

Commemoration Oration 2007
31 October, 18.00, Great Hall, Strand Campus

The Right Honourable Lord Bingham of Cornhill KG FKC
The Rule of Law and the Sovereignty of Parliament

It is, I need hardly say, a very great honour and privilege to give this Commemoration Oration here at King's. This is not simply because I follow speakers of outstanding distinction, although I certainly do. It is because there is so much to commemorate: the huge contribution made by King's to the cause of scholarship since the foundation of the college by the great Duke in 1829, notably in the fields of theology, medicine and law – once regarded as the three learned professions – but also in so many other academic disciplines as well, not excluding what the Duke himself might have called “the proud profession of arms”. It is a record of which we may all, even if vicariously, be proud, and for which we must all be grateful. I am a little daunted by the notion of a Commemoration Oration, which would seem to call for something in the style of Cicero, preferably in Latin. Alas, those expecting such a feast are doomed to disappointment.

If asked to identify the predominant characteristics of our constitutional settlement in the United Kingdom today, most of us would, I think point to, or at any rate include in any list, our commitment to the rule of law and our

recognition of the Queen in Parliament as the supreme law-making authority in the country. We would regard our commitment to the rule of law as one which, allowing for some flexibility and variation, we broadly share with other liberal democracies around the world.¹ And we note, probably with satisfaction, that adherence to the rule of law is now recognised for the first time in a UK statute, although without any definition.² Our acceptance of parliamentary sovereignty, by contrast, distinguishes us from all other members of the European Union, the United States, almost all the former Dominions and those former colonies to which this country granted independent constitutions. In all these countries the constitution, interpreted by the courts, has been the supreme law of the land, with the result that legislation inconsistent with the constitution, even if duly enacted, may be held to be unconstitutional and so invalid. While preserving our inalienable right to be discontented with the government of the day, and probably the opposition also, I do not think there has been any groundswell of dissatisfaction with our acceptance of parliamentary sovereignty, even if we do not quite share the complacency of Anthony Trollope's view of the political scene in 1859:

¹ It is invoked, for instance, in the preamble to the European Convention on Human Rights and article 6(1) of the Treaty on European Union.

² Constitutional Reform Act 2005, s.1.

“At home in England, Crown, Lords and Commons really seem to do very well. Some may think that the system wants a little shove this way, some the other. Reform may, or may not be, more or less needed. But on the whole we are governed honestly, liberally and successfully, with at least a greater share of honesty, liberality, and success than has fallen to the lot of most other people. Each of the three estates enjoys the respect of the people at large, and a seat, either among the Lords or the Commons, is an object of high ambition. The system may therefore be said to be successful.”³

But respected and authoritative voices now question whether parliamentary sovereignty can co-exist with the rule of law. In his recent, very distinguished, Hamlyn Lectures (“The Sovereignty of Law: The European Way”) Professor Sir Francis Jacobs observes:

“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, but which today is widely regarded as a paramount value: the rule of law.”⁴

The rule of law, he continued, “cannot coexist with traditional conceptions of sovereignty”.⁵ In similar vein, Professor Vernon Bogdanor, Professor of Government at Oxford, recently described it as “clear that there is a conflict between these two constitutional principles, the sovereignty of Parliament and the rule of law,” a conflict which if not resolved could generate a constitutional crisis.⁶ Reflecting this view, some distinguished academic authors,⁷ and also some judges in extra-judicial utterances⁸ and obiter observations,⁹ have suggested

³ Anthony Trollope, *The West Indies and the Spanish Main*, vol 1, Chap IX, 1859 (Trollope Society edition, p 120).

⁴ “The Sovereignty of Law: The European Way”, the Hamlyn Lectures 2006, CUP 2007, p 5.

⁵ *Ibid*, p 8.

⁶ Vernon Bogdanor, Magna Carta Lecture, 15 June 2006, “The Sovereignty of Parliament or the Rule of Law?”, p 20.

⁷ Notably Professor T R S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (OUP, 1993), “Parliamentary Sovereignty: Law, Politics, and Revolution (1997) 113 LQR 443.

⁸ Lord Woolf, “Droit Public-English Style” (1995) PL 57, although this view was later qualified (“Judicial Review – The Tensions Between the Executive and the Judiciary” (1998) 114 LQR 579); Sir John Laws “Law and Democracy” (1995) PL 72, “The Constitution, Morals and Rights (1996) PL 622.

that Parliament is not, or is no longer, supreme and that in some circumstances the judges might, without the authority of Parliament, hold a statute to be invalid and of no effect because contrary to a higher, fundamental, law or to the rule of law itself. If this is the correct view, the rule of law and parliamentary sovereignty are not, as one might have hoped, a happily married couple but are actual or potential antagonists. This makes it necessary to look at these two concepts a little more closely. They cannot be treated as concepts which, in the time-honoured formula used of lecturers and after-dinner speakers, are so well-known as to call for no introduction.

First, then, the rule of law. This is a principle routinely invoked by the leaders of illiberal and authoritarian regimes, who rely on it as meaning that people should obey the laws which the government makes, and be punished if they disobey. This is indeed one ingredient of the rule of law. It is a truism that we are all bound to obey the law, and the law may be defined as that which we must obey, even if a breach involves no criminal penalty. But on a more widely accepted and more enlightened view, the rule of law means much more than this. It means, first of all, that governments must themselves comply with the law. This is a feature on which the leaders of illiberal and authoritarian regimes tend to place less emphasis. But the rule of law clearly requires that decisions

⁹ *R(Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, *per* Lord Steyn para 102,

affecting people's lives, rights and interests should be made according to clear laws, duly made and publicly promulgated, and not according to the whim, prejudice or predilection of any unaccountable minister or official. On one view of the rule of law, this is enough: if clear laws, duly made and publicly promulgated, prescribe what is to be done or not done, and those rules are scrupulously observed, the rule of law is satisfied. On this view it does not matter how unfair or morally offensive the rules may be. They may, for instance, discriminate against an unpopular minority in an arbitrary and unjustifiable way, and yet – if the law is clear and unambiguous – be held to comply with the rule of law.

This is not a view which commands very wide acceptance, and it is not one which I could endorse. For while there is no universally accepted catalogue of rights and freedoms applicable in all countries at all times, and there is scope for local variations and development over time, there is nonetheless, I suggest, a broad measure of agreement in liberal democratic states on certain rights and freedoms regarded as fundamental to us all simply by virtue of our existence as human beings. The articles of the European Convention on Human Rights, to most of which domestic effect was given by the Human Rights Act 1998, provide as good a check list as any. The core rights embodied in that convention are

Lord Hope of Craighead paras 104-109, Baroness Hale of Richmond, para 159.

well-known: the right to life; the right not to be tortured or inhumanely treated; the right not to be enslaved; the right not to be detained arbitrarily or without means of challenging one's detention; the right to a fair trial of any criminal charge or civil claim; the right not to be punished for an act which was not criminal when one did it; the right to some protection of one's personal and family life; the right to think and believe what one wishes; the right to express oneself freely; the right to associate with others; the right to marry; the right not to be discriminated against on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status; the right not to be deprived of one's property without compensation; the right to be educated; the right to free elections. There is scope for legitimate argument about the full content of some of these rights. A number of them are not absolute and permit necessary and reasonable restrictions. Account must be taken of the rights of the individual but also of the rights and interests of the community as a whole. These are important qualifications. But having made them, I question if there is any of these rights which we would willingly discard as unnecessary or unimportant. One needs very little historical knowledge to recognise occasions on which at some time, in this country or elsewhere in the world, each of these rights has been the subject of flagrant abuse. It is hard to understand how this very basic and practical

catalogue of rights has come to be portrayed to the public as some ill-conceived, European-inspired, affront to the commonsensical conduct of government.

I would linger a little on one of the rights I have just mentioned, found not only in the European Convention but also in other comparable instruments around the world: the right to a fair trial. What does fairness ordinarily require? First, I suggest, that decisions are made by adjudicators who are independent and impartial: independent in the sense that they are free to decide on the legal and factual merits of a case as they see it, free of any extraneous influence or pressure; impartial in the sense that they are and appear to be, so far as humanly possible, open-minded, unbiased by any personal interest or partisan allegiance of any kind. There are other core principles which have come to be accepted: that a matter should not be finally decided against any party until he has had an adequate opportunity to be heard; that a person potentially subject to any liability or penalty should be adequately informed of what is said against him; that the accuser should make adequate disclosure of material helpful to the other party or damaging to itself; that where the interests of a party cannot be adequately protected without the benefit of professional assistance which a party cannot afford, public assistance should so far as practicable be afforded; that a party accused should have an adequate opportunity to prepare his answer to what is said against him; and that the innocence of a defendant charged with criminal

conduct should be presumed until guilt is proved. These again, I suggest, are rules which most of us would regard as basic. I think we would question whether a country in which they were significantly and unjustifiably broken or circumvented would be regarded as adherent to the rule of law.

Before turning to parliamentary sovereignty, perhaps I may make two further points on the rule of law. First, I have suggested that the rule of law requires a state to comply with the law binding upon it as well as its citizens. I do not think that this is controversial. But the law binding upon it must, I think, be understood to include the law binding upon it as a state: what used, attractively, to be called the law of nations and is now more often called international law, which may become binding as a result of a treaty or by force of customary international law, binding on all states. Secondly, I draw attention to the linkage, in public rhetoric and formal instruments, between the rule of law and democracy. One could perhaps imagine a wholly benign dictator, promulgating and abiding by fair and beneficial laws, respectful of human rights and international obligations, but free of any democratic constraint. Yet it would be hard to regard such a regime as compliant with the rule of law, which requires the citizen to comply with the law but requires, as a *quid pro quo*, that the citizen have a say in the laws by which he is to be bound. Thus, if I am right, democracy lies at the heart of the concept of the rule of law.

Professor Bogdanor has pointed out that the essence of parliamentary sovereignty can be expressed in eight words: “What the Queen in Parliament enacts is law.”¹⁰ In a memorable aphorism which Professor Dicey borrowed from an eighteenth century writer¹¹ and made famous,

“It is a fundamental principle with English lawyers,
that Parliament can do everything but make a woman
a man, and a man a woman.”¹²

Thus there was and could be no fundamental or constitutional law which Parliament could not change by the ordinary process of legislation. This does not of course mean that Parliament is omnipotent. Even the most paranoid legislator could not suppose that the due enactment of a statute at Westminster could effectively proscribe smoking on the streets of New York or the consumption of vodka in Russia. What the principle means is that Parliament has, in the United Kingdom, no legislative superior. The courts have no inherent powers to invalidate, strike down, supersede or disregard the provisions of an unambiguous

¹⁰ Bogdanor, *Politics and the Constitution: Essays on British Government* (1996 Aldershot, Dartmouth), p 5; “Our New Constitution” (2004) 120 LQR 242, 259.

¹¹ J L De Lolme, *The Constitution of England, or An Account of the English Government* (1796).

¹² A V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959), ed ECS Wade (Macmillan), p 43.

statute duly enacted by the Queen in Parliament and, indeed, an extremely limited power to enquire whether a statute has been duly enacted.¹³ So to express the principle is to expose the conflict or incompatibility to which I have already referred. For if Parliament may, under our constitution, enact any legislation it chooses and no court has any power to annul or modify such enactment, it necessarily follows that Parliament can, without acting unconstitutionally, legislate so as to abrogate or infringe any human right, no matter how fundamental it may be thought to be, or any obligation binding on the United Kingdom in international law. The courts have faced up to this problem. In the words of one notable judicial authority on constitutional issues,

“If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty’s treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties [authority cited], and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty’s own courts.”¹⁴

¹³ See *Pickin v British Railways Board* [1974] AC 765; *R (Jackson) v Attorney General*, f.n. 9 above, para 27.

¹⁴ *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143, per Diplock LJ.

The same rule must apply to the infringement of fundamental human rights. Thus critics of parliamentary sovereignty have no difficulty conceiving of flagrantly unjust and objectionable statutes: to deprive Jews of their nationality, to prohibit Christians from marrying non-Christians, to dissolve marriages between blacks and whites, to confiscate the property of red-haired women, to require all blue-eyed babies to be killed, to deprive large sections of the population of the right to vote, to authorise officials to inflict punishment for whatever reason they should choose.¹⁵ No one thinks it at all likely that Parliament would enact legislation of this character, but it is possible to conceive of less extreme and less improbable statutes which would nonetheless infringe the rule of law, and the mere possibility that Parliament might act in such a way gives rise to the argument that parliamentary sovereignty cannot, or cannot any longer, be fully respected.

Those who seek to undermine the principle of parliamentary sovereignty draw sustenance from the observation of Sir Edward Coke in *Dr Bonham's Case* in 1610 that a statute contrary to common right and reason would be void.¹⁶ But

¹⁵ These examples, given by F A Mann, "Britain's Bill of Rights", (1978) 94 LQR 512, 513 and T R S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993 OUP), pp 130, 282, 285 are cited by J. Goldsworthy, *The Sovereignty of Parliament* (1999, OUP), p 260.

¹⁶ (1610) 8 Co Rep 113b, 118a; 77 ER 646, 652.

it is not entirely clear what Coke meant;¹⁷ it appears that this observation may have been added after judgment had been given;¹⁸ it did not represent his later view;¹⁹ it was relied on as one of the reasons for his dismissal as Chief Justice of the King's Bench;²⁰ and it was not a view which commanded general acceptance even at the time.²¹ As Professor Jeffrey Goldsworthy has shown in his magisterial book on *The Sovereignty of Parliament*, on which I have drawn heavily and to which I am much indebted, there is no recorded case in which the courts, without the authority of Parliament, have invalidated or struck down a statute. This point is not to be discounted by pointing out, although this is true, that the question has never arisen for decision, since that is itself significant. As Goldsworthy demonstrates, to my mind wholly convincingly, the principle of parliamentary sovereignty has been endorsed without reservation by the greatest authorities on our constitutional, legal and cultural history. I need only mention Lord Burghley,²² Sir Robert Cecil,²³ Sir Matthew Hale,²⁴ Francis Bacon,²⁵ John Selden,²⁶ John Locke,²⁷ the Marquess of Halifax,²⁸ Blackstone,²⁹ Adam Smith,³⁰

¹⁷ Goldsworthy, *op. cit.*, p 111.

¹⁸ *Ibid*, p 123.

¹⁹ *Ibid*, p 112.

²⁰ *Ibid*, p 126.

²¹ *Ibid*, pp 122-124.

²² *Ibid*, p 61.

²³ *Ibid*, p 127.

²⁴ *Ibid*, pp 121, 157.

²⁵ *Ibid*, pp 126, 200.

²⁶ *Ibid*, p 128.

²⁷ *Ibid*, p 151.

²⁸ *Ibid*, p 156.

²⁹ *Ibid*, p 181.

³⁰ *Ibid*, p 183.

Samuel Johnson,³¹ Hardwicke,³² Montesquieu,³³ Thomas Paine,³⁴ Maitland,³⁵ Holdsworth,³⁶ Dicey.³⁷ As was stated by the Court of Queen's Bench in 1872,

“There is no judicial body in the country by which the validity of an act of parliament could be questioned. An act of the legislature is superior in authority to any court of law ... and no court could pronounce a judgment as to the validity of an act of parliament.”³⁸

John James Park, one of the first professors of law at this college, declared with similar clarity in 1832 that the British Constitution had no fundamental laws that could not be changed in the same way as ordinary laws.³⁹ He quoted an American author who had written:

³¹ *Ibid*, p 189.

³² *Ibid*, p 199.

³³ *Ibid*, p 201.

³⁴ *Ibid*, p 216.

³⁵ *Ibid*, p 44.

³⁶ *Ibid*, p 44, 233.

³⁷ *Ibid*, pp 1, 7, 9.

³⁸ *Ex p Canon Selwyn* (1872) 36 JP 54, per Cockburn CJ and Blackburn J.

³⁹ J J Park, *The Dogmas of the Constitution, Four Lectures on the Theory and Practice of the Constitution* (1832), pp 14-15.

“This is admitted by English jurists to be the case in respect to their own constitution, which, in all its vital parts, may be changed by an act of parliament; that is, the king, lords, and commons may, if they think proper, abrogate and repeal any existing laws, and pass any new laws in direct opposition to that which the people contemplate and revere as their ancient constitution. No such laws can be ... declared void by the courts of justice as unconstitutional.”⁴⁰

A more favoured argument advanced by those seeking to undermine the principle of parliamentary sovereignty is that Parliament’s sovereignty is no longer absolute. Three examples are usually given to support this contention: the European Communities Act 1972, the Human Rights Act 1998 and the three 1998 Acts devolving a measure of power to Scotland, Wales and Northern Ireland. None of these examples, I suggest, supports the proposition contended for: all involve a curtailment of the Westminster Parliament’s power to legislate, but that curtailment takes effect by express authority of the Westminster Parliament which, at least theoretically, it retains the power to revoke.

⁴⁰ William Rawle, *View of the Constitution of the United States* (1829).

Sections 2 and 3 of the European Communities Act 1972, enacted upon the UK becoming a member, provided in effect that the law of the Communities should have effect in this country. Before this date the European Court of Justice had already decided in decisions of, literally, fundamental importance, that the provisions of the Treaty of Rome had direct effect in member states and that Community law enjoyed primacy over any inconsistent national law of a member state.⁴¹ It necessarily followed that if a national Parliament were to legislate inconsistently with a relevant provision of Community law, as the UK Parliament did when it enacted the Merchant Shipping Act 1988 and the Employment Protection (Consolidation) Act 1978, the statute would be wholly or in part invalid, as was in due course held in two leading cases.⁴² This is the best example from the critics' point of view, since the process does involve the invalidation of statutes by the courts. But the courts act in that way only because Parliament, exercising its legislative authority, has told them to. If Parliament, exercising the same authority, told them to stop, they would obey that injunction also.

⁴¹ *Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v Nederlandse Belastingadministratie* [1963] ECR 1; *Costa v ENEL* [1964] ECR 585.

⁴² *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603; *R v Secretary of State for Employment, Ex p Equal Opportunities Commission* [1995] 1 AC 1.

The supposed exception based on the Human Rights Act is even weaker. As widely appreciated – although not, surprisingly, by the Prime Minister whose government promoted the Act – it was carefully drafted so as to preclude the invalidation by the courts of domestic legislation inconsistent with the articles of the European Convention given domestic effect by the Act, providing instead for the higher courts to make declarations of incompatibility which ministers might, but were not obliged under the Act, to take steps to rectify.⁴³ In the White Paper introducing the Human Rights Bill,⁴⁴ to which the then Prime Minister contributed the preface, the scheme of the legislation was made very plain:

“The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the

⁴³ Human Rights Act 1998, s.10.

⁴⁴ “Rights Brought Home”, Cm 3782, 1 October 1997.

validity of any Act that it passes ... To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it ...”⁴⁵

Thus in applying the Human Rights Act the courts have what has been called “a very specific, wholly democratic, mandate”,⁴⁶ but it is a mandate from Parliament and not one which overrides the sovereign legislative authority of the Queen in Parliament.

The devolution legislation affecting Scotland, Wales and Northern Ireland was of course prompted by the view that distinctive national communities within the United Kingdom should have increased responsibility for managing their own affairs. So Parliament enacted that certain functions which it and some central

⁴⁵ Para 2.13.

⁴⁶ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, para 42.

government departments had previously carried out should be devolved to the local administrations. But this involved no irrevocable surrender of parliamentary sovereignty, as is made clear by section 28(7) of the Scotland Act:

“This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.”

The Northern Irish Act contains a similar provision.⁴⁷

It has been suggested, with some judicial support,⁴⁸ that the principle of parliamentary sovereignty did not obtain in Scotland before 1707 and that the Union with Scotland Act 1706 cannot itself be amended or abrogated since it gave effect to the Treaty of Union in which certain provisions were agreed to be and were described in the Act as unalterable. The merits of this argument are far from clear.⁴⁹ It is hard to see how the pre-1707 Scottish Parliament could have done anything more fundamental than abolish itself, and it is hard to accept that the Westminster Parliament could not modify the Act of Union if there were a

⁴⁷ s 5(6) of the Northern Ireland Act 1998. There is no equivalent provision in the Government of Wales Act 1998, because the Welsh Assembly has no legislative competence.

⁴⁸ See *R(Jackson) v Attorney General*, f.n. 9 above, per Lord Hope of Craighead at paras 104-109, and the references there given.

⁴⁹ See, for instance, Goldsworthy, *op. cit.*, pp 165-173; Tom Mullen, “Reflections on *Jackson v Attorney General*: questioning sovereignty”, (2007) 27 *Legal Studies* 1 at 8-9.

clear majority in favour of doing so. But if, which I doubt, there is an exception here to the principle of parliamentary sovereignty, it is a very limited exception born of the peculiar circumstances pertaining to the union with Scotland and throws no doubt on the general applicability of the principle.

Much interest has been generated by observations of my greatly respected former colleague Lord Steyn in the case brought to challenge the validity of the Hunting Act 2004.⁵⁰ His observations did not bear on an issue which had to be decided in the case, and therefore have no authority as precedent, but they are germane to the question I am considering. He said:

“The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle

⁵⁰ *R(Jackson) v Attorney General*, f.n. 9 above.

established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is [a] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.”⁵¹

Lord Hope of Craighead similarly described the principle of parliamentary sovereignty as having been “created by the common law”.⁵² Baroness Hale of Richmond added:

“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.”⁵³

⁵¹ Para 102.

⁵² Para 126.

⁵³ Para 159. Lord Carswell also, para 168, described the principle of parliamentary sovereignty as a “judicial product”.

Welcomed in some quarters, these observations have also been described by one acerbic academic commentator as “unargued and unsound”, “historically false” and “jurisprudentially absurd”.⁵⁴

I cannot for my part accept that my colleagues’ observations are correct. It is true of course that the principle of parliamentary sovereignty cannot without circularity be ascribed to statute, and the historical record in any event reveals no such statute. But it does not follow that the principle must be a creature of the judge-made common law which the judges can alter: if it were, the rule could be altered by statute, since the prime characteristic of any common law rule is that it yields to a contrary provision of statute. It has to my mind been convincingly shown⁵⁵ that the principle of parliamentary sovereignty has been recognised as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it.

This is not a conclusion which, thus far, I regret, for the reason very well expressed by Professor Goldsworthy:

⁵⁴ Richard Ekins, “Acts of Parliament and the Parliament Acts” (2007) 123 LQR 91 at 103.

⁵⁵ Particularly by H L A Hart, *The Concept of Law* (1st edn, 1961), chaps 5-6; Goldsworthy, *op. cit.*, chap 10.

“What is at stake is the location of ultimate decision-making authority – the right to the ‘final word’ – in a legal system. If the judges were to repudiate the doctrine of parliamentary sovereignty, by refusing to allow Parliament to infringe unwritten rights, they would be claiming that ultimate authority for themselves. In settling disagreements about what fundamental rights people have, and whether legislation is consistent with them, the judges’ word rather than Parliament’s would be final. Since virtually all significant moral and political controversies in contemporary Western societies involve disagreements about rights, this would amount to a massive transfer of political power from parliaments to judges. Moreover, it would be a transfer of power initiated by the judges, to protect rights chosen by them, rather than one brought about democratically by parliamentary enactment or popular referendum. It is no wonder that the elected

branches of government regard that prospect with apprehension.”⁵⁶

I agree. 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 the unchallengeable rulings of unelected judges. A constitution should reflect the will of a clear majority of the people, and a constitutional change of the kind here contemplated should be made in accordance with that will or not at all. As it was put by a Member of Parliament in 1621,

“the judges are judges of the law, not of the Parliament. God forbid the state of the kingdom should ever come under the sentence of a judge.”⁵⁷

Thus, for those who have followed me this far, we reach these conclusions. We live in a society dedicated to the rule of law; in which Parliament has power, subject to limited, self-imposed restraints, to legislate as it wishes; in which Parliament may therefore legislate in a way which infringes the

⁵⁶ *Op. cit.*, p 3.

⁵⁷ Goldsworthy, *op. cit.*, p 103.

rule of law; and in which the judges, consistently with their constitutional duty to administer justice according to the laws and usages of the realm, cannot fail to give effect to such legislation if it is clearly and unambiguously expressed. Is there, then, a vice at the heart of our constitutional system? Some would answer that there is not, since although Parliament can legislate in a way that infringes the rule of law and fundamental rights it can in practice be relied on not to do so. No doubt the prospect of legislation discriminating against blue-eyed babies or red-haired women can be effectively discounted. But it is not at all hard to envisage legislation infringing the rule of law in less obvious ways and a constitution should, ideally, give protection against minor aberrations as well as those which are gross. Under the constitutional settlement bequeathed to us by the Glorious Revolution, a substantial measure of protection was given by the requirement that Crown, Lords and Commons, each of them powerful independent players, should assent to legislation before it became law. As a Victorian Lord Chief Justice put it in 1846,

“The constitution has lodged the sacred deposit of sovereign authority in a chest locked by three different keys, confided to the custody of three different trustees.”⁵⁸

⁵⁸ “Parliament and the Courts” (1846) 83 *Edinburgh Review* 1 at p 40, ascribed to Lord Denman.

Referring to these three different trustees, the same author continued with what now seems extraordinary prescience:

“One of them is now at length, after ages of struggle, effectually prevented from acting alone; but another of the two is said to enjoy the privilege of striking off the two other locks, when, for any purpose of its own, it wishes to lay hands on the treasure.”

Today, as we know, the legislative role of the Crown has been reduced to mere formality, and under the Parliament Acts 1911 and 1949 the power of the Lords is one of relatively brief delay and not denial. It was originally envisaged that the 1911 Act should be used to effect major constitutional changes, and it was so used to enact the Government of Ireland Act 1914, the Welsh Church Act 1914 and the 1949 Act itself. But the 1949 Act has been used in recent years to achieve objects of more minor or no constitutional import (the War Crimes Act 1991, the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000 and the Hunting Act 2004). This is the elective despotism to which Lord Hailsham, out of office at the time, famously referred. Thus our constitutional settlement has become unbalanced, and the power to restrain legislation favoured by a clear majority of the Commons much

weakened, even if, exceptionally, such legislation were to infringe the rule of law. This seems to me a serious problem. It is not a problem which will go away if we ignore it, but it may perhaps give rise, as Professor Bogdanor fears, to wholly undesirable conflict between Parliament and the judges. If, as I think we have been told, there is to be a review of our constitution and the governance of Britain, we may perhaps hope that the rule of law and its relationship with parliamentary sovereignty may feature high on the agenda. Once the problem is squarely confronted, the political genius of the British people will surely find a solution.