JUSTICE Tom Sargant memorial annual lecture 2010

The UK Constitution
Time for Fundamental Reform?

Rabinder Singh QC

Thursday 14 October 2010

Freshfields Bruckhaus Deringer LLP, London

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The UK Constitution: Time for Fundamental Reform?

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It is an honour to have been asked to give this year's Tom Sargant memorial lecture even though I feel unqualified to follow in the footsteps of the distinguished speakers who have given the lecture in the past. In particular it is right that we should remember Lord Bingham, who gave the lecture in 2001. Many fulsome tributes have been paid to him since his untimely death last month. I would like to add just a few words of my own as an advocate who had the privilege of appearing before him. As a judge he was unfailingly courteous and fair. This country can count itself fortunate that, at this troubling time in the early 21st century, it was able to turn to this wise man for moral leadership when it was so badly needed. In the *Belmarsh* case he reminded us of our better selves: if we had left people languishing in prison without trial I don't think we would have been proud of ourselves. I believe that for generations to come Lord Bingham's opinion in the *Belmarsh* case will be read by anyone who is interested in liberty and equality.[1]

As is well-known, in May this year the United Kingdom elected a coalition government for the first time since the Second World War. On 19 May Nick Clegg, the leader of the Liberal Democrats and Deputy Prime Minister, made a speech in which he promised the British people that:

> *This government is going to persuade you to put your faith in politics once again. I am not going to talk about a few new rules for MPs, not the odd gesture or gimmick here or there to make you feel a bit more involved. I am talking about the most significant programme of empowerment by a British government since the great reforms of the 19th century. The biggest shake up of our democracy since 1832 when the Great Reform Act redrew the boundaries of British democracy, for the first time extending the franchise beyond the landed classes.*

While this reforming zeal is welcome, it is slightly surprising to hear that the new coalition government's proposed reforms are going to be the most fundamental since 1832. Even allowing for political hyperbole, this seems to give no credit to the last government, which came to office in 1997 with an ambitious programme of constitutional reform and in large

[1] *A v Secretary of State for the Home Department* [2005] 2 AC 68

part delivered it, although I will suggest it left some of the biggest questions unresolved. In his 2001 lecture Lord Bingham referred to "the flood of constitutional legislation released by the Blair government after the 1997 election."[2] Professor Vernon Bogdanor has even described the package of constitutional reforms enacted in the last 13 years as amounting to the "new British constitution."[3] In October 1997 another young and energetic leader had just come to power. At that time Tony Blair said this:

> *The Government is pledged to modernise British politics. We are committed to a comprehensive programme of constitutional reform. We believe it is right to increase individual rights, to decentralise power, to open up government and to reform Parliament.*[4]

The main features of that programme of constitutional reform are well-known and can be summarised briefly.[5] First, there was devolution to Scotland, Wales and, following the Good Friday Agreement of 1998, Northern Ireland. Devolution was not imposed by the UK Government but was approved by referendum in each of the relevant regions. The powers of the Scottish Parliament and Executive in particular are strong and wide-ranging, covering most areas of domestic policy.

Secondly, the House of Lords was reformed in 1999 to remove all but 92 of the hereditary peers. However, it proved impossible for agreement to be reached in Parliament about what degree of elected element should be included in a reformed upper chamber, and that is undoubtedly unfinished business. It is perhaps ironic that the only members of the House of Lords who can claim to have been elected by anyone are the 92 hereditaries who are literally elected from among their own peers. There was a proposal in the Brown administration's Constitutional Reform and Governance Bill which would have ended the system for by-elections when a hereditary peer dies, but this had to be dropped in the last days of that administration in order to facilitate agreement with the Opposition to allow the Bill to be passed before the general election this year. So it is that we still have 92 hereditary peers in our legislature and the only people who can vote for them in by-elections are other hereditary peers.

Thirdly, the electoral systems for most tiers of government, whether in the devolved assemblies, the Greater London Assembly or the European Parliament, were all based on some system of proportional representation. However, the promised referendum for electoral reform for the House of Commons never came: the report by Lord Jenkins, which recommended a system of election known as "AV Plus", which would have retained

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[2] Lord Bingham, 'The Evolving Consitution' (JUSTICE annual lecture, 2001), p.2.
[3] Vernon Bogdanor, The New British Constitution (2009, Hart Publishing). See also the same author's 'Human Rights and the New British Constitution' (JUSTICE annual lecture, 2009).
[4] Prime Minister's preface to the White Paper 'Rights Brought Home', CM 3782, which accompanied the introduction of the Human Rights Bill in October 1997.
[5] For more detail see Sir Jack Beatson, 'Reforming an Unwritten Constitution' (Blackstone Lecture, Oxford, 16 May 2009).

constituency MPs elected on the basis of the Alternative Vote but with additional "top up" MPs elected from a regional list, to ensure a degree of proportionality, has been allowed to gather dust since it was published in 1998.[6]

Fourthly, there were reforms to the judicial system. The judicial functions of the House of Lords were removed to create a new Supreme Court of the UK, so that the British people and others would instantly recognise our highest court for what it is – a supreme court which is independent of the legislature. The Lords of Appeal in Ordinary, or Law Lords as they were more commonly known, became Justices of the Supreme Court and no longer sit in the legislature. The Lord Chancellor was replaced as the head of the judiciary in England and Wales by the Lord Chief Justice: no longer do we have a member of the Cabinet also sitting as a judge in our highest court. And the important role of the Lord Chancellor in making judicial appointments has been transferred in substance if not in form to the independent Judicial Appointments Commission. It is important to appreciate that these reforms to the judicial system were made for reasons of principle, in particular the principle of the separation of powers. In an article in February this year the chair of the JAC, Baroness Prashar, said that:

> *The balance between democratic aspirations and judicial independence was struck with great deliberation and thought during the course of the passage of the Constitutional Reform Bill in 2005. ... My experience of attempting to give effect to the objectives of this legislation has confirmed to me how important it is not to lose sight of the fundamental principles that underpinned this change in 2005 – independence, excellence and legitimacy – and not to be swayed by short-term imperatives, bureaucratic convenience, ill-informed sniping or those resistant to change.*[7]

It is therefore disturbing to read that, for example, the Supreme Court is on a list of so-called "quangos" whose very existence is apparently being reviewed by the Government with a view to making cuts in public spending. It is important to recall why Lord Bingham supported the creation of the Supreme Court when he said this in his 2001 Tom Sargant lecture:

> *the institutional structure should reflect the practical reality. If the appellate committee of the House of Lords is, as for all practical purposes it is, a court of the United Kingdom and as such entirely independent of the legislature, it should be so established as to make clear both its purely judicial role and its independence. ... When, for example, the Pinochet case was appealed to the House of Lords some foreign observers mistakenly thought that the issue had ceased to be a judicial one and had become a political one.*[8]

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[6] See further Rodney Brazier, Constitutional Reform (3rd ed., 2008, OUP) pp.60-61.
[7] Baroness Prashar, 'Judicial Appointments: A Work in Progress' (2010) LS Gazette, 18 Feb, p.8.
[8] Bingham, *op cit*, p.30.

I would venture to suggest that it may not have been only foreign observers who made that mistake.

Last but certainly not least the Labour Government's programme of constitutional reform gave us the Human Rights Act 1998, which came into full force in October 2000. The Coalition Agreement which was reached in May this year between the Conservatives and the Liberal Democrats stated that:

> *We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties.*

For the time being at least the Human Rights Act appears to be safe although that wording does not make express reference to it. Much could be said about the history of the Human Rights Act in its first 10 years, and has been, but time does not permit me to dwell on this now. What I would like to say is that it is clearly not yet the subject of universal affection. It is a sorry state of affairs when even the phrase "human rights", with its noble history, is regarded as a dirty one in some quarters. The concept of human rights has a long pedigree, both in religious thought (and not only in the Judaeo-Christian tradition) and in secular thought going back to the Enlightenment and earlier. As the late, great new Zealand judge, Lord Cooke, put it in *Daly*:

> *some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.*[9]

One of the interesting features of the new constitution which has been emerging since 1997 is that it was the product of cross-party co-operation. Although the Labour party secured its biggest ever victory (in terms of seats) in the general election of 1997 and then almost exactly repeated the scale of that victory in 2001, and although there was no formal coalition or pact, nevertheless there was an agreement with the Liberal Democrats in 1997 as a result of the Joint Consultative Committee on Constitutional Reform,[10] which included the late Robin Cook, whose early death deprived this country of one of the most thoughtful politicians to grace the House of Commons in recent times. Such cross-party co-operation is surely desirable even if not always attainable when the fundamental rules of how a society is to be governed are to undergo change. Constitutional reform does not have to be the subject of consensus although it usually requires acceptance of a fundamental change as being irreversible even if it was vehemently opposed at the time. So the extension of the franchise was initially resisted by the Tory party in the early 1830s but eventually accepted

[9] *R v Secretary of State for the Home Department, ex p. Daly* [2001] 2 AC 532, para. 30.
[10] See further Brazier, *op cit*, pp.31-35.

by it and led to its transformation into the Conservative party under the leadership of Sir Robert Peel. Similarly, devolution to Scotland was not supported by the Conservative party, which feared it would lead to the break-up of the Union (and perhaps it may still do so if Scotland votes one day for independence) but it is surely now an irreversible part of the constitutional scene, especially as it was supported by a large majority of Scottish voters in a referendum.

The other thing to note about the Blair Government's programme of constitutional reforms is that they were largely the product of pressure from civil society on the Labour party in the long years of opposition when it was looking for something to do once it regained power. In particular NGOs like Charter 88 effectively saw their wish-list of reforms adopted by the Labour party as its programme in the early and mid-1990s. Although the Government could be criticised, and often was, for not having an overall narrative for what its disparate reforms amounted to in total, it seems to me that criticism could equally be made of the groups in civil society which had persuaded the Labour party to adopt their recommendations for reform in the first place. It is not entirely fair to blame Tony Blair for failing to be a constitutional theorist when the likes of Earl Grey, Gladstone and Asquith had been no more successful. But in any event, I am not sure that criticism is really warranted. One of the advantages of the British constitution is said to be its flexibility and its pragmatism. Although purists may have wished for a comprehensive theory to join the dots and provide a coherent explanation of the Blair reforms, the history of this country's incremental approach to reform suggests that we got in the end what we probably deserved.

Against that background, it seems to me that there are three specific areas of unfinished business for the new coalition government to address. First is the proposal for fixed-term parliaments, so taking away from the Prime Minister the power in effect to choose the date of a general election in order to suit the interests of his or her political party. This was an important part of the initial coalition agreement. As Nick Clegg said on 19 May, the new Government has already fixed the date of the next general election for 7 May 2015. Primary legislation has been introduced to give the concept of fixed-term parliaments effect in law.[11] So in a modified form we are seeing implemented the last of the six points of the People's Charter: although annual parliaments are probably to no one's taste now, at least the Chartists would be pleased that the term of a parliament is to be fixed by law and not left to the prerogative of the monarch, in reality the Prime Minister of the day. Like many people I would have preferred a fixed term of four years, not five, but that perhaps is a minor quibble.[12] In countries such as Australia, New Zealand and Canada the term is one of three years and that would probably be regarded as too short for this country, as it tends to lead

[11] Fixed-term Parliaments Bill.

[12] See also the second report of the House of Commons Political and Constitutional Reform Committee for the session of 2010-11, HC 436, 9 September 2010, which noted that the most of the opinion available to the Committee suggested that a fixed term of four years would be preferable to one of five years.

to there being little time in between elections for hard decisions to be taken in the national interest.

There is one aspect of the proposed legislation for fixed-term parliaments which is particularly controversial. This is the requirement that any decision to call a general election before the end of the normal fixed-term will require a special majority in the House of Commons of two-thirds (as in the Scottish Parliament and not the 55% majority that was originally mooted).[13] It seems to me that this is defensible on the ground that it should prevent the government itself (or the bigger partner in the coalition) calling an early general election when it might suit its own party interests. It should not prevent a vote of no confidence in the government being carried on a normal majority in the House of Commons. It may be that the current coalition will not survive for a full five years: if some or all Liberal Democrat MPs were to withdraw their support from it and vote with the Opposition in support of a motion of no confidence, the Prime Minister would have to resign in accordance with normal constitutional convention. If that scenario arises in the next few years it would not necessarily follow that there would have to be an immediate general election because it might be possible for the leader of the Opposition to form a government, either a minority administration or a new coalition. But the most likely consequence would be another election. It seems to me that nothing in the proposed legislation for fixed-term parliaments does or should prevent an early election taking place in such circumstances. As Lord McNally, the deputy leader of the House of Lords, has put it: "Parliament would still be able to dismiss a Government, but the Government would not be able to dismiss Parliament."[14]

The second main area of unfinished business that the coalition government is addressing is reform of the voting system for the House of Commons. There is to be a referendum, currently planned for next May, on whether we should adopt the Alternative Vote system, sometimes called the preferential voting system, which enables the voter to number each candidate standing in a single member constituency in order of preference.[15] The Liberal Democrats would have preferred to introduce a much more proportional system like the Single Transferable Vote, which is used in the Republic of Ireland, but which requires multi-member constituencies. The Conservatives would like to see no change at all to the current system which is known as the "first past the post" system. This label is not entirely accurate as in most races the post is usually fixed in advance and the winner is the first to pass that post. In our current system there is no fixed post. It could more accurately be described as a simple plurality system, in other words in each constituency the candidate with the most number of votes wins, even if they win by one vote over the second placed candidate and

[13] Deputy Prime Minister's statement on political and constitutional reform, House of Commons, 5 July 2010.
[14] Debate on the Queen's Speech, quoted by the Advocate General for Scotland, Lord Wallace of Tankerness QC in an address to the Scottish Public Law Group's annual conference, Edinburgh, 7 June 2010.
[15] Parliamentary Voting System and Constituencies Bill.

even if they have less than 50% of the votes cast. It seems to me that the case for replacing the current system of voting has become overwhelming for several reasons.

First, it is unfair and risks undermining the legitimacy of the House of Commons and therefore the basis on which our government is chosen. No government in recent times has won a majority of the votes cast at a general election and yet the current system has delivered to single party governments not only safe majorities but sometimes very large ones on not much more than 40% of the vote. This was as true of the Labour victories of 1997 and 2001 as it was of the Conservative victories of 1983 and 1987. But it can be worse than that, because the current system can deliver a majority of seats to a party that has come second in the share of the national vote. This is what happened in 1951, when the Attlee government lost even though it won more votes and indeed Labour won its largest vote in history. In the first election of 1974, a minority Labour government was formed because it had won more seats although it had fewer votes than the Conservatives.

In effect our House of Commons is an electoral college, which decides who is to form the government. The government and the Prime Minister are not directly elected by the people although it is often thought that they are. We are prone to smirk at the Americans for their electoral college system for deciding who should become president, which has twice meant that the person who came second in the national vote has become president: once in 1876, which led to the ignominious ending of the period known as "Reconstruction" after the Civil War; and more recently in the disputed election of 2000, which was eventually decided in favour of George W. Bush by the US Supreme Court.

But our system is no better and is getting worse. In the 2005 election the Labour party was able to retain power with a safe majority of seats on less than 36% of the national vote. This year the Conservatives actually did better in the sense that they won 37% of the votes cast but failed to secure a majority and had to enter a coalition with the Liberal Democrats. If they had won perhaps another percentage point in the share of the votes cast, they would have obtained a majority. And, as we shall see later, that would have unlocked the door to the apparently limitless power that control of Parliament gives a government. That is how close this country came to electing a government that had made a manifesto commitment to repeal the Human Rights Act. Some opinion polls were predicting that Labour might remain the largest party in the House of Commons even if it came second or even third in the share of the national vote. That would surely have made even the Conservatives think twice about the legitimacy of the current system.

Secondly, whatever the merits of the current electoral system may have been when we had a two party system it cannot cope when our voting habits have become much more varied. Even leaving aside the devolved regions of the UK, with their multi-party systems, in England we now have not only a strong third party in the Liberal Democrats but also UKIP, the Green party and even sadly the BNP. In a democracy we have to see off the threat of

fascism and racism through legitimate debate and electoral politics, not by pretending that it does not exist.

Thirdly, the main merit of the current system is often said to be that it delivers stable majority governments. But even that cannot be taken for granted now. In this country the system has given us the first peacetime coalition since the 1930s. In Canada, the only other major democracy that still uses the first past the post system, the last two elections in 2006 and 2008 have produced minority Conservative governments, not a stable majority. Conversely, the result of our election this year has shown that, even if one party does not win an election outright, we were perfectly capable in this country of putting together a coalition within days of the election which was able to agree a programme of government and is able to function with a working majority in the House of Commons.

But, if the current voting system is in need of reform, is the AV system on offer any better? In my view, it is, while I would certainly not claim it is perfect. It retains the advantages that the current system is said to have, in particular the link of an MP to a single member constituency and it tends to deliver governments with stable majorities, although that was not the outcome of this August's election in Australia, where Labor retained power but as a minority government supported by some Independent MPs, giving it a notional majority in Parliament of just one seat. There can be no doubt that AV can, if anything, exaggerate the effect of big swings in votes as between the main parties, so that in 1997 the Labour party would have secured an even bigger victory over the Conservatives if AV had been used than under the current system. However, it has to be an improvement on the current system, in my view, and should receive support in the referendum. This is because it does at least mean that in any particular constituency the winning candidate has to win a majority of the votes cast after second and further preferences have been counted, and not simply have the most votes in the first round. This is the system used for the direct election of the Mayor of London. It is to be hoped that the leader of the Opposition will support AV in the referendum, as it is in effect the system of voting that elected Ed Miliband the leader of the Labour party after his brother David came first in the first round of voting. In my view the AV system will give greater legitimacy to each MP and therefore to the government which is elected on the basis that it has a majority in the House of Commons.

The third main piece of unfinished business is House of Lords reform. This has been waiting not just since 1999 but since 1911 when the Parliament Act envisaged that it would be a temporary measure pending the placing of the upper chamber on a popular footing. The point can be put simply. It is not legitimate or acceptable in a democracy for any part of our legislature to be unelected. If the moral and political authority of government rests on the consent of the governed then those who make our laws must be elected by the people. There is much to be said for the election of members of the upper house to be on a different system than the House of Commons: for example if it were conducted on a pure proportional system it would tend not to give any party a majority and so the new chamber might legitimately act as a restraining influence on the lower House. And, if it were thought

desirable, there might be appropriate recognition of the different regions of the UK, perhaps within England too, by having regional constituencies as for the European Parliament.

There is also a case for stipulating that the members of the upper house should be elected for a much longer period than MPs, perhaps for a single term of 15 years, and perhaps with one third of the house having to stand down every five years, since they could then act as they saw fit in the national interest without the fear of losing their seat at the next election. But the central principle must remain that no one should any longer be a member of our legislature who has not been elected. It is often said that the House of Lords has the benefit of having among its members people who are experts in a variety of fields. While this is true, and was often given as a reason for retaining the Law Lords as members of the legislature, I think in the end it is not a sufficient reason to outweigh the imperative of the democratic principle. There would be nothing to stop such experts from standing for election to a reformed upper house but, even if they did not, there are other ways in which the house or Senate, as it might be renamed, could gain access to their expertise, for example by taking evidence in committee.

But the last and most important question I want to ask is whether all of this is mere tinkering. Should we now go all the way and adopt a written constitution? Of course, in one sense we do have a written constitution. It may not be codified, or written down in one place, but we have had constitutional documents in the past: e.g. Magna Carta and the Bill of Rights (neither of which was an act of Parliament if by that is meant the Queen or King in Parliament). And more recently, we have had not only such important statutes as the Representation of the People Acts, which gave us universal suffrage, but also the European Communities Act 1972, the devolution legislation of 1998, the Human Rights Act of the same year, the Constitutional Reform Act 2005 and the Constitutional Reform and Governance Act 2010. There is a lot of constitutional law in writing if the citizen wishes to look it up.

Conversely, as is well-known, even a written constitution like that of the USA does not in practice contain all the rules which govern the way in which that country is governed. Every system of government has unwritten conventions to meet the needs of a changing society. But what we don't have (apparently) is a fundamental law, with a higher status than ordinary law, which defines the powers of the main constituent parts of the state. In my view, there is much to be said for having a written (or codified) constitution even if it does no more than set down in one place the framework for how we are currently governed. As Stephen Hockman QC and others have observed, we would not be much impressed if, on applying to join a tennis club, we asked for the club's constitution, only to be told that it was not set out in one place but could be found in previous minutes of the

club, decisions of past presidents and unspoken conventions.[16] A written or codified constitution could have a valuable role to play in educating the citizens of the future.

But it seems to me that the time has come for more fundamental reform: I suggest that what we need to recognise explicitly is the principle of constitutionalism – that all power is limited, including the power of Parliament. Just as in modern administrative law there is no such thing as an unfettered discretion, so in constitutional law, I suggest, there should be no body in the state which enjoys absolute power. We need to move from a lop-sided constitution in which apparently the ultimate constitutional principle is Parliamentary sovereignty to a balanced constitution in which each part of the state is limited by higher constitutional principles. What we need to recognise is that it is not Parliament which is sovereign but the constitution itself.

In the early 21st century can our constitution plausibly be reduced simply to one principle, the doctrine of Parliamentary sovereignty? Suppose a visitor came to the UK in the manner of Montesquieu or de Tocqueville now. Apart from any question of normative theory, simply in descriptive terms, how would that visitor describe the essential features of the current British constitution? I would make this tentative suggestion as to its essential features:

1. It is a monarchy but a constitutional monarchy, i.e. the nominal head of state does not in practice exercise political power but acts on the advice of Her Majesty's Government.

2. It is a Parliamentary democracy. This has two components. First the legitimacy of Her Majesty's Government depends on the ability to command a stable majority in the House of Commons. And secondly, the House of Commons is clearly the dominant chamber in a bi-cameral legislature: if necessary, it can act without the consent of the House of Lords to make laws under the Parliament Acts 1911 and 1949.

3. There is an independent judiciary and the government itself is subject to the law. The Rule of Law is a constitutional principle, as section 1 of the Constitutional Reform Act 2005 describes it, reminding us that we do indeed have a constitution and that it consists of principles.

4. Fundamental human rights are respected. The UK is a party to the European Convention on Human Rights and other international treaties on human rights.

5. The UK is part of the European Union, which has legislative authority over many aspects of social and economic life, and increasingly other parts of public policy. Directly effective EU law is given effect in the domestic legal order without the need

[16] Stephen Hockman and Vernon Bogdanor et al, 'Towards a Codified Constitution' (2010) 7 Justice Journal 74: I was a member of the working group which produced this document.

for further enactment by section 2(1) of the European Communities Act 1972. In so far as there is any inconsistency between a norm of the domestic legal order and the supranational European legal order, the latter is to prevail, even if the domestic norm is contained in an Act of Parliament and even if that Act was passed after the 1972 Act.[17]

6. The UK has devolved administrations in Wales and Northern Ireland, and also in Scotland, which has a Parliament enjoying wide legislative powers on matters which are not reserved to Westminster.

Traditional constitutional theory would have it that the British constitution is flexible and yet strangely that it has not developed at all since 1689, when the Crown of England was offered to William and Mary on condition that they accept the Bill of Rights, which in effect established the supremacy of Parliament over the Crown; or perhaps 1885, when Dicey published the first edition of his famous work on the law of the constitution.

Apparently, the Queen in Parliament has absolute power to make or unmake any law. So it could legislate for New South Wales or India in spite of the Statute of Westminster of 1931 or the fact that India became a dominion in 1947 and a republic in 1950. It could abolish the Scottish Parliament without even a referendum of the people of Scotland, who voted for that Parliament in 1998. It could abolish the principle of universal suffrage. It could abolish future elections and so extend its lifetime in perpetuity. It could abolish the concept of judicial review and indeed the courts themselves and perhaps vest all judicial power in the monarch or the Prime Minister. And of course it could legislate to decree that all blue eyed babies shall be killed. Whenever this kind of extreme scenario is posed, the conventional response is to say that these examples are absurd and, of course, Parliament would do no such thing: blue eyed babies are safe.

And yet, Parliament (for which one should read the government, which has an absolute majority in the House of Commons) has in recent times done things in relation to minorities that it would not have done generally. It is easy to forget that when Lord Scarman gave his famous Hamlyn lectures in 1974, when he advocated incorporation of the European Convention on Human Rights into the laws of this country, what prompted his concern was what had happened in 1968, when Parliament deprived Asian people living in east Africa who were British citizens of the right to come to this country when they feared persecution. This measure was regarded by the European Commission of Human Rights as being motivated by racial prejudice and found to constitute degrading treatment under Article 3 of the European Convention.[18] More recently, after 9/11 Parliament rushed through the Anti-terrorism, Crime and Security Act 2001, which empowered the Secretary of State to detain certain suspected terrorists who were foreign nationals without trial. This was the subject of the *Belmarsh* case, and eventually led to a declaration of incompatibility being

[17] *R v Secretary of State for Transport, ex p. Factortame (No. 2)* [1991] 1 AC 603.
[18] *East African Asians case* (1983) 3 EHRR 76.

made under section 4 of the Human Rights Act in respect of Part 4 of the 2001 Act. But that did not enable the House of Lords either to strike down the offending provisions or to order the release of the detainees, since they were lawfully detained under the authority of Parliament.[19] And of course it is not impossible that the Human Rights Act itself may be repealed, since it is not an entrenched statute. It is often said that the other two democracies which are closest to the UK are Israel and New Zealand because both recognise the doctrine of Parliamentary sovereignty and neither has a written constitution. But what each does have is a system of proportional representation for its legislature and certain statutes which are entrenched against ordinary repeal.[20]

This then starkly raises the question: how can fundamental human rights be protected in a constitutional system such as ours which apparently confers absolute power on Parliament? As James Madison put it in the *Federalist Papers*:

> *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*[21]

What auxiliary precautions are available to us in this country to prevent tyranny and protect human rights? A conventional understanding of our constitution, based on Dicey, would suggest that it is not possible. But other voices deserve to be heard.

Professor Philip Allott, in a 1979 essay on the relationship between the rule of law and Parliamentary sovereignty, said this:

> *Brilliantly in his articulation of the concept of the Rule of Law, less comfortably in his articulation of the concept of the Sovereignty of Parliament, Dicey sought to demonstrate the validity of the system in terms of its own coherence. Dicey's is a coherence theory of a constitutional system. It invited us to understand why it works by understanding how it works. The purpose of the present study is to recall that it is possible to take another view of our constitutional system, in particular a 'higher law' view, and to suggest that there are grounds for thinking that such a view is now not only possible but also necessary.*[22]

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[19] *A v Secretary of State for the Home Department* [2005] 2 AC 68.
[20] New Zealand's Constitution Act 1986 and Electoral Act 1993; Israel's Basic Law: Human Dignity and Liberty 1992.
[21] *Federalist Papers, No. 51*, 6 February 1788.
[22] Philip Allott, 'The Courts and Parliament: Who Whom?' [1979] Camb LJ 79, at p.80. For a different view, which obviously deserves respect, see Lord Bingham, 'The Rule of Law and the Sovereignty of Parliament', Commemoration Oration, King's College London, 31 October 2007; and also Lord

In similar vein, Trevor Allan said in an article in 1997 that:

> *When constitutional debate is opened up to ordinary legal reasoning, based on fundamental principles, we shall discover that the notion of unlimited Parliamentary sovereignty no longer makes any legal or constitutional sense*.[23]

Without any claim to originality I would suggest that it is arguable that Parliamentary sovereignty is not in fact the fundamental principle of our constitution,[24] for the following reasons.

1. That doctrine cannot itself be the product of the will of Parliament because that would be circular. In any event there is no Act of Parliament which lays down that doctrine. The doctrine therefore appears to be a rule of the common law and, as such, could be altered in the future.

2. Parliament does not exist in a state of nature but rather within a system of law. For example, what Parliament is and how it may validly enact a law are questions that may have to be determined, as they were in *Jackson*.[25]

3. The doctrine of implied repeal of statutes has quietly disappeared in the case of so-called "constitutional statutes."[26] The European Communities Act 1972 is not regarded as being impliedly repealed by a later inconsistent statute, as the House of Lords held in *Factortame*.[27] The same can also be said of the Human Rights Act: sections 3 and 4, for example, have been used in relation to later statutes (as in the *Belmarsh* case), whereas traditional theory would have had it that the later statute impliedly repealed those provisions to the extent of any inconsistency.

4. If this can happen then that suggests that the traditional view that there cannot be entrenchment by prescription of the form and manner of future Acts of Parliament is also wrong. The experience of Israel and New Zealand suggests that, at the very least, some form of Parliamentary entrenchment is possible even in systems like ours.

5. It may even be that there are certain express laws which it would not be within the power of Parliament to enact, if they strike at the very heart of our

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Clarke and John Sorabji, 'The Rule of Law and our Changing Constitution' in Mads Andenas and Duncan Fairgrieve (eds), Tom Bingham and the Transformation of the Law 2009, OUP).

[23] Trevor Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 LQR 443, at p.449. See also the same author's books, Law, Liberty and Justice (1992, Clarendon), esp. Ch. 11; and Constitutional Justice (2001, OUP), esp. Ch. 7.

[24] See also *R (Jackson) v Attorney General* [2006] 1 AC 262, paras. 104-107 (Lord Hope).

[25] *R (Jackson) v Attorney General* [2006] 1 AC 262.

[26] *Thoburn v Sunderland City Council* [2003] QB 151.

[27] *R v Secretary of State for Transport, ex p. Factortame* [1991] 1 AC 603.

> constitutional arrangements, e.g. to abolish Parliament itself; to repeal the principle of universal suffrage; to abolish the courts or their power of judicial review. Take the example of ouster clauses: there is a certain incoherence in an Act which creates a tribunal with limited jurisdiction and then purports to confer immunity on that tribunal from judicial review – which instruction by Parliament are the courts supposed to obey? Experience suggests that they will not give effect to a clause which purports to oust judicial review completely.[28]

And we need to get our constitutional theory right. Parliamentary sovereignty cannot just be explained away as a political fact – that explanation may be available to a political scientist or historian or some other external observer. But this is to ignore what Hart himself called the internal point of view,[29] i.e. the point of view of someone who is an actor within the legal system and believes that it is a legitimate system which deserves his or her allegiance. It is not, I suggest, available to a lawyer, still less a judge – judges do not owe allegiance to a political fact, they owe allegiance to the law. They must try to work out, using appropriate legal materials, what their legal system requires of them. A priest should not be an atheist. If Parliament is truly unlimited in its powers in our legal system that is because that is a legal principle which deserves our loyal adherence, not because it is a political fact.

However, I would agree with those who have suggested that it would be better for the courts not to have take on the task of deciding that the powers of Parliament are limited under our common law constitution and for there to be a public debate about these issues. Ultimately there should be a written constitution adopted and approved by the people in a referendum, setting out the powers of Parliament and the other branches of the state.

Then we would have restored the constitution to basic principles, that all public power is conferred by the people and is held in trust on their behalf – it cannot be used to attack the very structural principles which help to define not only our constitutional arrangements but our values as a free and democratic society governed by the rule of law.

Rabinder Singh QC[30]

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[28] E.g. *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 and *R v Secretary of State for the Home Department, ex p. Fayed* [1998] 1 WLR 763.

[29] H L A Hart, The Concept of Law (2nd ed., 1994, OUP) pp.89-91.

[30] I would like to thank the Legal Information Team at Matrix Chambers for their assistance with research for this lecture.

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