The Sovereignty of Law

Freedom, Constitution, and Common Law

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Introduction

I

A student of British constitutional law is confronted by an intimidating series of antinomies; and it is quickly apparent that there is great scope for argument about fundamental ideas and doctrines. A doctrine of absolute 'parliamentary sovereignty' appears to make the principle of the 'rule of law' subservient to a fluctuating legislative majority. Yet the rule of law is normally understood by its defenders to provide the foundations for government according to law—the bedrock of liberal democratic constitutionalism. The paradox is deepened by what is sometimes presented as an opposition between the rule of law and democracy. If the former is broadly represented, in practice, by judicial enforcement of established legal principle, the latter consists (on that view) in the right of the people's representatives to override such principles in the larger public interest. For example, basic rights of fair trial for certain types of criminal defendant—perhaps suspected rapists or terrorists—might have to give way to considerations of public safety, as determined by elected members of Government or Parliament.[1]

The sense of paradox or contradiction is further deepened by an overarching conflict between so-called legal constitutionalism and its political counterpart. Whereas the former emphasizes the role of the judiciary in defending basic liberties, the latter gives pride of place to the ordinary political process, giving maximum weight to the popular voice on any issue, as reflected by opinions expressed and votes cast. A legal constitutionalist typically concentrates on the legal framework of the constitution, treating the judiciary as the ultimate guardians of a system of law designed to regulate the exercise of power and protect individual liberty. The political constitutionalist usually treats the legal framework as a transient and temporary arrangement of rights, duties, and powers, vulnerable to change at the will of a current political majority acting in the name of the people at large. If the content of fundamental rights is sometimes controversial, making it hard to disentangle lawyerly disagreement from political dispute, it is not clear (on that view) why judges should be entrusted with resolving the controversy rather than elected politicians.[2]

[1] The capital G of 'Government' indicates the executive (ministers and civil servants) by contrast with 'government', which I use as to encompass all main branches of the state (including Parliament, Government, and the judiciary).

[2] For a particularly robust defence of political constitutionalism and critique of its legal counterpart, see Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005). See also Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

A further antinomy or opposition may now come forward, purporting to resolve an apparent conflict of basic principles. A purely formal conception of the rule of law, affirming a merely formal equality before the law, may be defended on the ground of its compatibility with parliamentary absolutism. On that view, the judicial role is simply to enforce whatever rules have been duly enacted by the legislature, without fear or favour: all are subject to the law, whatever its content, according to its enacted terms and without special exemptions (not expressly enacted) for powerful officials or their friends and allies. Any connection with substantive justice, such as rights to the enjoyment of free speech and other civil and political liberties, is merely incidental or contingent—the happy consequence of wise legislation by benevolent rulers. All rights and freedoms subsist at the will and pleasure of a parliamentary majority, which must be trusted to keep faith with our traditions of liberty even as it grapples with novel and pressing problems of governance. If Parliament is too easily manipulated by the executive Government, deploying the strength of its party domination of the House of Commons, the answer (according to the political constitutionalist) is political reform. A newly invigorated republicanism must nurture a greater independence for elected representatives, who may appreciate the virtues of liberty and defend it against governmental encroachment.[3]

By contrast with that merely formal account of the rule of law, a legal constitutionalist will insist on a broader and deeper conception. We see the point of formal equality before the law only when we understand it as being required by a deeper principle of equality or equal citizenship. The law is a shield against arbitrary power, whether wielded by influential private persons or organizations, bent on pursuit of their private interests, or by public officials, committed to conceptions of the public good that may be highly contentious or involve incidental costs that are hard to justify. By confining our conception of law to the regular enforcement of publicly promulgated rules, even when they have very damaging (and perhaps unforeseen) consequences for vulnerable persons or unpopular minorities, we deprive the principle of the rule of law of much of its power as a shield against oppression.[4] If the rule of law is a constitutional principle of real importance, capable of moderating the influence of majoritarian politics, especially in times of emergency or stress, it must be more than merely formal: it must embrace a range of familiar liberal rights and freedoms intended to guarantee each person's autonomy or independence. On this view, judges do not merely apply a law for whose content they take no responsibility; they rather apply a regime of legal principle whose integrity, as a systematic guarantee of basic liberties, it is their primary function to sustain.[5]

A thousand smaller controversies nestle amidst the clash of these contrasting versions of British constitutionalism. At numerous points, legal doctrine is torn

[3] See for example Tomkins, *Our Republican Constitution*, ch 4.

[4] There is here a further puzzling distinction: our concept of law is often treated as quite distinct from our ideal of the rule of law. See further Chapter 3, below.

[5] That has been a principal theme of my earlier books, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993) and *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001).

between rival visions of the constitution: it forms the anvil on which a larger resolution is hammered out in the course of legal and political evolution. The whole doctrinal basis of judicial review of administrative (or executive) action is contested by writers with varying understandings of the relationship between parliamentary sovereignty, on the one hand, and the rule of law, on the other. In its emphasis on the central place of legislative intention, the ultra vires doctrine seems a natural fit with absolutist conceptions of sovereignty; but its detractors give pride of place to common law doctrine, reflecting ideas of justice and fairness drawn from considerations of morality rather than authoritative political decision or instruction.[6] A formal doctrine, readily compatible with a formal account of the rule of law, confronts a more substantive engagement with political morality, which finds its natural expression in the articulation and development of the common law. And a lawyer who criticizes the thin formality of ultra vires, emphasizing instead the central role of the substantive common law, must equally acknowledge the thin formality of parliamentary absolutism. The nature and limits of parliamentary sovereignty are themselves (or so I shall argue) the products of common law—features of a common law constitution built on an elaborate mix of legal tradition and continuing popular and political allegiance.

Conflicting attitudes to the idea of separation of powers are closely related to these divergent theoretical viewpoints. A self-styled political constitutionalist is likely to look askance at the doctrine of separation of powers, fearful that too rigid a division of competence between different branches of government will frustrate political change or impede the implementation of policy.[7] For a legal constitutionalist, favouring legal guarantees of liberty, the separation of powers is an implication of the rule of law: only a strict division between legislator, executive government, and independent judiciary, marking the boundaries of separate jurisdictions, can preserve a sphere of individual autonomy in the face of state power. The subjection of public authorities to independent judicial scrutiny, bolstered by standards of procedural fairness that ensure an equality of arms between private citizen and public official, gives the rule of law a cutting edge: it promotes an accommodation between public policy and legal principle that might not otherwise be sought, let alone achieved. Questions about the justiciability of administrative action, or about appropriate styles of judicial deference to Parliament and Government, are closely bound up with contrasting attitudes to the separation of powers and the rival theories those attitudes invoke.[8]

A defender of the legal constitution as guarantor of individual liberty is likely to favour the proportionality standard of review: government action should not intrude on basic rights to any greater extent than is warranted, having regard to the gravity or urgency of the public interest in view. And a similar standard of

[6] See generally Christopher Forsyth (ed), *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000).

[7] See for example J A G Griffith, 'The Political Constitution' (1979) 42 MLR 1–21.

[8] See for example Jeffrey Jowell, 'Judicial Deference and Human Rights: A Question of Competence', in Paul Craig and Richard Rawlings, *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: Oxford University Press, 2003), 67–81.

review should apply whether such basic rights are identified as part of the ordinary common law or, instead, find their formal source within the European Convention on Human Rights.[9] The Human Rights Act 1998, making the Convention rights directly applicable in domestic law, may be understood to further and consolidate an indigenous rights culture—a culture reflected in a developing common law tradition of respect for individual freedom or autonomy. But those who locate the constitution in the ordinary flux of political debate and decision, wary of legal frameworks policed by unelected judges, will typically have their doubts about proportionality. Surely, they protest, a balancing of rights and interests lacks objective grounding, independent of a judge's own moral and political opinions: a more relaxed standard of reasonableness, or rationality, leaves greater scope for governmental decision and action, which may be quite legitimate (in any particular case) even if a judge thinks it gives inadequate weight to individual rights or freedoms.

The Human Rights Act, although widely praised for achieving a masterly equilibrium between competing theories of constitutionalism, actually enshrines the ambivalence that such contrasting accounts engender.[10] While on the one hand purporting to preserve Parliament's unfettered sovereignty—giving Parliament the 'last word', as it is often put—on the other, it mandates a mode of interpretation of laws that strengthens the hand of the judiciary in resisting unwarranted encroachments on fundamental rights. While a legal constitutionalist is likely to emphasize section 3, which commands an interpretation of statute compatible with European Convention rights, as far as this is possible, his political counterpart will point to section 4, which by enabling the court to declare a provision incompatible with the Convention, but not to quash it, leaves it to Parliament—if it sees fit—to change the law. The critical point, however, is that the interaction of these provisions—the limits of the 'possible' as regards benign interpretation, promoting harmony between statute and Convention—itself depends on underlying theories of law and adjudication. Whether or not a judge can apply a statute consistently with Convention rights, or must instead make a declaration of incompatibility, rarely depends on the dictionary meanings of words beyond his control. It hinges rather on his interpretative ingenuity, stimulated by the strength of his commitment to fundamental rights. Or, at any rate, so I shall argue.

II

The student of constitutional law, however, confronts a further question—one of crucial importance to a satisfactory understanding. Alongside these striking divisions of opinion and attitude is a further complexity concerning their pertinence to the administration of justice, as opposed to academic debate and criticism. Textbooks on constitutional and administrative law typically strive to present the law 'as it

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950).

[10] Compare Jowell, 'Judicial Deference and Human Rights', at 69–70 (challenging the idea of a 'subtle compromise between two models of democracy').

is'—accurately reflecting the settled understanding—implicitly pushing debate and division to the periphery, where (it is often implied) the higher courts must make new law, when necessary, to resolve disagreement. If, then, lawyers disagree about whether a fair trial can take place in the absence of relevant evidence, kept secret by a government agency in the public interest, there is no law on the matter until a superior court has ruled one way or the other, or until such a ruling has been affirmed or denied by the Supreme Court. If lawyers disagree about whether there are any limits to parliamentary sovereignty, there are none (on this view) unless and until they are confirmed or imposed by a court sufficiently senior and influential to do so. If there is disagreement over the true nature and content of the rule of law, or the separation of powers, there is no real answer as a matter of 'strict law': there is only an academic discourse *external* to law as it actually exists in judicial practice.

It is the main burden of this book to challenge that familiar, 'common-sense' viewpoint: there is no law or legal practice (I shall argue) separate from, or independent of, the larger debates in constitutional theory and jurisprudence over basic doctrines and their moral and political justification. We cannot identify the content of law with a merely descriptive account of judicial practice, viewed as a matter of empirical fact: it is a product of normative *judgement*, in which we attempt to make good moral sense of an array of such familiar legal 'sources' as Acts of Parliament, judicial precedent and influential dicta. An account of English law on any specific subject is always a *theory* of how best to read the relevant legal materials, guided by notions of justice and coherence: we assume that the law, correctly interpreted, should as far as possible serve the interests of justice, rather than injustice, and be broadly coherent rather than confused and contradictory. And this is true even when we disagree about what justice requires, or about what would make the law more coherent overall. Lawyers characteristically impugn their opponents' interpretations by pointing to their unjust or inconvenient or untidy consequences for particular cases, whether actual or imagined.

The law on any issue is always a matter of informed opinion, not the incontrovertible product of authoritative decree. Even the explicit terms of an Act of Parliament must be construed or interpreted before they can be applied to particular cases. A general rule must be *held* applicable—or otherwise—on a reasoned basis, having regard to its enacted terms, its supposed rationale, and an identification of the concrete case as an instance falling appropriately within its compass. Does a general prohibition on the publication of offensive material necessarily preclude the transmission of a party political broadcast, at the time of a general election, if some viewers are likely to be offended by claims or images they deplore?[11] Does the imposition of an automatic life sentence on anyone convicted of a second 'serious offence', subject only to the existence of 'exceptional circumstances', apply to someone who poses no real threat to public safety?[12] If opinions differ, it is because

[11] *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, considered in Chapter 1, below.

[12] *R v Offen* [2001] 1 WLR 253, considered in Chapter 1, below.

the statutory rule cannot be applied without interpretation; and interpretation involves moral or political judgement and not merely linguistic competence or expertise. We cannot ask what Parliament intended because cases arise that the legislators neither foresaw nor considered; we can only ask what decision would make their work, in retrospect, a better scheme of regulation—achieving its main objectives without unnecessary incidental harm to the broader public interest or to people's freedom and dignity.[13]

What is true of statutes is all the more plainly true of the common law. An analysis of precedent draws not merely on any general principles specifically mentioned in judicial opinions, but also on those further principles that enable us to find order and coherence in numerous previous decisions on particular sets of facts in related, but differing, circumstances. An account of common law rules and principles, in any field of law, is necessarily a theory about how best to understand why courts have reached certain decisions—not in the sense of explaining social or psychological phenomena, but rather of presenting reasons of justice or political morality for reading them in one way rather than another. If we are trying to make sense (for example) of the stronger control exercised by courts over public agencies in some cases than in others, we need a theory about the special demands of human rights and the implications for the scope of administrative discretion. We must try to construct an account which not only records judicial opinions and actions, but articulates a *justification* for such opinions and actions. We cannot, for instance, simply *describe* a doctrine of proportionality by reference to a course of judicial decisions in human rights cases. A trend in judicial behaviour becomes a *doctrine*, worthy of analysis and criticism, only when we can discover reasons that might plausibly inform and explain it—even if it remains controversial whether, on due reflection, those reasons really do justify the practice in question.

If legal analysis is always an *interpretation* of statute and precedent, it cannot be a neutral description of what judges characteristically do or decide. Legal advice (to a client) may sometimes amount to the prediction of a court's decision; but the lawyer may quite coherently add that, in his considered view, the court would be making a mistake by giving inadequate weight to an important legal principle. An opinion about what the law permits or requires—what standard of review the High Court must adopt in an administrative law case, for example, or what restrictions on freedom of speech can be imposed by broadcasting companies—is an interpretative conclusion, based on a judgement of the balance of argument between divergent accounts. Lawyers disagree in 'hard' cases, when there are good arguments for competing conclusions, because they appraise the strength of the relevant considerations differently: their legal conclusions reflect contrasting moral judgements which might be resolved, eventually, by a larger and deeper exploration of moral or political theory than current circumstances (or expertise) permit.[14]

[13] The argument is presented in detail in Chapter 5, below.

[14] I draw inspiration here from the work of Ronald Dworkin: see especially Dworkin, *A Matter of Principle* (Oxford University Press, 1985) and Dworkin, *Law's Empire* (London: Fontana Press, 1986).

Cases reach the courts when lawyers are unable to resolve such interpretative disputes without judicial deliberation and decision. And since courts rightly confine their attention to the specific questions immediately arising, many larger questions will inevitably remain unsettled and controversial. Whether or not Parliament has power to curtail free speech by express provision, even at election time, is a matter of opinion; but an opinion can be more or less persuasive—more or less accurate—independently of judicial pronouncement. The answer depends on our larger theory of constitutional law—a theory every public lawyer must try to articulate, step by step, as she deepens her understanding of the relevant legal principles. And a thoughtful lawyer will not simply abandon her theoretical moorings as soon as the Supreme Court hands down a decision inconsistent with them. If she does not find the Court's reasoning persuasive, she will reject its conclusions, hoping to foster a debate that may lead, in due course, to a reappraisal and perhaps reversal of (what she considers) an erroneous precedent. A proper humility in the face of contrary opinion should not be confused with craven submission to reasoning found—after all due reflection—to be seriously flawed.[15]

We cannot, then, distinguish (as is often supposed) between an account of the present law, as it simply is for the time being, and our opinions about what, ideally, it ought to be, if the statutes and precedents were better understood. I do not mean, of course, that the law on any issue is what it would be in an ideal world of my (or your) own making: it must, on the contrary, be informed and guided by any relevant statutory text and any pertinent judicial decisions and opinions. But a *theory* of the law relating to the basis and grounds of judicial review of administrative action, or the nature and scope of the proportionality doctrine, or the requirements of procedural fairness (in some particular field) cannot be detached from the theorist's views about what would make constitutional law better rather than worse. Even a theory about the best way to read the Broadcasting Act 1991 must engage the relevant political values.[16] The plain words of the statute cannot relieve us from the responsibility to weigh, in any specific context, the respective demands of free speech, on the one hand, and broadcasting standards, on the other. Of course, the theory must be about how to read the Act, not one about what should replace it. But that is, inevitably, a rather subtle distinction in practice and one which only detailed, contextual argument can elucidate. I cannot defeat your own theory by pointing to your obvious political or moral convictions: I must try to show that they have misled you into adopting a construction which, for connected reasons of language, consistency, and democracy, is ultimately unsound.

The law student cannot, then, stand aloof from the arguments that rage over rival versions of British constitutionalism. There is no simple fact-of-the-matter about any questions of public law, however comparatively local or trivial: any statement

[15] Compare A W B Simpson, 'The Common Law and Legal Theory', in Simpson (ed), *Oxford Essays in Jurisprudence*, 2nd series (Oxford: Clarendon Press, 1973), 77–99, at 90: 'Nor does the common law system admit the possibility of a court, however elevated, reaching a final, authoritative statement of what the law is in a general abstract sense. It is as if the system placed particular value upon dissension, obscurity, and the tentative character of judicial utterances.'

[16] See *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23.

of law is always the conclusion of an interpretative *argument* over how best to read the relevant legal materials. The United Kingdom has a common law constitution not merely in the sense that it is the product of history and tradition, but also in the sense that its content is a complex mixture of shared understandings and theoretical argument. Every doctrine, no matter how well established or exalted, is embraced as a rough approximation to the applicable balance of reasons—adequate for most purposes, perhaps, but subject to reappraisal and refinement when tested in novel circumstances or in the light of changing moral attitudes. The theoretical arguments often presented as an introduction to public law cannot, then, be set on one side in order to study the law as it currently stands: they are intrinsic to any competent statement of the law, which has no separate existence or meaning outside a morally engaged, interpretative account.[17]

It was once a settled doctrine of common law that action taken under the royal prerogative—the powers traditionally enjoyed by the monarch without the need of parliamentary assent—could not be challenged in the courts. If the pertinent action fell within the prerogative domain, its manner of exercise lay within the unfettered discretion of Government ministers (acting nominally on behalf of the Queen). When, however, the Judicial Committee of the House of Lords agreed that, in certain contexts, the legality or fairness of prerogative action could legitimately be brought into question in the courts, it conceded that the previous understanding had been erroneous, or at least inaccurate.[18] It 'changed' the law only in the sense of acknowledging that earlier assumptions were not consistent with legal principle, more deeply and reflectively considered. While in many cases Government action under prerogative powers would not be justiciable—involving matters unsuited to judicial scrutiny—in other instances it was harder to justify the distinction, as regards judicial review, between statutory and prerogative power. Why, for example, should it make any difference that the conditions of employment of civil servants were amended by an order made under prerogative Order in Council, rather than a power delegated by Act of Parliament? Surely similar considerations of fairness, as regards notice and consultation, should apply in either case? Even the notion that many prerogative powers are in their very nature non-justiciable can be challenged as inimical to the rule of law; and more recent case law has chipped away at a suggested list of such powers, showing that judicial review can encompass a much broader range of governmental decision-making than formerly assumed.[19]

The point is that public law doctrine adapts to meet fresh challenges, political and moral. Any statement of the current position is necessarily tentative and provisional, dependent in detail on study of the implications of our shared commitment to legality—a moral ideal connected to related ideals of freedom, justice, and equality. We move between general principle and more concrete application, refining and

[17] Compare David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' [2005] CLJ 329–51, at 350: 'There can be no one source of authority for constitutional rules: authority and legitimacy stem from the process of argument about and justification for the rules.'

[18] See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[19] Compare *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA Civ 498, para 46 (Sedley LJ); *Bancoult* is considered in Chapter 8, below.

developing legal doctrine as we proceed. And while we can describe the outcome in terms of legal change or reform—initiated by a kind of judicial 'legislation'—it is for the lawyer or judge involved much more a process of exploration and discovery. We examine the consequences of our fundamental ideas as circumstances or social attitudes change and new interpretations of doctrine, which would once have seemed plainly misguided, now seem more plausible—presenting a serious challenge to our aspirations for justice and coherence. So a lawyer or legal theorist cannot simply describe events from the outside, as a historian might seek to chart the various stages of constitutional change. A statement of law is only as accurate as its theoretical grasp of the pertinent standards of legality: to be a lawyer is to be, at least in part, a legal philosopher, even if the philosophy is steeped in local tradition and shared experience.[20]

III

This book denies that there is any neutral, detached, descriptive ground on which a lawyer may stand in drawing conclusions about the requirements of English (or Scottish or European) law, in general, or the content of the British constitution, in particular. It insists that any statement of law is always a matter of interpretation, and that interpretation is (in the present context) necessarily normative: it draws on moral and political ideas and values to support one reading rather than another. I proceed to defend an interpretation of principles of parliamentary sovereignty, the rule of law, and separation of powers that, in my view, permits the constitution to be viewed as a bastion of liberty and justice. It may fall far short of the constitution I would design for a newly created republic of free and equal citizens, each of whom had assented to my acting as their founding father. But if we treat its principal doctrines of parliamentary sovereignty and the rule of law as affirmations of fundamental ideals of democracy and legality—each linked in complex ways to related ideals of equality and freedom—our existing tradition is plainly open to a benign or congenial interpretation, capable in principle of inspiring loyalty and allegiance.

Many readers will disagree with the details of my analysis, even if they accept my general interpretative stance; other readers will oppose my views with sharply contrasting interpretations of their own. If, however, we draw on familiar ideas and ideals, citing similar examples and precedents, we are engaged in genuine interpretative debate. We are seeking to understand (and thereby improve) our constitutional practice; we are not conducting a debate over politics or justice or morality that has only marginal relevance to questions of public law. It is important to emphasize the nature of this debate—its character as an internal argument over what, when correctly understood, our legal order already permits or requires. Many of the matters that are vigorously contested in public law and legal theory are obscured, in

[20] Compare Dworkin, *Law's Empire*, 90: 'So any judge's opinion is itself a piece of legal philosophy … Jurisprudence is the general part of adjudication, silent prologue to any decision at law.'

practice, by ambiguity over the kind of debate involved. Moves in an interpretative argument are often construed, erroneously, as pleas for radical change or reform—calls for the kind of new constitutional settlement that only a special Convention of leading statesmen or some revolutionary upheaval could bring about. Criticism of prevailing orthodoxy, on any question, is not illegitimate because it is unorthodox: it is encouraged by the method of the common law, whose health depends on its continuing ability to meet fresh challenges and absorb new ideas.[21]

It will not do, therefore, for supporters of absolute parliamentary sovereignty, who deny all constitutional limits on the scope of legislative supremacy, to say that their opponents are inciting revolution. The doctrine cannot be defended on the basis that it is what a majority of senior judges or other senior officials happen to think correct: it must be defended by arguments of principle, if indeed such a defence could be devised, consistently with our commitment to constitutionalism. There is no current fact-of-the-matter to which absolutists can appeal.[22] Nor can the justiciability of certain sorts of prerogative governmental action be settled by reference to judicial dicta in prominent cases: such dicta must be subjected to critical inquiry on the basis of legal principle, informed by a developed account of the central ideal of legality or the rule of law. And whether or not courts should defer to the views of other public authorities, as regards the compatibility of their actions with human rights standards, and in what circumstances they should do so, are again matters of constitutional theory. Differences of opinion on such matters are internal to an exploration of our present public law practice: they evince divergent understandings of that practice as a contribution to democratic governance, respectful of human rights and equal citizenship.[23]

The nature of A. V. Dicey's well-known exposition of constitutional first principles continues to be hotly contested.[24] For some public lawyers, Dicey's text is essentially descriptive and morally detached. He presents the law as it simply is, in the sense of a systematic account of settled judicial practice, viewed from the outside: his numerous appeals to the value of liberty and the merits of English tradition must be taken as rhetorical flourishes, decorating an otherwise austere descriptivism. This is Dicey as legal positivist: the content of law is determined by its authoritative sources, whether respectful or otherwise of rights or liberty; any overlap with morality or justice (or any lawyer's understanding of those values) is mainly contingent, depending on the goodwill or wisdom of those exercising political authority.[25] It is possible, however, to defend a different Dicey, more congenial to my own interpretative project. Now the references to liberty and

[21] Compare Simpson, 'The Common Law and Legal Theory', 90: 'As a system of legal thought the common law… is inherently vague; it is a feature of the system that uniquely authentic statements of the rules which, so positivists tell us, comprise the common law, cannot be made.'

[22] See further Chapter 4, below.

[23] See especially Chapter 7, below.

[24] A V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (London: Macmillan, 1964; first published in 1885).

[25] H L A Hart took 'Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done

tradition—the contrasts with oppressive Continental regimes and the scepticism concerning enacted bills of rights—come centre-stage. Dicey, read in this way, attempts to provide a theory of the constitution intended to show that British democracy serves the interests of good governance, enhancing and protecting individual liberty. His 'rule of law', on this account, is as much the gift of historical tradition and respect for liberty as a merely formal doctrine, making everyone equally subject to whatever Parliament decreed as the law of the land. Here Dicey is himself an interpretivist, as much natural lawyer as legal positivist: the content of law is dependent on the 'spirit of legality' that animates his doctrine of the rule of law.[26]

The actual Dicey seems to have blended contrasting styles of analysis in a somewhat contradictory manner; perhaps that is part of his enduring influence, appealing to readers of different persuasions. In understanding his work as part of the tradition we are trying to explain and defend, however, we must identify the inconsistencies and expose the contrast between divergent understandings. If public lawyers read Dicey in contrasting ways, drawing rather different conclusions, it is largely because they begin with competing conceptions of the subject or of the nature of legal analysis. In that respect, continuing debate over Dicey's endeavour is a feature of the larger terrain of theoretical controversy that, to a significant degree, constitutes our public law.

My account of interpretation is developed more fully in Chapter 2, where I consider the familiar distinction between constitutional law and constitutional convention. That distinction, I argue, reflects a mainly descriptive stance, external to legal reasoning and adjudication. From the political scientist's perspective, legal rules enacted by Parliament or announced by judges can be readily distinguished from practices that politicians treat as morally binding: we can identify a category of rules that are mainly or wholly dependent, in practice, on political cooperation and consent. Dicey famously defined conventions as those rules observed by ministers of the Crown that were not enforced by the courts.[27] From an interpretative stance, internal to legal reasoning, however, such distinctions may prove unhelpful and misleading. The law consists of constitutional principles that may be illuminated as much by settled political practice as by enacted rules or judicial rulings: such principles try to make sense of the *whole* constitution, as an integrated legal and political order. Any feature of governmental practice may, in principle, become relevant to adjudication: settled convention, informed by ideas about good governance, is part of the normative background to any specific question of public law. And a judge cannot remain aloof, observing a practice whose content or significance he

so': Hart, *The Concept of Law* (first published in 1961), 2nd edn (Oxford: Clarendon Press, 1994), 185–6. John Austin observed (in 1832): 'The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.' (Austin, *The Province of Jurisprudence Determined*, ed Wilfrid E Rumble (Cambridge: Cambridge University Press, 1995), 157).

[26] See further Chapter 1, below.

[27] Dicey, *Law of the Constitution*, ch 14.

can simply take for granted.[28] I draw here on Ronald Dworkin's helpful account of legal interpretation, revealing the crucial linkage between practice and principle—matters of fact and attitude illuminated by reasons ascribed, in the last analysis, by the interpreter himself.[29]

In Chapter 3, I offer an account of the rule of law that invokes the idea of liberty as independence. Drawing on the work of F. A. Hayek as well as Dicey, I try to show the links between law and liberty that not only characterize republican political thought, but help to make sense of constitutional doctrine. Administrative discretion, though a necessary tool of modern governance, presents a threat to an ideal of individual autonomy or independence: judicial review of executive state action provides a necessary safeguard. The various connections between liberty, legality, and justice enable us to develop a much stronger conception of the rule of law than Dicey's well-known account initially suggests: it is ultimately a principle of equal citizenship, precluding arbitrary distinctions between persons irrelevant to any legitimate public purpose. Our statements of law, as regards the content of individual rights or the scope of public powers, are informed by an implicit ideal of legality: they express an understanding of the manner in which, in the specific context in point, our legal practice serves our guiding political ideals.

The discussion of parliamentary sovereignty in Chapter 4 matches the logic of my account of legality. From an appropriately internal legal stance, rooted in the basic political values, Parliament's authority is confined by the limits of our ability (in any concrete context) to interpret its enactments as contributions to the public good. Our obedience is necessarily reasoned and reflective, attempting always to reconcile statutory instructions with constitutional principle, according to the circumstances in view. The responsibility to uphold legality—to keep faith with the rule of law—cannot be discharged by mere submission to literal meaning, divorced from its broader moral and political context. And it is ultimately a personal moral responsibility, linked to citizenship or membership of the political community. From an external vantage point, congenial to legal positivism, we might seek to identify a 'rule of recognition', summarizing the opinions of senior officials (including senior judges); there might be a broad consensus on the unqualified authority of Parliament.[30] But that would tell us nothing useful, as legal interpreters, responsible for making sense of Parliament's instructions in the infinitely varied contexts and circumstances we confront in practice. Our efforts to honour the demands of both democracy and legality, in any practical instance, must be morally engaged, not neutral and detached.

[28] Compare Feldman, 'None, One or Several?', 343: 'In theory, the convention [of collective cabinet responsibility] is established by consensus among actors in the political arena, and the courts merely take some form of judicial notice, for their own limited purposes, of that consensus. In reality, there may be no consensus, yet the courts have to assume or pretend that some consensus is to be found. In those circumstances, the judiciary creates a vision of the constitutional convention that is effective, at least for the court's own purposes.'

[29] Dworkin, *Law's Empire*. See also Dworkin, *Justice for Hedgehogs* (Cambridge, Mass: Harvard University Press, 2011), Part 2.

[30] For the rule of recognition, see Hart, *The Concept of Law*, ch 6; see also Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999), ch 10.

The implications of seeking harmony between parliamentary sovereignty and the rule of law are further explored in Chapter 5, where I defend a style of statutory interpretation that affirms both legislative supremacy and constitutional rights. The application of statutes to particular cases calls for deliberation and judgement: there is always a balance to be struck, according to the circumstances, between legislative aim or purpose (as revealed by the text) and conflicting individual rights and interests. The new interpretative regime under the Human Rights Act 1998 is, I argue, largely a reaffirmation of common law orthodoxy: a correct construction, compliant with the rule of law, gives as much protection to basic rights as possible, having regard to the legitimate public purposes a statute can be understood to further. I shall challenge the view that the Act prescribes a mode of construction that would not otherwise apply, at least in cases where European Convention rights run in parallel with constitutional rights at common law. Our discussion will broaden out into a study of the jurisprudential debate over statutory meaning and interpretation; we will examine the idea of 'legislative intention', a notion closely linked to certain conceptions of parliamentary sovereignty. I shall emphasize, in keeping with the main theme of the book, the contrasting perspectives of detached observer and committed interpreter. Our theoretical vision must match the demands of legal practice if constitutional theory is to play its proper role.

Chapter 6 considers the lively debate about the constitutional foundations of judicial review in the light of the principal themes of the book. Insofar as the ultra vires doctrine is anything more than a merely formal rationalization—squaring judicial enforcement of principles of legality with the empowerment of executive officials by a sovereign Parliament, free to impose such constraints and conditions as it pleases—it must draw sustenance from a *justification* of that sovereignty. And insofar as a rival common law theory, displacing ultra vires, locates the basis of judicial review in fundamental moral principle, it must repudiate any absolutist conception of sovereignty, inconsistent with the rule of law. It cannot (I shall argue) be neutral between competing conceptions of the legal and constitutional order, or take for granted any received ideas about the content of the 'rule of recognition'. It must, like any persuasive constitutional theory, be normative all the way down—rooted in a theory of legality that provides a context for parliamentary sovereignty, defining its reach and marking its boundaries.

In Chapter 7, I explore a range of issues concerning judicial review of administrative action, emphasizing the way in which legality depends on judgements about legitimacy: legal doctrine, although an important guide, must be adaptable to subtle variations of legal and political context. From an internal, interpretative viewpoint we can sometimes acknowledge the legitimacy of decisions or developments which from an external, detached perspective may look more doubtful. In some accounts, for example, the articulation of common law constitutional rights, in the decades before the Human Rights Act was passed, was a species of judicial activism that had no firm foundation in existing law: certain prominent judges manipulated the law for their own radical political ends (however noble such ends

might be considered in themselves).[31] If, as I contend, we must appraise the legitimacy of such developments from the inside—from within the distinctive normative sphere that common law reasoning creates and maintains—we may reasonably reach quite different conclusions.

From an internal perspective, consistent with our commitment to legality as a moral ideal, a number of familiar doctrinal distinctions that serve mainly descriptive purposes look more questionable—procedure and substance, review and appeal, standards of legality and standards of review, European Convention rights and their common law equivalents, reasonableness (or rationality) and proportionality, judicial review of administrative action and the judicial enforcement of Convention rights. It is, I suggest, largely a failure to appreciate the fragility of such distinctions—the manner in which their application is sensitive to all the circumstances of any affront, or threatened affront, to legality—that underlies the calls for a specific doctrine of judicial deference, curbing the reach of judicial protection of fundamental human rights. Such a doctrine may duplicate what is already inherent in legal process, correctly understood, adding complexity rather than sophistication. From the perspective of adjudication, wisely conducted, deference to Parliament or Government means enforcing rights according to their true extent—if no further—having regard to the legitimate demands of the common good or public interest.

A number of prominent themes re-emerge in Chapter 8 by way of a concluding discussion. Questions about the rule of law and separation of powers, including the critical role of judicial independence, resurface in the context of fundamental rights. Whereas an external critique of 'legal constitutionalism' may attribute certain basic rights, such as freedom of speech or unimpeded access to the courts, to judicial 'invention' or dubious activism, an internal, more lawyerly, perspective may readily locate their legitimate interpretative foundations. Indeed, when the external critic dons the lawyer's robe, acknowledging the inherent role of the judiciary as guarantor of liberty, his scepticism may quickly disappear. A 'political constitutionalist', who recognizes only a very limited and subservient role for courts, risks an illuminating collapse into legal constitutionalism when he tries to confront questions of legality in the adjudicative context.[32]

A further distinction now appears which, though plausible from a primarily descriptive vantage point, proves brittle in more nuanced, interpretative hands. The Human Rights Act is presented (from the outside) as an example of 'weak' as opposed to 'strong' review: courts cannot quash or modify a statute that infringes constitutional rights but must obey it notwithstanding their declared objections.[33]

[31] See Tom Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), 99–111. And compare Tomkins, *Our Republican Constitution*, ch 1, considered in Chapter 2, below.

[32] See my discussion of the work of Adam Tomkins and Richard Bellamy in (mainly) Chapter 8. Bellamy has been misled (I shall suggest) by Cass Sunstein's critique of Ronald Dworkin's account of adjudication: Sunstein's strictures about competing levels of theoretical sophistication (or 'conceptual ascent') make little sense from an internal, interpretative perspective (as Dworkin observes).

[33] See Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346–406.

If, as I contend, however, statutory interpretation is at the same time constitutional interpretation—the content of law being always informed by the ideal of the rule of law—such distinctions between strong and weak review are in practice hard to sustain. The interpretative process is too subtle and discriminating for such labels to stick. The lawyer or judge strives to reconcile statutory purpose and individual right—or, more grandly, democracy and the rule of law. Judicial review is thereby rendered as strong as it needs to be to preserve legality. There is rarely any need to quash—or any sense in quashing—a provision whose full meaning and effect the court itself has helped to fashion.

Insofar as the standard debate over judicial or constitutional review assumes a rigid polarity—legislative versus judicial supremacy—I am challenging its practical utility. Common law constitutionalism, as I understand and defend it, resists that polarity. It denies that we have to choose between democracy and fundamental rights, or between parliamentary sovereignty and the rule of law, or between judicial deference and judicial activism. Our legal doctrine is only an attempt to summarize and systematize a tradition that has its own deeper momentum, rooted in conceptions of liberty and human dignity that may be hard to articulate in any comprehensive fashion. We resolve doctrinal conflicts by interrogating our tradition, confident that it has the resources to guide our deliberations. Even when doctrinal conflicts and inconsistencies suggest deeper divisions of moral or political opinion, our participation in a shared tradition holds out the promise of a larger, more complex vision, capable of resolving such conflicts and inconsistencies, at least for present purposes. There is rarely any genuine experience of *choice* available in ordinary legal practice, and hence in legal theory. There is, in practice, only the obligation to identify, by reference to the pertinent political values, what the law dictates in the circumstances we confront or suppose. Our differences are cognitive or intellectual, not (or not primarily) volitional or existential.

In an Appendix, at the end of the book, I consider a debate within public law about the relationship between the law and political theory, which is relevant to questions of method and interpretation. While the virtues and vices of my own approach will be apparent from my discussion of specific legal issues, it seemed appropriate briefly to reflect on that approach in the context of the wider debate. I also consider some further questions raised by Ronald Dworkin's interpretative approach to law and legal theory, developing themes explored in the earlier discussion of British constitutionalism.

IV

I have tried to make the earlier sections of each chapter accessible to students coming to the subject afresh, while developing my argument more fully in later sections. I envisage that the reader will move between chapters in the order he or she pleases, trusting that the introductory sections of each chapter will give sufficient guidance for the construction of an individual route-map. Later sections can be postponed, if the reader wishes, until a grasp of the larger argument across the

book as a whole has been obtained. I have avoided separate subject headings within each chapter for the obvious reason that the material is closely interrelated, later sections pursuing, in more detail or in a different manner, themes already established in previous ones. I hope, nevertheless, that the index will enable the reader readily to locate discussion of specific cases or issues or writers. I have tried to be as systematic as my subject matter permits; but it is a general theme of the book that there are few straightforward divisions and distinctions: an interpretation must be an interpretation of everything—everything, at least, relevant to public law.