the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority."¹⁶¹ The most obvious criticism of this assertion is that the President cannot be above the law. Neither can he, even when exercising his authority as Commander-in-Chief, or even when securing the safety and security of the nation, excuse the breach of Constitutionally guaranteed rights such as the Fourth Amendment right to privacy of communications.¹⁶²

The Constitution itself states that the role of the President is to defend and protect the Constitution of the United States¹⁶³, but the question to be asked is whether the President has the right to defend

¹⁵⁹ Bazan, E and Elsea, J, Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, Congressional Research Service Memorandum, 05/01/2006 (Hereafter Congressional Research Memorandum)

¹⁶⁰ Risen J Lichtblau E, Bush Lets U.S. Spy on Callers Without Courts, N.Y. TIMES, 16/12/2005, at 1, 22

¹⁶¹ RE [deleted] ON APPEAL FROM THE UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT (2002) No. 02-001 Supplemental brief

¹⁶² US Constitution, 4th Amendment, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

¹⁶³ Article 3 §3

his own constitutionally authorised role as Commander-in-Chief against the Fourth Amendment, which would seek to limit the President's authority to carry out warrantless wiretaps against US citizens. Naturally, at first glance the answer to this riddle is simple: the Constitution, and *not* the President is sovereign in the United States, and so the President must uphold and respect the Fourth Amendment. But by doing so, he must concede that his role as commander-in-chief is not unlimited and so he must abide by the provisions of FISA. This argument was, however, dismissed in the brief, which claimed that "in considering the constitutionality of the amended FISA, it is important to understand that FISA is not required by the Constitution." This bold statement asserts that the President, in exercising his role as Commander-in-Chief, has the authority to sweep aside inferior statutes (i.e. Any laws which are not constitutional) that preclude his ability to carry out actions which he considers to be necessary to secure the safety of the United States.

It has been made clear, however, that the courts do not agree with this position. In *Butenko*¹⁶⁴, for example, the court found that, "The President in his constitutionally designated role as Chief Executive is charged with the duty to see that the laws of the United States are enforced and obeyed. Yet it is incontrovertible that the President, through his subordinates, cannot ignore the admonitions of the Fourth Amendment when investigating criminal activity unrelated to foreign affairs. Thus, evidence seized in the investigation of domestic crimes as a result of actions outside the bounds of the Amendment would not be admissible in a criminal prosecution."

This case, along with two others, was relied upon in the brief to legitimise the President's claim to unlimited authority¹⁶⁵. However, it is clear that the Brief mistakes the President's authority to carry out wiretaps in the interest of Foreign relations and international affairs with his authority to carry out those same acts against domestic US citizens. FISA grants the President the authority to allow warrantless wiretaps on non-US citizens where it is in the interests of foreign relations, but there are few exceptions pertaining to citizens, and even where these are stipulated there are nonetheless strict safeguards to ensure that this authority is not abused. The judgement in *Butenko* goes on to explain that,

"The President's authority to conduct foreign affairs ... is implied, at least in part, from the language contained in Article II of the Constitution. The Constitution contains no express provision authorizing the President to conduct surveillance, but it would appear that such power is similarly implied from his duty to conduct the nation's foreign affairs. Although direct threats to the existence of governmental institutions or to territorial integrity are of immeasurable gravity, there would seem to be nothing in the language of the Constitution to justify

¹⁶⁴ 494 F.2d 593: *United States of America v. John William Butenko and Igor A. Ivanov v. Appeal of Igor A. Ivanov* pp29

¹⁶⁵ The Brief states in Section A that "Both before and after the enactment of FISA, courts have recognized the President's inherent authority to conduct foreign intelligence surveillance. See, e.g., *Butenko*, 494 F.2d at 608 (grounding exception to warrant requirement in the President's Commander-in-chief and foreign-affairs powers; noting that the country's self-defence needs weigh on the side of reasonableness)."

completely removing the Fourth Amendment's requirements in the foreign affairs field and, concurrently, imposing those requirements in all other situations.”¹⁶⁶

The second case the brief sought to rely on to justify the President’s authority to carry out wiretapping without warrant was *Truong*,¹⁶⁷ which states that “the President may authorize surveillance without seeking a judicial warrant because of his constitutional prerogatives in the area of foreign affairs ... only so long as the investigation was "primarily" a foreign intelligence investigation.” This case also, therefore, refutes the notion that the President is above the law, and reaffirms the fact that where the President permits an illegal wiretap, or any act not permitted according to statute or which is not in accordance with the constitution, he acts *ultra vires*, and therefore his actions cannot be permissible under the law.

It is easy to forget when discussing the more general rights and liberties of citizens, that the argument of the Government rests on the notion that the Executive branch may be granted absolute discretion to intercept private conversations and communications without any judicial review. As was stated neatly in *United States v. United States District Court (Keith)*¹⁶⁸, “The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.”

This principle has its roots in English common law, long before it was enshrined in the United States Constitution under the Fourth Amendment. Lord Mansfield, in *Leach v Three of the Kings Messengers*,¹⁶⁹ says that “It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.”

This statement has held in the Common law in the United Kingdom just as well as the Constitution has protected this right in the United States. The Constitution, although useful in securing and defining the basic rights of citizens and the operation of government, adds nothing useful to the protection of those rights except a more difficult means of expunging them. Although valuable in itself, the mere ability to keep the right secure is one just as well defended by the courts in the common law. Indeed, given the length of time and number of cases giving ample chances to remove or infringe this right, the common law has stood fast, and has prevailed. Now, with the introduction of the Human Rights Act, this right has been written into our body of Constitutional documents, and will now no doubt prove just as hard to expunge as a right in the US constitution.

¹⁶⁶ 494 F.2d 593: *United States of America v. John William Butenko and Igor A. Ivanov v. Appeal of Igor A. Ivanov* (1972)

¹⁶⁷ *United States of America v Truong Dinh Hung, United States of America v Ronald Louis Humphrey* 629 F.2d 908 (1980)

¹⁶⁸ 407 U.S. 297, 308 (1972)

¹⁶⁹ 19 How.St.Tr. 1001, 1027 (1765)

The controversy surrounding illegal wiretaps came to a head in 2006, after the revelations in the press, and the practice was widely condemned both by the public and the courts. Speaking in judgement in a Federal Court in Michigan, Judge Anna Diggs Taylor ruled that the arbitrary violations of Fourth amendment rights were unlawful, and that “there are no hereditary kings in America.”¹⁷⁰ Bowing to public and legal pressure, President Bush finally conceded to end the NSA’s secret wiretapping programme in January 2008, proving at last that everyone, the President being no exception, is subject to the rule of law as defined by the courts.¹⁷¹

Nixon, of course, is a President who did not learn this valuable lesson. His presidency is remembered for the Watergate and Houston scandals, both of which helped to redefine the accepted view of the powers and authority of the President of the United States in a legal capacity.

As has already been explained, the President has the authority to issue orders for wiretaps against domestic citizens only in specific circumstances and only if a warrant is authorised either before or immediately following the wiretap. If the wiretap is rejected, the evidence gathered cannot be used (the fruit of the illegal act). This is the basic circumstance of the Houston Scandal, which shares many similarities with the NSA Terrorist wiretapping programme carried out under the Bush Administration. The Houston Plan was a programme of warrantless wiretapping against domestic US citizens whom were suspected of aiding the Vietnamese during the American incursion in the middle of the twentieth century. Although Nixon personally authorised the operation, it was shelved before wiretaps could begin due to pressure from J Edgar Hoover, the director of the FBI, who felt that such an incursion was unconscionable.¹⁷² The Parallels with the Bush administration are obvious, the only difference being that Nixon defended his position not by claiming that he was constitutionally authorised to do anything when acting in a certain constitutional capacity, as Bush argued. Instead, Nixon claimed that when the President commits any offense he cannot be prosecuted, because as President he is above the law. Naturally this was not true, as his impeachment testifies. The Houston plan is historic now, and has been replaced by the NSA Wiretapping affair, but it is Watergate that is arguably Nixon’s most damning criminal scandal.

Watergate began in 1972, when the Democratic Party headquarters in the Watergate Building, Washington D.C. was the target of a break-in. Eventually, it was revealed that the order for the break-in had come from the Oval Office, and that the President may have been directly involved. This was an immensely important allegation, as it would be a direct accusation of the President in a statutory crime. Two years after the break-in, the Special Prosecutor in charge of investigating the scandal, Leon Jaworski, obtained a subpoena requiring the President to release certain tapes and transcripts of meetings and conversations he had held with suspects indicted by the grand jury.

¹⁷⁰ *ACLU v NSA/Central Sec. Ser.* 438 F Supp 2d 754 (E D Mich 2006). It may be that in this case Justice Taylor missed the point. Although not hereditary, the President certainly takes on a role not dissimilar to a King, though without the hereditary nature of a Royal Family. Further discussion of this topic can be found in *The Man Who Would Not be King* by Stephen Krensky.

¹⁷¹ Lobel, J Cole, *D Less Safe, Less Free: Why America Is losing the War on Terror*, New Press 2007 pp135-6

¹⁷² Cole, D *Is the Commander in Chief subject to the Rule of Law?*

Nixon, bowing to pressure to appease the public mood, released edited transcripts of forty conversations, including twenty conversations ordered in the subpoena. Nixon's attorney, James D Sinclair, told the court that, "The President wants me to argue that he is as powerful a monarch as Louis XIV, only four years at a time, and is not subject to the processes of any court in the land except the court of impeachment."¹⁷³

Naturally the court rejected this statement and demanded the release of all the tapes and transcripts, unedited, to be delivered to the court by the 31st May 1974. Upon referral to the Supreme Court, it was decided that the transcripts may indeed contain evidence of wrongdoing and, despite the President's claim that he had the right to protect all privileged government communications, the court decided that Nixon had no right to "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."¹⁷⁴

This case redefined the role of the president politically and legally in the United States. The Supreme Court exercised its authority and made clear that even the President can be subject to the rule of law as enacted through decisions of the courts.

It is evident therefore that the courts are unafraid of interpreting the constitution in a way that is damaging to the executive or the legislative branches of government. In *Congress Versus The Supreme Court*,¹⁷⁵ C Herman Pritchett provides evidence in detail of the frequent constitutional battles between the legislative and the judicial branches, and this he covers on only a small period between 1957-60. Beyond this time frame the US Supreme Court has been called upon to challenge the decisions and actions of the other branches of government and has succeeded (in the sense that the court remains intact, and its powers of judicial review remain untouched). It is easy to forget some of the more serious flaws in the American judicial system, especially given that to be elected to the Supreme Court is still a political appointment. So long as this is the case, noble though the cause and victories of the Supreme Court may be, it will always be true that "the Constitution says whatever the Supreme Court says it says. As for what the Supreme Court says, that all depends on who's president."¹⁷⁶ Equally, it is easy to demonstrate the power of the courts when reflecting on a country whose sovereign legal document is the constitution. For countries with no formal constitution, such as the United Kingdom and those countries who follow the Westminster System, how can the court define its role when there is no precedent to identify it? For this reason it is vital that we explore the role of the courts in other foreign jurisdictions, and the legal system of closest relevance to that of the United Kingdom is that of New Zealand.

Judicial Activism in New Zealand

¹⁷³ Trachtman, Michael G. *The Supreme's Greatest Hits* (Sterling: 2007) pp131

¹⁷⁴ *United States v Nixon* 418 U.S. 683 (1974)

¹⁷⁵ (1973) Da Capo Press New York

¹⁷⁶ "Dances With Wolves" Boston Legal, Kelley, D, 20th Century Fox 6/10/2008

New Zealand is a member of the Commonwealth whose head of state is the Monarch of the United Kingdom, the Queen. It follows the Westminster system, in that there is no formal, codified constitution and relies on a mix of primary and secondary legislation, as well as selected statutes from the United Kingdom legal system, to formulate its constitutional doctrines¹⁷⁷. New Zealand relies on the *Imperial Laws Application Act*, first passed in 1854, which affirmed the application of certain statutes and common law principles from the United Kingdom. Included in the list of such laws are *Magna Carta*, the *Habeas Corpus Acts*, the *Petition of Right* and the *Bill of Rights*. What is more, the Act also provides the Governor General the right to create subordinate legislation under the laws contained within the Act. This authority demonstrates that the Attorney-General acts as the political 'Sovereign' for New Zealand, and as country's the Head of State. For this reason, the *Imperial Laws Application Act* is one of the most vital laws of New Zealand, and could be described as a fundamental, constitutionally significant law.

The Imperial Laws Application Act is not the only constitutionally significant act that New Zealand boasts, however. In addition one of the most fundamental laws, and also one of the most controversial, is the Treaty of Waitangi. Signed in 1840 by more than 50 tribal leaders of the Maori people (of which 13 were women) on both the North and South Islands, as well as a representative of the British Crown, the treaty guaranteed certain rights of the Maori people as well as conferring upon the Imperial British Crown the right to govern the unified New Zealand protectorate. The treaty, outlining these rights in three parts, guaranteed the Maori their right to own property, their independence and to their own self governance under the British Crown (although the differing interpretations of the Maori and English versions call this into question). The treaty also established a British government in New Zealand, as well as creating the position of Governor-General, who would act as Head of State for the Crown *in absentia*.

The Treaty of Waitangi has, because of its differing versions, led to a series of difficulties in interpretation and application, and led eventually to the *Treaty of Waitangi Act 1974* which established the Treaty of Waitangi Tribunal, which hears arguments when the government is accused of breaking the terms of the accord. The most famous implementation of the Treaty of Waitangi was in the case of *New Zealand Maori Council v Attorney-General*.¹⁷⁸ This case was groundbreaking if only because, although the act to which the case refers¹⁷⁹ states that "Nothing in this act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi," the Courts themselves were tasked to determine what exactly these principles were. It was Lord Cooke, one of New Zealand's foremost jurists, who delivered the judgement and who was responsible for determining standards regarding the relationship between the Maori and the Crown in New Zealand. This is a significant development in the argument that the courts are sovereign. Here the courts have abandoned using the traditional method of statutory interpretation, that is, the *Purposive*, *Literal* and *Integrated* approaches. For these approaches, the courts usually

¹⁷⁷ Imperial Laws Application Act 1988

¹⁷⁸ [1987] 1 NZLR 641

¹⁷⁹ State Owned Enterprises Act 1987, §9 (NZ)

interpret statutes according to strict guidelines. For the Literal approach, the courts will rule on the meaning of a law or the intention of Parliament according to the literal definition of the word whose interpretation is required. For example, Lord Reid said, “We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.”¹⁸⁰

The Purposive approach is an approach more flexible than the literal, and requires the court to try and understand the aims of Parliament in a statute, in order to not, as Lord Denning put it, “pull the language of Parliament to pieces and make nonsense of it. We sit here to find out the intention of Parliament and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.”¹⁸¹

The Integrated approach is one that takes elements from both and uses both a respect for the words in the statute and their context and assumed purpose to reach a judgement. As Denning stated, the task of the court is *filling in the gaps* that Parliament might have left when drafting legislation. Of course, this view was challenged, and when the case reached the House of Lords Denning’s approach was dismissed by Lord Simonds as a “naked usurpation of the legislative function under the thin guise of interpretation...if a gap is disclosed the remedy lies in an amending Act.”¹⁸²

Denning’s approach, therefore, is one of cautious law-making. Where Parliament leaves a gap in interpretation, it is the courts’ duty, says Denning, to fill in those gaps and complete the law. This may not be how judges such as Lord Simonds would prefer the process be described, but it is the way the system works nonetheless.

In *New Zealand Maori Council*, the court was asked not to interpret the terms of the treaty; it would be impossible given the differing meanings of the Maori and English translations; but to infer from it the rights and responsibilities of the signatories party to the original agreement. In the case, Cooke says that,

“The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral character of Maori tradition and culture ... The relatively sophisticated society for whose needs the State-Owned Enterprises Act has been devised could not possibly have been foreseen by those who participated in the making of the 1840 Treaty. In brief the basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions

¹⁸⁰ Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg [1975] HL

¹⁸¹ Magor and St Melons v Newport Borough Council (1952) HL

¹⁸² *ibid*

were to be protected, but sales of land to the Crown could be negotiated. These aims partly conflicted. The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.”¹⁸³

This is a clear example of a judge ‘filling the gaps’ but on a truly huge scale. Cooke tells us that,

“It does not follow that in each instance the question will admit of only one answer. If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.

“I use "reasonably" here in the ordinary sense of in accordance with or within the limits of reason. The distinction is between on the one hand what a reasonable person could do or decide, and on the other what would be irrational or capricious or misdirected. Lawyers often speak of *Wednesbury* unreasonableness, in allusion to the case reported on page 223 of the King’s Bench Reports 1948, volume 1, but I think that it comes to the same thing.”

Cooke was, in this passage, defining the terms of the treaty and setting the boundaries which constrain both the Maori tribes and the Crown in their dealings with each other. He puts into place a test of reasonableness when determining if a transfer of property can be carried out between the Maori and the Crown. Moreover, he defines the test of reasonableness underneath and, therefore, creates a rule with clearly defined requisites for operation, and a penalty for non-completion (i.e. The transfer will be void). Technically the Crown is, as with the United Kingdom, Sovereign in New Zealand. This means that in this ruling the courts are constraining the powers of the Crown by creating the rules in a treaty binding the sovereign. If the courts are able to act in this way, and constrain the Crown in this manner, then how can it be that the Crown is Sovereign?

Naturally, the answer is that it cannot be. Of course, the Crown in New Zealand differs from the Crown in the United Kingdom. In New Zealand it is a nominal concept, and the power of the Sovereign is *de facto* vested in the Attorney-General, although *de jure* the sovereign is still the British Monarch. In this sense, therefore, the Governor-General for New Zealand can be seen as a head-of-state akin to the President in the United States. Despite this however, since New Zealand follows the Westminster System, Sovereignty is still found with the Queen in Parliament as with The United Kingdom. As a result of this, and lacking a formal constitution defining the roles and powers of the three branches of government, it can only be possible for the Courts to prove their

¹⁸³ New Zealand Maori Council v Attorney General [1987] 1 NZLR 641 pp664

sovereignty where there is a challenge to the authority of Parliament or where the courts create a new law based upon a novel question brought before a higher court able to issue judgements that will have a binding effect.

However Lord Cooke, mentioned above, has contributed to the movement in New Zealand that the courts are responsible for making law. In his article *An Impossible Distinction*¹⁸⁴ he argues that the common law has developed and invented law in situations where no law previously existed (and this is to him especially true of the courts in New Zealand) doing so sometimes before the House of Lords in the United Kingdom. This leads him to the conclusion that the common law of New Zealand should not only be in a position to be cited as primary law in its own right, but that also, in cases heard by courts in other jurisdictions, common law judgements should be relied upon as persuasive. This argument puts the courts in a position where they can claim law-making authority and so allows provides the opportunity to establish themselves as sovereign in a common law system.

For his argument he draws heavily from the case law of England and Wales, while reminding us that the same rules are of importance in the legal system of New Zealand: “It may be doubted whether there is any overseas jurisdiction where the work of the United Kingdom courts is more deeply respected and influential than it is in New Zealand.”¹⁸⁵

In the course of his argument, he explains that the courts inevitably create new law, simply by altering or expanding upon the existing case law or by interpreting statutes that have any gaps that need filling in. The common law by its definition is a system of evolution; slow and carefully considered incremental changes to the law which culminate in a refined rule which can provide a certain outcome for a variety of circumstances.

Beyond New Zealand but also in the other common-law jurisdiction that shares the Westminster System, Australia, Cooke tells us that there are two schools covering the creation of law; by *proximity* or by *incrementalism*. These schools are explained simply by their titles, and it is incrementalism that shall be focused upon here. This method is the progression of laws through precedent, and results in a wider reaching law than would exist thanks to a single judgement. An example of such a rule could be found in *Dutton*, the facts of which are further explained below.

Cooke points out, however, that “It has to be remembered ... that what is a jump to one person may be quite a small and necessary step to another.” Filling in a gap in the sense that Denning describes, or creating a new common-law rule may be to anyone else a leap beyond the perceived role of the judge in the common law. Moreover, he goes on to affirm that “it may conduce to perspective to remember that when a truly new point arises *any* solution of it is truly judicial legislation”. *Dutton v*

¹⁸⁴ 107 Law Quarterly Review 46

¹⁸⁵ *ibid* at 49

*Bognor Regis Urban District Council*¹⁸⁶ is the example Cooke provides in his analysis. In this case, a local authority approved in negligence a construction project, and this negligence led to the property being less valuable to the ultimate purchaser than would have been the case if the inspection had not been negligent. Counsel for the appellant opened his case in the Court of Appeal by stating, “The case raises for the first time in this country the question whether where someone like a local authority, exercising a right to inspect during manufacture or construction of buildings or goods, negligently approves the construction or manufacture so that the property of the goods turns out to be less valuable to the ultimate purchaser than they would have been if there had been no negligence, the ultimate purchaser will have a right of action in tort against the inspecting body.”

Cooke reaches the logical conclusion that whatever the decision in *Dutton*, the Court would still be writing a new law covering an area neither legislated for by Parliament or decided in the common law. This case was overruled by the House of Lords in *Murphy v Brentwood District Council*¹⁸⁷ which decided that the council, absent of physical injury, could not be liable for the economic loss as *Dutton* had said. Despite being overruled, courts in any common law jurisdiction must agree to a responsibility that in situations such as this, Judges are acting as a legislator, and indeed in a capacity as Sovereign, in creating these laws. This of course is the accepted academic view of the Common Law system, except that we can see that the justices’ decisions can both create new laws and amend old ones, be they statute or common law rules.

We can see, therefore, that in Australia and New Zealand there is a more significant movement to accept that the Courts do bear responsibility for creating law (a reality that any common law jurisdiction needs to accept). For Lord Cooke, the Courts play a vital role in the innovation and development of new law by incremental steps, though sometimes they are called upon to manufacture laws for novel circumstances for which no previous rule exists.

The Treaty of Waitangi also provides us with an excellent example of the courts defining not just the meaning of terms in a law, but what the law of a statute in fact is. In *New Zealand Maori Council* there is a clearly defined set of principles laid out to govern the interaction between the Crown and the Maori tribes and these terms were not clarified in the treaty; it is hard enough to provide a common translation that satisfies the perceived meanings found in both the Maori and English versions. In circumstances such as this, the courts have two choices: either wait for Parliament to draft an explanatory amendment or simply fill in the gaps themselves. In this circumstance, and relying upon the English case law cited by Cooke in *An Impossible Distinction*, it becomes clear to see that for New Zealand, there is no argument that the Courts are granted sovereignty to make law through the common law even on matters of constitutional significance such as the Treaty of Waitangi.

¹⁸⁶ [1972] 1 QB at 380

¹⁸⁷ [1991] 1 AC 398

For the United States, the power of the courts in addition to their common-law responsibility for creating new judge-made rules, such as the kind found in *Dutton*, also include the authority to defy both the executive and the legislative branches of government in the name of the constitution. This provides them with a legitimacy to rule against political figures and authorities, like the President, since all authority for all political activity is drawn from the same well as that of the power of the Courts.

Of course, the hypocrisy of this circumstance is that although Justices of the Supreme Court in the United States are aware of their constitutional authority, they choose not to act upon it in some circumstances simply because the nature of their appointment to the Court is political in nature. An example of this could be drawn, as above, with wiretapping; - since this was not widely condemned under Bush until the affair came to light in the press. On the other hand, there are circumstances where the Court is prepared to make decisions that do not comply with national or state policy, such as *Brown v Board of Education of Topeka*¹⁸⁸ which held that state laws that established segregated public schools were unconstitutional according to the Fourteenth Amendment of the US Constitution¹⁸⁹, since “separate educational facilities are inherently unequal.” This demonstrates that, at a time when the United States actively implemented a system of segregation the Court was prepared to defy that popular, if odious *zeitgeist*, and judge reasonably and according to the constitution. That is not to say, however, that *Brown* was designed to combat segregation because it caused the black students to feel inferior. Supreme Court Justice Clarence Thomas, in his judgement in *Missouri v Jenkins*¹⁹⁰ said that,

“Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior educational resources making blacks “feel” superior to whites sent to lesser schools - would violate the fourteenth amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed. Psychological injury or benefit is irrelevant.”¹⁹¹

For the Supreme Court in this case, the issue at hand was not whether black students were made to feel inferior but that any minority were; and that this was an unacceptable breach of their Fourteenth Amendment rights. As this shows, the Supreme Court of the United States as well as the courts of New Zealand and Australia are not afraid to admit to their authority to challenge other branches of government, and pass laws through their judgements that will have wide-reaching and

¹⁸⁸ [1952] 37 US 483

¹⁸⁹ “All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...” US Constitution Amendment 14

¹⁹⁰ (1995) 515 US 70

¹⁹¹ *ibid* at 75

lasting implications for not only their own legal-political systems, but for the legal systems of any common-law jurisdiction that tends to rely on overseas judgments to decide on cases of their own. Indeed, given the nature of the American legal system, lawyers and lawmakers alike look to the judgments of the Supreme Court to identify what the law is in certain circumstances. It is the responsibility of the Supreme Court to decide what is or is not constitutional, and as a result their decisions can have extraordinary implications. In 2013 for example the justices will decide on the issue of gay marriage in the USA, which will be scrutinised carefully by parties on both sides of the debate.

This is not to say, however, that the legal systems that institute this approach are not without shortcomings of their own. The US Supreme Court has its own outspoken critics, not of the work they do, but the way in which they carry it out. For the US, the higher courts are political as much as they are legal, and this brings challenges unique to the United States. Justices of the United States Supreme Court are political appointments made by the incumbent president. As a result, there is often a mix of conservative and liberal judges on the bench, appointed for life by various administrations over any number of years. This means that justices are open to make their decisions according to the policy of their party affiliation, which can cause difficulties in matters of justice, especially where the prevailing political attitude is legally questionable. This makes establishing such a system in the United Kingdom less attractive, and ultimately means that a different system must be sought.

Chapter Five - *The Judiciary Constrained: Economics and the Law in Communism and Capitalism*

The Soviet Union was founded on an economic principle, and it was this principle that continued to drive the legal-political system until Communism's fall in 1991. In the USSR, party policy and communist doctrine were at the heart of the legal system, and judges were required to work in light of this at all times.

In the wake of the credit crisis and global recession, governments are turning to austerity in their economic policy, the harsh results of which are felt by ordinary people to their detriment, and to little overall gain. The question to be examined is, can it be constitutional to enact policy which has an outcome that is harmful to the population-at-large, and how will the judiciary react, if at all? As in communist states such as the USSR and China, economics is taking on greater and greater significance in the lives of both politicians and ordinary citizens in the United Kingdom, but how drastic are the effects of an economic technocracy, and what changes can we expect in the judiciary where money is involved?

Introduction

The differences between the legal systems of communist states like that of Soviet Russia and their western counterparts are stark, but are as much concerned with differing ideas of jurisprudence as they are with the dispensation of justice. After all, according to Schlesinger, "Law is no more than a social technique, with some advantages and disadvantages in comparison with other possible ways of regulating human behavior, but it is certainly not superior to what it should regulate."¹⁹² Marxist ideology follows a differing view of the State to the ideas of the European enlightenment, which reached the height of its influence in the 18th century; an age of political upheaval that culminated in the American War of Independence and the French Revolution. As philosophers such as Paine, Locke Rousseau and Montesquieu disseminated their ideas of the state, power and the citizen's relationship to the government, a revolutionary zeitgeist took hold which transformed the western world's concept of justice, the law and the political.

In the East however, Russia failed to adopt this revolutionary spirit, and maintained a hereditary autocracy until their own revolution in 1917. Unlike in the west, Russia was gripped by a revolution that had a new, Soviet identity, underpinned by the philosophies of Marx and Lenin. These new philosophers of the people, inspired by the socialist and unionist movements of the nineteenth century, advocated a system dominated by economic principle: a vast, all-controlling state that

¹⁹² Schlesinger R, *Soviet legal theory* (2nd ed) London 1951 pp119

became “the ultimate force behind the organs of justice ... and the ultimate rationale behind the direction taken by Soviet law has tended to be its relationship to Party policy.”¹⁹³

The Pre-Revolutionary Legal System

The Russian attitude to the law, predating the Soviet revolution, has been at best ambivalent - the Czars from as early as Peter the Great began erecting a system of laws and government designed to protect the political and authoritarian centre, rather than protect those at most risk of abuse at the hands of the system. However, it was in the nineteenth century that perspectives regarding the Judiciary were beginning to change. The 1864 legal reforms introduced by Alexander II provided for an independent judiciary, trial by jury and a Bar Association (*Advokatura*).¹⁹⁴

This new judiciary, with its attention to defendants’ procedural and appeals rights, and their willingness to disregard executive administrative orders which they deemed illegal,¹⁹⁵ could well have developed into a powerful and just judicial-administrative body, were it not for the constant interference by the government whenever it felt that the courts were threatening their authority. This philosophy of government was not restrained after the revolution, either. It is almost a given that justice as we know it in the West was denied to those under the iron thumb of the Soviet Party Secretaries, but for the judiciary, which had only recently begun to forge an independent identity under the Czars, the frustration caused by a sudden and dramatic change in perspective must have been staggering.

Under the reign of successive autocrats the law in Russia had lurched through several attempts at codification and reform but none had been entirely successful. As a result, the Czar had taken to issuing Executive Orders where there was a gap in the law, or where the Judiciary was seen to threaten the supremacy of the regime. This mish-mash of statutes and orders was a quagmire for judges and advocates alike, who would in fact need knowledge of several legal systems operating alongside each other; the rigid and outdated *soslovie* system of Estates provided different rules for different classes, and as a result, the law governing the clergy was separate from that which governed the aristocracy or the peasantry. Not only that, but the changing social conditions in Russia created new classes of people for which the Estates system could find no place, for the intelligentsia, or the growing industrial class, for example. *Soslovie* in this case placed them in the somewhat ambiguous *raznochintsy* class, for those who no longer belonged to a traditional class.

Moreover, the emancipation of the Serfs in 1861 led to a further division in the law. Until Stolypin’s sweeping agrarian reforms from 1906, the peasant class in Russia, who had only recently won their freedom, were not truly free. Instead, the crippling tax and land redemption payments that were agreed as part of the emancipation deal effectively trapped peasants in their communes (in Russian referred to as the *Mir*), where they were subject to customary, or popular laws (*obychnoe*

¹⁹³ *ibid* pp210

¹⁹⁴ Ed. Beirne, P, *Revolution in Law: Contributions to the Development of Soviet Legal Theory* pp3

¹⁹⁵ *ibid* at pp5

pravo and *narodnoe pravo* respectively). As a result, these legal reforms that provided a new and more robust judiciary did not become available to the peasant class until the beginning of the nineteenth century.

Unfortunately, despite the wave of sweeping reforms enjoyed by the peasant and destitute classes in Russia at the turn of the twentieth century, any chance to see them pay off were stripped from them at the time of the Russian Revolution. In 1922, the Introductory Law of the Civil Code in Russia forbade “any interpretation of provisions of the Code on the ground of laws of the overthrown governments and the decisions of the pre-revolutionary courts,” and ordered that “no court or other authority of the Republic shall take cognizance of disputes originating before November 7, 1917.” The use or reference to any pre-revolutionary law, proceeding, decision or statute, effectively cutting Communist Russia’s ties with the previous legal system and starting from scratch. Although for the new communist rulers this break made the task of forming a Party-obedient judiciary more simple, the developments made by the Czars might well have been further built upon to create a much fairer legal system, which could be relied upon to uphold the Rule of Law as is expected in other developed legal systems.

It now is much easier to understand how the Russian legal system was able to be so perverted by the state in the years after the Revolution. A judiciary which had only recently before won its right to independence from government, yet had always been countermanded where the regime felt threatened, would have been much more receptive to an authoritarian regime, especially one as involving as the Soviet Party. The principal idea of government to the Soviet Union was an enormous and intrusive state, which was solely responsible for the rights of its citizens, and which could remove those rights as it saw fit. Childcare in the Soviet Union, for example, was a privilege granted by the state to Parents, and if it was felt by the party that a parent should not be responsible for raising his or her child, the child would be removed. This was the reality of life in Soviet Russia.

The legal system fared no better, and individual rights were all but forgotten under the weight of responsibility to the party. However, this notion was not only because of a will by the government for absolute authority. In fact, the spirit of the Revolution had always been the Marx/Lenin Communist theory, which viewed crime differently to that of the West. In the Soviet state, crime was a matter of ignorance to communist ideals, and by educating criminals the idealist ‘Workers’ Paradise’ could be created. Of course, for many in the Soviet System this idea was an illusion, and although the Communist philosophy is seductive the reality it offers is less appealing.

Perspectives on Law and the Constitution in the USSR

This philosophy, where the needs of the many outweigh the needs of the individual, does not gel easily with the notion of human or individual rights, but nonetheless many states that adopted communism in the twentieth century also enacted grandly worded constitutions promising the people’s interests over those of the state. For example, Article 10 of the 1936 Constitution

guarantees protection under law for individual property rights, however Article 12 goes on to say that, “In the U.S.S.R. work is a duty and a matter of honor for every able-bodied citizen, in accordance with the principle: ‘He who does not work, neither shall he eat.’” As a result, the Soviet approach to the legal system seems to be one of contradiction. Not only that, but it places an unnecessary burden on the individual, since he owes his daily meals to the state in return for work that he *hopes* is satisfactory in the eyes of the government.

The constitution itself in the Soviet Union was in effect an empty promise designed to convince observers of Communism’s democratic credentials. According to US Supreme Court Justice Scalia,

“The bill of rights of the former evil empire, the Union of Soviet Socialist Republics was much better than ours... We guarantee freedom of speech and of the press, big deal! They guaranteed freedom of speech, of the press of street demonstrations and anyone who is caught trying to suppress criticism of the government will be called to account. Of course just words on paper - what our framers would have called a parchment guarantee.”¹⁹⁵

Just as Scalia asserted, “The Soviet Constitution [was] in no sense the supreme law of the land. It is, rather, a solemn declaration of general policies and a general approximate organizational and administrative scheme for government authorities. . . . A constitutional provision may be set aside by an administrative decree and the newly enacted rule incorporated into the Constitution only at a later date.”¹⁹⁶

Further evidence of the Soviet Union’s enforcement of Communist doctrine over the the rule of law was evidenced in their system of election, which by-and-large was nothing more than a show, where “no chance is given to the voters to make a choice of the candidates.”¹⁹⁷ This was because under Soviet rule, and in order to protect the interests of the regime, “the right to nominate candidates [was] secured to Communist Party organizations and to other organizations controlled by the Communist Party ... In elections thus far held only one ticket had been placed on the ballot, that of the 'Communist block and those without party affiliations.’”¹⁹⁸

Like everything else in the government of the Soviet Union, the dispensation of justice was carried out under the auspices of Marxist principles. The first People’s Commissar of Justice, Nikolai Krylenko, commented that, “What we're up against here is a deep prejudice... a mistaken belief that people should be tried in accordance not with the Party's political guidelines but with considerations of ‘higher justice’.”¹⁹⁹ Evidently, crime was viewed differently to how it is in the West; the objective of the law was to protect the Communist state from individuals perceived as threats, and

¹⁹⁶ Scalia, A, Judiciary Committee Hearing SH-216, 09/02/2012

¹⁹⁷ Ed, Gsovski, V Grzybowski, K. Government, Law and Courts in the Soviet Union and Eastern Europe New York: Frederick Praeger, Inc., 1959 pp24

¹⁹⁸ *ibid* pp25

¹⁹⁹ Radzinsky, E Stalin: The first In-Depth Biography Paw Prints (2008) pp258

the criminal justice system was a constant means of enforcing the Marxist education of the people through public trials and constant judicial influence. The constitution of the USSR provided for the appointment to judicial office by the Supreme Soviet, which essentially meant that it was the General Secretary who would appoint senior judges in the Soviet Union.

Not only did the communist system fail to gel with democratic principles, but problems arose because it was a state founded on the Marxist economic ideology, and it was this economic perspective that coloured the development of the Russian legal system.

As is demonstrated particularly well in the example of the Corn Ear Law of the early Soviet Union, the Judiciary are loathe to dish out unnecessarily long, draconian sentences, the economics and politics of the time called upon the judiciary to punish harshly those who would steal and, in the eyes of the government, threaten the revolution itself. This was perhaps more true in the time of the New Economic Policy, when the Soviet Union faced the threats of starvation, insurrection and foreign interference, and as a result justice caved to the will of the regime.

Economy and the Law in China

China, which still operates under communist doctrine, is a curious case. The Communist principles advocated by Mao Tse Tung were somewhat different to those of Marx, Lenin and later Stalin. It was Mao's belief that it was the agricultural peasant class, alongside the working class proletariat, that would drive the Communist revolution. This was part of Mao's need to adapt Marxist principles to the conditions in China, where agriculture was still a dominant industry, and the old philosophies of Legalism and Confucianism were still held in high regard. As a result, it is possible to see the Communist revolution in China as a Utopian vision based on Confucian principles and brought about by Marxist revolutionary method.

Of course, the manner in which the revolution was brought about changes little the effect it had upon the Chinese legal system or absence thereof. Until the revolution in 1949 China had followed confucian principles even in legal disputes, and the underused and underdeveloped legal system was all but ignored in favor of mediation.

In 1978, when Deng Xiaoping began the process of Chinese economic reform (改革开放), Chinese politics and economics drastically deviated from their Russian counterparts. Xiaoping, whose ideas on socialist economic principles were at odds with Mao's own political thought, took power after Mao's death in 1976 and began his changes in two stages; the first stage saw decollectivisation of agriculture, inviting foreign investment and permitting entrepreneurs to open businesses; the second stage, begun in the 1980s and ending in the 1990s, involved the privatisation and outsourcing of much state-owned industry to the private sector and the lifting of price controls, protectionist policies and regulations, although state monopolies in sectors like banking and fuel remained. The private sector grew remarkably, accounting for as much as 70 percent of Chinese Gross Domestic Product by 2005, From 1978 to 2010, unprecedented growth occurred. With the economy increasing by 9.5% a year, China's became the second largest economy after the United States.

Of course, the development of an economy is not always an indication of a developing legal or political system, and in many ways the developing legal and political landscape in China can be likened to a period of feudal rule. The reforms of 1978 marked the beginning of the end of communism in China. The twenty years that followed saw the constitution of China evolve to support both private enterprise and personal property rights; and these reforms forced the development of the Chinese political system from being one of tight communist control and economic principles to a colossal yet profitable serf-state, more akin to Stolypin than Stalin.

These reforms sparked the need for a new legal system to reassure foreign investors that they could expect the same legal protections in China as they could expect in any other nation. Despite the revolution and the push toward modernisation that culminated with the Great Leap Forward China still lacked a legitimate legal system to govern civil disputes between private corporations. As a result, China can be used to observe the development of a legal system from scratch. More importantly, China's legal system will develop alongside a young but already successful economic system, based on modern economic principles and which is connected globally by highly developed digital communications technology. As a result, observers will be able to chart the development of judicial attitudes toward modern legal challenges such as the right to die, or the question of protecting the interests of big business, particularly on-line, without historical bias or an already existing but inappropriate framework.

Of course at the present time China's political and legal policies, particularly regarding the internet, are quite different from our own. China has been accused of being responsible for a number of digital attacks against foreign governments and private corporations. "In May 2009, President Obama labeled cyber-attacks "one of the most serious economic and national security challenges" that the country faces. Joel Brenner, former director of the Office of the National Counterintelligence Executive, has identified China as the origin point of extensive malicious cyber activities that target the United States. ... A large body of both circumstantial and forensic evidence strongly indicates Chinese state involvement in such activities, whether through the direct actions of state entities or through the actions of third party groups sponsored by the state."²⁰⁰

Although the Chinese courts claim to "independently [exercise] the highest judicial right according to the law and without any interruption by administrative organs, social organizations or individuals,"²⁰¹ the flagrant abuse of the Internet in China for piracy and cyber-terror attacks with very limited attention from the courts until only recently point to a judiciary with its eyes firmly closed to these kinds of crime, and being directed thus by the state government organs. According to a study by the International Federation of the Phonographic Industry (*IFPI*) almost 100% of music downloaded from the Net in China is stolen.²⁰² According to the Asia Director for the IFPI, Leong May See, "We have huge problems in China" when it comes to enforcing piracy legislation, not least of all because despite paying out an average of \$13,000 per case the IFPI only recoups

²⁰⁰ U.S.-China Economic and Security Review Commission - *Report* November 2009

²⁰¹ en.chinacourt.org accessed 21/08/2012

²⁰² Einhorn, B Xiang, *J Deaf to Music Piracy* Newsweek 30/08/2007

some \$130 for each successful law suit. The result of this is that there is no deterrence from the courts or government to prevent this kind of crime from occurring. It might be argued in this instance in fact that neither state organ is prepared to claim sovereign right to decide on this issue, since the Supreme Court lacks the scope or determination to begin producing leading cases, except for those which receive government approval and become so-called *Guiding Cases*. This inaction is, in part because “Judges are the judicial personnel who exercise the judicial authority of the **State** according to law”²⁰³ (emphasis added). Despite the State having control of decisions made by the judiciary, because the state has been supposedly instrumental in carrying out these kinds of aggressive cybercrimes, by keeping the law in China governing these crimes vague and unevenly applied, the State can continue to legitimise its activities.

The Twin Serpents: the Constitution and the Economy

The digital age has given rise to copyright piracy on a scale not seen before, and the response from the industry has been to try and use the courts, whose “general use of the Internet is ‘very pedestrian’”²⁰⁴ to set an example, pressing for huge awards in damages against defendants. Recently Joel Tanenbaum, a student in the United States, was sued for copyright infringement on thirty songs, which he had downloaded and distributed via the Internet, and was ordered to pay damages of \$675,000²⁰⁵. Excessive punishment like this while not deterring piracy²⁰⁶ harms the economy by removing real income from a consumer, and harms the rule of law.

The creative arts industry has been slow to adapt to changing economic conditions in the past, and reacted similarly during the introduction of film with sound in the 1930s. It was the main concern of the music industry at the time that permitting soundtracks in film would destroy the music industry as it existed.^{Mark} More and more in the recent past however, there is increasing support by governments internationally for curtailing copyright violations with a series of bills that, it is argued, would seriously curtail rights to privacy and communications. These include the *Digital Millennium Copyright Act (DMCA)* 1998.

This intertwining of economic and political-philosophical thinking is not unique to what might be described as peculiar or novel legal systems as compared to our own. In fact there has been a growing trend in the study of both economics and the law of the constitution to view political and legal systems as being fundamentally connected with the economic system of a state, which puts the ideals of a state constitution at risk.

To elucidate; the object of a constitution is to safeguard the rights and responsibilities of both the state and the citizen as inviolable *superior* laws; to protect the means and manner in which a government can claim a mandate to rule, and afterwards the manner in which it is to rule. Deviation

²⁰³ JUDGES LAW OF THE PEOPLE'S REPUBLIC OF CHINA, Article 2 (Adopted on July 1, 1995)

²⁰⁴ Kessler, GC *Judges' Awareness, Understanding, and Application of Digital Evidence*, PhD Thesis Graduate School of Computer and Information Sciences Nova Southeastern University 2010

²⁰⁵ *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 [2010]

²⁰⁶ “[in the same year] worldwide, roughly 41 percent of all software installed on personal computers [was] obtained illegally, with foregone revenues to the software industry totaling \$53 billion.” - *Software Piracy on the Internet: A Threat to Your Security* A Report by the Business Software Alliance, 2009

from these rules is said to be *unconstitutional* and, as a superior law, carries with it greater penalties not just in law, but in the common understanding of the citizens.

However, in times of great financial difficulty, the Chancellor of the Exchequer is able to enact policy that would lead directly to a worsening of socio-economic conditions viewed as real income, often dressed up in more acceptable terms such as ‘belt-tightening’ or balancing the budget. This is perhaps best expressed by the founder of the modern school of Constitutional Economics, Hector McNeill, who said,

“It [is] evident that Keynesianism [is] associated with ... generating policy-induced implications for segments of the economy causing them to suffer outcomes which were neither reasonable nor required. For example a common outcome of policy decisions has been corporate failures, unemployment and house repossessions. Governments and economists have tended to dismiss such perversity by wrapping it up in a parcel on which they write "medicine", "belt-tightening" or even "adjustment". However, in constitutional terms, when such events result directly from policy decisions they represent a form of arbitrary collateral damage.”²⁰⁷

These policies, especially in times of recession, often create economic ‘winners’ and ‘losers’ just as success in times of economic growth would create the same: those who succeed and those who do not. In a recession however, when these policies are enacted, it is not market forces that worsen social and financial problems for citizens, but the policies themselves that create public sector unemployment, slash interest rates and increase tax (especially point-of-sale tax schemes such as VAT and fuel duty).

We presuppose that in the courtroom any conflict between industry and society must be a zero sum game; - that is, one side must win to the other’s detriment. In order for a factory, for example, to produce a good, it must also produce waste smoke, which spreads across a nearby residential area²⁰⁸. The residents object to the smoke, and bring a civil suit. As a result a judge might force the factory to pay for every ton of gas they produce, relative to the damage caused to the residents. This method forces the factory to reduce production of the smoke, and thus the product which they produce, which means the profitability of the factory will be damaged. If the judge is persuaded that the residents nearby are not affected then the factory can continue producing harmful emissions. In this circumstance there is no compromise, and it leads inevitably to a greater harm than good for society. Regardless of the outcome society is damaged in some way in this scenario, by focusing the court’s attention on choosing between public health or economic health.

²⁰⁷ McNeill, H.W., *"Price Performance Fiscal Policy - A Real Incomes Approach"*, Charter House Essays in Political Economy, Hambrook Publishing Company, Portsmouth, 1981.

²⁰⁸ I have borrowed this example from Coase, R *The Problem of Social Cost*, 3 *Journal of Law and Economics* (1960). I would like to echo his apologies to economists, who may be rightly indignant at the use of technical terms they may consider misused, but which I have substituted for clarity and for the readers’ sake.

With this in mind, the question to be asked is whether a money bill could be challenged in court on the grounds that it is unconstitutional. In this section it shall be shown that if a money bill such as a budget were to be challenged there could be a strong legal argument to permit ignorance of its rules, supported by the cases which have been explored so far in previous chapters.

This argument should primarily focus on the rules governing Human Rights, especially those in the European Convention and the UN Declaration. These rules have made challenging the government on its decisions much easier, as they provide a codified framework of rules in which the government must operate. Not only that, because the operation of government extends so widely into people's lives there exist countless variations of facts that could challenge a government's action which have not been litigated upon already. In other words, there have not been enough instances of litigation in the European Court of Human Rights to properly define the limits of actions brought against governments for acts against the economic health of its citizens. We hear in times of economic woe of government 'belt-tightening' policies, but although they may bear some significance to the improvement of the country economically, they lead to deliberate damage against those in work, who claim benefits of some description or another or otherwise rely upon the government to assist in some way²⁰⁹. For example, is it constitutional for a government to enforce a policy that charges an additional twenty per-cent value added tax against goods which are served hot but not meant to be consumed immediately, such as cornish pasties bought from a baker? This question may not at first appear to be a legal one, but such a tax would have particularly damaging implications to small businesses and consumers who, in times of economic crisis, would spent in greater amounts on products such as pasties and pies which are inexpensive and immediate.

In the end, the comparison is not drawn against the tax itself, but against the manner in which the tax is brought about and the manner in which government imposes it. The Bill of Rights precludes arbitrary taxation by royal prerogative, but that is precisely the pattern that is appearing in British politics. Harsher and harsher regimes of taxation and austerity are pushed through Parliament first at the Commons stage, where a Budget bill will only be defeated as a sign of revolt against the government of the day (but can be debated upon), and from there is made into good law without any oversight by the Upper House. Although this process speeds up the timetable for the bill's assent it provides much more limited protection

Backdoor Privacy Laws: Buying Justice

This section will lead on to comments about judge-made laws and how they are created and evolve. Judges create new laws (super-injunctions, for example) supported by the weight of litigation and availability of funds for appeal;, - one might think of it as 'buying' a new law from the courts. The courts would be abandoning their principles of justice and fair trial by allowing themselves to be manipulated by money, though the fact that a litigant has money does not mean that the courts will

²⁰⁹ Ackerman, Bruce, "Constitutional Economics/Constitutional Politics" (1999). Faculty Scholarship Series. Paper 124

support their claim. The fact that a party has more cash only means that it becomes easier financially to appeal (since litigation in an appellate court can be very expensive), where he may find a more favorable judgement. While this does not guarantee any certainty litigants with limited funds, even for a hearing at first instance, cannot pursue a different ruling at the higher courts should they not achieve the outcome they want. The result of this inequality was the introduction of so-called 'Super-Injunctions,' which be explained in greater detail below.

How did Super-Injunctions Come About?

Super-injunctions began their lives effectively as gag-orders, preventing mention not only of what it is that the order concerns, but also preventing mention of the order itself. This development in the common law, although it highlighted neatly the authority of judges to make new laws, was also a cynical exploitation of the judiciary by the wealthy to protect their secrets. Not only did this stifle freedom of the press, but also the more fundamental right to freedom of expression. in the case of John Terry's super injunction, the order not only gagged the press but also the young woman with whom he was accused of having an extra-marital affair. This was clearly too far an extension of the authority of any injunction, and created a situation that would allow for a very serious breach of another persons rights. Such gagging orders give an unfair weighting to the right to privacy of the richest individual and as such could not have continued as good law.

Although this super-injunction regime is largely thought of as a failure, it nonetheless proved that judges are still able to create rules where there is a gap in the statute law, or where judges deem it to be appropriate. The significant public and political backlash that accompanied the super-injunction decisions did serve to show that perhaps judges should bear in mind the public support for a privacy law created through the courts, and remember that even though the courts have the right to create new law, this is not necessarily a right that should be invoked without serious consideration for its wider impact. The relationship between parliament and the courts should therefore be one of symbiosis. Both the courts and Parliament have a responsibility to uphold the rule of law, and to protect the lives and rights of citizens in accordance with the constitution. To do this, Parliament and the courts should not see themselves as competitors or rivals, but as two separate but equal colleagues, who support each other and correct each other when it is appropriate, and not when it is convenient politically. As most people would no doubt argue, the law is too important for it to be used as a tool to garner support or to encourage derision.

Chapter Six - *Judicial Revolution, Mission Creep?*

“The judge, by the way, was the King; and as he wore his crown over the wig, did not look at all comfortable, and it was certainly not becoming.”²¹⁰

Lewis Carroll

In the previous chapters, we have seen the effect that an active Judiciary can have upon a common law system, especially where that system bears some similarity to our own. In the United States and New Zealand, the comparison is simple because their legal system is so similar to our own. In the following chapter, we shall expand on this exploration of foreign jurisdictions, however rather than using them to draw comparisons to the legal system as it currently stands, we shall be using the likes of Pakistan and Thailand to demonstrate the potential political fallout from such an increase in Judicial Activism in the United Kingdom. We shall use these jurisdictions as an allegory to what the future may hold should Judges take a more active role in policy.

Is it Possible to Challenge the Sovereignty of Parliament?

In 1702 Chief Justice Holt, influenced by Coke’s assertion that a statute could be declared void, judged in *City of London v Wood*²¹¹ that, “if an act of Parliament should ordain that the same person should be party and judge in his own cause, it would be a void Act of Parliament; for it is impossible that the same person should be Judge and party, for the judge is to determine between party and party; and if an act of Parliament can do no wrong, though it may do several things that may look pretty odd; for it may discharge one from the allegiance to the government he lives under, and restore him to the state of nature; but it cannot make one that lives under a Government Judge and party.”²¹²

This judgement provides evidence of the Judiciary actively seeking to follow Coke in a way that is unprecedented. In *Bonham’s Case* as we have seen above, Coke sought to avoid a party being Judge in his own cause, and declared that a statute must be void if it reached this outcome, a serious blow to the idea that a Statute can only be repealed by the will of Parliament. Almost one hundred years later, Holt reached the same conclusion and demonstrated that same flaw in the currently held belief that Sovereignty lies with Parliament. Coke and Holt differ in one important respect, however. According to Baroness Hale’s interpretation of Coke’s judgement, his opposition to the absolute nature of a Statute was based purely on his distaste for the Sovereignty of the King. According to Baroness Hale²¹³, after the Revolution we succeeded as a nation in establishing Parliament (in a closer form to the kind that we have today), and so Coke’s impassioned judgement against Statutes

²¹⁰ Carroll, L, *Alice in Wonderland*

²¹¹ 12 Mod 669

²¹² *ibid* at 687-88

²¹³ Interview with Baroness Hale, see appendix

that defy right or reason should be remembered not as an important precedent for overruling Parliament's will, but as a footnote in the development of our modern legislature. Holt muddied the waters however, when he decided to follow Coke in his decision in *Wood*. Doing so has meant that Coke's judgement is more firmly defined as good law, and standing precedent. In so doing, Holt has made Coke more significant than he could have imagined in the development of the concept of Judicial sovereignty.

Naturally, Judges today would be extremely cautious to follow Coke, or Holt, in one of their own judgements. That doesn't limit their ability to void statutes, however. There are still a host of decisions available to the Courts that would give them avenue to do so. *Anisminic*, one of the most principally important constitutional cases of the twentieth century, clarified that where a statute removed the Courts' right to make judgements on points of law, the Court would ignore that section of the act entirely. Further attacks on the validity of statutes, explored in the previous chapters above, serve equally well as means of excluding statute from the spectrum of law. Should a case like one of these be encountered over an issue of real significance to the operation of Parliament, such as that of expenses, or over an issue vital to the policy of the Government of the day, such as control orders, it is easy to imagine that there would be a very real constitutional crisis on hand.

For example, in the wake of the political furore that erupted after the decision in the Supreme Court to allow appeals to the Sex Offenders Register in 2010, members of the Government openly criticised the decision of the justices as being irresponsible. On the 16th February 2011 during his weekly Question Time session in the House, the Prime Minister, David Cameron, described "how completely offensive it is, once again, to have a ruling by a court that flies in the face of common sense. Requiring serious sexual offenders to sign the register for life, as they now do, has broad support across this House and across the country. I am appalled by the Supreme Court ruling. ... I can also tell my hon. Friend [Philip Davies, Conservative MP for Shipley] that a commission will be established imminently to look at a British Bill of Rights, because it is about time we ensured that decisions are made in this Parliament rather than in the courts."²¹⁴

Further attacks were made in a special statement to the House that day by Theresa May, the Home Secretary, who said that, "It is time to assert that it is Parliament that makes our laws, not the courts; that the rights of the public come before the rights of criminals; and, above all, that we have a legal framework that brings sanity to cases such as these."²¹⁵

Of course, it is Parliament's right and proper function to produce statutes, which have the benefit of being considered "real" law before they are subject to implementation. Their mere existence as statute should grant them an authority beyond that of ordinary common law decisions. For many statutes, this remains true for its entire operating life. For many Parliament-made rules, such as the

²¹⁴ Hansard, 16 Feb 2011 : Column 955

²¹⁵ Ibid: at Column 959

thousands of tax codes and statutory instruments in place in the United Kingdom today, there will be no judicial review of their implementation. However, for those that are questioned by the court, they must gain the assent of the judiciary before they can claim to be immutable. This leads us to the inevitable conclusion that all statutes are open to judicial review, and so all statutes *could* be overturned by the Judiciary.

This is not an easy concept for the Judiciary to accept and follow, since the nature of their training inclines them toward sustaining the status quo with Parliament. Public opinion of the Courts often lists violently from endorsement to derision, depending on the nature of the judgement handed down. The Daily Mail, a British tabloid paper known for its extreme reaction to political scandal, said that David Cameron “declared war on unelected judges,” who have, the paper claims, “put the human rights of paedophiles and rapists before public safety.”²¹⁶

Equally, the Supreme Court suffered similar public consternation when it handed down a judgement vindicating bank charges for returned cheques and unauthorised overdrafts in 2005. Members of the public expressed their outcry against the decision, and their misunderstanding of the role of the Courts was obvious. One member of the public commented said that he believed, “The members of the Supreme Court are no doubt receiving backhanders from the banks, or perhaps they go to the same clubs with the executives of the banks.”²¹⁷ Others were more vocal in their opposition to the judgement. Writing under the monicker ‘Chris,’ one reader from Liverpool said, “Isn't it strange that now the Government owns most of our banks, they suddenly decide that the 'unfair charges' are perfectly legal after all! Will Labour never stop finding ways to tax this population via ‘stealth taxes?’”²¹⁸ A later attack by the Conservative Member Michael Howard was more direct. In a statement he made in 2005, he warned that “Parliament must be supreme. Aggressive judicial activism will not only undermine the public’s confidence in the impartiality of our judiciary. It could also put our security at risk - and with it the freedoms the judges seek to defend. That would be a price we cannot be expected to pay.”²¹⁹ Mr Howard is correct, increased judicial activism would indeed demonstrate a degree of partiality by the judiciary, but it does not seek to favor one party over another.

In the situation Mr Howard’s comments reflect, where the judiciary become increasingly political over the use of the Human Rights Act, the judiciary are actually siding with the rights of the British people. This is true, even in the case of indefinite detention, where the group the judgment directly effected is a minority or criminal. Though the group were branded “extremists” both by Mr Howard and by the press, the Courts recognised, and continue to recognise, that Human Rights should be applied without exception. Perhaps what Howard saw as the judiciary being “difficult” was in fact a

²¹⁶ Shackman, T, End this human rights insanity: PM's fury as judges rule paedophiles and rapists should have chance to get off sex offenders' register, Daily Mail, 17th February 2011

²¹⁷ ‘Alastair’, Salem, USA, 26/11/2009 04:07: <http://www.dailymail.co.uk/news/article-1230742/Bank-charges-Britains-biggest-lenders-avoid-repaying-20bn-unfair-charges-shock-Supreme-Court-decision.html>

²¹⁸ Ibid: ‘Chris’, Liverpool, UK, 26/11/2009 06:17

²¹⁹ <http://www.guardian.co.uk/politics/2005/aug/10/uksecurity.terrorism>

closer insight into how the courts should behave when faced with a decision that brings them into a confrontation with Government and policy. This is a view supported by at least a few politicians, such as Simon Hughes, the Liberal Democrats' president, who said "British judges are the people's best safeguard against misuse of power by ministers and failures to guarantee human rights by parliament."²²⁰ This phrase is significant, because it places the Judiciary in a position of authority over ministers, to ensure that they use their position and powers properly. If this were so, then that would mean that the Judiciary have a greater role and significance in policy than otherwise believed. If the Judiciary have, or perhaps should have, the authority to stop ministers from abusing their power, then the Courts would adopt a role that actively seeks to change and affect policy *in* Parliament.

It is still clear however- that there is a tremendous disconnect between the Courts' role in political decisions and the public's interpretation of that role. If there were a direct challenge to Parliamentary Sovereignty, these examples show that there is a public tendency toward mistrust of the Courts which is separate from their mistrust of politics and politicians, but also the obvious failure to appreciate the separation of powers that enables the Courts to operate independently from Parliamentary, and thus political, influence.

Politicians' complaints directed toward judgements from the Court seem to be more influential over public opinion, alongside the power of the press to turn the tide of public sentiment, than the Courts' ability to persuade using their judgements. Seemingly, although willing to uphold the Rule of Law, the ideals of freedom, and our inalienable right to fair and open justice (as demonstrated in *Wood, Bonham, Control Orders* c), the unwillingness shown by Justices of the upper Courts to accept their prominent role in policy and the political also engenders a popular, if inaccurate, feeling of mistrust among what the public perceive as unelected judges pursuing matters of policy that should, by rights, be left to Parliament.

So although we have decided here that there would be at least *some* public opposition to a more active judiciary in the political landscape, there have been examples in other jurisdictions, including some that follow our own Westminster model, that show the judiciary successfully overcoming the bonds of Parliamentary Sovereignty and establishing themselves in a new, central position in the political landscape. Two such examples can be found in Southeast Asia, where the influence of the courts on politics and on Schmitt's 'political' has been much more significant this century than for their western counterparts. In jurisdictions like Thailand and Pakistan, "a wave of democratization hit the region ... and a majority of states there altered their constitutions to give more attention to rule of law, accountability, and rights issues. The effect was to empower the court."²²¹ In Pakistan, despite the civil unrest which continues to plague the political elite, the Courts have adopted a much more benign role amongst the population.

²²⁰ The Today Programme, BBC, 10/08/2005

²²¹ Dressel, B, "Judicialisation of Politics or Politicisation of the Judiciary?" 23 Pacific Review 5 [2010] 671, at 672

Judicial Activism in Southeast Asia: Successful Challenges?

With the revolutions of Southeast Asia as a backdrop, I intend to demonstrate a thought experiment in which I shall present a challenge to Parliamentary Sovereignty. The impact of this challenge will be debated and the possible outcomes, based on previous cases and examples, will be put forward. We shall be focusing in this chapter on examples from other jurisdictions where the judiciary have taken an over-active political role, or one where the political authority of the state has been superseded by the judiciary themselves, taking on a direct role as the sovereign in both the legal and political senses of the word. We shall examine how this has affected the state's political and social structure, how laws operate and how the people are able to express their wishes.

In Southeast Asia, the Courts have developed a far greater prevalence in politics than in other areas of the world yet, in Thailand in particular, "current scholarship on Thailand has yet to draw much attention to this phenomenon"²²². In Pakistan the courts have instigated near-revolution against the dictatorship that, prior to 2007, Judges and lawyers had sworn allegiance to simply as an "occupational hazard." According to one observer, however, since the Chief Justice, Iftikhar Chaudhry, dared to challenge the constitutionality of an order by President Musharraf asserting a State of Emergency (Which places the Pakistani Constitution on hold). Chaudhry was immediately removed from office and placed under house arrest, and the next most senior Judge in the Pakistani Supreme Court was ordered to be his replacement. However, the Supreme Court ruled to overturn the dismissal, and he returned to work as Chief Justice once again.

As a result of this judicial activism, "the average Pakistani distinguishes very clearly between the judiciary and the establishment [executive] ... he now not only recognises the judiciary as a fully autonomous arm of the State but also looks to it to save him from the establishment as well as the legislature, the feudalocracy, his local SHO and everybody else in between."²²³ Of course, it may well mean that rather than there being a greater trust between the population and the Judiciary, it is just as likely that this is a result of a greater understanding of the courts' role in the political system, and so a broader awareness that the Judiciary's role in a political system is to prevent the executive and the legislature from overstepping their legal bounds.

With this in mind, we can see that should the political class challenge the rights and freedoms of the people in the United Kingdom; and the courts, as would be expected, defend those rights and freedoms against encroachment by the government, then the tide of public opinion will inevitably turn in the judiciary's favor. More than this, that defence would give the courts a legitimacy to rule, a mandate from the public of the United Kingdom that no government could even hope to gain from an election, even one with a huge majority.

²²² *ibid*

²²³ Naqvi, F, On the Judicial Revolution <http://www.pakistantoday.com.pk/2010/12/on-the-judicial-revolution/>

Unlike in the United Kingdom, where the role of the courts still appears to be somewhat misunderstood to the general public, in Southeast Asia the Courts are becoming an important influence on policy decisions. In the Philippines the Supreme Court had begun to regularly intervene in the country's deadlocked politics, but as we have seen in Pakistan, this judicial activism is becoming more widespread across the region. After a spate of disputed elections the Indonesian Constitutional Court cleared the way constitutionally toward a more open democratic process through a number of controversial decisions in 2009, and the Malaysian High Court has also found itself entangled in political argument; theirs involving the use of the name Allah, a debate made more significant given the complex relationship faith groups have in Malaysia, alongside a second trial of Anwar Ibrahim, the Malay opposition leader.

It is fairly clear that the courts would intervene in politics if the circumstances absolutely called for such an approach, and so the question is not whether the courts could ever hope to have such influence in political processes in this country, but which circumstances would drive our Judiciary to intervening so directly in this way. The circumstances do not require the courts to perform any constitutionally outlandish action, such as bringing proceedings against the Government itself, as Chaudhry's Supreme Court did in Pakistan, but only require an unreasonable government to attempt to exclude basic premises of the constitution. This is a much simpler task for judiciaries in countries which have a written constitution. After all, it is easier to see which of your rights have been infringed by the government when they are neatly codified into a single document.

A further example of how the judiciary and the executive can be caught in conflict was demonstrated in Fiji, when the latest of a series of coups instigated by the military brought down the democratic civilian government in 2006.

*Qarase v Bainimarama*²²⁴: When the Relationship Breaks Down

Fiji is by no means a traditional example of a democratic nation. Since its independence from the United Kingdom in 1970 the Pacific island state has suffered a total of four coups from 1987 to 2006. In the course of these coups and changes in government, the country has undergone a number of massive constitutional changes both positive and negative. These coups have also demonstrated the frailty of the relationship between the Courts and the government, and prove the assertion that ultimately the authority does indeed lay where the tanks are.

Of course the political and constitutional differences between the United Kingdom and Fiji put some distance between the fates of the two nations, given that Fiji is currently under military rule and not a democratic political system. Not only that, but Fiji has a definite written Constitution which should help to safeguard the democratic process, the operation of government and the rights and responsibilities of citizens. In this situation, however, it seems that the Constitution has lost its

²²⁴ *Qarase v Bainimarama* [2009] FJCA 9

force, and proves to a certain extent that all constitutions are in the end simply paper promises, only as good as the word of the men we ask to keep them.

The facts of the case are quite straightforward, but it is how this case has developed that has changed how the Constitution and courts are seen as a safeguard against government abuse. After an uprising in 2000, the government in Fiji was ruled by the SDL, the governing political party in Fiji, and led by the Prime Minister, Qarase. In 2006 the Republic of Fiji Military Forces (RFMF) led by Commander Frank Bainimarama began what was called a “Truth Campaign”²²⁵ apparently because it was feared that SDL and Qarase intended to pursue racist policies that denied political involvement to the Indian Fijians settled on the islands, and unfairly forced ethnic Fijians to take up roles in politics that should be filled by Indian Fijians.

Not long after this, Bainimarama demanded that the government submit to nine demands, or else resign. These demands focused generally around the same themes: the instigators of the 2000 coup being brought to justice; the withdrawal of certain Bills in Parliament which may worsen economic inequality based on racial grounds; denying intervention by foreign authority; dropping court proceedings against the military for statements made earlier in 2006 and formally addressing concerns about government spending and internal governance.

Although Qarase did attempt to reach a compromise with Bainimarama during a meeting in New Zealand in November 2006, the military nonetheless began a coup d’etat on the 5th December 2006. This led to the dissolution of Parliament and the dismissal of the cabinet. The President, Ratu Uluivuda, appointed Bainimarama the caretaker Prime Minister, and he subsequently appointed a military cabinet. It was also announced that Fiji would be placed under a state of emergency, placing more authority in the military, severely curtailing freedom of speech and of the press.

In 2009 the Appeals Court of Fiji, the second highest court in the country, ruled that the coup had been illegal, as were the emergency powers that had been in place. It also declared that the interim government that had been in place since January 2007 was ‘invalid’. This decision effectively prompted the dissolution of the government and forced the resignation of Bainimarama from the position of Prime Minister, who returned to his position as commander of the military. Uluivuda was ordered by the court to set a date for democratic elections, and appoint a new Caretaker Prime Minister, who was to be a “distinguished person” and neither Bainimarama or Qarase.

The next morning, Uluivuda announced news that elections would be held for a new government not later than 2014, and that Bainimarama was to be re-appointed as Prime Minister. It was also announced that all judicial appointments were to be dissolved, indicating that the regime was intent on ignoring the authority of the courts and the constitution. It is significant that the military

²²⁵ Diplomatic Cable 06SUVA109, *MILITARY INSERTS ITSELF INTO FIJI'S ELECTION CAMPAIGN, LASHES OUT AT POLICE*, Dinger, L (U.S. Ambassador to Fiji) accessed at <http://wikileaks.org/cable/2006/03/06SUVA109.html#> 03/09/2011

government²²⁶ felt that these actions were justified and leads to the question of how a proven, decorated and distinguished military leader²²⁷ could feel that his only choice in changing and improving his country's system of government was through the abrogation of the constitution, a document considered in other jurisdictions (America, for example) and especially in a legal context to be almost sacred. It belies a philosophical exception to the rule of law, which grants a moral excuse where, as the adage goes, 'an old man plants a tree under which he knows he will never sit'. In other words, Bainimarama is permitting himself to commit acts which are otherwise unacceptable (for example, establishing himself as a dictator and abrogating the constitution) in the hope that under his exclusive direction he can fix the problems he sees in Fiji in order to produce long-term stability. Although the constitution is considered to be the Sovereign, and if not the constitution then the President in Fiji, Bainimarama has completely ignored this sovereign authority and claimed it for himself, as well as ignoring the direction of the court that said the government must be re-appointed and elections held immediately in order for Fiji to be given a "clean slate". Although he may not be the legitimate leader in Fiji he is now the *de facto* sovereign and this seems not to have caused many political or legal ripples, besides the challenge against him by his predecessor Qarase.

Of course, the order of the court was to dissolve the government and declare new elections in order to give Fiji a "fresh start," and this Bainimarama did to the very fullest he could. He demolished the legal system and rebuilt it, re-appointed his own cabinet after he was forced to declare its dissolution, and then set about drafting the *People's Charter for Change, Peace and Progress*, which is an attempt to create a manifesto for change in Fiji and directed by Bainimarama himself without partisan interest from politicians, many of which he considered to have racist tendencies and an unwillingness to change. This is also true of the Constitutional Commission, set up to draft a new Sovereign document for Fiji. For Bainimarama, the most important thing for the Commission is that "The commissioners should not be giving a running commentary on the proceedings, they should be completely independent ... They should not give preferential treatment to certain segments or individuals in society who they meet privately and they should adhere to the laws in Fiji."²²⁸

For the Government of the United Kingdom, it is much more difficult to exclude rights from the population because there are so many different Statutes, common law decisions and international treaties governing our freedoms. Since we have never had a formal constitution, the rights we now consider to be fundamental bear no greater or lesser significance in fact than any other law. In order for the government to usurp our right to freedom of speech, for example, it would not simply be a case of repealing the affiliated section of the Human Rights Act. The Government would need to legislate in a way that would overturn the judicial decisions of every case of the Superior Courts of

²²⁶ Which was, ultimately, ruled by the will of Bainimarama.

²²⁷ By the 2006 coup Bainimarama had already been awarded the UN Peacekeeping Medal and the Fiji Republic Medal, among others.

²²⁸ <http://www.abc.net.au/news/2012-08-16/an-fiji-bainimarama-ghai/4203912> accessed 11/09/2012

Record that govern freedom of speech, privacy and general publication. Doing this would be a very grand exercise, and would not go unnoticed by the population, the judiciary and the international community. Without upsetting their constitutional status quo, the Judiciary would make decisions when required in much the same way as they do now when excluding statutes: they would simply claim that Parliament did not intend to exclude freedom of expression in this or that circumstance; or they would do as they did in the Control Orders case, and simply interpret the Act into something it did not start out as. Following this, any attempt to usurp the authority of the Courts by Parliament would be very dubiously entertained by the Judiciary, and would no doubt be widely condemned by the legal and international communities.

Of course, we must push this experiment further, and continue it to its next logical step, which is the reaction of the Judiciary to a serious constitutional crisis, set into motion by the Government.

We have already seen in previous chapters that the relationship between the Judiciary and the Government is not always one of mutual agreement and camaraderie. However, despite the press continually reminding the people of the United Kingdom that the judiciary are unelected and undemocratic, international examples have shown that most Courts, where their members respect the Rule of Law, will look very harshly upon any attempt to exclude the democratic process, or constitutionally guaranteed rights of citizens. As was the case in Pakistan, where the dictatorial president attempted to suspend the constitution and institute a state of emergency, the Courts are, in generally democratic states or states still developing the notion of democracy, quick to ensure that the right to proper representation of the people is not abused by those in charge. Given that the United Kingdom can be proud of the historical development of human rights and Constitutional freedoms that have been innovated and nurtured, in part thanks to its legal system, it would not be a terribly large leap to assume that the Supreme Court, along with the wider Judiciary, would be equally inclined to support this doctrine and take appropriate action against the Government in order to prevent a more catastrophic miscarriage of justice against the British people. We must distinguish first between the *kinds* of action available to the Judiciary, which are defined and constrained by certain principles of legal theory.

As we have already seen, there is a distinction between seeing a rule as being intrinsically wrong, as Coke did in *Bonham*, and regarding a rule as morally questionable. For the latter position, we look to the Sovereign, or the author of the rule, to establish moral blameworthiness.

We discussed in Chapter one that two schools of thought relating to this issue exist in law, and are called Natural Law and Legal Positivism. Applying one or the other to this scenario is challenging, as attempting to reconcile the two theories is a complex business. For the most part, just like courts of Pakistan, Thailand, Malaysia, and the Philippines, whose actions have demonstrated the same, the Judiciary in the legal system of the United Kingdom are concerned with the wellbeing of the citizens, and not the operation of the State. Although they may accept that it was the will of

Parliament to author a Statute to begin with, and that in other circumstances the Statute might not cause an injustice, the Courts will still look unfavorably and wholesale upon Statutes that deliberately seek to exclude judicial review, or curb the rights of citizens. This indicates that in fact Judges are Natural Lawyers, even if they don't see themselves in those terms or even appreciate their meaning.

For natural lawyers, rules draw their foundation from the distinction between Ordinary and Superior rules. Certain rules, such as constitutions, are more significant and are given greater worth in law than other statutes, and other laws must harmonise with them. The source of this superiority could be called sovereign, and in states with constitutions, that source can often be found in the wording of the document itself, and is almost always assigned to the population. But the problem with constitutions is that, as with all law, if the Government chooses not to uphold it, then it becomes meaningless. That is why the Judiciary are all the more significant in any legal system. All three of the Soviet constitutions, that of 1924, 1936 and 1977 all talk in one way or another about the so-called "dictatorship of the Proletariat"²²⁹ and of Sovereign power belonging with the common people of the state; but the reality, as is commonly known, was much different. Far from having power, the people of the USSR were brutally repressed by a system of government that involved itself in a huge proportion of the population's lives, and whose legal system worked more to help the government's oppression than it did to guard against constitutional abuses, since the Justices of the Supreme Court were responsible to the body that elected them, the Supreme Soviet.²³⁰ As a result, we can see that too great an involvement in politics by the judiciary can lead to the Courts becoming nothing more than a part of Government involved principally with self-interest, thus depriving the population of justice and recourse against the State. The separation of the Judiciary and Government is of course a vital principle in the Rule of Law, and ensures that there is always an institution available to keep another from overstepping its authority and infringing the rights of citizens. This can apply equally of course to any branch of the establishment (these are the Judiciary, the Legislature and the Executive), who should in any government maintain necessary checks and balances on each other.

Given then that in a democracy such as ours the courts would tend to decide in favour of defending the rights of the individual over the interests of Government, we can assume that if there was a significant challenge, most likely by implementing a statute against what we consider to be a *fundamental* right (i.e. Rights that we consider to be inalienable because of their age or the significance of the document that enshrines them, such as habeas corpus in *Magna Carta*), the Courts would exclude that challenge by failing to enforce the statute, or by interpreting it in a way

²²⁹ Constitution of the Soviet State Republics, January 1924, Article I (Introduction), Article 1 of the '36 Constitution reads that "The Union of Soviet Socialist Republics is a socialist state of workers and peasants" and Article II of the '77 Constitution says "All power in the USSR belongs to the people".

²³⁰ "Judges and people's assessors are responsible and accountable to their electors or the bodies that elected them, shall report to them, and may be recalled by them in the manner prescribed by law." Ch XX Art 152, Constitution of the Soviet State Republics, Novosti Press, Moscow 1985

that perverts its meaning until it cannot operate as Parliament intended, such as was the case with the Supreme Court's treatment of special advocates.

The European Declaration on Human Rights, which was incorporated into the law of the United Kingdom through the Human Rights Act, lists the most important rights that have been recognised by the states of the European Union, and by the wider international community,²³¹ specifying rights which are completely inalienable, as well as circumstances where a right can be constrained by a state's government. Those that cannot be broken by a state regardless of the circumstances include the right against torture and against slavery, while those which are unacceptable in all save a few circumstances include the right to life, which can be constrained where the prescribed penalty in law is death; and the right to liberty, which can be constrained where a person is detained by the state for the commission of a crime.

It is the Human Rights Act that has done so much to give power to the Judiciary since it was incorporated. The Act gives judges the authority to issue a declaration of incompatibility where they believe that an Act of Parliament does not work properly with the rights of the Declaration or with directly applicable European Union law, which means that judges can, legitimately, directly involve themselves in politics, not because they feel that it is their place to, or at least this is not a perspective that has been widely circulated; in fact, the justices involve themselves in politics because the law makes that action available.

However, although a question governed by the Rights incorporated by the Declaration would provide the most scope for judicial activism, which may result in a law being overturned, as well as being a topic that would gain significant public attention, such a question would not provide enough scope for the Judiciary to properly challenge the authority of Parliament as *sovereign*. It is not enough for statutes to be rendered incompatible; constitutionally, the most significant challenges to Parliament have come about when the Judiciary have attempted to limit the authority of Parliament to govern and police itself and its members. More controversy still has come about from Parliament attempting to limit the jurisdiction of the courts into its business. As a result of these observations, it becomes clear that the only real constitutional challenge that could come about with any real impact would be one similar to that of the *Sheriff of Middlesex's Case*. This case, which has already been explored in greater detail in chapter two, was concerned with the jurisdiction of Parliament in matters of breach of Parliamentary procedure.

Were a similar case to arise today, though it would need to be one that challenges Parliament's procedure much more significantly than *Middlesex*, the results could be phenomenal. Parliament could become limited even in the scope of disciplining its MPs, or regulating its finances. Of course, the most significant challenge would be to assert that a Bill passed by Parliament and which

²³¹ Since most of the rights it identifies, such as the right to life and habeas corpus are shared with other key documents, such as the United Nations Declaration on Human Rights, the American Convention and African Charter on Human Rights.

has received Royal Assent is not automatically valid until it has been reviewed by the Judiciary beforehand, but this would require the most unique and limiting of circumstances for it to become good case law.

Theoretical Challenges to Parliamentary Sovereignty

We shall look therefore to Judicial Review to provide us with an opportunity to challenge Parliament more directly. In this case, as we are focusing on the application of Judicial Review to challenge Parliament's Sovereignty, we are limited in scope to challenging Parliament on three points of political pressure. The courts could use any one of these three avenues to bring about the required challenge to Parliament, which should result in a change in their relationship in favour of the courts. The First method would be a challenge to the Courts' jurisdiction by Parliament. Any attempt to exclude the Courts from examining a case on a point of law has been avoided by the judiciary. For specific examples we need only look to *Anisminic*, as well as the more recent terror cases, as well as *Woolas*. In these circumstances, the court can do nothing but follow the decisions from these earlier cases. After all, what purpose would a court hold if Parliament excluded its right to examine questions of law? Of course, the courts could follow the methodology of their decisions in the *Belmarsh* cases. In these circumstances, as we have already explored, the courts were able to reinterpret the statute in a way that allowed for operation of transparent judicial procedure by excluding the use of closed evidence and special advocates. In similar circumstances, we can be confident that this is the course the Judiciary will take again.

The second challenge would be on the grounds of Parliamentary procedure. Of course, it isn't possible for the courts to simply challenge the way in which Parliament goes about its business, and there must be an instigating action. In the case of MPs' expenses, it was criminal proceedings brought about by a Metropolitan Police investigation. As a result of this investigation, the courts were able to examine in detail the way in which Parliament records its expenses records, and the justification Parliamentary members offered up for its inclusion in the convention of Parliamentary Privilege. Put simply: because the question of the expense records was brought before a court, it thus brought the question of their being privileged squarely into their proper jurisdiction. A similar challenge that brought into question the right of Parliamentary parties to accrue funds from specific sources, for example, or the question of a judicially imposed cap upon donations, would hurl the Courts into a maelstrom of Political wrangling, as public opinion would likely not permit the government to create legislation to make the donations process less transparent, and more unfairly weighted toward big donors, trade unions and industry leaders; such a public reaction would seem especially likely in the wake of the Phone Hacking scandal, that raised the profile of the political dangers involved with interacting with high-level members of the press.

The third and final challenge that the Judiciary could make use of is that of its involvement, and specifically it's current a lack thereof, in International politics. It is often considered by the judiciary to be a "forbidden area" to discuss questions of international diplomatic policy in court,

since the Courts lack the jurisdiction to call into question the policy of foreign governments; however, should the Judiciary challenge the policy of our government in their interaction with a foreign power, such as America for example, would the government consider itself bound by the decision, or would it go ignored? And if it were to be bound by that decision, it may well mean that the Government must accept that the courts have a much more significant role defined for them in general politics and international relations.

It seems likely, given that in the majority of challenges against policy that the Government have suffered in recent years, that the Executive would in fact capitulate, and accept a court decision in international relations. Of course, the problem with this scenario is that so far the courts have respected this “forbidden” question of international policy, as Lord Neuberger explained in *Rahmatullah*.²³² According to him, “it would be very doubtful whether a domestic court should start dictating to the FCO or the MoD as to how to communicate with a foreign government, and in particular how a letter relating to a potentially sensitive diplomatic issue should be expressed. Doing so would risk trespassing into the forbidden areas.”²³³

Importantly, this statement does not rule out altogether the courts questioning the interpretation of diplomatic communication, or how a branch of the government should communicate with a foreign power. Naturally, as Lord Neuberger has said, it is “very doubtful,” and would only be in the most severe of circumstances that such action would be permissible, but it would not be impossible.

Therefore, our last circumstance seems like the most likely candidate for a successful challenge to Parliamentary Sovereignty. If the Judiciary challenge the interpretation of a diplomatic communication, and successfully interpret it to support a claim against the government and its international relations, then it could be a significant milestone in redefining the role of the courts in the political system not just in Britain but internationally. A ruling in the United Kingdom giving domestic courts the right to question international relations could feasibly spread to other Common law states, and the balance of power would inevitably shift from State Parliaments to national courts as the principal actors on the international stage.

In some senses, this has already happened in the United Kingdom. The Human Rights Act, alongside Britain’s involvement with the European Union, makes it necessary to involve the courts to some degree. The Courts are at present responsible for ensuring that the Government carries out its responsibilities to the European Union, and that it ensures the Government is made to account for its actions where they infringe upon the rights of citizens. In the same case, Lord Neuberger said that,

²³² *Rahmatullah v Secretaries of State for the Commonwealth and for Defence* (Number 2) [2012] EWCA Civ 182

²³³ *ibid* at 13

“This case is an illustration of the court performing perhaps its most vital role, namely to ensure that the executive complies, as far as it can, with its legal duties to individuals, in particular when they are detained; and the limits of the powers of the court, as a domestic tribunal, in that its reach cannot go beyond its jurisdiction, and that jurisdiction does not extend to the US military authorities in Afghanistan.”

It seems fairly plain that the Courts in the United Kingdom would lack jurisdiction over the American armed forces in Afghanistan, but could they claim that they had an authority over the interpretation of diplomatic communications after all? Of course, in this case the testimony of diplomats had to be sufficient for the court, as it was felt that it would be inappropriate for a lawyer to interpret a diplomatic document. This is also understandable, since it is well known that diplomats speak in “the thicket of diplomatic language,” and “for this Court to take issue with Mr Drew or to go behind his interpretation of the diplomatic language and communications would take us into the forbidden area.”

However, the courts must step at least a short way into the forbidden area if there is to be a successful challenge to Parliamentary sovereignty. It seems that *Rahmatullah* does, in fact, provide a useful starting point in mounting a successful challenge to Parliament. The key difference in this case and our preferred challenge, however, would be if the detainee were a British national and not a national of Pakistan, as is the case in *Rahmatullah*. Just as it was in this case, were the courts to issue a writ of *Habeas Corpus* to the United States following a period of imprisonment governed by a so-called *Memorandum of Understanding* (MoU), the United Kingdom would have no choice but to force the United States to grant a request for the prisoner to be returned. Whether this would be done by the government or the courts is yet to be seen, but it is doubtful that a judgement by the domestic judiciary would have any impact on policy in the United States. Alternatively, a direction by the courts may force the Government in the United Kingdom to address the issue more forcefully through the proper diplomatic channels.

Whatever the outcome, should the courts deliberately challenge the diplomatic or government interpretation of a communication made in the course of international relations, the courts will have redefined their position in international politics from passive to active players in international relations. But the vital question governing this challenge is yet to be faced: how far would the Courts be willing to tread into the “forbidden area,” and how drastically would their role change were they to do so? *Rahmatullah* has provided for the courts the thin end of the wedge simply by granting the writ of *habeas corpus*. However as Lord Neuberger points out it is the courts’ responsibility to ensure that “the executive complies, as far as it can, with its legal duties to individuals”²³⁴ and this has been an enduring theme in our exploration of the role of the Judiciary as Sovereign, and of its relationship with Parliament itself.

²³⁴ *Rahmatullah* (No 2) [2012] EWCA Civ 182

Should the courts defy the will of Parliament and policy so dramatically by undertaking to influence diplomatic relations, or reinterpret diplomatic communications, or however the judiciary may choose to effectively force itself into the world of the political, the consequences may be quite dramatic. A political landscape that places the judiciary in a more central position would alter the constitutional model for the United Kingdom dramatically. Adjudicating under the principles of the Rule of Law, the Courts would be able to vet policy for constitutional issues, or even to simply ensure that no statute is “contrary to right or reason” in the style of Natural lawyers. However, serious questions of legitimacy are raised when the courts begin interfering with Parliamentary prerogative. For example, it is the sole responsibility of Parliament to decide on acts of hostility against foreign powers. If, for example, the judiciary had been involved in the political process undertaken shortly before the invasion of Iraq, for example, the outcome for both Britain and Iraq may have been quite different, and the rules governing the invasion may have taken on a feeling of greater empathy for Natural law and human rights. This is simply because the current constitutional framework, created as a result of a deeper integration with Europe as well as the greater significance of the Human Rights Act in the early years of the twenty-first century, favors the implementation of human rights in law. Should the Judiciary adopt a greater political role law and policy become synonymous, and as a result politics will be forced into a perspective that favors Natural law and the idea of “ought-ness” in law.

The judgement in *Rahmatullah* has, for now, effectively closed the book on the Courts’ interpretation of diplomatic communication just as much as on Rahmatullah’s hopes of returning to Britain; but should a situation such as the one suggested above arise in the course of the United Kingdom’s relationship with the United States, it seems all the more likely that the judgement handed down by the court will be much more significant. If the courts do attempt to force the Government into acting against the United States, or indeed any foreign power who is holding a British citizen, it will primarily show a determination by the courts to uphold the values of the rule of law, by ensuring that the notion of *habeas corpus* is not an empty one to either the judiciary or the government. In fact, were there to be a question of *habeas corpus* concerning a British citizen held by the United States in Bagram, without the interference of a third nation (in this case Pakistan) also vying for the prisoner’s release, the pressure upon the judiciary by centuries of Judicial respect for the Rule of Law would, it is hoped, be sufficient to inspire drastic actions by the Judiciary.

Much like some of the historical challenges to Parliamentary sovereignty that were explored in chapter two, when the courts try their hand at judicial activism the stakes will always be high. Even in Rahmatullah’s case, and in our theoretical challenge, it is not just the future of the prisoner that the court holds in its hands. If the judiciary is careless or rushed in its judgement, and words their response too strongly, it is possible that, like in Pakistan and Thailand, the judiciary could end up deciding on the fate of governments and elections. Although this would demonstrate their

Sovereign authority absolutely, it would also bring the electoral system in the United Kingdom into a state of disarray and uncertainty. Like the common law itself, the role of the judiciary is ever-evolving, and it requires time and carefully considered judgements to properly define its place. This has always been the way in the United Kingdom, however.

As with our constitution, which has no fixed point of origin and no determinate end,²³⁵ the Judiciary's role will continue to expand; or perhaps more fittingly, through their judgements the courts are pulling the cloth away, slowly revealing the true extent of their authority by pressing, gently but often, against the edges of Parliamentary sovereignty.

The story of the Judiciary's relationship with Parliament is a complex narrative which continues to change as much as new developments in law allow. Documents such as *Magna Carta* gave the Judiciary an opportunity to challenge the King on notions of fairness and the rights of man; the Bill of Rights gave the people a means of redress against the Sovereign and fundamentally changed the balance between Parliament, the King and the Judiciary; and the Human Rights Act, possibly the most influential of all, gave the Courts the ability to directly challenge the legality of a statute using International law. Though it is not true yet that Parliament must tread softly to avoid the attentions of a more powerful judiciary, Parliament must be cautious. The Courts have already demonstrated their willingness to enter the fray on questions of elections, expenses, jurisdiction and Parliamentary procedure,²³⁶ and their willingness to continue to press against Parliament's authority extends as far as they are willing to defend the rights of citizens against the abuses of their government. This is not to say that Judges are becoming or are willing to become the new political authority in the United Kingdom. As Lord Bingham wrote, "The British people have not repelled the extraneous power of the papacy in spiritual matters, and the pretensions of royal power in temporal, in order to subject themselves to unchallengeable rulings by unelected judges."²³⁷ A former Law Lord himself, this testimony reflects the attitudes of many in the Judiciary. Although wary of expanding their authority, and cautious of the damage too forceful a grab for power would cause, the courts tread carefully to balance their duty to the rights of man with the responsibility to allow Parliament to operate as a democratic institution. To reiterate Lord Bingham's statement above, judges have no desire to subject the people to their unelected, despotic will; but it must be acknowledged that the courts have a duty to uphold the rights of the citizen against the state, and this is a responsibility that they will exercise to the very limit of their jurisdiction. The only difficult part of that task is discovering how far their jurisdiction extends. *Rahmatullah* has shown us that it cannot extend to American servicemen overseas, but the next challenge to British diplomatic method by the courts, in only slightly different circumstances, may yield very different results. We shall further explore this conclusion in the next and final chapter.

²³⁵ That is, where it is possible to say that the Constitution is 'finished' and in need of no more refinement.

²³⁶ *Woolas, R v Chaytor Others, Rahmatullah, Anisimic, and Stockdale v Hansard*. All these cases were explored in depth in chapters two and three.

²³⁷ Bingham, T, *The Rule of Law*, Penguin 2010, pp55

Chapter Seven - *The Continued Survival of Parliamentary Sovereignty?*

“The whole structure of the common law . . . stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals of whom each built upon the relics which his predecessors left and in turn left a foundation upon which his successors might work”

- *Judge Learned Hand, 1922*

Introduction

In the following chapter we shall explore the impact that both historical and modern cases and theory has had upon the theory of Parliamentary Sovereignty, and how perspectives on this theory are beginning to change. This final chapter's title ends with a question, inviting consideration that this topic is yet to be explored completely. The puzzle of Parliamentary Sovereignty is its own contradictory nature. In order to resolve constitutional conflicts, such as the conflict in *Jackson*, we turn to the courts for an answer. However, simply by informing us, through their judgements, that Parliament is still Sovereign, we delimit the power of Parliament into what the Courts say it is. As a result, we have to question the continuation of Parliamentary Sovereignty. This is because the more cases that are brought before the courts which invite debate on the subject of Sovereignty, the more Parliament's authority is curtailed simply by defining it. Once we define how Parliament is able to properly legislate we are provided with a better understanding of how Parliament might be unable to do the same.

As has been explored in previous chapters, no constitution can claim to be fixed and immutable. Judicial review and constitutional interpretation provide means for a constitution to update and evolve with changing attitudes. Given that amendments to constitutions normally require much stricter assent by the legislature, judicial review provides a faster and more accessible method, without the need to engage the legislature in arduous consultation and debate. Since the United Kingdom lacks a written constitution, codified in a single document, the constitutional principles that the Courts in the United Kingdom uphold are much more fluid, and can be more easily defended by judges tasked with constitutionally difficult or contentious questions. There are a collection of historical documents that have taken on a significance unlike any 'normal' statute, but whether or not this amounts to a constitution in the same way as we see, for example, in the United States, is a topic of much debate. The Constitution of the United Kingdom, unlike its written counterparts from other jurisdictions, “contains no statement of fundamental rights” and this can be both limiting and liberating for the courts. Unlike in the United States, where the Supreme Court has a constitutional authority to review statutes, in the United Kingdom the courts have no constitutionally defined mandate to interfere in politics, but that does not exclude them from doing

so. If anything, it is this lack of definition that has led to a “judicialization [sic] of politics” which is “likely to become a more important feature of the [political] system...”²³⁸

For the United States, who benefit from the certainty of a written constitution and centuries of precedent provided by *Marbury v Madison* amongst others, the position of their judges has been made absolute. Unlike the French Conseil Constitutionnel²³⁹ for example, who are given the opportunity to review Bills before they become law, the US Supreme Court is only called upon to decide the constitutionality of Statutes when a dispute is raised; but for the United Kingdom, the procedure is much less clear. Courts in the United Kingdom have for centuries appeared to follow the doctrine of Parliamentary Sovereignty, and Judges themselves at least seem to accept this notion; and yet Judges even today are reshaping the relationship between the courts and Parliament, using new tools unavailable to eminent Judges from history such as Coke. In the time of *Bonham* there was no European Convention on Human Rights, and many of the rights recognised in that Treaty were absent from statute in England and Wales. With no other means of reaching the same judgement, Coke established (in somewhat controversial terms) the principle of excluding Government from acting as Judge in its own cause, and in so doing found that Acts of Parliament are not unquestionable and can be made void.

Judges are much maligned in our society²⁴⁰. They are not Government officials, and neither are they snake-oil lawyers. As Stephen Sedley asserts, there are “sections of the media which are out to get Judges.”²⁴¹ Their responsibility is to justice and the constitution. Of course, sometimes they do make errors, as all judges will inevitably do in the course of their long careers, but the gift of a common-law system means that an appeal can overturn such a decision, potentially changing not just one person's life, but the entire law under which their judgement was passed down.

Judges can only make decisions based on the evidence before them and the testimony of those brought before the court. Where the evidence is flawed, inevitably so too will be the judgement. But Judges don't work for the benefit of Government, and they certainly shouldn't favor one argument over another without impartiality before evaluating all the evidence. Their allegiance lies with the Rule of Law, which is a principle that lies beyond government policy or public opinion. It is the principle that lies at the heart of all jurisdictions, and is a constant for all countries that respect that Justice comes from an impartial and independent Judiciary, that creates and influences the law over time and by evolution to improve and develop it for the modern world.

According to Natural lawyers a law cannot be a law if it is, as Coke LJ said in *Bonham's Case*, “against common right and reason, or repugnant, or impossible to be performed,” if it were, then

²³⁸ Sunkin, M, from *The Global Expansion of Judicial Power*, Tate and Vallinder (ed) NYU Press 1995

²³⁹ The French Constitutional Council's website has some useful resources relating to its history and role. The website can be found here: <http://www.conseil-constitutionnel.fr/>

²⁴⁰ “The sovereignty of Parliament is under threat ... from the common law radicalism of judges” - Cash, W, *The EU Bill: Parliament, Judges and the National Interest*, European Foundation article, 17/01/2011. The rest of this article, which is particularly critical of the judiciary, can be found here:

http://www.europeanfoundation.org/my_weblog/2011/01/the-eu-bill-parliament-judges-and-the-national-interest.html

²⁴¹ Sedley, S *Judicial Politics: Stephen Sedley on the Separation of Powers*, London Review of Books 23/02/2012 pp15

“the common law will control it, and adjudge such an Act to be void.” The Courts apply the law in a way that reflects a belief in fundamental human rights, an awareness of the Rule of Law and a desire to maintain the very most basic of freedoms granted to us by *Magna Carta* and which have been present in one form or another for hundreds of years. In other words, they will defend the notion that Coke laid out so neatly in *Bonham*. The courts will tend to uphold and preserve our right as citizens to a free and fair trial, so that none of us are sold or denied justice. Given, as we have seen above, that it was Parliament that wrote and approved a number of Bills throughout the twenty-first century that attempted to deny us those rights, and which have been challenged successfully by the Courts, it seems that our basic freedoms would be better secured with more judicial activism, not less; a viewpoint that can only be reinforced by the examples we have seen in the Southeast Asian jurisdictions we have observed here.

Judges should not be discouraged from changing the rules, as the common law permits them to do. To lawyers, and so to judges, rules and laws are very different, but judges effect change in both. They are deeply involved in changing policy by altering and affecting the interpretation of statute, but they also affect procedural rules, such as those in Parliament that govern expenses, or the extent of the authority of individual government ministers. By doing this, the courts carve for themselves an important place in the constitutional and governmental framework of the United Kingdom. As judges have already made clear, through their judgements if not directly, they are deeply involved in policy-making, and cannot refuse to acknowledge their place in the law-making process no matter how involved their role might be. Their decisions form part of a foundation that inevitably leads to the evolution of the law as a whole.

The End of Legalism

It is no longer possible to consider laws as static and without involvement in morality. If one is handed a law that is obviously unjust, or morally reprehensible, it must be the responsibility of those in a position to correct it to do so. For judges, the means of this correction is statutory interpretation. Where the only means of correcting the injustice the law creates, the only means of redress is to render the statute void. This was illustrated best in *Somerset's Case*, where it is inconclusive to say that no statute has any superior place above any other kind of law, when it is the courts alone who are charged with interpreting statutes based on what 'ought' to be²⁴². Parliament legislates according to necessity, and creates positivist Acts, laws whose existence and role cannot be questioned, but it is the common law that decides whether it is a law that should exist as it is, and creates a Natural Law framework to constrain parliament's whim. In our legal system, therefore, we actually reconcile the two theories by allowing them to operate side-by-side, and provide checks and balances for each other.

²⁴² That is, protecting the rights of the citizen against the state, alongside more obvious legal considerations. This position is one in accordance with Natural Law theory, but may be more appropriately called 'Legal Realism', a school of jurisprudence which sees the law as being intimately involved with questions of moral, social and political conflict, rather than Classical legal theory, which separates the law from such issues.

In order for us to reconcile the clear ability of the Courts to overturn statute and create policy, demonstrated by the cases we have explored in the previous chapters, we must accept that statutes are only law once they have been validated by the Judiciary. Although a law is permitted to operate as-is until it is reviewed in court, once the question of its validity has been raised, and the rule is interpreted in different ways depending on the circumstance of the complaint, the law certainly faces the choice either to change or die. If we consider the popular view of the Enlightenment, as the US Declaration of Independence does, that “Governments are instituted among Men, deriving their just powers from the consent of the governed,”²⁴³ we find it impossible to reconcile our obedience with our sovereignty.

There can be only one sovereign, and in the United Kingdom the title has to rest not with Parliament but with the Rule of Law. It is a lofty concept, that we could give such a title to a notion that lacks even a clear definition, but it is the most satisfactory means of reconciling the equally valid methods available to the separated offices of power in a government (the Executive, the Legislature and the Judiciary) of reversing rules created by those opposing and equal offices. Even the population, if they are so inclined to do so, can petition for a law to be unmade, or in cases of demonstration, can engage in civil disobedience to render a law inoperable. Parliament is able to overturn common law decisions using statute, and the Judiciary are able to overturn legislation through careful interpretation. All these methods of recourse are available thanks to the Rule of Law, whose will is interpreted and carried out by the Judiciary. In this regard one could say, to paraphrase George Orwell, that each of the organs of Government are equal, but some are more equal than others.

Naturally, Parliament will and often does balk against the Courts exercising any degree of judicial activism, especially on matters that directly affect policy or are populist issues that attract attention. Michael Portillo, an experienced politician, voiced his concern on the *Sex Offenders' Register* issue when he told *This Week*,

“Judicial activism is a tautology... It’s a bit like talking about political politicians... All judges are active and in this case [the right of appeal for people who appear on the sex offenders’ register] they have made the right decision. People are placed on this list for life without any redress or appeal process... They ought to have an appeal – as those on other lists compiled by the government do. That’s as close to a human right as I can imagine... What you have here is parliament grandstanding on a populist issue.”²⁴⁴

²⁴³ Declaration of Independence, Virginia 4th July 1776

²⁴⁴ This Week, BBC One 17th February 2011

It is clear to see that the Courts have a legitimate claim to Sovereign power in the United Kingdom, since they do so much that changes, creates and strikes down law, be it a judicial decision or a statute and Judges have a great many means available to them in order to exercise this power. In the wake of the European Convention on Human Rights as we have already said, the Human Rights Act gives the judiciary the ability to declare statutes incompatible. *Bonham* gives the Courts the option to follow Coke, especially where the rule to be examined is one so opposed to right and reason. Finally, the Courts could exercise the authority put to use by Lord Mansfield in *Somerset's Case*,²⁴⁵ who said

“The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.”

Clearly here we see Lord Mansfield declaring that when a statute so odious as slavery has lost its reason and occasion, yet the statute still remains, the judge has a duty to implement the common law, and render the statute to be invalid. It is the only way that the rules of Parliaments of the past, rendered now inoperable in all save a few circumstances, can be swept away so as to preserve the rights and freedoms of the contemporary state and its people. Were the common law not to exercise this house-keeping, then it may be that many laws odious to our society would still be on the statute books. Although it is true that such laws may need never be implemented, it is a matter of pride that statutes which control and permit the trade of slaves, for example, should be utterly removed from being allowed to operate in our jurisdiction.

No matter whether the statute is one or one hundred years old when the courts control it and adjudge it to be void, its position as statute should grant it immunity from being invalidated by the courts, but this is not true. The very fact that a statute can be overturned in the manner undertaken by Lord Mansfield, Lord Chief Justice Coke or the Supreme Court of today proves that the concept of a superior statute is fallacy. This makes it much more clear to see how the role of the Judiciary has changed since the earliest days of the Common Law. Justice Michael Kirby explains that, “It was inherent in the role of the Royal judges from the reign of Henry II to enforce the law throughout the Kingdom. This was an attribute of their function as Royal servants. Servants state and apply the law. Making the law is the province of sovereigns.”²⁴⁶

²⁴⁵ (1772) 20 State Tr 1

²⁴⁶ Kirby, M Judicial Activism: Authority, Principle and Policy in the Judicial Method, Hamlyn Lecture Series 2004

Now of course we see that this simply is no longer the case. The Judiciary has been granted its own slice of Sovereign power, and this gives it the authority to strike down and control statutes, sometimes stating directly the intent to make a law void, and sometimes interpreting the wording of the statute so obliquely that it becomes unenforceable or remotely different from the meaning it had when first given Royal Assent. Kirby goes on to tell us that, in the common law jurisdictions of the United States, and elsewhere in the Commonwealth, jurists were challenging the declaratory theory of English positivism, and in doing so discovered that, “Judicial creativity lay deeply embedded in the very nature of the common law as they practiced it.”²⁴⁷

Clearly, the declaratory concept of judicial theory is beyond help. “The legal Reformation ... gained urgency as the twentieth century drew to its close” and Judicial activism as the dominant theory behind the law-making and un-making processes in the common law became more prevalent among academics and practicing judges alike.²⁴⁸

But as the authority of Judges grows, so the authority of statute, and so parliament, must wane, if only by short distances. We began our annotation of so-called ‘activist’ judgements with *Bonham*, one of the most significant cases supporting the development of greater judicial authority. *Bonham*, of course, attempted to give the courts the authority to strike down statute where, as has been explained, the law is anathema, or contrary to public right or reason, or where it cannot be performed. Lord Chief Justice Coke aimed to give the Courts a means of redress against positive law, which would otherwise claim to be inviolable. After this judgement, that position was less clear, and justices became emboldened. *Somerset’s Case* is another excellent example of this expansion of Judicial power. In this case, where the law of slavery was called into question in British Courts, it was a judge who decided that the practice of slavery was so abhorrent to the society of the time that the law was to be ignored completely.

Moving further toward the modern-era, cases such as *Liversidge v Anderson* demonstrate a willingness by the courts to defend principles felt to be more vital than simple obedience to Parliamentary Sovereignty. This is a trend that continued into the twenty-first century as we have seen in cases such as *Ahmed v The Treasury* and the Belmarsh cases. Moreover, this trend has not limited itself just to the rights of man. *Anisminic*, which has been mentioned countless times, demonstrates ideally that Parliament can never constrain the right of the judiciary to examine cases on points of law. This case is the best example of the courts asserting their constitutional place, and defying the will of Parliament in order to preserve that place.

It is unusual to see that, far from becoming prevalent in the United Kingdom, there is still a reluctance to embrace further Judicial authority over Parliament, especially where that same attitude has already been met with relative popularity in other jurisdictions, including in Australasia and

²⁴⁷ *ibid* at 15

²⁴⁸ *ibid*

America. At more-or-less the same time, but on different sides of the world, countries united by their shared use of the historic common law brought to them by the British Empire were finding more and more that the Judiciary was moving further and further from the “unrealistic ... dogma of ‘strict and complete legalism.’”²⁴⁹

This paradigm shift need not be unwelcome in the legal system of the United Kingdom. Its occurrence is an inevitability, but it comes with many more benefits than were afforded under the previous system of legalism. A commentary article in *The Guardian* reflected the shift in popular opinion regarding Judicial activism, claiming that,

“Partly through the common law, partly through treaty and partly through statute, modern Britain is slowly moving, over time, from being a country in which rights were conceded to those deemed worthy, often based on property or gender, to becoming a country where rights are deemed inherent to the individual and can be enforced in independent courts.”²⁵⁰

Were it not for this fundamental change in the attitudes of judges, such a defence of modern human rights might not be possible, especially in a system where judges are expected to simply interpret the law based on what had come before, and what Parliament had already decided. Now that judges accept that their judgements form a part of the rule-making process, and the options created by European integration provide them with even further authority to keep statute from having the full effect of law, they are better able to accept that the courts are able to stake a claim to certain sovereign authority, on at least an equal footing with that of Parliament. It could be seen that, as with the comment in the *Guardian* above, statute, treaty and common law can be seen as three equally applicable rule-types, that can each cancel out the other should the need arise. As a result, each of the organs of power adopt certain shared attributes of the Sovereign.

One could interpret this as being the Sovereign itself; that it is not a title given to one group or individual, but is divided amongst the organs of power who operate together as the sovereign. Otherwise, the Sovereign may better be identified, as has been seen above, to be the Rule of Law itself, that regulates each of these organs, controlling and checking their power through the authority of the courts themselves. It could be argued that when the courts rule a statute to be invalid, they are in fact invoking the will of the rule of law to give their decision the requisite authority. It has been proven in the course of this thesis however, that it is impossible for legal Sovereignty to rest solely with Parliament.

There have been too many successful challenges to the absolute authority of Parliament for the claim to hold water, and the majority of these challenges, as we have seen, have come from the

²⁴⁹ Kirby, M Judicial Activism, pp13

²⁵⁰ Editorial, *The Guardian* 17th February 2011

language of the court. It becomes ever more plain that Parliament not only shares sovereign authority with judges, but is also bound by the decisions of the courts. A unifying aspect of the Sovereign regardless of the theory that you investigate is that he is unlimited by any other instrument, organ, group or individual. If the Sovereign can be limited in scope then he cannot claim the title. Where the courts challenge the authority of Parliament, with every success Parliament loses yet more authority as Sovereign, and this authority is transferred to the courts.

Judicial Activism and Austin's Decline

Chapter one of this thesis opened with the statement, "There does not appear to be any room for absolute power in modern law and politics."²⁵¹ This is still very much the case, and the courts continue to confirm this belief whenever a question of constitutionality is raised. Although the courts make no claim to absolute authority, they nonetheless continue to ensure that other organs of power cannot claim the same. The twin tools of Judicial Review and Declarations of Incompatibility provide the courts with legitimate means of challenging Parliament when it chooses to exercise its unchecked will upon the population. In time, these tools will inevitably evolve, and grant even greater powers to the court to check the continued expansion of the government. The ever-increasing role that international law plays in the legal and political systems not just of our country but in every country can only serve to widen the role the courts must play in enforcing and upholding the Rule of Law. "The ICC's [International Criminal Court's] biggest achievement ... is the fact that most of the world (111 countries and rising) is committed to the idea that certain crimes should never go unpunished."²⁵² The authority of statute internationally is only granted so long as the states that are signatory to them respect and enforce them. As problems such as these become more prevalent in legal systems across the globe, a more active and imaginative judiciary will begin to play a much more vital role in international law and politics. Truly, the age of international law will be the age of modern international judicial activism.

Without the courts, and their exercise of this function, it would be impossible for our society to operate properly and with the necessary safeguards to ensure that the population is protected and allowed to flourish. As with Bentham and Austin²⁵³, it is prudent to regard government as being in a position to effect both positive and negative social change; as a result, the need for an impartial judiciary, properly equipped and able to amend and, if necessary, strike down Acts of Parliament, is a fundamental tool for democracy.

Although it is true that Austin has been used as little more than a straw-man argument on behalf of Classical legal theorists (though there are few classical lawyers who remain loyal to Austin²⁵⁴) to be

²⁵¹ Pavlos Eleftheriadis *Law and Sovereignty* (Draft Paper) Cambridge 2009

²⁵² *The International Criminal Court and the Crime of Aggression: An Argument worth Avoiding* The Economist, 27/05/2010

²⁵³ Ireland, R, Austin, Hart... Oh and W. Jethro Brown! 36 *Cambrian Law Review* 2003

²⁵⁴ *ibid* Ireland R

swept aside before moving on to more modern theories²⁵⁵ to be defeated, his is still nonetheless a widely taught and respected theory that attempts to capture a comprehensive roadmap of the law and aspects of politics. The downfall that Austin suffered was making his definition of the Sovereign too rigid, too certain. In so doing, Austin in fact made his theory all the more susceptible to criticism. As a result, Hart developed Austin's theory of sovereignty into his *rule of recognition*. This hardly helps either because, rather than personalising the origin of law, as Austin did with his human Sovereign, Hart places the validity of a rule inside an impersonal system of validation. In effect, Hart reduces Austin's sovereign into a box-ticking exercise rather than a person or body of persons who can be easily identified, can be demonstrated enforcing his will, and can be held to account for his actions. Hart's theory does not account for this, but holds more to the spirit of the idea of the Rule of Law as being Sovereign.

Austin failed to provide an appropriate definition for the Sovereign, and it is in trying, in the course of this work, to find a person or body of persons to fill the Sovereign's seat that we realise that the Sovereign is the Rule of Law, which allows statutory rules to be validated²⁵⁶ using the rule of recognition, and so the laws of England and Wales are continually reassessed and evaluated by the Judiciary. We have seen in both our own jurisdiction and in others internationally that Judges have the authority, the will and the means to make, change and strike down statutes, which gives them a position of unrivaled constitutional authority. The Sovereignty of the courts provides a new constitutional model that radically affects the way Parliament can do business. If the courts were involved in policy-making and implementation, then not only would the system be drastically slower, as the judiciary evaluates government decisions for constitutionality, it must lead to an inevitable stand-off with Parliament, as each vies for absolute authority for law-making in the United Kingdom.

Although Austin may be outdated he nonetheless provides a pivotal starting point in accurately identifying where Sovereignty might lie. However, since Austin's lectures in jurisprudence were first published in 1832, the legal landscape has changed drastically. As a result our understanding of the Sovereign must change as well. Instead of a King, Parliament or deity, the Sovereign has become something more intangible, and more universal, and yet something that is easier understood than trying to force inappropriate definitions upon the existing machine of government. After an international post-war shift from Positivism to Natural law in the years after World War Two, the Rule of Law, a principle acknowledged in cultures across the world, may now claim Sovereignty in the United Kingdom with certainty and legitimacy. Of course, Baroness Hale was right to point out in Chapter One that it is indeed a matter of where the tanks are, but when the International Criminal Court takes up jurisdiction over the controversial crime of aggression in 2013, the notion of legitimacy to rule may mean more than simply a monopoly on violence and coercion by force.

²⁵⁵ *ibid*

²⁵⁶ That is, clarified and converted into 'good' law that is applicable by the Judiciary.

Hart's Influence in the Sovereignty Debate

According to Hart, “to say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.”²⁵⁷ to Hart, a rule is a rule if the procedure that created it is the accepted means of creating law, and that the procedure was followed fully and properly. This effectively concurs with the idea that the Rule of Law is sovereign, in much the same way as a Constitution enjoys sovereign authority in a society, the Rule of Recognition, theoretically, should be the most superior form of law, since it determines how all other laws can be manufactured. However, there arises the question of where the rule comes from, and furthermore, whether or not the rule of recognition can be changed.

One serious pitfall with the rule of recognition is the question of alteration. If the rule of recognition can be altered, then who can alter it, and does that deprive it of its authority? The Parliament Acts of 1911 and 1949 both served to change the rule of recognition for statutes in the United Kingdom. Rather than receiving assent from both Houses of Parliament and the Monarch, the Act granted the House of Commons the authority to pass a statute to the Monarch for Royal Assent without the scrutiny of the Upper House. If the definition of a statute is a bill which has received assent from Parliament and the Crown, is an act passed without all of these requirements a ‘real’ act of Parliament? The *Jackson* ruling plainly demonstrated that the Courts were willing to consider Acts passed in this way as *bona fide* Acts of Parliament, with the same authority as any other, but the question was addressed that by altering the framework of Statutory creation, Parliament had inadvertently caused one constitutional crisis by authoring an act designed to solve another.

Without judicial review the Courts are little more than dispute resolution centres, but given the authority to challenge statute the Judiciary in the United Kingdom has an opportunity to redefine its role in the British Constitutional Model, and to adopt, as closely as possible, the mantle of Sovereign in the legal sense. The passionate defence of the rights of the individual by the court, expressed by Baroness Hale in *Jackson*, means that “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 scrutiny.”²⁵⁸ Given that the courts may “reject” such an attempt by Parliament, we can see that the Courts accept that their authority extends to striking down statute, no matter how reluctant they might be to vocalise this authority. However, as Lord Carswell pointed out, the courts will always be cautious of attacking the theory of Parliamentary Sovereignty, in order to preserve the “tradition of mutual respect”²⁵⁹ between Parliament and the Judiciary. Given however that this thesis has demonstrated that the Sovereign is the Rule of Law, no one body in the United Kingdom could claim Sovereignty. However the Courts

²⁵⁷ The Concept of Law pp54

²⁵⁸ *Jackson*, per Baroness Hale at 159

²⁵⁹ *ibid*, per Lord Carswell at 168

are the arbiters of the Rule of Law and, in a similar fashion to the divine right of Kings, are solely charged with revealing and defining the law through reported decisions.

Conclusion

“Parliamentary Sovereignty is no longer, if it ever was, absolute.”²⁶⁰

-Lord Hope in *Jackson*

Of course Parliament plays a significant role of its own in the rule-making process. It's ability to create anticipatory rules, and to make laws when required and not when the question is brought before a judge in court, provides the legal system with greater certainty and flexibility. But it is still possible for the Courts to control statutes and even change their meaning, sometimes drastically.

It is in the interpretation of statutes and judgements that the real advantage of the common law can be seen, and that is it's flexibility. Every judgement sets in stone the law, to a degree of certainty, for the next litigants to use or refute. But these words are open to interpretation, and the difficulty is persuading a judge that your perspective is the correct one. This becomes even more difficult as cases become older, and their circumstances become all the more alien and historical. Statutes and decisions alike can still claim historical origin. Even familiar cases like *Donoghue v Stephenson*²⁶¹ are becoming more historical and less understandable from a social perspective; drying up into opaque legal terminology and rule frameworks with only a little context left to which people can relate, be them lay person or professional.

As a result, and with reference to the cases we have discussed above, it becomes obvious that Parliament must submit to the will of the Courts, and as a result must renounce it's claim to legal Sovereignty in the United Kingdom. For the Legal System in the United Kingdom, there are now a host of precedents to be examined when considering the question mark that now hangs over Parliamentary Sovereignty. *Jackson v Attorney General* is now the most significant of the cases to have directly challenged the notion of Parliamentary Sovereignty, since rather than challenging the validity of a statute based on European Union law,²⁶² the case challenges the very means by which Parliament enacts statutes. Although the position of Statute as law is not under question, the issue at hand both for practicing professionals and legal philosophers is whether the court can, thanks to this judgement, declare an act to be invalid through interpretation if the process by which it was authored was not appropriate or correct, and based on the research carried out in this paper, I am forced to accept that this is the reality. In the words of Lord Nicholls, “Statutes create law. The proper interpretation of a statute is a matter for the courts, not Parliament. This principle is as fundamental in this country's constitution as the principle that Parliament has exclusive cognisance over its own affairs.”²⁶³

²⁶⁰ [2005] UKHL 56 per Lord Hope at 104

²⁶¹ [1932] UKHL 100

²⁶² Such as Prisoner voting or the Sex Offenders Register

²⁶³ *Jackson v Her Majesty's Attorney General* [2005] UKHL 56 per Lord Nicholls at 26

Early statutes, however, served a similar purpose to the courts of today. These rules were seen not as a change in the law, or the creation of laws anew, but an agreed restatement by the government of what the law was. By way of example, the 1351 Treason Act sought to explain that the rule on treason did not extend to crimes of servants against their masters, so called 'petty treason'. In the early years of the development of the common law as we know it today, the lines between the institutions of power were less defined. The High Court of Parliament as it was then known brings into question the separation of the legislature and the judiciary, and goes some way to explain why it is that the system in the United Kingdom works as it does.

Like the common law itself, the relationship between the Courts and Parliament has evolved over time, and the roles of the institutions have changed. Parliament has shifted from a body with legislative and judicial authority to one which can only claim a legislative role. This was further cemented in the *Sheriff of Middlesex's Case* which made clear that it was the role of the Courts to decide on matters of law, and not Parliament. For the Judiciary, the process has been slower, and marked with greater controversy, especially in the twentieth century amid the rise of popular democracy. It is important to remember that in any society no system is static, and neither is any system perfect. All need to adapt to changing circumstances and different cultural norms. If the relationship between the courts and Parliament were never to change, it would be very dangerous for justice and the Rule of Law, as there would be no body with the jurisdiction to challenge the will of Parliament even if it is one that runs counter to the Rule of Law.

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