

BONHAM'S CASE: THE GHOST IN THE CONSTITUTIONAL MACHINE

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Doctor Bonham, doctor of physic and graduate of Cambridge University, was discovered early in the seventeenth century practising in London without the necessary licence from the College of Physicians. The College, empowered by statute, sought, after a summer of legal manoeuvring, to fine and imprison the doctor. However, in an action to determine the legality of the College's decision Sir Edward Coke C.J. held the statute void as it made the college judge in its own cause. During the course of his seminal judgement, Sir Edward noted in a now famous passage that:

“it appears from our books¹ that, in many cases, the common law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Acts to be void.”²

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¹ See T.F.T.Plunkett, "Bonham's Case and Judicial Review" 40 *Harv.L.R.* 30 where the author casts doubts on the strength of the precedents on which Coke based his reasoning. Cf. the conflicting opinion in McIlwain, *High Court of Parliament and Its Supremacy* (O.U.P.,1910).

² *Dr Bonham's Case* [1609] 8 Co. Rep.113b at 118a, per Coke C.J. Justices Warburton and Daniel concurred. Hereafter cited simply as *Bonham's Case*.

I. THE RISE AND FALL OF *BONHAM'S CASE*

Bonham's Case was one of the landmarks of early-modern English law, and has provided an intellectual banquet for lawyers ever since. *Bonham's Case* for certain scholars was merely a restatement of the principles of statutory interpretation, albeit in a strong form. Although statute law was still in its infancy, Coke's argument concluded Thorne, "is derived from the ordinary common law rules of statutory interpretation."³ However, the real significance of the case others have advocated, was the belief in the supremacy of a higher rule of law, binding on both Parliament and the courts. Although in *Bonham's Case* Coke did not define what he meant by "common right and reason" or "repugnant," a year later in *Calvin's Case* he went on to expand his canvass.⁴ This higher law, was it seems a superior and immutable law of nature derived from God.⁵ On this view, it was not beyond the provenance of the courts to control acts of Parliament. Similarly, acts that were "repugnant," argues Plunkett, were those which were either distasteful to the court, self-contradictory or contrary to the common law.⁶ In any case, Coke was not merely asserting the rules of statutory interpretation.⁷ In fact the subsequent case law lends a certain amount of support to this view.

During *Rowles v. Mason*, Coke once again asserted that the common law "corrects, allows and disallows both statute and custom, for if there be repugnancy in statute or unreasonableness in custom, the common law disallows or rejects it as in *Bonham's Case*."⁸ That Coke believed statutes could be declared unlawful was further re-enforced by his account of the Judges reply to

³ See further, Thorne, "Dr Bonham's Case" [1938] 54 *L.Q.R.* 543 .

⁴ 7 Co.I. 4b [1610] at 12a-12b.

⁵ Indeed during his judgement in *Bonham's Case* (*supra*.n.2 at 12b), Coke states that "this law of nature is part of the laws of England."

⁶ T.F.T.Plunkett , *supra*.n.1 at 34.

⁷ Corwin, "The Higher Law Background of American Constitutional Law" [1928] *Harv.L.Rev.* 149;365 at 370-372.

⁸ [1612] 2 Brown L.192 at 198.

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the King on the question of Royal Proclamations.⁹ Among a list of unlawful proclamations Coke noted that:

“an Act of Parliament was made that all Irish people should depart the Realm ... upon pain of death; which was absolutely *in terrorem* and was utterly against the law.”¹⁰

Even Lord Ellesmere, who was not enamoured of the common law courts and had described the decision as “possessting [sic] a better room in the press than is deserved,” nonetheless did not deny the existence of the doctrine.¹¹ In both *Day v. Savadge*¹² and *Sheffield v. Ratcliffe*¹³ Sir Edward's successor, Sir Henry Hobart, gave effect to the doctrine that *Bonham's Case* contained, although without referring to the views of Coke who by this time had fallen from Royal favour.¹⁴

Although cases after the Glorious Revolution are rare, it is wrong to describe the doctrine at this stage, as Lord Reid did, as “obsolete.”¹⁵

“In earlier times,” Lord Reid concluded, “many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688¹⁶ any such

⁹ R.A.Mackay, “Coke - Parliamentary Sovereignty or the Supremacy of Law” [1923-24] 22 *Mich.L.Rev.* 215 at 225.

¹⁰ 12 Co. Rep. 76.

¹¹ *Earl of Oxford's Case* [1615] 1 Chan.Rep.1 at 12.

¹² [1615] Hobart 86.

¹³ [1615] Hobart 334 at 336.

¹⁴ G.Walker, “Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion.” [1985] 59 *A.L.J.* 276 at 279-280.

¹⁵ *British Railways Board v. Pickin* [1974] A.C. 765. This case, like *Edinburgh Railway infra.n.24* concerned the fraudulent use of Parliamentary power.

¹⁶The Bill of Rights 1688 does not assert the supremacy of Parliament. The supremacy and scope of legislative power are the products of the decisions of the courts.

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ideas have become obsolete.”¹⁷

Soon after the Glorious Revolution, *Bonham's Case* was cited by Chief Justice Holt in *City of London v. Wood*,¹⁸ a case which “is sometimes quoted out of context to support the omnipotence theory.”¹⁹ Lord Holt is reported as ruling that:

“what my Lord Coke says in Doctor Bonham's Case is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain the same person to be party and judge, it would be a void Act of Parliament.”²⁰

During *Campbell v. Hall*, Lord Mansfield stated that the King in Parliament “cannot make any new law contrary to fundamental principles.”²¹ Later in *Green v. Mortimer*²² Lord Campbell, who had described *Bonham's Case* as “a foolish doctrine which ought to have been laughed at,”²³ indirectly approved it by invalidating a private Act of Parliament. This is all the more striking as, in the earlier *Edinburgh and Dalkeith Railway Co. v. Wauchope*, Lord Campbell had held that in the courts legislative enactment was conclusive.²⁴

Today, based on a narrow reading of his *Institutes*, Coke is more often seen as an early advocate of the supremacy of Parliament.²⁵

¹⁷ *Supra*. n.15 at 782.

¹⁸ [1755] 12 Mod. 669.

¹⁹ G.Walker, *supra*. n.14 at 280.

²⁰ *Supra*. n.18 at 687-688.

²¹ [1774] 1 Cowp.204 at 209.

²² [1861] 3 L.T. 642.

²³ H.W.R.Wade, *Constitutional Fundamentals* (Stevens & Sons, 1980) at 31.

²⁴ [1842] 8 Cl. & F. 710 at 724.

²⁵ For example, de Smith & Brazier, *Constitutional and Administrative Law*, (7th.ed., Penguin, 1994) at 76 at n.34.

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“Of the power and jurisdiction of Parliament for the making of laws in proceeding by bill, it is so transcendent and absolute as it cannot be confined either for causes or person within any bounds”²⁶

However, Parliament was at Coke's time, and indeed up until the civil war, more a court than a legislature.²⁷ The King was the fountain of justice and Parliament was his court. A close reading of the *Institutes* reveals that Coke's theories are bereft of the modern distinction between legislating and adjudication.²⁸ Indeed, McIlwain believes that the use of the words “jurisdiction”, “causes”, and “person” point conclusively to Parliament's existence as a court.²⁹ Whatever his scholastic inconsistencies, nothing can be read into them that approaches the modern doctrine of sovereignty. Parliament may have been emerging as the supreme body relative to the other organs of government, but it was not the supremacy of legislative omnicompetence.³⁰ Indeed, Blackstone in his *magnum opus*, *The Commentaries* reached exactly this conclusion.³¹ Nonetheless, the error of Blackstone in accepting what Coke had written in his *Institutes* at face value, in contradiction to his own views on the separation of powers and civil liberties, and thereby claiming that Parliament enjoyed “uncontrollable authority”³² was to have wider ramifications, for these views were later moulded by Dicey into the dogma of Parliamentary sovereignty. Thus today's theories concerning Parliament are based on a misunderstanding of constitutional history.

²⁶ 4 Co. Inst. 36.

²⁷ As is widely recognised, the origins of the unlimited power that Parliament enjoys grew out of this period as the supreme court. See further Gough, *Fundamental Law in English History*, (O.U.P.,1955) ch.3 esp.at 42.

²⁸ Corwin, *supra*.n.7 at 379.

²⁹ McIlwain, *supra*.n.1 at 139-48.

³⁰ G.Marshall, *Parliamentary Sovereignty and the Commonwealth* (Clarendon, 1957), ch.5.

³¹ *Commentaries* Vol.1 at 91 & 162.

³² *Ibid.* at 91.

II. THE RISE OF THE DICEYAN PARADIGM

After its misapplication in *Godden v. Hales*,³³ where the real issue was the dispensing power of the King and not Coke's doctrine,³⁴ *Bonham's Case* came to be regarded at best as a legal relic, and at worst, especially by the Parliamentary side of politics, as a suspicious and potentially dangerous precedent.³⁵ After the Glorious Revolution, as has been seen, despite attempts to keep it alive the concept of common law judicial review of Parliamentary legislation fell into general disuse. By the nineteenth century, with the scholarly re-enforcement of Dicey's pen, statutes had become inviolable. According to Dicey, English law denied the "existence of any judicial or other authority the right to nullify an Act of Parliament or to treat it as void or unconstitutional."³⁶ The courts could no longer interfere with the monopolistic legislative power that Westminster had been granted by the courts.³⁷ Judicial interference could only be justified in the sphere of policing the limits of legislative intent.³⁸ These sentiments were succinctly expressed in the judgement of Mr Justice Willes during *Lee v. Bude & Torrington Railway Co.*:

"It was once said - I think in Hobart - that, if an Act of Parliament were to create a man judge in his own cause the court might

³³ (1686) 89 E.R. 1050.

³⁴ For a stimulating account of this, see D.A.Smallbone, "Recent Suggestions of An Implied Bill of Rights" [1993] 21 *Fed.L.Rev.*254 at 262-267.

³⁵ Yet, strangely, it has not been over-ruled. (Although it has languished in the legal doldrums for many years fortune smiled once more on *Bonham's Case* when it was endorsed by no less a figure than Lord Denning: "Misuse of Power" [1981] 55 *A.L.J.* 720 at 723.)

³⁶ A.V.Dicey, *An Introduction to the Study of the Law of the Constitution*, (10th.ed., Macmillan Education, 1964) at 91.

³⁷ A.W.Bradley, "The Sovereignty of Parliament - in Perpetuity?" in *The Changing Constitution* (eds. Jowell & Oliver) (Oxford University Press, 1994) at 85. It is to the decisions of the courts that "we must look to discover propositions about the legislative powers of Parliament." See *infra*.

³⁸ P.P.Craig, *Public Law and Democracy in the UK and the USA* (Clarendon, 1990) at 24-25.

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disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature ... if an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law then the courts are bound to obey it.”³⁹

This philosophy has been oft repeated. In *British Railways Board v. Pickin*, for example, not only was Lord Reid of the opinion that “for more than a century both Parliament and the courts have been careful not to act so as to cause a conflict between them,”⁴⁰ he resolutely believed that “the idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution.” His Lordship concluded, that there “has been no attempt to question the supremacy of Parliament.”⁴¹ There was no role for the Courts to limit the actions of Parliament by way of judicial review.

III. PARLIAMENT AND CIVIL LIBERTIES: EXHUMING *BONHAM'S* CASE

In areas now governed by European law, Parliament is now subject once more to a higher form of law in the shape of the Community Treaties. Whilst the received nostrums of Dicey have, in part, been overtaken by the accession of the UK to the European Union,⁴² in areas not concerned with Community law the Courts cannot declare an act *ultra vires*.⁴³ Where Community law is not

³⁹ (1871) L.R.6 C.P 576 at 582 This case was concerned with the fraudulent use of legislative power, and not its scope. Mr Justice Willes was clearly worried about an unseemly clash between the courts and Parliament.

⁴⁰ *Supra*.n.15 at 618.

⁴¹ *Ibid*.at 614. The Revolution of 1688 did not assert the supremacy of Parliament. Contrary to popular belief the Bill of Rights 1688 fails to mention it. It is to the decisions of the courts that we must turn in order to discover the legislative limits of Parliament. See Bradley *supra*.n.37.

⁴²For example *Stoke-on-Trent City Council v. B&Q Plc* [1991] Ch. 48 *per* Hoffman J.

⁴³ For example, see the remarks of Lord Diplock and Lord Morris in *Hoffman La Roche & Co.AG v. Secretary of State for Trade and Industry* [1975] A.C. 295 at 365 & 349 respectively.

involved, English courts refuse to apply any extrinsic control to acts of Parliament, even if those appearing before them claim that their fundamental rights and freedoms have been infringed by statute.⁴⁴ While the rule of law mediates the sovereignty of Parliament by ensuring that legislation is interpreted in a way that respects the principles and values of the common law,⁴⁵ the courts must yield to legislative intent in the face of clear and unambiguous wording. Judges allegedly avoid public policy issues, simply “administering the law, good or bad as they find it.”⁴⁶ If Parliament enacts oppressive legislation, for example denying the franchise on the grounds of race,⁴⁷ then following the dictates of positivism the courts must apply it, no matter how contrary to the tone and spirit of our constitutional traditions. “The policy or impolicy of such an enactment,” concluded the Privy Council in *Cunningham v. Tomez Homma*, “as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider.”⁴⁸ The legislation in question may be dubbed “unconstitutional,” but this does not attract any legal consequences as it might in Canada. The rights and freedoms of the individual, as Lord Scarman notes, are helpless “in the face of the legislative sovereignty of Parliament.”⁴⁹ The absence of judicial power to strike down oppressive statutes has become the “Achilles heel of a society which aspires to constitutionally protected freedom.”⁵⁰

There are two solutions to this problem. First, we could adopt an entrenched bill of rights, or second we could exhume the doctrine in *Bonham's Case*.⁵¹ The

⁴⁴ For example *R.v. Secretary of State for Home Affairs, ex p. Bhajan Singh* [1975] 2 All E.R. 1081.

⁴⁵ For a recent restatement of this doctrine see Lord Browne-Wilkinson, “The Infiltration of a Bill of Rights” [1992] *P.L.* 397 at 404-8.

⁴⁶ Lord Denning, “The Spirit of the British Constitution” (1951) 29 *C.B.R.* 1180 at 1193.

⁴⁷ This possibility is far more probable than the specious example peddled by Dicey, quoting Leslie Stephen, that all blue eyed babies should be murdered on legislative licence. See further A.V. Dicey, *supra* n.36 at 81.

⁴⁸ [1903] A.C.151 at 156.

⁴⁹ Sir Leslie Scarman, *English Law : The New Dimension* (Stevens & Sons, 1974) at 15.

⁵⁰ Sir Gerard Brennan, “Courts, Democracy, and the Law” (1991) 65 *A.L.J.* 32 at 38.

⁵¹ *Ibid.*

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first possibility need not detain us here. However, what if the courts were faced with a statute utterly “repugnant” to our constitutional traditions. Would it be possible for the courts to return to the doctrine of *Bonham's Case*, albeit equipped with modern “right and reason” focused on the rights and freedoms of the individual, and declare it void? Or to put it another way, can the courts place common law limits on legislative power?

IV. DISSENT WITH DICEYAN FORMALISM

The questioning of parliamentary sovereignty is far from an historical phenomenon. In many senses the New Zealand constitution is a mirror image of its British parent. The Auckland Parliament, like Westminster, is sovereign in the Diceyan sense.⁵² However, in no less than five Court of Appeal cases, the supremacy of the New Zealand Parliament has been questioned by Sir Robin Cooke, the former President of the Court.⁵³ Although Lord Cooke's judgements do not provide any reasoning or analysis in relation to the conclusion, they are nonetheless of great significance.⁵⁴ During his dissent in *L v. M*, a case that concerned the exclusive jurisdiction of the Accident Compensation Commission, Mr Justice Cooke noted:

“it would be a strong and strange step for Parliament to attempt to confer on anybody other than the Courts power to determine conclusively whether or not actions in the Courts are barred .. there is even room for doubt whether it is self-evident that Parliament could constitutionally do so.”⁵⁵

Later, in *Brader v. Ministry of Transport* where the validity of the careless day regulations made under the Economic Stabilisation Act 1948 was questioned, his Honour noted *obiter*:

⁵² See further Constitution Act 1986 (NZ), s.15(1).

⁵³For an excellent commentary see J.L.Caldwell, “Judicial Sovereignty - A New View” [1984] *N.Z.L.R.* 357. Lord Cooke of Thorndon, as Sir Robin became, was appointed to the Appellate Committee of the House of Lords in 1996.

⁵⁴ L.Zines, *Constitutional Change in the Commonwealth* (1988) at 48.

⁵⁵ [1979] 2 *N.Z.L.R.* 519 at 527.

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“it may be added that the recognition by the common law of the supremacy of Parliament can hardly be regarded as given on the footing that Parliament would abdicate its function ... it is not to be supposed that by the 1948 Act the New Zealand Parliament meant to abandon the entire field of the economy to the Executive.”⁵⁶

Then again in the *New Zealand Drivers' Case* where the Arbitration Court had been prohibited from determining the validity of a wage freeze Mr Justice Cooke noted in a majority judgement that the entire court had “reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights.”⁵⁷ However, in *Fraser v. State Services Commission*, his Honour appeared to go further noting that “it is arguable that some common law rights may go so deep that Parliament cannot be accepted by the Courts to have destroyed them.”⁵⁸ Indeed, later in *Taylor v. New Zealand Poultry Board* where the ability of the Poultry Board Act 1980 to remove the common law right to silence was questioned, Sir Robin re-enforced his previous dicta:

“I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament .. some common law rights presumably lie so deep that even Parliament could not override them.”⁵⁹

All these judgements point clearly to a revival of the doctrine first espoused by Lord Cooke's famous namesake - Sir Edward Coke.⁶⁰ Moreover, they are “are absolutely opposed to Dicey.”⁶¹

⁵⁶ [1981] 1 N.Z.L.R. 73 at 78.

⁵⁷ *New Zealand Drivers' Association v. New Zealand Road Carriers* [1982] 1 N.Z.L.R. 374 at 390.

⁵⁸ [1984] 1 N.Z.L.R. 116 at 121(emphasis added).

⁵⁹ [1984] 1 N.Z.L.R. 394 at 398(emphasis added)

⁶⁰The High Court of Australia has made a similar observation on one occasion *cf. Union Steamship Co. of Australia Pty.Ltd. v. King* [1988] 166 C.L.R. 1 at 9-10. In addition see, *Builders' Labourers Federation v. Minister of Industrial Relations* [1986] 7 N.S.W.L.R. 372.

⁶¹ *Supra*. n.54 at 48.

V. FUNDAMENTAL PRINCIPLES: WHAT ARE THEY?

Claiming that an act of Parliament is contrary to deeply embedded fundamental common law rights and principles is obviously beset by the difficulty of not only deciding which rights and freedoms are fundamental, but also from whence they originate. "Fundamental rights," as Joseph notes, "purveyed within the matrix of law may, in truth, be no more than moral statements about how government and society ought to function, if so, whose 'morality' are we talking about? The presiding judge's or society at large?"⁶² Clearly there is a danger that the judicial advocacy of common law rights could lead to subjectivism and uncertainty. With no bill of rights there is the danger that laws could be struck down on the vague basis of failing to comply with nebulous moral standards. How are we to define these conceptual and technical limits on Parliamentary power?

VI. RIGHTS DERIVED FROM DEMOCRACY

In part this problem may be solved by focusing on what rights and freedoms are essential for a democratic society. This basis of society manifests itself in, for instance, the Representation of the People Act 1983.⁶³ Implicit in such legislation must be the recognition that a bundle of rights exist in order to ensure that the democratic process is more than just an empty shell. Clearly the franchise is of little use unless a society enjoys, as a bare minimum, a free press, freedom of speech, freedom of movement, freedom of thought and freedom of assembly and association. These rights form, in part, the normative framework of democracy. Moreover, such rights are implicit in the Representation of the People Act which clearly assumes that the people are free to criticise, discuss and debate the merits of political policies and parties.⁶⁴

Although the constitution is unwritten, there can be no doubt that the United Kingdom is essentially a parliamentary democracy. The Representation of the People Acts, for instance, are a clear manifestation of a free society that governs its affairs in accordance with the principles of representative democracy. Society tolerates Parliamentary law-making because it is the elected legislative forum of

⁶²P.A.Joseph, "Beyond Parliamentary Sovereignty" [1990] *Anglo-Am.L.Rev.* 91 at 104-105.

⁶³ 1983, c.2.

⁶⁴ For a similar observation in the Canadian context see *Switzman v. Elbling* [1957] 7 D.L.R (2d) 337 *per* Abbot J.

the nation. It is in this wider context that Parliament must be seen. Moreover, the theory of parliamentary sovereignty developed by Dicey is justified by democratic theory.⁶⁵ If the political sovereign, the people, are to control the legal sovereign, the Queen in Parliament, then the operation of the political process must support a democratic choice.⁶⁶ Indeed, there seems to be no reason in the age of mass democracy for the courts not to raise explicitly the people to a position of constitutional supremacy over Parliament, thereby recognising the sovereignty of the people as the ultimate constitutional foundation.⁶⁷ Whatever the form of the British Constitution, in the late twentieth century sovereign power belongs to and resides in the people. It is exercised on their half by the government of the day who derive their moral and political authority from the ballot box. This, surely, is the self-evident basis of representative government. Clearly then a mere parliamentary majority is not therefore free to abandon democratic institutions or the rights and freedoms that support them. In order to prevent this there must be some form of external control that can prevent a government from resiling from these institutions and the normative values of democracy.

Judicial review of legislation is of course frequently criticised on the grounds that it is undemocratic.⁶⁸ Although this is not the place to repeat these arguments they are, however, in one sense of crucial importance. The crude logic of majoritarians dictates that any interference with any statute is illegitimate, irrespective of the content of that statute. Parliament, as the democratic element of the Constitution, must be supreme. Yet without question this theory is flawed. Unchecked democracy, as Lord Hailsham famously observed, can be as unjust and tyrannical as any dictator. More fundamentally in the context of the British constitution this criticism is more than a little ironic. Ministers can serve the Crown without ever being elected. And of course two-thirds of the legislative process has no democratic pedigree whatsoever: *viz.* the Queen and the House of

⁶⁵ A.V.Dicey, *supra*.n.36 at 70 (where Dicey notes that the electors “are the true sovereign of the country”) & at 429-30.

⁶⁶ L.Zines, “A Judicially Created Bill of Rights” [1994] 16 *Sydney L.Rev.*166 at 177. Zines persuasively argues that in order to avoid opening Pandora's Box the judges should “cleave close” to the rights and freedoms associated with the concept of a representative democracy.

⁶⁷ *Supra*.n.34 at 258.

⁶⁸ For example, the classic, J.A.G Griffith, *The Politics of the Judiciary* (4th.ed.,Fontana, 1991) . See also Ewing & Gearty, *Freedom Under Thatcher* (Clarendon,1990) at 270-1.

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Lords. Equally, governments formed under our electoral arrangements are usually endorsed by less than half the electorate, and are therefore not true expressions of majoritarian will.

Thus instrumentalist democratic rights, for example equal access and participation in the democratic process, must be protected otherwise political equality, the bedrock of majoritarianism, will be undermined. Likewise, free speech must be protected for it provides the very breath of life for our Parliamentary democracy.⁶⁹ Any enactment that threatened to undermine the essentials of democratic government clearly lies beyond the lawful limits of Parliament.⁷⁰ Therefore, the courts through judicial review would be ensuring that the political will of the nation would continue to be accurately expressed in a democratic manner. In this sense a limited doctrine of judicial review can be conducive to democracy, and thus confined, is no more anti-democratic than judicial review of administration.⁷¹

VII. COMMON LAW RIGHTS

Beyond the values that might be considered essential for democracy, there are a number of fundamental common law principles deeply rooted in the common law tradition. Although these principles are increasingly identified with the catalogue of rights in the European Convention on Human Rights,⁷² they are nonetheless “the basis of our fundamental freedoms”⁷³ and have “sunk deep into the mind of the nation and have been more powerful than anything else in creating the spirit of the British Constitution.”⁷⁴ These principles represent a

⁶⁹ As the decisions in *Re Alberta Legislation* [1938] 2 D.L.R. 81 at 107 and *Australian Capital Television Pty. Ltd. v. The Commonwealth* [1992] 177 C.L.R. 10 recognise.

⁷⁰ T.R.S. Allen, “The Limits of Parliamentary Sovereignty” [1985] *P.L.* 614 at 620-22.

⁷¹ D. Feldman, “Democracy, The Rule of Law, and Judicial Review” [1990] 19 *Fed.L.Rev.* 1 at 23.

⁷² For example, *A-G v. Guardian Newspapers (No2)* [1990] 1 A.C. 109 at 283 *per* Lord Goff; *Derbyshire County Council v. Times Newspapers* [1992] 3 All E.R. 65 at 77-78 *per* Balcombe L.J.; and *R v. Cambridge Health Authority, ex p. B* (*The Times*, 15th. March, 1995). For an extra-judicial view see: The Hon. Sir John Laws, “Is the High Court the Guardian of Fundamental Constitutional Rights ?” [1993] *P.L.* 59.

⁷³ Lord Denning, *supra*. n.46 at 1183.

⁷⁴ *Ibid.* at 1181.

number of enduring values. They include, for example, “the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of private property, the benefit of natural justice and immunity from retrospective and unreasonable operation of law.”⁷⁵ Furthermore, despite the semi-entrenched provision in the Canadian *Charter* guaranteeing freedom of expression ⁷⁶ the Canadian Supreme Court has observed that freedom of expression is not:

“a creature of the *Charter* ... it is one of the fundamental concepts that has formed the basis of the historical development of the political, social and educational institutions of western society [and] representative democracy.”⁷⁷

Even before the advent of the *Charter*, free speech had been recognised as an essential feature of Canadian democracy, and as such had been granted a constitutional status by the courts. ⁷⁸ Equally, in the context of the right to be secure from arbitrary search and seizure, the Alberta Court of Appeal noted during *Southam v. Hunter* that “the roots of the right ... are embedded in the common law ... [and] the expression in a constitutional document simply reminds us of those roots and the tradition associated with the right.” ⁷⁹ Such principles cannot be dismissed as ephemeral or nebulous.

Would it be possible, however, to go further and claim that such principles form a fundamental law and as such they are not ordinary positive law? This would not be at all revolutionary. What is revolutionary is talk of the omniscience of Parliament, free to destroy and erode rights and freedoms such as the right to silence. Such views, as Allott notes:

⁷⁵ *Supra*.n.50 at 40.

⁷⁶ S.2 (b) *Canadian Charter of Rights & Freedoms* (1982) s.2 is subject to the legislative override provisions contained in s.33 and is therefore not fully entrenched.

⁷⁷ *Retail, Wholesale & Department Store Union v. Dolphin Delivery Ltd.* [1986] 33 D.L.R. (4th.) 174 at 183 *per* McIntyre J.

⁷⁸ *Ibid.* at 184 *per* McIntyre J. For cases giving free speech a constitutional status, see e.g. *Re Alberta Legislation supra*.n.69 at 107-109 and at 119-120. See also *infra*.

⁷⁹ [1983] 147 D.L.R. (3d) 420 at 426 *per* Prowse J.A. Section 8 of the *Charter* provides “Everyone has the right to be secure against unreasonable search or seizure.”

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“fly in the face of one thousand years of talk about ‘fundamental law’ by Kings, judges, political men, and commentators ... if there is one thread which runs through the whole turbulent story of British constitutional development it is the belief that we are the servants of fundamental constitutional rules which were there before us and will be there after we have gone.”⁸⁰

VIII. THE PROTECTION OF UNENUMERATED RIGHTS AND FREEDOMS

There are, of course, those who believe that in the absence of a bill of rights the courts are unable to protect adequately rights and freedoms.⁸¹ However, it is disingenuous to claim that as rights are unenumerated that they cannot be protected. In Ireland, for example, the Supreme Court has ruled that unspecified rights lurk in the Constitution,⁸² and at a deeper level in the laws of nature. Furthermore, these rights could be identified by the courts and protected.⁸³

Similarly, in the United States the courts have from the very beginning proclaimed and enforced unwritten constitutional principles.⁸⁴ Thus clearly, as Grey notes, many of the court's decisions on constitutional law are non-interpretive.⁸⁵ Perhaps this is not surprising, for at the time the Constitution was framed it was recognised that it did not completely codify all the higher law.⁸⁶ Equally, the Australian High Court has “distilled from the provisions and

⁸⁰ P.Allot, “The Courts and Parliament: Who, Whom ?” [1979] 38 *C.L.J.* 79 at 114.

⁸¹ Eric Barendt, for example, notes “the Courts in the absence of a Constitutional text are unable to give adequate weight to the freedom when it conflicts with other public values and interests,” in *Freedom of Speech* (Clarendon,1985) at 299. See also *Builders' Labourers Federation v. Minister of Industrial Relations* *supra*.n.60 at 406b-c *per* Kirby P.

⁸² For example *Bunreacht na hEireann* (1937) Art.43.1.1 (Private property).

⁸³ See *Ryan v. A-G(Ireland)* [1965] I.R. 264, & *G v. An Bord Uchtala* [1980] I.R. 32.

⁸⁴ T.Grey, “Do We Have an Unwritten Constitution ?” [1975] 27 *Stan.L.Rev.* 703 at 717.

⁸⁵ For example, *Roe v. Wade* 410 U.S.113 at 152-3 (1973).

⁸⁶ *Supra*.n.84 at 716.

structure of the Constitution”⁸⁷ an implied freedom⁸⁸ of communication “at least in relation to public affairs and political discussion.”⁸⁹ Whilst attractive, the difficulties of such an approach should not be underestimated. The result could be the simple exchange of one Leviathan in Parliament for another in the courts. Under a constitution that provides no limits to the legislative supremacy of Parliament it is both dangerous and unwarranted for the courts to expand the scope of judicial review beyond constitution principles that have a widely recognised legal and political heritage in society. With this in mind is it therefore too bold to suggest that certain of the common law rights and freedoms, such as free speech, are so essential to a representative democracy that a mere Parliamentary majority lacks the legitimacy to uproot them? If it is desired to protect these rights then should the doctrine in *Bonham’s Case* not be exhumed, employing the constitutional principles outlined above as the modern “right and reason”? Whilst this “would not be an easy move in a democracy, it might be done, and the scope of rights might be usefully delimited, if the judges concentrated on enforcing only those rights which are essential to democratic society.”⁹⁰ For clearly if the courts were to expand their canvass beyond these important rights and freedoms then the benefits to society become more questionable and judicial review more difficult to justify.

⁸⁷ *Theopanos v. Herald & Weekly Times* [1994] 68 A.L.J.R. 713 at 716b per Mason C.J. The leading authority on this implied freedom is *Australian Capital Television Pty. Ltd. v. The Commonwealth* *supra*.n.69. Here the High Court ruled that Part IIID of the Political Broadcasts and Political Disclosures Act 1991, an act of the Federal Parliament, was invalid on the ground that it infringed the implied right of communication which was inherent in the Australian Constitution. See also *Stephens v. West Australia Newspapers* [1994] 68 A.L.J.R. 765 & *The Nationwide Case* [1992] 177 C.L.R.1.

⁸⁸Although the drawing of implications from the Constitution is not new, the application of such thinking to fundamental rights and freedoms is: see Zines, *The High Court & The Constitution* (3rd.ed.,Butterworths,1993)). See also *Miller v. TCN Channel Nine Pty. Ltd.* [1986] 161 C.L.R. 556 where Murphy J.’s implied freedom of communication failed to find favour with the rest of the High Court. For a general discussion of this area see further, H.P.Lee, “The Australian High Court & Implied Fundamental Guarantees” [1993] *P.L.*606.

⁸⁹ *Australian Capital Television Pty. Ltd. v The Commonwealth* *supra*.n.69 at 140-42 per Mason C.J.

⁹⁰ D.Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press,1993) at 55.

IX. THE RULE OF LAW AND THE POLITE REBELLION

In cases that concern ouster clauses the courts have already shown scant regard for the sanctity of statute law when it conflicts with the rule of law. In fact, their Lordships “politely rebelled.”⁹¹ In *Anisminic Ltd. v. Foreign Compensation Commission* the House of Lords disregarded the clear and unambiguous words of the statute that stated that the findings of the Commission “shall not be called into question in any court of law.”⁹² Drawing on precedents of some antiquity, their Lordships claimed that the statute would not prevent them reviewing any decision of the Commission if it had exceeded its jurisdiction. “The net result,” as Wade notes, “was that they [the judges] had disobeyed the Act although nominally they were merely construing it in a peculiar but traditional way.”⁹³ In doing so, their Lordships were doubtless more alive to the potential of the abuse of power, than were the legislators who passed the act. The *Anisminic* decision, in a sense gave “us a constitution, establishing a kind of entrenched position to the effect that even Parliament cannot deprive [judges] of their proper function.”⁹⁴ In the same way that Sir Edward Coke in *Bonham’s Case* held that Parliament could not make a man judge in his own cause, the House of Lords in *Anisminic* were asserting a common law doctrine of the separation of powers which statute could not override. Thus as the courts clearly feel that statute law is no longer sacrosanct if it conflicts with the rule of law, what then is the difference in applying the same logic to statutes that undermine the efficacy of our representative democracy?⁹⁵

X. THE FAILURE OF DICEY - A NEW ROLE FOR THE COURTS?

The possibility, however, of further activism aimed at the protection of rights and freedoms is unlikely, due largely to the current narrowness of the judicial mandate, and the fossilised mindset of English public lawyers. This, of course,

⁹¹ *Supra*.n.14 at 281-2.

⁹² [1969] 2 A.C.147.

⁹³ *Supra*.n.23 at 65.

⁹⁴ *Ibid*.at 68.

⁹⁵ See Lord Woolf’s observations on the likely resistance of the judiciary to any proposal to remove judicial review contained in “Droit Public - English Style” [1995] *P.L.*57.

flows from the constitutional consequences of Dicey, particularly his notion of the supremacy of Parliament and beyond this, the Austinian legacy of the rigid separation of law and morality. Austin, who had little time for civil liberties, is largely responsible for the mechanistic “law is law” positivism which so bedevils the mindset of English lawyers.⁹⁶ Moreover lawyers, as Wade has famously noted, are brainwashed from their professional infancy by the dogma of legislative sovereignty.⁹⁷ Consequently, constitutional law has become, and is in danger of continuing to be, merely a series of footnotes to Dicey. Yet in propounding his theories Dicey casually “announced that it was the law that Parliament was omniscient, explained what this meant, and never devoted so much as a line to fulfilling the promise he made to demonstrate that this was so.”⁹⁸ The theories that Dicey developed are, without doubt, both deeply flawed, and are hopelessly outdated being based to a large extent on the idea of a self-correcting democracy.⁹⁹ Absent from Dicey's work, not surprisingly, is any mention of *Bonham's Case*.

In the light of such deep flaws it is difficult to understand why lawyers have taken Dicey and his *Study* so seriously. Ironically, Dicey himself refused to do so when they conflicted with his own political beliefs.¹⁰⁰ In *Fool's Paradise*, for example, he sanctioned the recourse to violence if the Home Rule Bill was enacted even if “the British electorate sanction the monstrous iniquity.”¹⁰¹ Implicit in his work was the message that he too was all too aware of the failings of the theories he had nurtured. Today, as Lord Hailsham has said, we would readily label these deficiencies “the Elective Dictatorship.” In short the Diceyan paradigm placed unbridled power into the hands of those who far from acting as the servants of the people have behaved as their masters. When, however, Dicey

⁹⁶J. Austin, *The Province of Jurisprudence Determined*, (ed. H.L.A.Hart),(Weidenfeld & Nicolson, 1954).

⁹⁷ *Supra*.n.23 at 68.

⁹⁸ A.W.B.Simpson, *Oxford Essays in Jurisprudence* (2nd.ed.,Clarendon,1973) at 96.

⁹⁹ It is not the purpose of this paper to undertake an analysis of Dicey. This has been eloquently achieved by P.P.Craig. See further, “Dicey:Unitary, Self-correcting Democracy and Public Law” [1990] 106 *L.Q.R.* 105, and *supra*.n.38 at ch.2.

¹⁰⁰ F.Mount, *The Constitution Now: recovery or decline* (Mandarin, 1993) at 56.

¹⁰¹ A.V.Dicey cited in *ibid.* at 55.

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wrote he was not concerned “to see strength curbed in response to the plaintive mewling of the weak.”¹⁰² Dicey believed that the House of Commons would protect liberty.

Today, however, the legislature is largely an instrument of executive government. And as such is increasingly used to diminish the rights and freedoms of the citizen, as the removal of the right to silence all too clearly shows.¹⁰³ Dicey re-enforced his belief in self-correcting democracy by claiming that civil liberties in England were adequately protected by the common law.¹⁰⁴ However, like the notion of a self-correcting democracy the protection this affords is minimal, for statutes that curtail liberty are, on Dicey's analysis, beyond the control of the courts.¹⁰⁵ However if lawyers recognise and reject the dangerous and inherent flaws in Dicey's theories and look to develop a doctrine of judicial review based on the precedent in *Bonham's Case*, and the principles of the common law, freedom will undoubtedly be better protected. This, naturally, is further dependent on the willingness of the courts to change the ultimate principle.

In every legal system there exists a basic rule by which the validity of legislation can be judged. In the United Kingdom, the ultimate principle is, that which the Queen in Parliament enacts is law. This principle is what enables the courts, officials, and private individuals to determine the legality of legislation. In the United Kingdom the ultimate legal principle is unique in that it is the only part of the common law that Parliament cannot change. This common law rule is the ultimate constitutional foundation for “the rule of judicial acceptance is in one sense a rule of the common law, but in another sense - *which applies to no other rule of common law* - it is the ultimate political fact upon which the whole system of legislation hangs.”¹⁰⁶ The rule is unique, for the rule may not be altered by statute, contrary to what Sir Owen Dixon thought,¹⁰⁷ for “legislation

¹⁰² *Ibid.* at 57.

¹⁰³ See further the Criminal Justice & Public Order Act 1994, c.33..

¹⁰⁴ *Supra.* n.38 at 36.

¹⁰⁵ See generally, E.Barendt, “Dicey and Civil Liberties” [1987] *P.L.* 596.

¹⁰⁶ H.W.R.Wade, “The Basis of Legal Sovereignty” [1955] *C.L.J.* 172 at 188.

¹⁰⁷ Sir Owen Dixon, “The Common Law as an Ultimate Constitutional Foundation” [1957] 31 *A.L.J.* 240 at 242-3.

owes its authority to the rule ... the rule does not owe its authority to legislation ... to say that Parliament can change the rule because it can change any other rule is to put the cart before the horse."¹⁰⁸

Moreover, the ultimate principle lies within the keeping of the judiciary: "the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts."¹⁰⁹ In this area it is the judges and not Parliament who are sovereign. It is for the judges to declare what valid legislation is. The judiciary may be under a duty to obey the orders of the legislature, but it is the judiciary who determine what those orders are. Thus it is quite natural that over the course of time, in the face of a changing society, "it is possible that the content of this rule could alter if the practice of those who operate the system changes."¹¹⁰

This, in part, is a political decision. For example, during the course of the *Factortame* litigation, the judges who heard that case recognised the political fact that the United Kingdom's membership of the European Union meant that the doctrine of implied repeal was in part redundant.¹¹¹ The courts were simply recognising the fact that, for political reasons, in certain areas the U.K. Parliament was no longer sovereign. Previously it was believed that no Parliament could bind its successor, yet Parliament seems to have done just that. While, the *Factortame* litigation has not only exploded that myth, it has also shown that it is perfectly possible to review the validity of legislation against a set of higher principles. If an act of Parliament conflicts with Community law, it will be disapplied.¹¹² How much longer before the belief in the Diceyan fairy tale that, aside from European matters, Parliament is free to enact any law it pleases,

¹⁰⁸ *Supra*. n.106 at 188.

¹⁰⁹ *Ibid.* at 189.

¹¹⁰ P.P.Craig, "Sovereignty of the United Kingdom after *Factortame*" [1992] *Y.B.E.L.* 221 at 250.

¹¹¹ *R. v. Secretary of State for Transport ex p. Factortame (No1)* [1990] 2 A.C. 85, and *R. v. Secretary of State for Transport, ex p. Factortame (No2)* [1991] 1 All E.R. 70. See also H.W.R.Wade, "What has happened to Sovereignty of Parliament"[1991] 107 *L.Q.R.* 1.

¹¹² For example, *R. v. Secretary of State for Employment, ex p. Equal Opportunities Commission* [1994] 3 W.L.R 409 and generally N.Gravells, "Diasapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Right?" [1989] *P.L.* 568 & "Effective Protection of Community Rights: Temporary Disapplication of an Act of Parliament"[1991] *P.L.* 180.

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ceases? Indeed:

“the realisation that the foundations [of orthodox theory] were flawed even at the time that Dicey wrote, and that they have been further undermined since then, might cause some other institution, such as the courts to consider whether they should be exercising control over Parliamentary power.”¹¹³

The decision to change the ultimate principle will doubtless be based on considerations of political morality. Judicial obedience to an Act of Parliament is dependent, in part, on what the judiciary perceive as the basis of political morality. Currently political morality, based on the recognition that the United Kingdom is a representative democracy, informs the judicial decision to interpret restrictively repressive statutes. Such ideas, however, might equally justify rejections of statutes whose injustice was especially grave.¹¹⁴ Thus any immoral act that undermines the efficacy of representative democracy by restricting the franchise on racial grounds or licences the press, clearly does not deserve either to be recognised as valid law or receive judicial obedience.

In practice the decision to alter the ultimate principle in order to protect fundamental rights and freedoms is not as unlikely as it may, at first sight, appear. A close study of Canadian law before the *Charter*, for example, reveals a judicial willingness to change the ultimate principle in an effort to uphold the rights and freedoms of the individual. Before the passage on the Canada Act 1982, the Canadian Federal Parliament, within its jurisdiction, was like Westminster supreme,¹¹⁵ although a law if it was to be valid had to come within the grant of legislative power contained in section 91 of the Constitution Act 1867.¹¹⁶ Freedom of expression, however, was not placed within the distribution of legislative power. Likewise, there was no express provision in the Constitution Act guaranteeing free speech. Instead, the Canadian judiciary came to rely on the Preamble to the Constitution Act, which granted “a constitution

¹¹³ *Supra*.n.110 at 250.

¹¹⁴ T.R.S Allen, *Law, Liberty and Justice* (Clarendon, 1993) at 284.

¹¹⁵ For example *Pearson's Case* [1928] 4 D.L.R 98 at 112-3 *per* Duff C.J.C.

¹¹⁶30 & 31 Vict. c.3 (UK). Until 1982 intituled the British North America Act but since retitled as the Constitution Act (*cf.* Canada Act 1982). If the legislature in question was provincial then s.92 of the Constitution Act would be applicable.

similar in principle to that of the United Kingdom” to Canada, in order to vindicate free speech. The Preamble, which had no enacting force, was employed by the Canadian judiciary to alter the ultimate principle in this area by finding implied limitations on the legislative sovereignty of Parliament. As these judges believed that they were protecting free speech under an unwritten constitution similar in principle to our own, then their reasoning is surely highly persuasive. Thus during the seminal case, *Re Alberta Legislation*, the Canadian Supreme Court derived from the Constitution Act, its Preamble and the grant of representative government in the form of parliamentary democracy, an implied freedom of communication that provincial legislatures had no power to curtail.¹¹⁷ Sir Lyman Duff, Canadian Chief Justice, considered that any act similar to the questioned Bill, which purported to suppress public debate or the freedom of the press, would deny “the very breath of life for Parliamentary institutions.”¹¹⁸ It would thus not only be repugnant to the Constitution Act but would also be beyond the competence of a provincial legislature.¹¹⁹ The provinces lacked the legislative power “to reduce the ability of the people to participate in the democratic process through the expression of opinions.”¹²⁰ Later, during *Switzman v. Elbling* Mr Justice Abbot went further in a now famous dictum expressing the opinion that free expression could not be abrogated by either provincial or federal legislatures.¹²¹

Bonham's Case and its progeny show that an ultimate principle which allowed the control of legislation by the courts has been previously recognised long before our accession to the European Union. In areas other than E.C.law it could easily be recognised again.¹²² Following the partial normative reformulation of Dicey's ideas in the aftermath of the *Factortame* decision, it is not such an enormous mental leap to do it in another area by limiting Parliamentary power to mould the constitutional landscape. This, quite naturally, would be based on the recognition that Parliament in the vital area of the liberty of the individual within

¹¹⁷ *Re Alberta Legislation supra*.n.69 at 106-9 & 119-20.

¹¹⁸ *Ibid.* at 107 *per* Duff C.J.C.

¹¹⁹ *Ibid.* at 106-9 *per* Duff C.J.C.

¹²⁰ S.I.Bushnell, “Freedom of Expression - The First Step” [1977] 15 *Alberta L.Rev.* 93 at 114.

¹²¹ *Supra*.n.64 at 371.

¹²² *Supra*.n.49 at 16.

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a representative democracy must not have the final word on the limits of its own power. As with the attempt to remove the separation of powers in the *Anisminic* Case, Parliament in abrogating common law rights and freedoms is illegitimately attempting to assume the power of detrimentally moulding the constitutional landscape.¹²³ By legislating in this manner, Parliament upsets the balance of the constitution while simultaneously illegitimately enhancing its and the Executive's position within our constitutional settlement. In short, "a stream cannot rise above its source."¹²⁴ After all "the doctrine of the sovereignty of Parliament must itself be found in the common law which first distributed among the branches of government their respective functions."¹²⁵

The common law is the basis of our constitution, containing as Sir Owen Dixon put it, the *anterior corpus* which provides the juristic authority for the institution of Parliament.¹²⁶ Without question, the common law is the source of the principle of legislative supremacy. Thus, it is to the decisions of the courts which determine what the nature of the power is, but also, more importantly from the perspective of this paper, what limitations there are on its power.¹²⁷ For example, "it is a proposition of the common law that no court may question the validity of a statute."¹²⁸ Equally, the common law is the source of the proposition that no Parliament may bind its successors.¹²⁹ The last example has, of course, been recently adjusted by the courts to take account of the political reality of our continuing membership of the European Union. Why stop at these if faced with oppressive legislation?

In both pre-*Charter* Canada and more recently Australia the courts have limited legislative supremacy with little in the way of explicit justification from their respective constitutions. Both the Canadian Preamble doctrine, as noted

¹²³ *Supra*.n.92 & text.

¹²⁴ *Heiner v. Scott* [1914] 19 C.L.R.381 at 393 *per* Griffith C.J.; & *The Australian Communist Party Case* [1950] 83 C.L.R.1.

¹²⁵ *Supra*.n.50 at 38.

¹²⁶ *Supra*.n.107 at 240.

¹²⁷ *Supra*.n.37 at 85.

¹²⁸ *Supra*.n.107 at 242.

¹²⁹ *Ellen Street Estates v. Minister of Health* [1934] K.B.590 at 597 *per* Maugham L.J.

above, and the Australian implied freedom of communication¹³⁰ are predicated on notions of responsible and accountable democratic government. Indeed, what textual justification is employed is a smoke-screen laid by the judiciary in order to hide the alteration of the ultimate principle.¹³¹ Thus in Australia the ultimate principle before *Australian Capital Television* case was “the Federal Parliament, within the terms of the Constitution,¹³² is supreme.” Today following the High Court’s innovative judgement, the principle has become “subject to the implied freedom of communication, the Federal Parliament, within the terms of the Constitution, is supreme.” As free speech is just as vital to the constitution of the United Kingdom, this begs the question of whether or not the U.K. courts should seek to limit the principle of legislative supremacy by the development of a common law constitutional principle, similar to those created in Canada and Australia. Here it is important to remember that just as the development of the common law principle of legislative supremacy was influenced by both abstract conceptions of sovereignty and changes in political thought, now other political conceptions and theories, perhaps on the lines outlined above, might play a part in limiting the absolute power of Parliament.

Where will the courts gain the authority to review legislation? In such circumstances the courts will acquire their power after the question has arisen, and a decision has been given.¹³³ The power to review legislation is acquired *ex post facto*, and appears to have been inherent all along. This, of course, is exactly what happened in the seminal American case *Marbury v. Madison*.¹³⁴ Although the American Constitution did not expressly provide for judicial review of legislation, the Supreme Court appropriated the power, which it has retained ever since. While it is, of course, easy to treat the U.S. Constitution as the paramount consideration and ignore the role of the general law, under *Marbury v. Madison*, as in *Bonham's Case*, the common law is, in fact, controlling acts of the legislature. In the U.S.A. it is the courts that have administered the elixir of

¹³⁰ *Australian Capital Television Pty.Ltd. v. The Commonwealth supra*.n.69. See also *The Nationwide Case supra*.n.87.

¹³¹ *Australian Capital Television Pty.Ltd. v. The Commonwealth ibid.* at 108 *per* Madam Justice Gaudron.

¹³² Constitution of the Commonwealth 1901 (Section 9 Commonwealth of Australia Constitution Act 1900 (63 & 64 Vict.c.12)).

¹³³ H.R.A.Hart, *The Concept of Law* (2nd.ed.,Oxford University Press, 1994) at 153.

¹³⁴ (1803) 1 Cranch 103.

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life to the Constitution. Furthermore, the ultimate principle is not open to doubt on every point, only on some points.¹³⁵ Thus the rule that the Queen in Parliament can enact whatever law it pleases could be held open to doubt on the point of whether it is constitutionally proper for Parliament to abrogate rights and freedoms that it is entrusted with protecting. To deny this point would, of course, be to endorse the principle of constitutional suicide by a liberal democracy. The courts would only be questioning this vital area of the ultimate principle, not the principle in its entirety. Thus, in the sphere of fundamental rights and freedoms, the supremacy of the legislature would be ousted in favour of a very limited but necessary form of judicial supremacy. This might, for example, be based on the recognition that a theory of limited judicial supremacy could be instrumental in the protection of the normative rights and freedoms of democracy. Needless to say, any such rights and freedoms will be subject to reasonable and necessary limitation by the courts. Free speech for instance is not an absolute. Like other rights and freedoms it must often be limited by other important, and at times, competing rights and values. This, of course, is a task that institutionally the courts are well suited to doing.

English law “by dint of sheer repetition, academic preaching of the absolutist theory of sovereignty has” as Walker observes, “diverted the attention of bench and bar away from the more limited and balanced principle developed by common lawyers during the seventeenth century ...[namely] one of Parliamentary *supremacy*, not sovereignty.”¹³⁶ Sir Edward Coke, for example, noted during the debate on the Petition of Right 1628 that “‘sovereign power’ is no parliamentary word ... Magna Carta is such a fellow that he will have no sovereign.”¹³⁷ That debate was, of course, concerned with the sovereign power of the king in person. Yet the tenor of the contributions to the debate make it clear that sovereign power was unknown both to Parliament and the law. What Parliament had in mind was a government of laws and not men.¹³⁸

At the heart of Dicey's flawed theory is an irreducible contradiction between the rule of law and the sovereignty of Parliament. Indeed Dicey himself never managed to reconcile the two. This is not surprising. It is, of course, essential for the maintenance of the rule of law that legislative power be subject to certain

¹³⁵ *Supra*. n. 133 at 147-54.

¹³⁶ *Supra*. n. 14 at 279.

¹³⁷ 3 St. Tr. 59 at 193 cited in Walker, *ibid*.

¹³⁸ *Supra*. n. 14 at 279.

limits, for while Parliament can enact any law at any time on any subject then “the rule of law is little more than a joke.”¹³⁹ Such limits to legislative power, as the International Commission of Jurists noted, can either be legal or customary.¹⁴⁰ It is an often overlooked feature of the constitutional landscape that the power of our unbridled Parliament is tempered by convention. Until recently, it was a vague but clearly accepted convention, resting on the principle of constitutionalism and the rule of law, that Parliament did not use its unlimited power to legislate in an oppressive or tyrannical way.¹⁴¹ The power of Parliament would, according to convention, be exercised in a manner that conformed to the principles of constitutionalism, the rule of law and toleration of minorities.¹⁴² This convention, in keeping with all constitutional conventions is bereft of any legal sanction to enforce compliance. Not surprisingly it is increasingly flouted, as the Criminal Justice and Public Order Act 1994 graphically illustrates.¹⁴³

In tolerant times judges are all too ready to say how they would respond to situations where Parliament did the unthinkable and enacted a form of apartheid. In *Oppenheimer v. Cattermole* Lord Cross observed *obiter* that any form of anti-Semitic legislation “which takes away without compensation from a section of the citizen body singled out on racial grounds all their property ... and in addition deprives them of their citizenship ... constitutes so grave an infringement of human rights that the courts ought to refuse to recognise it as law at all.”¹⁴⁴ Amazingly his timid colleagues Lord Pearson in the Lords, and Lord Justices Buckley and Orr in the Court of Appeal, felt compelled to bow to the supremacy of the German lawmaker.¹⁴⁵ Some judges, whatever the content of statutes, are only too happy to continue to subscribe to Dicey’s dogmas. Perhaps this state of affairs is a consequence of the marination of English lawyers in positivism. The

¹³⁹ *Ibid.* at 281.

¹⁴⁰ *The Rule of Law in a Free Society* (International Commission of Jurists, 1960) at 198 & 210-15 cited also in Walker, *ibid.*

¹⁴¹ G.Marshall, *Constitutional Conventions*, (Clarendon,1984) at 9 & 201.

¹⁴² *Ibid.* at 201.

¹⁴³ c.33. See further M.J.Allen and S.Cooper, “Howard’s Way - A Farewell to Freedom?” [1995] 58 *M.L.R.* 364.

¹⁴⁴ [1976] A.C. 249 at 278.

¹⁴⁵ *Ibid.* at 265, and [1973] Ch. 264 at 64-5.

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result, an obsession with rules of law and their mechanical application, eschews any contemplation of the moral content of law. The dangers are obvious, as the experience of inter-war Germany eloquently illustrates. At this time the only acceptable legal philosophy was positivism; a feature of the legal landscape that was most congenial to the evils of Nazism. In short, the adherence to the "law is law" mentality of positivism by German lawyers left them unable to deal with oppressive laws.

More recently in South Africa, parliamentary sovereignty under a Westminster style constitution has been "taken to its logical and brutal conclusion at the expense of human rights."¹⁴⁶ Under the apartheid policies systematically pursued by the National Party in South Africa, the judiciary, who were a paragon of positivistic virtue writ large, undoubtedly helped to advance the sacrifice of human rights and the rule of law upon the altar of parliamentary sovereignty.¹⁴⁷ Somewhat ironically in dealing with such "hard cases" the courts will excuse their judgements by pointing to the democratic nature of the institution they are obeying.¹⁴⁸ They will go on to suggest that remedial action be sought via the ballot box.¹⁴⁹ Yet when laws grant or retract human rights from people according to arbitrary caprice even lawyers, as the eminent German jurist, Gustav Radbruch, argued, "must find the courage to deny them the nature of law."¹⁵⁰

¹⁴⁶ J.Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, 1978) at 36.

¹⁴⁷See generally, Dugard, *ibid.* Also Wouter de Vos, "The Challenge Facing the South African Judiciary: Further Comments" in S.Shetreet (ed.), *The Role of Courts in Society* (Martinus Nijhoff, 1988).

¹⁴⁸*Builders' Labourers Federation v. Minister of Industrial Relations supra.*n.60 at 405d-g per Kirby P.

¹⁴⁹*Quebec Association of Protestant Boards v. A-G for Quebec (No2)* [1982] 140 D.L.R. (3d.) 33 at 52.

¹⁵⁰Barend Van Niekerk, "The Warning Voice From Heidelberg - the Life and Thought of Gustav Radbruch" [1973] *S.A.L.J.* 234 at 248.

XI. CONCLUSION

Thus, in the end, there can be little doubt that there are “advantages in making it clear that ultimately there are limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold.”¹⁵¹ Yet quite what these limits are and on what grounds they likely to be justified, is a question that can only be resolved by the courts drawing on their conceptions of political and constitutional morality in the context of particular cases. If the political morality of the British constitutionalism fails to restrict legislators, then in the last resort the courts will have to formulate a legal morality that recognises the worth of the rights and freedoms of the individual. Whilst it is preferable that the legislature itself imposes limits on its own power through a bill of rights, the time may well arrive when in the absence of such an instrument and in the face of oppressive legislation the courts may need to revive the doctrine in *Bonham's Case*. In acting as the platonic guardians of liberal democracy the courts should not feel constrained by precedents expressing total deference to the absolute sovereignty of Parliament. Such precedents were written in different constitutional context, not only before the advent of the concept of legally enforceable human rights but also before the Westminster paradigm of responsible government had become dysfunctional.

¹⁵¹ Lord Woolf of Barnes, *supra*.n.95 at 69.