

# **The Constitutionalisation of Public Law**

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## The Constitutionalisation of Public Law

In the late 1950s and early 1960s Stanley de Smith and William Wade published the first editions of their classic books. It was an intellectual breakthrough: they were the first to describe the contours of our administrative law in a coherent fashion. But at that time little attention was paid to the constitutional foundations of judicial review. Indeed in Britain constitutional law did not seem to matter very much. There was a general and comforting sense of satisfaction with our existing constitutional arrangements. Any sceptical questions about the shape of our unwritten constitution were met with the knock-down argument that "it works". Historically that is unremarkable. Unlike many countries in Europe, England has had a long history of constitutional habits, and of evolutionary rather than revolutionary change. And in the constitutional sphere it is what happens in practice that is of fundamental importance. Moreover, England had the enduring advantage of a well developed common law, rooted in custom and usage, and a Westminster model of parliamentary democracy, both of which were transplanted to a great many dominions, colonies and dependent territories. There was reason for some satisfaction. Unfortunately, general contentment with the existing order of things did not encourage enquiry into the link between the constitution and judicial review. And comparative law methods in regard to constitutional matters were not in vogue. The view among lawyers was not very different from that captured by Anthony Trollope in *Orley Farm* which was first serialized in monthly parts in 1861 and 1862. Trollope described the prejudice of English lawyers against learning from international experience. He wrote:

"It would be useless at present, seeing that we cannot bring ourselves to believe it possible that a foreigner should in any respect be wiser than ourselves. If any such point out to us our follies, we at once claim those follies as the special evidences of our wisdom. We are so self-satisfied with our own customs, that we hold up our hands with surprise at the fatuity of men who presume to point out to us their defects."

In the same novel an experienced barrister of Lincoln's Inn said about international legal congresses that "all this palaver that was going on in all the various tongues of babel would end as it began - in nothing." Such a mindset among English lawyers still played a pervasive role until the 1960s. It discouraged active constitutional debate. And during this period the courts were excessively deferential towards acts of ministers and officials which were called in question in judicial review proceedings. There was a great fear of the danger of changing anything, the danger of making anything more and the danger of making anything less as Bagehot famously remarked about Lord Eldon.

## Judicial Review

From the late 1960s the long slumber of judicial review slowly came to an end. The bonds of judicial restraint in respect of the review of acts of the executive gradually became loosened. Judges became increasingly willing to restrain unlawful acts of the executive. From the 1970s there was an enormous increase in applications for judicial review. The occasions for examining and re-examining the principles of judicial review multiplied. A partnership of judges and academic lawyers developed public law in a relatively coherent fashion. But it was only in the late 1980s that judges came to realise and accept that standards applied by them in judicial review must ultimately be justified by constitutional principles. There was and still is much controversy about the constitutional principles upon which judicial review rests. I will not try to describe the lively debates in which academic lawyers, practitioners and judges have jostled. Instead I will try to state what I regard as the critical constitutional underpinning of our public law. For my part, the architecture of public law rests mainly on four constitutional foundations, namely the separation of powers, the rule of law, the principle of constitutionality or legality as an aid to the interpretation of statutes, and the *ultra vires* rule as the justification for the major and statute based part of judicial review.

### *The separation of powers*

The legitimacy of the judiciary's power to review acts of the executive must ultimately depend on the judiciary being a separate and independent branch of government. In *Hinds v. The Queen* the Appellate Committee of the House of Lords held that the British constitution is firmly based on the separation of powers between the legislature, the executive and the judiciary.<sup>1</sup> Undoubtedly, the divergences from this principle in our constitutional arrangements are significant. Indeed a disinterested observer may question whether we make more than a formal obeisance to the principle of separation of powers. After all, the Lord Chancellor is a member of the cabinet and nevertheless one of the privileges of his office is to sit from time to time in our final court of appeal. When in 1997 in a public lecture I argued that there is no longer any constitutional or pragmatic reason for the Lord Chancellor to sit in the Appellate Committee of the House of Lords I seemed to be tilting at windmills.<sup>2</sup> Now challenges to the Lord Chancellor sitting judicially have become a reality. And that risk will be greater once article 6 of the European Convention on Human Rights, which requires that a court must be independent, becomes part of our law next year.

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<sup>1</sup> [1977] A.C. 195, at 212, *per* Lord Diplock; see also *Duport Steel Ltd. v. Sirs* [1980] 1 W.L.R. 142 at 157.

<sup>2</sup> I discussed the separation of powers in some detail in "The Weakest and Least Dangerous Department of Government" [1997] P.L.84. See also Diana Woodhouse, *The Office of Lord Chancellor*, 1998 P.L. 617, and Dawn Oliver, *The Lord Chancellor, the Judicial Committee of the Privy Council and devolution* 1999 P.L.1.

In the wake of the Government's far-reaching programme of constitutional reform and the *Pinochet* affair there may be change in the air. Moreover, in *McGonnell v. United Kingdom* the European Commission has decided that the Bailiff of Guernsey who is a member of the executive and a judge, does not satisfy the criterion of independence under article 6(1) of the European Convention on Human Rights.<sup>3</sup> The scale of the problem in Guernsey and in the United Kingdom is very different. Nevertheless, in principle the same reasoning applies to the Lord Chancellor sitting in the Appellate Committee of the House of Lords. If the European Court of Human Rights comes to the same conclusion the writing may be on the wall for the Lord Chancellor's privilege to sit on the Appellate Committee. Following the decision of the House of Lords in *Pinochet No. 2*, in which the first decision of the House of Lords was set aside by a differently constituted Appellate Committee, there may be a challenge in a case in which the Lord Chancellor sat in the Appellate Committee, notably where there is a split decision.<sup>4</sup> Such a case would have to be considered by a new panel of the Appellate Committee. It would place the Appellate Committee in a most invidious position. But it will discharge its duties in accordance with the law. If such a challenge should fail, the next step could be a complaint to the Strasbourg Court. That court will probably not be oblivious of the need to apply the principle of the independence of the judiciary consistently throughout Europe. It would be surprising if the Strasbourg Court made an exception in the case of the United Kingdom. If, as seems likely, the privilege of the Lord Chancellor to sit in the Appellate Committee can no longer be maintained, it seems to me to follow that the privilege of serving Law Lords to speak and vote in the House of Lords will also have to come to an end. And that may in turn eventually lead to the creation of a Supreme Court. The Royal Commission on the Reform of the House of Lords will examine the position of the Law Lords as members of the House of Lords.<sup>5</sup> But the Royal Commission will apparently not consider the linked question of what will happen if the Law Lords are to lose their existing privileges and no other investigation of this wider question is on foot. This is a curiously truncated enquiry. Moreover, it is odd that the Royal Commission will consider the position of the Law Lords but not the position of the Lord Chancellor whose office involves greater anomalies than the offices of the Law Lords. The strategic thinking behind this coyness may be that turning the searchlight on the Lord Chancellor's position may expose the fragility of the supposed pragmatic justifications for the present arrangements. But I return to the main point. Subject to the well known anomalies, our constitution is squarely based on the doctrine of separation of powers. It is the source of the residual or inherent powers of the court, notably to curb abuse of power by or on behalf of the executive. It is a cornerstone of judicial review.

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<sup>3</sup> Report of the Commission dated 20 October 1998 on Application No. 284 88/95.

<sup>4</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet No. 2* [1999] 2 W.L.R. 272.

<sup>5</sup> *Modernising Parliament: Reforming the House of Lords*, Cm 4183, January 1999, Chapter 7, Paragraph 20.

### *The rule of law*

From the time of Dicey to the present day the concept of the rule of law has been used in a number of different senses. The authors of a book called "The Noble Lie" observed that the "rule of law, elastic though it may be, comes as close as anything to signposting our unique compact."<sup>6</sup> For my part two core meanings of the rule of law are essential to an understanding of our public law. The first is not a legal concept. The rule of law is a term of political philosophy or institutional morality. It conveys the idea of government not under men but under laws. It eschews the instrumentalist conception of law that enables an oppressive regime to attain its aims by the use of law, as happened in South Africa in the apartheid era. It addresses the moral dimension of public power. It contemplates a civil society under equal and just laws. This is the sense in which the rule of law is mentioned in a preamble to the European Convention on Human Rights. In this sense the rule of law is the greatest single moulding force of our public law.

In its second sense the rule of law is a general principle of constitutional law. Its central focus is to constrain the abuse of official power. It protects a citizen's right to legal certainty in respect of interference with his liberties. It guarantees access to justice. It ensures procedural fairness over much of the range of administrative decision-making by officials. An interesting example of the application of the rule of law is *Venables and Thompson* where a majority of the House of Lords quashed the Secretary of State's decision setting a tariff for the custodial term to be served by child murderers.<sup>7</sup> One ground of the majority decision was that the Secretary of State relied on a press campaign for an increase in the tariff. The conduct of the Secretary of State was contrary to the rule of law. The rule of law has substantive content. Thus in *Wheeler v. Leicester City Council* a local authority withdrew the licence of a football club because some of their members had visited South Africa.<sup>8</sup> There was, however, no law prohibiting contact with South Africa. The local authority's decision was held to be contrary to the rule of law. It has been invoked by judges in many diverse circumstances.<sup>9</sup> It is an over-arching principle of our public law. But it does not cover the whole field. Its essential terrain of application is closely linked with the kind of democracy we have in Britain, namely a European liberal democracy in which the pluralism of our society is recognised and the rights of minorities are protected.

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<sup>6</sup> I. Harden and N Lewis, *The Noble Lie: The British Constitution and the Rule of Law*. (Hutchison, London, 1986.)

<sup>7</sup> [1998] A.C. 407.

<sup>8</sup> [1985] A.C. 1054.

<sup>9</sup> Compare Jeffrey Jowell, *The Rule of Law Today*, 57-77, in *The Changing Constitution*, ed. by Jowell and Oliver, 3rd ed.

### *The principle of constitutionality*

The supremacy of Parliament no longer means what it did in the days of *Dicey*. It is a more complex concept. Subject to Parliament's power to legislate expressly to withdraw from the present 15-nation European Union - an unthinkable hypothesis - our membership carries with it a pluralistic or divided concept of legal sovereignty. This is illustrated by the second *Factortame* case.<sup>10</sup> There was a clash between community law and a later Act of the United Kingdom Parliament. The House of Lords granted an injunction to forbid a Minister from obeying the act of Parliament. The Act was disapplied. What is the constitutional position? Only an express enactment of Parliament could terminate our membership of the European Union. Similarly, the view may prevail that only an express repeal of the Human Rights Act and the devolution legislation would be effective. In practice the sovereignty of the Westminster Parliament is qualified. Moreover, the general principle that treaties which are not incorporated into our domestic law by Parliament, cannot give rise of rights or obligations is being questioned.<sup>11</sup> Let me illustrate the point. Assume a prisoner in Wormwood Scrubs wishes to lodge a complaint under the European Convention of Human Rights to the Strasbourg Court. The governor refuses to allow him to forward his petition. I have assumed that the doctrine of legitimate expectations is inapplicable. Does the fact that the United Kingdom government has formally submitted to the jurisdiction of the Strasbourg Court in respect of the right of individual petition give the prisoner a legal right to obtain an order of mandamus against the governor? The orthodox view is that the answer is No. Unincorporated treaties do not become part of domestic law. The rationale of the traditional rule is that the executive must not be allowed to bypass Parliament and oppress citizens by entering into treaties which are not incorporated. Human rights treaties are untouched by this rationale. It is arguable that where the reason for the rule stops the reach of the rule may end. There is scope for the evolution of a pluralistic and inter-active notion, which may place international human rights tribunals to which a country submitted pursuant to an unincorporated treaty in a special category. By resort to a constitutional due process provision the Privy Council recently granted a stay of execution to two condemned men in Trinidad until of the determination of their appeals to the Inter-American Human Rights Committee, the jurisdiction of which depended on an unincorporated treaty.<sup>12</sup> But the central problem of the status of rights conferred by the executive may arise again, notably in respect of appeals to international human rights tribunals.

Where does this leave the relationship between Parliament and the courts? The traditional view is that Parliament has the power to pass any legislation other than legislation purporting to bind itself for the future. There has been a vigorous debate in which the omnicompetence of Parliament has been questioned. I take the traditional view.

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<sup>10</sup> [1991] A.C. 603, at 658-9.

<sup>11</sup> *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418.

<sup>12</sup> *Thomas and Hillaire v. The State*, P.C. 17 March 1999, unreported.

Parliament has the sovereign legal power to legislate as it thinks fit. The courts will give effect to the clearly expressed will of Parliament. The courts have said so on countless occasions. On the other hand, it is of fundamental constitutional importance that the courts must interpret and apply legislation on the assumption that Parliament does not write on a blank sheet. Parliament legislates for a European liberal democracy founded on the traditions and principles of the common law. This gives rise to what Rupert Cross described as a presumption of general application which operates as a constitutional principle.<sup>13</sup> It applies particularly to open-textured and general statutory language entrusting wide powers to ministers and public officials. It is not dependent on finding an ambiguity in the statutory language. In *Pierson* Lord Browne-Wilkinson examined the authorities with great care and formulated this principle as follows:<sup>14</sup>

A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.”

This is the principle of constitutionality or legality.<sup>15</sup> Given the fact that Parliament usually confers statutory powers to ministers in wide terms, this principle is of central importance over a wide spectrum of statute based judicial review cases.

#### *The justification for judicial review*

There has been a lively debate in England about the constitutional justification for judicial review.<sup>16</sup> This is an important question because the answer to it may affect the development of judicial review. In my view the constitutional justification for the major and statute based part judicial review is the *ultra vires* doctrine: when the executive strays beyond its statutory powers the judiciary is empowered to declare such acts invalid. In *Page* and again *Boddington* the House of Lords adopted this explanation of the statute based

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<sup>13</sup> Statutory Interpretation, 3rd ed, at 166.

<sup>14</sup> [1998] A.C. 539, at 575D.

<sup>15</sup> Less felicitously than Lord Browne-Wilkinson I covered the same ground and came to the same conclusion in *Pierson*: at 587C-590A.

<sup>16</sup> For an sample of the literature see: D. Oliver, “Is the Ultra Vires Rule the Basis of Judicial Review?” [1987] P.L. 543; Paul Craig, “Ultra Vires and the Foundations of Judicial Review” [1998] C.L.J. 63; Forsyth, “Of Fig Leaves and Fairy Tales: The ultra vires Doctrine, the Sovereignty of Parliament and Judicial Review” [1996] C.L.J. 122.

part of judicial review.<sup>17</sup> How does this explanation fit into constitutional theory? In *M v. Home Office* Nolan L.J observed that "... the proper constitutional relationship of the courts with the executive is that the courts will respect all acts of the executive within its lawful sphere, and the executive will respect all decisions of the court as to what its lawful province is".<sup>18</sup> To this explanation one must add that in making decisions in judicial review cases judges are constrained by the principle of institutional integrity. They must make their decisions on principled grounds. There is a Rubicon which they may not cross. This is then the demarcation of the provinces the executive and the judiciary. In deciding in which domain a particular case falls the context is all important. The continuum can be illustrated by two cases at the extreme ends of the spectrum: Where policy issues regarding the allocation of resources is concerned the courts hardly ever intervene. An example might be a decision by a health authority not to provide funds for cosmetic surgery while there are long waiting lists of individuals requiring major surgery. On the other hand, where fundamental human rights are at stake an approach of proportionality or virtual proportionality applies and the courts intervene more readily. An example might be an issue whether a particular applicant is entitled to asylum. Most judicial review cases fall somewhere between the two. For my part there is no conceptual or pragmatic difficulty in saying that such a graduated system of judicial review of statute based powers is founded on the *ultra vires* principle. But it is necessary to emphasise that this view is based on the premise that the issue of *vires* is considered with due regard to the principle of constitutionality.

But it is obvious that the *ultra vires* principle cannot be the explanation of the judicial review of non-statutory powers. It has long been recognised that judicial review will extend to trade unions, trade associations and corporations with *de facto* monopoly power.<sup>19</sup> This branch of public law was explained in *R. v. Panel on Take-overs and Mergers, ex parte Datafin plc*.<sup>20</sup> The Court of Appeal held that decisions of the Take-over Panel, which exercises its functions as part of a self-regulatory framework, are judicially reviewable. For the Court of Appeal the decisive factor was not the source of the power of the Take-over Panel but the nature of the functions it exercised. The Court of Appeal regarded the common law as the true foundation of this branch of public law. It is true that in some later decisions a different test has been employed, namely whether it can be said that "were no self regulatory body in existence, Parliament would almost inevitably intervene to control the

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<sup>17</sup> *R. v. Lord Chancellor, ex-parte Page* [1993] A.C. 682; *Boddington v. British Transport Police* [1998] 2 W.L.R. 639.

<sup>18</sup> [1992] 1 Q.B. 220, at 314H-315A.

<sup>19</sup> Craig, *Constitutions, Property and Regulation* [1991] P.L. 538.

<sup>20</sup> [1987] Q.B. 815.

activity in question."<sup>21</sup> This extension of the *ultra vires* principle to non-statutory bodies is a fiction. Murray Hunt has convincingly explained:<sup>22</sup>

The test for whether a body is "public", and therefore whether administrative law principles presumptively apply to its decision-making, should not depend on the fictional attribution of derivative status to the body's powers. The relevant factors should include the nature of the interests affected by the body's decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body's jurisdiction, and the nature of the context in which the body operates. Parliament's non-involvement or would be involvement, or whether the body is woven into a network of regulation with state underpinning, ought not to be relevant to answering these questions. The very existence of institutional power capable of affecting rights and interests should itself be a sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court, regardless of its actual or would-be source."

In my view this is the true basis of the court's jurisdiction over the exercise non-statutory powers. If this reasoning is correct, it calls into question the decision of the Court of Appeal that the Jockey Club is not amenable to judicial review.<sup>23</sup> After all, those wanting to race their horses had no alternative but to be bound by the rules of the Jockey Club. There is, however, an even more important dimension. In an era when government policy is to privatise public services, to contract out activities formerly carried out directly by public bodies and to put its faith in self regulation it is essential that the courts should apply a functional test of reviewability.

### **The Recognition of Constitutional Rights**

In parallel with the development of judicial review the courts have recognized certain fundamental rights as constitutional in origin. The classification of a right as constitutional is meaningful. It is testimony that an added value is attached to the protection of the right.

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<sup>21</sup> R. v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wackmann [1993] 2 All E.R. 249 and see R. v. Football Association Ltd. ex parte Football League [1993] 2 All E.R. 833.

<sup>22</sup> The Province of Administrative Law, ed. Michael Taggart, Chapter 2, Constitutionalism and the Contractualisation of Government in the United Kingdom, at 32-33.

<sup>23</sup> R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993] 1 W.L.R. 1993.

It strengthens the normative force of such rights.<sup>24</sup> The courts protect as constitutional rights the right of participation in the democratic process, equality of treatment and freedom of expression. Another constitutional principle is that all citizens (including prisoners convicted of heinous crimes) have a right of unimpeded access to the courts. It has also long been established that a defendant has a right to a fair trial but it was not clear that it was a constitutional right. It matters whether it is a constitutional right. If the right to a fair trial is not a constitutional right, the Court of Appeal may be entitled to condone a breach of the right on the ground that the defendant was in the view of the Court of Appeal undoubtedly guilty. On the other hand, if in breach of a constitutional right the defendant did not receive a fair trial his conviction ought always to be quashed. This is subject to the power of the Court of Appeal to direct in an appropriate case that there should be a new trial. There was, however, little authority on the point. But in 1995 in *Brown* the Court of Appeal stated that the right of a defendant to a fair trial was indeed a constitutional principle.<sup>25</sup> On appeal the House of Lords simply described it as an elementary principle.<sup>26</sup> There is no conflict. Given that the right of access to courts is a matter of constitutional right, it would be curious if the principle that a citizen has a right to a fair trial is not also a constitutional principle. There is also ample precedent in the Privy Council for the view that where a defendant has not had the substance of a fair trial the conviction must be quashed.

### **The Human Rights Act**

A development of profound constitutional significance for our public law was the enactment of the Human Rights Act 1998. It enables citizens of the United Kingdom to vindicate the rights and liberties guaranteed by the European Convention on Human Rights in our courts. It marks a shift to a rights based system. It requires judges to examine allegations of abuse of power from the perspective of what is necessary in a democratic society. In a technical sense it is probably not right to regard the Human Rights Act and the European Convention on Human Rights as part of our constitution. In reality, however, it will contribute greatly to the constitutionalisation of our public law. It will create a new and higher legal order. It poses great challenges for the judiciary. They will have to learn apply constitutional methods of interpretation over a wide spectrum of cases. In a sense the European Convention is an ageing convention, dating back to 1950, but it is well established in the jurisprudence of the European Court of Human Rights that the Convention is a living

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<sup>24</sup> In a magisterial article the President of the Supreme Court of Israel explained this point: Aharon Barak, *The Constitutionalisation of The Israeli Legal System As A Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 1997, *Israeli Law Review*, Vol. 31, Numbers 1-3, 3.

<sup>25</sup> [1994] 1 W.L.R. 1599, at 1606E.

<sup>26</sup> [1998] A.C.367, at 374G.

text which must be interpreted in the light of present-day conditions. That does not mean that the degree of protection under the convention is dependent on the unfettered intuitions of judges. But a decision about human rights is also not a technical exercise in textual analysis. The jurisprudence of the European Court of Human Rights shows that ultimately judgements of political morality are involved. And our courts will have to apply the principle favouring the effectiveness of the provisions in the Convention, which is so clearly enunciated in the decisions of the European Court of Human Rights.

The Human Rights Act imposes an interpretative obligation on courts. It requires courts to interpret all legislation, primary and subordinate, whenever enacted, in a way which is compatible with Convention rights, "so far as it is possible to do so". This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a statute. Traditionally the search has been for the one true meaning of a statute. Now the search will be for a possible meaning that would prevent the need for a declaration of incompatibility. The questions will be: (1) What meanings are the words capable of yielding? (2) And, critically, can the words be made to yield a sense consistent with Convention rights? There will be a rebuttable presumption in favour of an interpretation consistent with Convention rights. Given the inherent ambiguity of language the presumption is likely to be a strong one. But when a provision cannot be read in a sense which is compatible with Convention rights, the courts are empowered to make a declaration of incompatibility. It is a reasonable assumption that such a declaration may make it difficult not to amend the offending provisions.

The courts will have to use new methods of solving problems. The cherished concept of *Wednesbury* unreasonableness will no longer provide all the answers. Now an important issue will be whether an interference with a right is justified by a legitimate aim and is proportionate to the need in question, that is, necessary in a democratic society. Moreover, there will be no place for formalism. English courts will have to look behind the appearances and investigate the realities of the impact on individuals of a procedure, practice or decision which is under scrutiny. In order to filter out insubstantial complaints our courts will no doubt apply the principle that for conduct to constitute a breach of a Convention right it must attain a minimum level of severity. This qualification is well established in the jurisprudence of the E.C.H.R. Without it our courts would be swamped with trivial complaints.

A core provision of the Convention is Article 6, which contains the guarantee of a fair trial. It will be the prism through which diverse aspects of our criminal justice system will have to be re-examined. The principal battleground will be the criminal courts. But the influence

of the Human Rights Act will be general and pervasive. Often the values underlying the convention will be in collision. *Isaiah Berlin* wrote:<sup>27</sup>

Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted. . . . Equality may demand the restraint of the liberty of those who wish to dominate; liberty - without some modicum of which there is no choice and therefore no possibility of remaining human as we understand the word - may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised."

Courts will sometimes have to balance the protection of the fundamental rights of individuals against the general interest of the community. Individualized justice and the stability needed in any democratic society may be in contention. Privacy will be countered by the fundamental and irreducible need in a democracy for freedom of expression. Often courts will have to choose between competing values and to make sophisticated judgements as to their relative weight. Utopia is unrealisable. But judges will have to persevere in the pursuit and reconciliation of the aspirations of the Convention.

### **Devolution to Scotland and Wales**

The Westminster Parliament is devolving powers to Scotland, Wales, and Northern Ireland. The devolution of powers to Scotland is the most far-reaching. I will concentrate on the Scotland Act 1998.<sup>28</sup> In theory Westminster could take back those powers but that seems unthinkable. The devolution of powers involves the demarcation of the sphere of legislative competence of the Scottish Parliament. Legislation by the Scottish Parliament must not touch on so-called reserved matters or be incompatible with the Convention rights or Community law. Inevitably, this involves constitutional review. Indeed the legislation expressly provides for pre-enactment review as well as for post-enactment review. The demarcation issues will be decided by the Privy Council. It is to be noted, however, that the system is asymmetrical: no question as to the legislative competence of the Westminster Parliament can arise. Nevertheless, judges will have to decide constitutional issues and apply constitutional methods of interpretation. As judges become familiar with methods of

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<sup>27</sup> *The Crooked Timber of Humanity*, Fontana Press, 1991, 12-13.

<sup>28</sup> See Scotland Act 1998, s.s. 29, 30, 33, 98; Sch. 5; Sch. 6.

constitutional adjudication it would be surprising if this process did not have a spillover effect on public law.

### **A Freedom of Information Act**

The civil service has a monopoly over official information. Traditionally, the civil service has been secretive. The civil service appears to operate a prima facie rule against disclosure. That makes life easy for governments and the civil service. Under this system the doctrine of ministerial responsibility is toothless. Knowledge and power are intertwined. Without knowledge there can be no effective public participation in decision making. Moreover consumers are adversely affected by the fact that State regulatory agencies and purchasing organizations do not make information about industry and products available to the public. The truth is that there is much unnecessary government secrecy. The government is apparently committed to a Freedom of Information Act. The Home Secretary has promised to publish a bill. If that comes about, and if the bill measures up to the requirements of a true Freedom of Information Act, constitutional accountability will be enhanced. Rodney Austin wrote:<sup>29</sup>

"... the people in whose name and with whose consent government acts would be the ultimate beneficiaries of freedom of information. Democracy demands that government be open and public unless some legitimate interest requires official secrecy. Freedom of information legislation would restore to the citizens of the UK and their elected representatives the real power to choose, to influence, to control, and to dismiss governments".

Exposing the conduct of government and its agencies to public scrutiny will improve the functioning of our democracy. This too is an important proposal for reform with potential constitutional dimensions. It is, however difficult to predict the consequences for our public law of such a shift to greater transparency. Perhaps such legislation may affect the duty to give reasons and public interest immunity. But I remain sceptical until I have seen the shape of the legislation. Whitehall is not likely to roll over.

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<sup>29</sup> Freedom of Information: The Constitutional Impact, *The Changing Constitution*, 3rd ed, 393, at 439.

## **Constitutionalism**

That brings me to the principle of constitutionalism.<sup>30</sup> It is neither a rule nor a principle of law. It is a political theory. It holds that the exercise of government power must be controlled in order that it should not be destructive of the very values which it was intended to promote. It requires of the executive more than loyalty to the existing constitution. It is concerned with the merits and quality of institutional arrangements. In aid of political liberty it sets minimum standards of constitutional government. Two particular applications of this political theory must be noted. It suggests that it is insufficient that the holders of high office are public spirited men of great competence and honour. What matters is that the institutional arrangements must provide for effective control of the abuse of executive power. The second feature is that absolute executive power ought to be avoided by a diffusion of authority. This can be achieved by nurturing independent centres of decision making. Such autonomous centres introduce checks and balances in a democratic system. Thus at the apex of our constitutional system there is the neutrality of the sovereign which is the indispensable constitutional pivot on which our entire unwritten constitution depends. A politically neutral civil service is a vital centre of autonomy. So is an independent police force. A wholly independent legal profession and body of advocates is a substantial check on absolute executive power. A free press, controlled by diverse interests, is the great servant of the cause of democracy.

Constitutionalism is not often at the top of the agenda of business of governments. But the creation of an independent Monetary Policy Committee, chaired by the Governor of the Bank of England, with operational responsibility for the achievement of the inflation target advanced constitutionalism. In the Labour election manifesto there was further the promise of an independent Food Standards Agency i.e. an agency separated from the government and producers and charged with the duty of ensuring the health of the nation. The Prime Minister has confirmed in the House of Commons that this commitment will be fulfilled. In the wake of the B.S.E. crisis this is hardly surprising. If a truly independent and effective Food Standards Agency is created this will be another step towards establishment of constitutionalism in our affairs.

## **European Integration**

The isolation of England from European legal culture has ended. The dominant influence has been our membership of the European Economic Community and the European Union. The direct impact on our substantive law has been great. By analogy general principles of community law have influenced our public law, e.g. in regard to principles of legal

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<sup>30</sup> I have drawn on my article in 1997 P.L. 83. I repeat my acknowledgment of my indebtedness to M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 1967.

certainty, non-discrimination, legitimate expectations and in regard to the intensity of judicial review depending on the interests at stake. Even the Diceyan idea of sovereignty has in practice been qualified. It is a reasonable assumption that the Westminster Parliament will not legislate in areas covered by community law, in breach of the European Convention on Human Rights, or in spheres over which the Scottish and Welsh legislative assemblies have legislative competence. The European Convention on Human Rights, and the jurisprudence of Strasbourg, has brought us into the mainstream of the Human Rights movement. And due to the enactment of the Human Rights Act that process will accelerate. Many multi-lateral treaties are incorporated into our law. Such treaties represent a mixture of civil law and common law influences. Our universities teach not only community law but comparative law in a broad sense, notably the modern *jus commune* of Europe. Our country is a European liberal democracy. In the words of the Treaty on European Union, as amended by the Amsterdam Treaty, the Union "is founded on" the principles of liberty, democracy, and respect for human rights and fundamental freedoms.<sup>31</sup> Those values must inevitably be the context against which judges will have to interpret statutes and develop the common law. The process of our integration into the legal culture of Europe is irreversible and continuing. And it cannot but strengthen the constitutionalisation of our public law. All this has happened and is happening whatever the people of the United Kingdom decide in a referendum on the Economic and Monetary Union (EMU). If the decision in a referendum is for joining EMU, and joinder takes place, the United Kingdom will at the very least be co-operating in the "pooling" of sovereignty at inter-governmental and inter-central bank level. But Monetary Union is more than a union of central banks. It has a constitutional and political dimension. But the outcome may be dictated not by theories of sovereignty but by the verdict of the international market places and the public's perception of the success of the enterprise.

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<sup>31</sup> Articles 6-7 of the TEU. See also the commentary in *Craig and De Burca, EU Law: Text, Cases, and Materials*, 2nd ed. 1998, at 332-333.

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# The Constitutionalisation of Public Law

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## The Constitutionalisation of Public Law

In the late 1950s and early 1960s Stanley de Smith and William Wade published the first editions of their classic books. It was an intellectual breakthrough: they were the first to describe the contours of our administrative law in a coherent fashion. But at that time little attention was paid to the constitutional foundations of judicial review. Indeed in Britain constitutional law did not seem to matter very much. There was a general and comforting sense of satisfaction with our existing constitutional arrangements. Any sceptical questions about the shape of our unwritten constitution were met with the knock-down argument that "it works". Historically that is unremarkable. Unlike many countries in Europe, England has had a long history of constitutional habits, and of evolutionary rather than revolutionary change. And in the constitutional sphere it is what happens in practice that is of fundamental importance. Moreover, England had the enduring advantage of a well developed common law, rooted in custom and usage, and a Westminster model of parliamentary democracy, both of which were transplanted to a great many dominions, colonies and dependent territories. There was reason for some satisfaction. Unfortunately, general contentment with the existing order of things did not encourage enquiry into the link between the constitution and judicial review. And comparative law methods in regard to constitutional matters were not in vogue. The view among lawyers was not very different from that captured by Anthony Trollope in *Orley Farm* which was first serialized in monthly parts in 1861 and 1862. Trollope described the prejudice of English lawyers against learning from international experience. He wrote:

"It would be useless at present, seeing that we cannot bring ourselves to believe it possible that a foreigner should in any respect be wiser than ourselves. If any such point out to us our follies, we at once claim those follies as the special evidences of our wisdom. We are so self-satisfied with our own customs, that we hold up our hands with surprise at the fatuity of men who presume to point out to us their defects."

In the same novel an experienced barrister of Lincoln's Inn said about international legal congresses that "all this palaver that was going on in all the various tongues of babel would end as it began - in nothing." Such a mindset among English lawyers still played a pervasive role until the 1960s. It discouraged active constitutional debate. And during this period the courts were excessively deferential towards acts of ministers and officials which were called in question in judicial review proceedings. There was a great fear of the danger of changing anything, the danger of making anything more and the danger of making anything less as Bagehot famously remarked about Lord Eldon.

## Judicial Review

From the late 1960s the long slumber of judicial review slowly came to an end. The bonds of judicial restraint in respect of the review of acts of the executive gradually became loosened. Judges became increasingly willing to restrain unlawful acts of the executive. From the 1970s there was an enormous increase in applications for judicial review. The occasions for examining and re-examining the principles of judicial review multiplied. A partnership of judges and academic lawyers developed public law in a relatively coherent fashion. But it was only in the late 1980s that judges came to realise and accept that standards applied by them in judicial review must ultimately be justified by constitutional principles. There was and still is much controversy about the constitutional principles upon which judicial review rests. I will not try to describe the lively debates in which academic lawyers, practitioners and judges have jostled. Instead I will try to state what I regard as the critical constitutional underpinning of our public law. For my part, the architecture of public law rests mainly on four constitutional foundations, namely the separation of powers, the rule of law, the principle of constitutionality or legality as an aid to the interpretation of statutes, and the *ultra vires* rule as the justification for the major and statute based part of judicial review.

### *The separation of powers*

The legitimacy of the judiciary's power to review acts of the executive must ultimately depend on the judiciary being a separate and independent branch of government. In *Hinds v. The Queen* the Appellate Committee of the House of Lords held that the British constitution is firmly based on the separation of powers between the legislature, the executive and the judiciary.<sup>1</sup> Undoubtedly, the divergences from this principle in our constitutional arrangements are significant. Indeed a disinterested observer may question whether we make more than a formal obeisance to the principle of separation of powers. After all, the Lord Chancellor is a member of the cabinet and nevertheless one of the privileges of his office is to sit from time to time in our final court of appeal. When in 1997 in a public lecture I argued that there is no longer any constitutional or pragmatic reason for the Lord Chancellor to sit in the Appellate Committee of the House of Lords I seemed to be tilting at windmills.<sup>2</sup> Now challenges to the Lord Chancellor sitting judicially have become a reality. And that risk will be greater once article 6 of the European Convention on Human Rights, which requires that a court must be independent, becomes part of our law next year.

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<sup>1</sup> [1977] A.C. 195, at 212, *per* Lord Diplock; see also *Duport Steel Ltd. v. Sirs* [1980] 1 W.L.R. 142 at 157.

<sup>2</sup> I discussed the separation of powers in some detail in "The Weakest and Least Dangerous Department of Government" [1997] P.L.84. See also Diana Woodhouse, *The Office of Lord Chancellor*, 1998 P.L. 617, and Dawn Oliver, *The Lord Chancellor, the Judicial Committee of the Privy Council and devolution* 1999 P.L.1.

In the wake of the Government's far-reaching programme of constitutional reform and the *Pinochet* affair there may be change in the air. Moreover, in *McGonnell v. United Kingdom* the European Commission has decided that the Bailiff of Guernsey who is a member of the executive and a judge, does not satisfy the criterion of independence under article 6(1) of the European Convention on Human Rights.<sup>3</sup> The scale of the problem in Guernsey and in the United Kingdom is very different. Nevertheless, in principle the same reasoning applies to the Lord Chancellor sitting in the Appellate Committee of the House of Lords. If the European Court of Human Rights comes to the same conclusion the writing may be on the wall for the Lord Chancellor's privilege to sit on the Appellate Committee. Following the decision of the House of Lords in *Pinochet No. 2*, in which the first decision of the House of Lords was set aside by a differently constituted Appellate Committee, there may be a challenge in a case in which the Lord Chancellor sat in the Appellate Committee, notably where there is a split decision.<sup>4</sup> Such a case would have to be considered by a new panel of the Appellate Committee. It would place the Appellate Committee in a most invidious position. But it will discharge its duties in accordance with the law. If such a challenge should fail, the next step could be a complaint to the Strasbourg Court. That court will probably not be oblivious of the need to apply the principle of the independence of the judiciary consistently throughout Europe. It would be surprising if the Strasbourg Court made an exception in the case of the United Kingdom. If, as seems likely, the privilege of the Lord Chancellor to sit in the Appellate Committee can no longer be maintained, it seems to me to follow that the privilege of serving Law Lords to speak and vote in the House of Lords will also have to come to an end. And that may in turn eventually lead to the creation of a Supreme Court. The Royal Commission on the Reform of the House of Lords will examine the position of the Law Lords as members of the House of Lords.<sup>5</sup> But the Royal Commission will apparently not consider the linked question of what will happen if the Law Lords are to lose their existing privileges and no other investigation of this wider question is on foot. This is a curiously truncated enquiry. Moreover, it is odd that the Royal Commission will consider the position of the Law Lords but not the position of the Lord Chancellor whose office involves greater anomalies than the offices of the Law Lords. The strategic thinking behind this coyness may be that turning the searchlight on the Lord Chancellor's position may expose the fragility of the supposed pragmatic justifications for the present arrangements. But I return to the main point. Subject to the well known anomalies, our constitution is squarely based on the doctrine of separation of powers. It is the source of the residual or inherent powers of the court, notably to curb abuse of power by or on behalf of the executive. It is a cornerstone of judicial review.

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<sup>3</sup> Report of the Commission dated 20 October 1998 on Application No. 284 88/95.

<sup>4</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet No. 2* [1999] 2 W.L.R. 272.

<sup>5</sup> *Modernising Parliament: Reforming the House of Lords*, Cm 4183, January 1999, Chapter 7, Paragraph 20.

### *The rule of law*

From the time of Dicey to the present day the concept of the rule of law has been used in a number of different senses. The authors of a book called "The Noble Lie" observed that the "rule of law, elastic though it may be, comes as close as anything to signposting our unique compact."<sup>6</sup> For my part two core meanings of the rule of law are essential to an understanding of our public law. The first is not a legal concept. The rule of law is a term of political philosophy or institutional morality. It conveys the idea of government not under men but under laws. It eschews the instrumentalist conception of law that enables an oppressive regime to attain its aims by the use of law, as happened in South Africa in the apartheid era. It addresses the moral dimension of public power. It contemplates a civil society under equal and just laws. This is the sense in which the rule of law is mentioned in a preamble to the European Convention on Human Rights. In this sense the rule of law is the greatest single moulding force of our public law.

In its second sense the rule of law is a general principle of constitutional law. Its central focus is to constrain the abuse of official power. It protects a citizen's right to legal certainty in respect of interference with his liberties. It guarantees access to justice. It ensures procedural fairness over much of the range of administrative decision-making by officials. An interesting example of the application of the rule of law is *Venables and Thompson* where a majority of the House of Lords quashed the Secretary of State's decision setting a tariff for the custodial term to be served by child murderers.<sup>7</sup> One ground of the majority decision was that the Secretary of State relied on a press campaign for an increase in the tariff. The conduct of the Secretary of State was contrary to the rule of law. The rule of law has substantive content. Thus in *Wheeler v. Leicester City Council* a local authority withdrew the licence of a football club because some of their members had visited South Africa.<sup>8</sup> There was, however, no law prohibiting contact with South Africa. The local authority's decision was held to be contrary to the rule of law. It has been invoked by judges in many diverse circumstances.<sup>9</sup> It is an over-arching principle of our public law. But it does not cover the whole field. Its essential terrain of application is closely linked with the kind of democracy we have in Britain, namely a European liberal democracy in which the pluralism of our society is recognised and the rights of minorities are protected.

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<sup>6</sup> I. Harden and N Lewis, *The Noble Lie: The British Constitution and the Rule of Law*. Hutchison, London, 1986.)

<sup>7</sup> [1998] A.C. 407.

<sup>8</sup> [1985] A.C. 1054.

<sup>9</sup> Compare Jeffrey Jowell, *The Rule of Law Today*, 57-77, in *The Changing Constitution*, ed. by Jowell and Oliver, 3rd ed.

### *The principle of constitutionality*

The supremacy of Parliament no longer means what it did in the days of *Dicey*. It is a more complex concept. Subject to Parliament's power to legislate expressly to withdraw from the present 15-nation European Union - an unthinkable hypothesis - our membership carries with it a pluralistic or divided concept of legal sovereignty. This is illustrated by the second *Factortame* case.<sup>10</sup> There was a clash between community law and a later Act of the United Kingdom Parliament. The House of Lords granted an injunction to forbid a Minister from obeying the act of Parliament. The Act was disapplied. What is the constitutional position? Only an express enactment of Parliament could terminate our membership of the European Union. Similarly, the view may prevail that only an express repeal of the Human Rights Act and the devolution legislation would be effective. In practice the sovereignty of the Westminster Parliament is qualified. Moreover, the general principle that treaties which are not incorporated into our domestic law by Parliament, cannot give rise of rights or obligations is being questioned.<sup>11</sup> Let me illustrate the point. Assume a prisoner in Wormwood Scrubs wishes to lodge a complaint under the European Convention of Human Rights to the Strasbourg Court. The governor refuses to allow him to forward his petition. I have assumed that the doctrine of legitimate expectations is inapplicable. Does the fact that the United Kingdom government has formally submitted to the jurisdiction of the Strasbourg Court in respect of the right of individual petition give the prisoner a legal right to obtain an order of mandamus against the governor? The orthodox view is that the answer is No. Unincorporated treaties do not become part of domestic law. The rationale of the traditional rule is that the executive must not be allowed to bypass Parliament and oppress citizens by entering into treaties which are not incorporated. Human rights treaties are untouched by this rationale. It is arguable that where the reason for the rule stops the reach of the rule may end. There is scope for the evolution of a pluralistic and inter-active notion, which may place international human rights tribunals to which a country submitted pursuant to an unincorporated treaty in a special category. By resort to a constitutional due process provision the Privy Council recently granted a stay of execution to two condemned men in Trinidad until of the determination of their appeals to the Inter-American Human Rights Committee, the jurisdiction of which depended on an unincorporated treaty.<sup>12</sup> But the central problem of the status of rights conferred by the executive may arise again, notably in respect of appeals to international human rights tribunals.

Where does this leave the relationship between Parliament and the courts? The traditional view is that Parliament has the power to pass any legislation other than legislation purporting to bind itself for the future. There has been a vigorous debate in which the omniscience of Parliament has been questioned. I take the traditional view.

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<sup>10</sup> [1991] A.C. 603, at 658-9.

<sup>11</sup> *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418.

<sup>12</sup> *Thomas and Hillaire v. The State*, P.C. 17 March 1999, unreported.

Parliament has the sovereign legal power to legislate as it thinks fit. The courts will give effect to the clearly expressed will of Parliament. The courts have said so on countless occasions. On the other hand, it is of fundamental constitutional importance that the courts must interpret and apply legislation on the assumption that Parliament does not write on a blank sheet. Parliament legislates for a European liberal democracy founded on the traditions and principles of the common law. This gives rise to what Rupert Cross described as a presumption of general application which operates as a constitutional principle.<sup>13</sup> It applies particularly to open-textured and general statutory language entrusting wide powers to ministers and public officials. It is not dependent on finding an ambiguity in the statutory language. In *Pierson* Lord Browne-Wilkinson examined the authorities with great care and formulated this principle as follows:<sup>14</sup>

A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.”

This is the principle of constitutionality or legality.<sup>15</sup> Given the fact that Parliament usually confers statutory powers to ministers in wide terms, this principle is of central importance over a wide spectrum of statute based judicial review cases.

#### *The justification for judicial review*

There has been a lively debate in England about the constitutional justification for judicial review.<sup>16</sup> This is an important question because the answer to it may affect the development of judicial review. In my view the constitutional justification for the major and statute based part judicial review is the *ultra vires* doctrine: when the executive strays beyond its statutory powers the judiciary is empowered to declare such acts invalid. In *Page* and again *Boddington* the House of Lords adopted this explanation of the statute based

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<sup>13</sup> Statutory Interpretation, 3rd ed, at 166.

<sup>14</sup> [1998] A.C. 539, at 575D.

<sup>15</sup> Less felicitously than Lord Browne-Wilkinson I covered the same ground and came to the same conclusion in *Pierson*: at 587C-590A.

<sup>16</sup> For an sample of the literature see: *D. Oliver, "Is the Ultra Vires Rule the Basis of Judicial Review?"* [1987] P.L. 543; *Paul Craig, "Ultra Vires and the Foundations of Judicial Review"* [1998] C.L.J. 63; *Forsyth, "Of Fig Leaves and Fairy Tales: The ultra vires Doctrine, the Sovereignty of Parliament and Judicial Review"* [1996] C.L.J. 122.

part of judicial review.<sup>17</sup> How does this explanation fit into constitutional theory? In *M v. Home Office* Nolan L.J observed that "... the proper constitutional relationship of the courts with the executive is that the courts will respect all acts of the executive within its lawful sphere, and the executive will respect all decisions of the court as to what its lawful province is".<sup>18</sup> To this explanation one must add that in making decisions in judicial review cases judges are constrained by the principle of institutional integrity. They must make their decisions on principled grounds. There is a Rubicon which they may not cross. This is then the demarcation of the provinces the executive and the judiciary. In deciding in which domain a particular case falls the context is all important. The continuum can be illustrated by two cases at the extreme ends of the spectrum: Where policy issues regarding the allocation of resources is concerned the courts hardly ever intervene. An example might be a decision by a health authority not to provide funds for cosmetic surgery while there are long waiting lists of individuals requiring major surgery. On the other hand, where fundamental human rights are at stake an approach of proportionality or virtual proportionality applies and the courts intervene more readily. An example might be an issue whether a particular applicant is entitled to asylum. Most judicial review cases fall somewhere between the two. For my part there is no conceptual or pragmatic difficulty in saying that such a graduated system of judicial review of statute based powers is founded on the *ultra vires* principle. But it is necessary to emphasise that this view is based on the premise that the issue of *vires* is considered with due regard to the principle of constitutionality.

But it is obvious that the *ultra vires* principle cannot be the explanation of the judicial review of non-statutory powers. It has long been recognised that judicial review will extend to trade unions, trade associations and corporations with *de facto* monopoly power.<sup>19</sup> This branch of public law was explained in *R. v. Panel on Take-overs and Mergers, ex parte Datafin plc*.<sup>20</sup> The Court of Appeal held that decisions of the Take-over Panel, which exercises its functions as part of a self-regulatory framework, are judicially reviewable. For the Court of Appeal the decisive factor was not the source of the power of the Take-over Panel but the nature of the functions it exercised. The Court of Appeal regarded the common law as the true foundation of this branch of public law. It is true that in some later decisions a different test has been employed, namely whether it can be said that "were no self regulatory body in existence, Parliament would almost inevitably intervene to control the

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<sup>17</sup> *R. v. Lord Chancellor, ex-parte Page* [1993] A.C. 682; *Boddington v. British Transport Police* [1998] 2 W.L.R. 639.

<sup>18</sup> [1992] 1 Q.B. 220, at 314H-315A.

<sup>19</sup> Craig, *Constitutions, Property and Regulation* [1991] P.L. 538.

<sup>20</sup> [1987] Q.B. 815.

activity in question."<sup>21</sup> This extension of the *ultra vires* principle to non-statutory bodies is a fiction. Murray Hunt has convincingly explained:<sup>22</sup>

The test for whether a body is "public", and therefore whether administrative law principles presumptively apply to its decision-making, should not depend on the fictional attribution of derivative status to the body's powers. The relevant factors should include the nature of the interests affected by the body's decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body's jurisdiction, and the nature of the context in which the body operates. Parliament's non-involvement or would be involvement, or whether the body is woven into a network of regulation with state underpinning, ought not to be relevant to answering these questions. The very existence of institutional power capable of affecting rights and interests should itself be a sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court, regardless of its actual or would-be source."

In my view this is the true basis of the court's jurisdiction over the exercise non-statutory powers. If this reasoning is correct, it calls into question the decision of the Court of Appeal that the Jockey Club is not amenable to judicial review.<sup>23</sup> After all, those wanting to race their horses had no alternative but to be bound by the rules of the Jockey Club. There is, however, an even more important dimension. In an era when government policy is to privatise public services, to contract out activities formerly carried out directly by public bodies and to put its faith in self regulation it is essential that the courts should apply a functional test of reviewability.

### **The Recognition of Constitutional Rights**

In parallel with the development of judicial review the courts have recognized certain fundamental rights as constitutional in origin. The classification of a right as constitutional is meaningful. It is testimony that an added value is attached to the protection of the right.

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<sup>21</sup> R. v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wackmann [1993] 2 All E.R. 249 and see R. v. Football Association Ltd. ex parte Football League [1993] 2 All E.R. 833.

<sup>22</sup> The Province of Administrative Law, ed. Michael Taggart, Chapter 2, Constitutionalism and the Contractualisation of Government in the United Kingdom, at 32-33.

<sup>23</sup> R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993] 1 W.L.R. 1993.

It strengthens the normative force of such rights.<sup>24</sup> The courts protect as constitutional rights the right of participation in the democratic process, equality of treatment and freedom of expression. Another constitutional principle is that all citizens (including prisoners convicted of heinous crimes) have a right of unimpeded access to the courts. It has also long been established that a defendant has a right to a fair trial but it was not clear that it was a constitutional right. It matters whether it is a constitutional right. If the right to a fair trial is not a constitutional right, the Court of Appeal may be entitled to condone a breach of the right on the ground that the defendant was in the view of the Court of Appeal undoubtedly guilty. On the other hand, if in breach of a constitutional right the defendant did not receive a fair trial his conviction ought always to be quashed. This is subject to the power of the Court of Appeal to direct in an appropriate case that there should be a new trial. There was, however, little authority on the point. But in 1995 in *Brown* the Court of Appeal stated that the right of a defendant to a fair trial was indeed a constitutional principle.<sup>25</sup> On appeal the House of Lords simply described it as an elementary principle.<sup>26</sup> There is no conflict. Given that the right of access to courts is a matter of constitutional right, it would be curious if the principle that a citizen has a right to a fair trial is not also a constitutional principle. There is also ample precedent in the Privy Council for the view that where a defendant has not had the substance of a fair trial the conviction must be quashed.

### **The Human Rights Act**

A development of profound constitutional significance for our public law was the enactment of the Human Rights Act 1998. It enables citizens of the United Kingdom to vindicate the rights and liberties guaranteed by the European Convention on Human Rights in our courts. It marks a shift to a rights based system. It requires judges to examine allegations of abuse of power from the perspective of what is necessary in a democratic society. In a technical sense it is probably not right to regard the Human Rights Act and the European Convention on Human Rights as part of our constitution. In reality, however, it will contribute greatly to the constitutionalisation of our public law. It will create a new and higher legal order. It poses great challenges for the judiciary. They will have to learn apply constitutional methods of interpretation over a wide spectrum of cases. In a sense the European Convention is an ageing convention, dating back to 1950, but it is well established in the jurisprudence of the European Court of Human Rights that the Convention is a living

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<sup>24</sup> In a magisterial article the President of the Supreme Court of Israel explained this point: Aharon Barak, *The Constitutionalisation of The Israeli Legal System As A Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 1997, *Israeli Law Review*, Vol. 31, Numbers 1-3, 3.

<sup>25</sup> [1994] 1 W.L.R. 1599, at 1606E.

<sup>26</sup> [1998] A.C.367, at 374G.

text which must be interpreted in the light of present-day conditions. That does not mean that the degree of protection under the convention is dependent on the unfettered intuitions of judges. But a decision about human rights is also not a technical exercise in textual analysis. The jurisprudence of the European Court of Human Rights shows that ultimately judgements of political morality are involved. And our courts will have to apply the principle favouring the effectiveness of the provisions in the Convention, which is so clearly enunciated in the decisions of the European Court of Human Rights.

The Human Rights Act imposes an interpretative obligation on courts. It requires courts to interpret all legislation, primary and subordinate, whenever enacted, in a way which is compatible with Convention rights, "so far as it is possible to do so". This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a statute. Traditionally the search has been for the one true meaning of a statute. Now the search will be for a possible meaning that would prevent the need for a declaration of incompatibility. The questions will be: (1) What meanings are the words capable of yielding? (2) And, critically, can the words be made to yield a sense consistent with Convention rights? There will be a rebuttable presumption in favour of an interpretation consistent with Convention rights. Given the inherent ambiguity of language the presumption is likely to be a strong one. But when a provision cannot be read in a sense which is compatible with Convention rights, the courts are empowered to make a declaration of incompatibility. It is a reasonable assumption that such a declaration may make it difficult not to amend the offending provisions.

The courts will have to use new methods of solving problems. The cherished concept of *Wednesbury* unreasonableness will no longer provide all the answers. Now an important issue will be whether an interference with a right is justified by a legitimate aim and is proportionate to the need in question, that is, necessary in a democratic society. Moreover, there will be no place for formalism. English courts will have to look behind the appearances and investigate the realities of the impact on individuals of a procedure, practice or decision which is under scrutiny. In order to filter out insubstantial complaints our courts will no doubt apply the principle that for conduct to constitute a breach of a Convention right it must attain a minimum level of severity. This qualification is well established in the jurisprudence of the E.C.H.R. Without it our courts would be swamped with trivial complaints.

A core provision of the Convention is Article 6, which contains the guarantee of a fair trial. It will be the prism through which diverse aspects of our criminal justice system will have to be re-examined. The principal battleground will be the criminal courts. But the influence

of the Human Rights Act will be general and pervasive. Often the values underlying the convention will be in collision. *Isaiah Berlin* wrote:<sup>27</sup>

Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted. . . . Equality may demand the restraint of the liberty of those who wish to dominate; liberty - without some modicum of which there is no choice and therefore no possibility of remaining human as we understand the word - may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised."

Courts will sometimes have to balance the protection of the fundamental rights of individuals against the general interest of the community. Individualized justice and the stability needed in any democratic society may be in contention. Privacy will be countered by the fundamental and irreducible need in a democracy for freedom of expression. Often courts will have to choose between competing values and to make sophisticated judgements as to their relative weight. Utopia is unrealisable. But judges will have to persevere in the pursuit and reconciliation of the aspirations of the Convention.

### **Devolution to Scotland and Wales**

The Westminster Parliament is devolving powers to Scotland, Wales, and Northern Ireland. The devolution of powers to Scotland is the most far-reaching. I will concentrate on the Scotland Act 1998.<sup>28</sup> In theory Westminster could take back those powers but that seems unthinkable. The devolution of powers involves the demarcation of the sphere of legislative competence of the Scottish Parliament. Legislation by the Scottish Parliament must not touch on so-called reserved matters or be incompatible with the Convention rights or Community law. Inevitably, this involves constitutional review. Indeed the legislation expressly provides for pre-enactment review as well as for post-enactment review. The demarcation issues will be decided by the Privy Council. It is to be noted, however, that the system is asymmetrical: no question as to the legislative competence of the Westminster Parliament can arise. Nevertheless, judges will have to decide constitutional issues and apply constitutional methods of interpretation. As judges become familiar with methods of

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<sup>27</sup> *The Crooked Timber of Humanity*, Fontana Press, 1991, 12-13.

<sup>28</sup> See Scotland Act 1998, s.s. 29, 30, 33, 98; Sch. 5; Sch. 6.

constitutional adjudication it would be surprising if this process did not have a spillover effect on public law.

### **A Freedom of Information Act**

The civil service has a monopoly over official information. Traditionally, the civil service has been secretive. The civil service appears to operate a prima facie rule against disclosure. That makes life easy for governments and the civil service. Under this system the doctrine of ministerial responsibility is toothless. Knowledge and power are intertwined. Without knowledge there can be no effective public participation in decision making. Moreover consumers are adversely affected by the fact that State regulatory agencies and purchasing organizations do not make information about industry and products available to the public. The truth is that there is much unnecessary government secrecy. The government is apparently committed to a Freedom of Information Act. The Home Secretary has promised to publish a bill. If that comes about, and if the bill measures up to the requirements of a true Freedom of Information Act, constitutional accountability will be enhanced. Rodney Austin wrote:<sup>29</sup>

". . . the people in whose name and with whose consent government acts would be the ultimate beneficiaries of freedom of information. Democracy demands that government be open and public unless some legitimate interest requires official secrecy. Freedom of information legislation would restore to the citizens of the UK and their elected representatives the real power to choose, to influence, to control, and to dismiss governments".

Exposing the conduct of government and its agencies to public scrutiny will improve the functioning of our democracy. This too is an important proposal for reform with potential constitutional dimensions. It is, however difficult to predict the consequences for our public law of such a shift to greater transparency. Perhaps such legislation may affect the duty to give reasons and public interest immunity. But I remain sceptical until I have seen the shape of the legislation. Whitehall is not likely to roll over.

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<sup>29</sup> Freedom of Information: The Constitutional Impact, *The Changing Constitution*, 3rd ed, 393, at 439.

## **Constitutionalism**

That brings me to the principle of constitutionalism.<sup>30</sup> It is neither a rule nor a principle of law. It is a political theory. It holds that the exercise of government power must be controlled in order that it should not be destructive of the very values which it was intended to promote. It requires of the executive more than loyalty to the existing constitution. It is concerned with the merits and quality of institutional arrangements. In aid of political liberty it sets minimum standards of constitutional government. Two particular applications of this political theory must be noted. It suggests that it is insufficient that the holders of high office are public spirited men of great competence and honour. What matters is that the institutional arrangements must provide for effective control of the abuse of executive power. The second feature is that absolute executive power ought to be avoided by a diffusion of authority. This can be achieved by nurturing independent centres of decision making. Such autonomous centres introduce checks and balances in a democratic system. Thus at the apex of our constitutional system there is the neutrality of the sovereign which is the indispensable constitutional pivot on which our entire unwritten constitution depends. A politically neutral civil service is a vital centre of autonomy. So is an independent police force. A wholly independent legal profession and body of advocates is a substantial check on absolute executive power. A free press, controlled by diverse interests, is the great servant of the cause of democracy.

Constitutionalism is not often at the top of the agenda of business of governments. But the creation of an independent Monetary Policy Committee, chaired by the Governor of the Bank of England, with operational responsibility for the achievement of the inflation target advanced constitutionalism. In the Labour election manifesto there was further the promise of an independent Food Standards Agency i.e. an agency separated from the government and producers and charged with the duty of ensuring the health of the nation. The Prime Minister has confirmed in the House of Commons that this commitment will be fulfilled. In the wake of the B.S.E. crisis this is hardly surprising. If a truly independent and effective Food Standards Agency is created this will be another step towards establishment of constitutionalism in our affairs.

## **European Integration**

The isolation of England from European legal culture has ended. The dominant influence has been our membership of the European Economic Community and the European Union. The direct impact on our substantive law has been great. By analogy general principles of community law have influenced our public law, e.g. in regard to principles of legal

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<sup>30</sup> I have drawn on my article in 1997 P.L. 83. I repeat my acknowledgment of my indebtedness to M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 1967.

certainty, non-discrimination, legitimate expectations and in regard to the intensity of judicial review depending on the interests at stake. Even the Diceyan idea of sovereignty has in practice been qualified. It is a reasonable assumption that the Westminster Parliament will not legislate in areas covered by community law, in breach of the European Convention on Human Rights, or in spheres over which the Scottish and Welsh legislative assemblies have legislative competence. The European Convention on Human Rights, and the jurisprudence of Strasbourg, has brought us into the mainstream of the Human Rights movement. And due to the enactment of the Human Rights Act that process will accelerate. Many multi-lateral treaties are incorporated into our law. Such treaties represent a mixture of civil law and common law influences. Our universities teach not only community law but comparative law in a broad sense, notably the modern *jus commune* of Europe. Our country is a European liberal democracy. In the words of the Treaty on European Union, as amended by the Amsterdam Treaty, the Union "is founded on" the principles of liberty, democracy, and respect for human rights and fundamental freedoms.<sup>31</sup> Those values must inevitably be the context against which judges will have to interpret statutes and develop the common law. The process of our integration into the legal culture of Europe is irreversible and continuing. And it cannot but strengthen the constitutionalisation of our public law. All this has happened and is happening whatever the people of the United Kingdom decide in a referendum on the Economic and Monetary Union (EMU). If the decision in a referendum is for joining EMU, and joinder takes place, the United Kingdom will at the very least be co-operating in the "pooling" of sovereignty at inter-governmental and inter-central bank level. But Monetary Union is more than a union of central banks. It has a constitutional and political dimension. But the outcome may be dictated not by theories of sovereignty but by the verdict of the international market places and the public's perception of the success of the enterprise.

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<sup>31</sup> Articles 6-7 of the TEU. See also the commentary in *Craig and De Burca, EU Law: Text, Cases, and Materials*, 2nd ed. 1998, at 332-333.