CHAPTER 4

The rule of law

> The concept of the rule of law is not fixed for all time . . . But in a world divided by differences of nationality, race, colour, religion and wealth it is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large.[1]

During 1971, at what we now know was an early stage of open strife between the communities in Northern Ireland, the IRA increased the ferocity of its campaign of violence in Northern Ireland, shooting soldiers and police and blowing up buildings. Early in August, the government of Northern Ireland, after consulting with the UK government, decided to exercise the power of internment available to it under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922.[2] This power could be used against persons suspected of having acted or being about to act in a manner prejudicial to the preservation of peace or the maintenance of order. On 9 August, 342 men were arrested. By November 1971, when the total arrested had risen to 980, 299 of those arrested were being interned indefinitely; the remainder were held under temporary detention orders or had already been released.

The security forces saw in internment an opportunity of obtaining fresh intelligence about the IRA. Fourteen detainees were interrogated in depth. The procedures of interrogation included keeping the detainees' heads covered with black hoods; subjecting them to continuous and monotonous noise; depriving them of sleep; depriving them of food and water, except for one slice of bread and one pint of water at six-hourly intervals; making them stand facing a wall with legs apart and hands raised.

In November 1971, after these facts had been established, three Privy Counsellors were asked to consider whether the procedures 'currently authorised' for interrogating persons suspected of terrorism needed to be changed. They produced two reports.[3] Two members, a former Lord Chief Justice and a former Conservative Cabinet minister, recommended that the procedures could continue to be used subject to certain safeguards, including the express authority of a UK minister for their use, the presence of a doctor with psychiatric training at the interrogation centre, and a complaints procedure. This report did not express any view on the legality of the interrogation procedures, but stated that valuable information about the IRA had been discovered through the interrogation.

The minority report, by Lord Gardiner, a former Labour Lord Chancellor, held that the interrogation procedures had never been authorised:

> If any document or minister had purported to authorise them, it would have been invalid because the procedures were and are illegal by the domestic law and may also have been illegal by international law.

Should legislation be introduced enabling a minister in time of emergency to fix in secret the limits of permissible ill-treatment to be used in interrogating suspects? Lord Gardiner viewed

[1] Lord Bingham, *The Rule of Law*, p 174.

[2] The power did not survive into the Terrorism Act 2000; see ch 20 C. On the internments in 1971–6, see R J Spjut (1986) 49 MLR 712.

[3] Cmnd 4901, 1972 (Parker Report).

with abhorrence any proposal that a minister should be empowered to make secret law. Nor could he agree that a minister should fix secret limits without the authority of Parliament, 'that is to say illegally', and then if found out ask Parliament for an Act of Indemnity: that, he said, would be a flagrant breach of the whole basis of the rule of law and of the principles of democratic government.

The government accepted Lord Gardiner's report and Prime Minister Heath stated that the interrogation procedures would not be used again. When those who had been interrogated sued the government for damages for their unlawful treatment, liability was not contested and substantial awards of damages were made. The European Commission on Human Rights held that the interrogation procedures amounted to inhuman and degrading treatment and also torture, contrary to art 3 of the European Convention on Human Rights. When the Irish government referred the case to the European Court of Human Rights, the court held that the procedures were inhuman and degrading treatment but did not amount to torture.[4]

No clearer illustration could be given of the need to adhere to the rule of law if citizens are to be protected against arbitrary and harsh acts of government. However lawless may have been the acts of the IRA, and however seriously those acts infringed life and liberty, government must not retaliate with measures which are not only unlawful but also are of such a nature that it would be impossible on moral and political grounds to make them lawful. Controversial as the power of internment was, it was authorised by the legislature and its use was a matter of public knowledge and admitted political responsibility. But in law the power to intern does not include power to interrogate or to administer physical ill-treatment or torture.

Northern Ireland has, happily, entered a more peaceful stage in its history. But the issues the internment example gives rise to are not confined to Northern Ireland, nor to history. Depressingly, it remains an intensely relevant example.[5] The role of the law in policing the state's security efforts, and holding it to a higher standard than those of its enemies, is as crucial today as ever. Since the 9/11 atrocities in the United States, many urgent questions have been raised as to the legality (in national and international law) of measures taken in the 'war against terrorism'. One aim of the Bush administration in establishing a detention centre at the Guantanamo Bay naval base on Cuba was to place detainees outside the protection of any legal system, but in 2004 the US Supreme Court held that this had not been achieved.[6] There can now be no doubt that procedures amounting to torture were authorised by the Bush administration.

[4] *Ireland* v *UK* (1978) 2 EHRR 25; and see ch 14 B. In 2004, Lord Hope wrote: 'It seems likely that the mixture of physical and psychological pressures that were used in the case of the IRA suspects would now be regarded as torture . . .': (2004) 53 ICLQ 807, 826. The UN Convention against Torture was signed by the United Kingdom in 1984 and ratified in 1988 after enactment of the Criminal Justice Act 1988, s 134.

[5] The above account of interrogation of IRA suspects first appeared in this book in 1977. It should by 2013 have been possible to relegate this to the pages of history, since a government assurance was given in 1972 (HC Debs, 2 March 1972, col 743), repeated by the Attorney General in 1977, that the unlawful techniques had been prohibited. Sadly, events involving the death of an Iraqi citizen while in the custody of British troops in Basra caused serious concern at Westminster regarding 'discrepancies' in evidence from military sources on use of the techniques: Joint Committee on Human Rights, 28th report (2007–8), HL Paper 157, HC 527; 23rd report (2008–9), HL Paper 153, HC 553. And see *R (Al-Skeini)* v *Defence Secretary* [2007] UKHL 26, [2008] AC 153 and *Al-Skeini* v *United Kingdom* (2011) 30 BHRC 561. A document-based inquiry led by Sir Peter Gibson into issues of interrogation and rendition found there to be many matters needing further investigation: *Report of the Detainee Inquiry* (Cabinet Office, 2013, and HC Debs, 19 December 2013, col 913).

[6] *Rasul* v *Bush* 124 S Ct 2686 (2004); *Hamdi* v *Rumsfeld* 124 S Ct 2633 (2004); *Boumediene* v *Bush* 128 S Ct 2229 (2008). See D Golove (2005) 3 Int Jl of Const Law 128; S Hannett [2008] PL 636. Also Lord Steyn (2004) 53 ICLQ 1; Sands, *Lawless World* and (same author) *Torture Team.*

In the United Kingdom, two particularly significant decisions have arisen from the 'war against terror': (1) indefinite detention without trial under the Anti-Terrorism, Crime and Security Act 2001 was held to breach the European Convention on Human Rights;[7] and (2) evidence obtained or likely to have been obtained by torture committed abroad by a foreign state's agents was held to be inadmissible in proceedings before the Special Immigration Appeals Commission.[8] The decisions underline the continuing relevance of values associated with the 'rule of law'. In the first case, Lord Nicholls said that 'indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law';[9] Lord Hoffmann said that there was 'nothing more antithetical to the instincts and traditions of the people of the United Kingdom'.[10] A Court of Appeal judge has written of this decision: 'It is a powerful statement by the highest court in the land of what it means to live in a society where the executive is subject to the rule of law.'[11]

A. Historical development

In a review of the history of political philosophy, Anthony Quinton has written: 'In all its historical variations the state has sought to discharge two connected functions: the maintenance of order within its domain by the promulgation and enforcement of law and the defence of the nation against external enemies'.[12] To perform these functions, the state possesses coercive powers that may be used to oppress the people as well as confer benefits upon them. Law is an instrument for exercising state power that in some circumstances is also a means of protecting the people against arbitrary or abusive government. Aristotle argued that government by laws was superior to government by men.[13] But one dominant theme in the story of western civilisation in the last 500 years has been the struggle for liberty and rights against absolutism in its several forms, including the absolutism of the state and its use of law.[14]

Bracton, in the 13th century, maintained that rulers were subject to law: 'The King shall not be subject to men, but to God and the law: since law makes the King.'[15] Magna Carta and its later confirmations expressed the principle that justice according to law was due both to the ruler and to other classes in the feudal hierarchy. When renaissance and reformation in the 16th century weakened the idea of a universal natural law, emphasis shifted to the function of law as an aspect of the sovereignty of the state.[16] In Britain, the 17th-century constitutional settlement rejected the claims of absolute monarchy based on the divine right of kings, in favour of a mixed system of government that relied on the authority of the Houses of Parliament and the common law courts.

[7] *A* v *Home Secretary* [2004] UKHL 56, [2005] 2 AC 68.

[8] *A* v *Home Secretary (No 2)* [2005] UKHL 71, [2006] 2 AC 221. At [101], Lord Hope said: '[In times of emergency] where the rule of law is absent, or is reduced to a mere form of words to which those in authority pay no more than lip service, the temptation to use torture is unrestrained.'

[9] *A* v *Home Secretary* (above) at [74].

[10] Ibid, at [86].

[11] M Arden (2005) 121 LQR 604, 622.

[12] Kenny (ed.) *The Oxford History of Western Philosophy*, ch 6 (A Quinton), p 296.

[13] d'Entrèves, *The Notion of the State*, p 71.

[14] See Grayling, *Towards the Light*.

[15] Maitland, *Constitutional History*, pp 100–4; McIlwain, *Constitutionalism Ancient and Modern*, ch 4.

[16] For the rule of law in 16th-century England, see Elton, *Studies in Tudor and Stuart Politics and Government*, vol 1, p 260.

The Bill of Rights in 1689 affirmed that the monarchy was subject to the law.[17] Not only did it force the Crown to govern through Parliament, but it also established the right of individuals to challenge unlawful interference in respect of their life, liberty and property.

In *Entick* v *Carrington*, two King's Messengers were sued for having unlawfully broken into the plaintiff's house and seized his papers: the defendants relied on a warrant issued by one of the Secretaries of State ordering them to search for Entick and bring him with his books and papers before the Secretary of State for examination. The Secretary of State claimed that the power to issue such warrants was essential to government, 'the only means of quieting clamours and sedition'. The court *held* that, in the absence of a statute or judicial precedent upholding the legality of such a warrant, the practice was illegal. Lord Camden CJ said: 'What would the Parliament say if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation . . . And with respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction.'[18]

The 'general warrant' cases sought to protect rights to liberty and property, but such rights were not absolute. In 1772 Lord Mansfield held that the common law did not recognise the right of a slave-owner to enforce ownership of a slave brought from Jamaica to England.[19] The procedure by which individual liberty was protected was that of habeas corpus, a common law writ which had been rendered more effective by statute.[20] Formal adherence to the law was one of the public values of 18th-century Britain, although not all the people gained equally from it.[21] Economic and social developments since 1765 have qualified the forthright declaration of Lord Camden that in the absence of precedent no common law powers of search and seizure will be recognised,[22] but *Entick* v *Carrington* still exercises influence on judicial attitudes to the claims of government.

Dicey's exposition of the rule of law

One reason for this is found in the work of A V Dicey, whose lectures at Oxford were first published in 1885 under the title, *Introduction to the Study of the Law of the Constitution*.[23] Dicey's aim was to introduce students to 'two or three guiding principles' of the constitution, foremost among these being the rule of law. The spirit of *Entick* v *Carrington* seems to run through Dicey's arguments, but he expressed the doctrine of the rule of law in the form of

[17] See too: *R (Miller)* v *Secretary of State for Exiting the EU* [2017] UKSC 5, [2017] 2 WLR 582 at [41]–[42].

[18] (1765) 19 St Tr 1030, 1067, 1073. And see *Wilkes* v *Wood* (1763) Lofft 1. See the fascinating collection of essays celebrating *Entick* and its impact on the law in Tomkins and Scott, *Entick v Carrington: 250 Years of the Rule of Law*.

[19] *Somersett* v *Steuart* (1772) 20 St Tr 1. See for Scotland: *Knight* v *Wedderburn* (1778) Mor 14545.

[20] See ch 25 D.

[21] Thompson, *Whigs and Hunters*, pp 258–69. And see Tomkins, *Our Republican Constitution*. In the age of colonialism, British rule was not always characterised by adherence to law: see Kostal, *A Jurisprudence of Power*, examining the impact on opinion in London of atrocities during the Jamaica uprising in 1865.

[22] *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344.

[23] The main text was settled by Dicey in 1908; it appears in the 10th edn (with introduction by E C S Wade). See also Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, and the symposium of articles at [1985] PL 587.

several statements describing the English constitution, some of them derived from authors who immediately preceded him.[24] Dicey gave to the rule of law three meanings:

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government . . . ; a man may with us be punished for a breach of law, but he can be punished for nothing else.

Thus no one could be made to suffer penalties except for a distinct breach of law established before the ordinary courts. In this sense Dicey contrasted the rule of law with systems of government based on the exercise by those in authority of wide or arbitrary powers of constraint, such as a power of detention without trial.

Second, the rule of law meant

> equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.

In Dicey's view, this implied that no one was above the law; that officials like private citizens were under a duty to obey the same law; and that there were no 'administrative courts' to decide claims by citizens against the state or its officials.

Third, the rule of law meant

> that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.[25]

So the rights of the individual were secured not by guarantees in a formal document but by the ordinary remedies of private law available against those who unlawfully interfered with someone's liberty, whether they were private citizens or officials.

Assessment of Dicey's views[26]

These three statements about the rule of law raise many questions. In the first, what is meant by 'regular law'? Does this include, for example, social security law, anti-discrimination law or anti-terror laws? Does 'arbitrary power' refer to powers of government that are so broad they could be used for a wide variety of different purposes; powers that are capable of abuse if they are not properly controlled; or powers that directly infringe individual liberty (for example, power to detain a citizen without trial)? If 'arbitrary power' and 'wide discretionary authority' alike are unacceptable, how may the limits of acceptable authority be settled? If it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then the rule of law applies to no modern constitution. Today the state regulates national life in multifarious ways. Discretionary authority in most spheres of government is inevitable. While there are still certain powers which we are unwilling to trust to the executive (for example, the power to indefinitely detain individuals without trial) except when national emergencies dictate otherwise, attention has to be given not so much to attacking the

[24] H W Arndt (1957) 31 ALJ 117.

[25] Dicey, pp 202–3.

[26] See Jennings, *The Law and the Constitution*, ch 2 and app 2; F H Lawson (1959) 7 *Political Studies* 109, 207; H W Arthurs (1979) Osgoode Hall LJ 1; Lord Bingham [2002] PL 39; Craig, *Public Law and Democracy*, ch 2; Loughlin, *Public Law and Political Theory*, ch 7. For endorsement of Dicey's approach, see Allan, *Law, Liberty and Justice*, ch 2, and *Constitutional Justice*, ch 1. A devastating dissection of Dicey's methodology is in Allison, *The English Historical Constitution*, ch 7.

existence of discretionary powers as to establishing legal and political safeguards by which the use of such powers may be controlled.[27] Doubtless Dicey would have regarded as arbitrary many powers of government on which social welfare and economic regulation now depend.

Dicey's second meaning stresses the equal subjection of all persons to the 'ordinary law'. The 14th Amendment to the US Constitution provides that no state shall 'deny to any person within its jurisdiction the equal protection of the law', a provision which has been a fertile source of constitutional challenges to discriminatory state legislation. Similar provisions are in the constitutions of India, Germany and Canada.[28] In fact, the legislature must frequently distinguish between categories of person by reference to economic or social considerations or legal status. Landlords and tenants, employers and employees, company directors and shareholders, British citizens and aliens – these and innumerable other categories are subject to differing legal rules. What a constitutional guarantee of equality may achieve is to enable legislation to be invalidated which distinguishes between citizens on grounds which appear irrelevant, unacceptable or offensive (for example, discrimination between persons on grounds of sex, race, origin or colour).[29] Dicey had in mind no such jurisdiction. The specific meaning he attached to equality before the law was that all citizens (including officials) were subject to the ordinary courts should they transgress the law which applied to them, and that there should be no separate administrative courts, as in France, to deal with unlawful conduct by officials.[30] He believed that *droit administratif* in France favoured the officials and that English law through decisions such as *Entick* v *Carrington* gave better protection to the people. These views of Dicey long impeded the proper understanding of administrative law. Today the need for such law cannot be denied. Administrative courts in most European countries, including France, protect the individual against unlawful acts by public bodies.

Dicey's third meaning of the rule of law expressed the view that the principles of common law declared by the judges are the basis of the citizen's rights and liberties. Dicey had in mind the fundamental political freedoms – freedom of the person, freedom of speech, freedom of association. Someone whose freedoms were infringed could seek a remedy in the courts and did not need to rely on constitutional guarantees. Dicey believed that the common law gave better protection to the citizen than a written constitution. The Habeas Corpus Acts, which made effective the remedy by which persons unlawfully detained might be set free, were 'for practical purposes worth a hundred constitutional articles guaranteeing individual liberty'.[31] Today, we cannot share Dicey's faith in the common law as the primary means of protecting our liberties against the state. First, liberties at common law may be eroded by Parliament and thus they have a residual character (namely, what is left after all statutory restrictions have taken effect). Second, the common law does not assure the economic or social well-being of the people. Third, there is now wide support in many countries both for a formal declaration of basic rights (such as is provided by the European Convention on Human Rights) and for the creation of judicial procedures for protecting those rights.[32] That is not to say that a written guarantee of specified rights is sufficient. Some of the most tyrannical regimes have had, on paper, fulsome rights afforded to their citizens which were, in practice, wholly illusory.[33]

Dicey's view of the rule of law, like his view of parliamentary sovereignty, was based on assumptions about the British system of government that no longer apply. Although he did

[27] Davis, *Discretionary Justice*.

[28] India, 1949 Constitution, art 14; Federal Republic of Germany, Basic Law, art 3; Canadian Charter of Rights and Freedoms, s 15.

[29] Ch 14 A; and Feldman, *Civil Liberties and Human Rights*, ch 3.

[30] See Brown and Bell, *French Administrative Law*; and ch 21.

[31] Dicey, p 199. And see ch 25 D.

[32] Ch 14.

[33] The constitution of the Union of Soviet Socialist Republics was a classic example of this genre.

not satisfactorily resolve the potential conflict between the two notions of the rule of law and the supremacy of Parliament,[34] a judicial formulation of the relationship implies the need for equilibrium and balance rather than conflict:

> The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.[35]

We have seen that Dicey's views on the sovereignty of Parliament remain influential today. The same cannot be said of his treatment of the rule of law. But this is no reason for assigning the rule of law and its meaning today to the margins of legal debate. Indeed, in the Constitutional Reform Act 2005 (s 1), Parliament declared (without offering a definition) that the Act 'does not adversely effect . . . the existing constitutional principle of the rule of law'. The next section seeks to explore the main aspects of the rule of law today, in a discussion which is not cast in the Diceyan mould.

B. The rule of law and its implications today

Emphasis will be placed on three related ideas. First, statements of the rule of law embody a preference for orderly life within an organised community, rather than a situation of anarchy or strife in which there is no security for persons, their well-being or their possessions. Some stability in society is a precondition for the existence of a legal system. Second, the rule of law expresses the fundamental principle that government must be conducted according to law and that in disputed cases, what the law requires is declared by judicial decision. This principle is manifest in innumerable decisions of the courts, and represents existing law. Third, the rule of law refers to a rich body of opinion on matters such as the powers that the state should or should not have (for example, whether ministers should have power to detain without trial), the procedures to be followed when action is taken by the state (for example, the right to a fair hearing in criminal trials), and the values inherent in a system of justice. This third idea is relevant to debates about what the law should be, particularly when our lives are challenged by events such as unrest on the streets or international terrorism, whether these debates occur in Parliament or in a court when new issues are confronted by the judges.

The relation between the second and third ideas may be put in this way. The requirement that government be conducted according to law (the principle of legality) is a necessary condition for the rule of law; but insistence on legality alone does not ensure that the state's powers are consistent with values such as liberty and due process. This emphasis is found in case law of the European Court of Human Rights.[36]

These three aspects of the rule of law are now examined in more depth.

Three aspects of the rule of law

1. Law and order better than anarchy

In the limited sense of law and order, the rule of law may appear to be preserved by a dictatorship or a military occupation as well as by a democratic form of government. Under a

[34] Dicey, ch 13. For an approach that sees no such conflict, see Allan, *Law, Liberty and Justice*, chs 3, 11; and (same author) *Constitutional Justice*, ch 7.

[35] *X* v *Morgan-Grampian Ltd* [1991] AC 1, 48 (Lord Bridge).

[36] See ch 14 B.

government which is not freely elected, courts of law may function, settling disputes between private citizens and such disputes between citizens and government officials as the regime permits to be so decided. However, constitutionalism and the rule of law will not thrive unless legal restraints apply to the government. The maintenance of law and order and the existence of political liberty are not mutually exclusive, but interdependent. As the Supreme Court of Canada has said, 'democracy in any real sense of the word cannot exist without the rule of law.'[37] The Universal Declaration of Human Rights states: 'It is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'[38] In a democracy, it must be possible by political means to change a government without threatening the existence of the state. Unless this possibility exists, the state becomes identified with coercive might and the role of law within the state is emptied of moral content, for 'the State cannot be conceived in terms of force alone'.[39]

2. Government according to law

The principle of legality requires that the organs of the state operate through law. If the police need to detain a citizen or if taxes are levied, the officials concerned must be able to show legal authority for their actions. In Britain, their authority may be challenged before a court of law. Acts of public authorities which are beyond their legal powers may be declared ultra vires and quashed by the courts.[40] In a striking instance, the High Court held (30 years after the event) that the enforced removal of some 1,000 British citizens from the Chagos islands in the Indian Ocean to make way for the US military base on Diego Garcia had lacked legal authority.[41] It is because of the principle of legality that legislation by Parliament is necessary if (for instance) the police are to have additional powers to combat crime; and for this reason the rule of law serves as a buttress for democracy.[42]

In the British tradition of government according to law, it is from the ordinary courts that a remedy for unlawful acts of government may be obtained: the Human Rights Act 1998 extended this jurisdiction by requiring all courts where possible to interpret legislation in conformity with the European Convention on Human Rights.[43] In many European legal systems, jurisdiction in public law is assigned to administrative courts. Such courts vary greatly in structure and procedure, but their power to review the legality of executive acts has much in common with the work of the Administrative Court.

Public authorities and officials must be subject to effective sanctions if they depart from the law. Often the sanction is that their acts are declared invalid by the courts. The idea within the rule of law that the state – and everyone else – is bound by and accountable to the law only holds good if there is a mechanism by which alleged infringements of the law can be tested and established. This is why the courts have repeatedly reiterated that access to justice is integral to the rule of law; Dicey's second principle is meaningless if it cannot be adjudicated upon and enforced (not necessarily in all instances by a judicial body). This point was

[37] *Reference Concerning Certain Questions Relating to the Secession of Quebec* (1998) 161 DLR (4th) 385, 416–17.

[38] Preamble, 3rd para.

[39] d'Entrèves, *The Notion of the State*, p 69.

[40] Ch 24.

[41] *R* v *Foreign Secretary, ex p Bancoult* [2001] QB 1067; A Tomkins [2001] PL 571. According to Ewing and Gearty, *The Struggle for Civil Liberties*, ch 1, the principle of legality is the essence of the rule of law. And see *R* v *Home Secretary*, *ex p Pierson* [1998] AC 539, 587–9 (Lord Steyn).

[42] On the relevance of the rule of law to government, see Jowell and Oliver (eds), *The Changing Constitution*, 7th edn, ch 1 (J Jowell). In the case of the Chagos islands (previous note) further 'powers of government' were conferred not by Parliament, but by the secret procedure of a prerogative Order in Council: *R* v *Foreign Secretary, ex p Bancoult (No 2)* [2008] UKHL 61, [2009] 1 AC 453.

[43] Ch 14 C.

made in stirring language by Lord Reed in the Supreme Court's decision quashing the imposition of unjustifiably high fees to bring various sorts of claims in employment tribunals:

> At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.[44]

In Britain, government departments are liable to be sued for their wrongful acts under the Crown Proceedings Act 1947.[45] That Act preserved the personal immunity of the Sovereign, an immunity which in other legal systems is enjoyed by the head of state. Thus in the United States, the President in office is immune from liability for his unlawful acts and he is irremovable except on a successful impeachment. If the President is removed, he can then be sued or prosecuted for unlawful acts which he may have committed. Even a President in office may not disregard the law.

> In the course of criminal investigations into the Watergate affair, the special prosecutor appointed by the Attorney General requested President Nixon to produce tape-recordings of discussions which the President had had with his advisers. When presidential privilege was claimed for the tapes, the US Supreme Court held that the claim had to be considered 'in the light of our historic commitment to the rule of law'. The court rejected the claim and ordered the tapes to be produced, since 'the generalised assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial'.[46]

Nixon then resigned rather than face impeachment proceedings before a hostile Congress. In 1998–9, when President Clinton was impeached, he was acquitted by the Senate on charges that included one of giving false testimony to a federal grand jury in the Lewinsky affair.[47] In 1999, presidential immunity of a different kind came before the House of Lords: General Pinochet, former President of Chile, was held liable to be extradited to Spain to stand trial on charges of conspiring to commit torture contrary to international law, relating to events while he was in office.[48] No general immunity applies to government ministers. In 1993, the Law Lords held that the Home Secretary was liable for contempt of court, in that he failed to order the return to the United Kingdom of a Zairean teacher who had claimed refugee status, despite an order by a High Court judge that this should be done. Lord Templeman said: 'For the purpose of enforcing the law against all persons and institutions, . . . the courts are armed with coercive powers exercisable in proceedings for contempt of court.'

[44] *R (Unison)* v *Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [68].
[45] Ch 26.
[46] *US* v *Nixon* 418 US 683 (1974); for public interest immunity in Britain, see ch 26 D.
[47] Gerhardt, *The Federal Impeachment Process*, ch 14. And see Berger, *Impeachment*.
[48] *R* v *Bow Street Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147.

The Home Secretary's argument that the courts had no such powers against ministers 'would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War'.[49]

In a system in which Parliament is supreme, and so long as the Cabinet has a majority in the Commons, legal authority for new powers may not be difficult for the government to obtain, and fundamental rights are not protected against legislative invasion. The supreme Parliament may grant the executive powers which drastically affect individual liberty, as it did in 2001 when it authorised the indefinite detention without trial of foreign nationals suspected of terrorist involvement.[50] If all that the rule of law means is the purely formal idea that official acts must be clothed with legality, this gives no guarantee that other fundamental values are not infringed.

3. The rule of law as a broad doctrine affecting the making of new law

If law is not to be merely a means of achieving whatever ends a particular government may favour, the rule of law must go beyond the principle of legality. The experience and values of the legal system are relevant not only to the question, 'What legal authority *does* the government have for its acts?' but also to the questions, 'What powers *ought* the government to have? And how *ought* those powers to be exercised?' If, for example, the government wishes to introduce penal sanctions for conduct contrary to its economic or social policies, the new legislation ought to respect principles of fair criminal procedure. That obligation is reinforced by the Human Rights Act 1998 and the right to a fair trial under the European Convention on Human Rights, art 6.

As a broad principle influencing development of the law, the content of the 'rule of law' has been much debated. What *are* the essential values which have emerged from centuries of legal experience? Are they absolute values, or are there circumstances in which political necessity justifies the legislature in departing from them? To revert to the example of interrogation in depth with which this chapter began, could it ever be justified to use such methods to compel those suspected of terrorist activities to reveal information? Could there be legislation to authorise this that would not also open the way for measures amounting to torture or degrading treatment in breach of art 3, ECHR?

Since 2001, there have been many claims that measures amounting to torture have been used by states against suspected terrorists. In 2005, as we have seen, the Law Lords held that evidence that might have been obtained by means of torture committed abroad is inadmissible in special immigration proceedings. Having surveyed national and international rules against torture, Lord Bingham said:

> it would of course be within the power of a sovereign Parliament (in breach of international law) to confer power on [a tribunal] to receive third party torture evidence. But the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention.[51]

For legislation to connive at the use of torture would indeed be to erode the rule of law. The same may be said of proposals to administer justice in secret, especially if the aim is to prevent sensitive evidence being made known to an accused person and his or her legal representatives. Yet a controversial result of the present role of the security and intelligence agencies is that a majority ruling by the UK Supreme Court that the courts have no inherent

[49] *M* v *Home Office* [1994] 1 AC 377, 395.
[50] See *A* v *Home Secretary* (note 7 above) and ch 20 D.
[51] *A* v *Home Secretary (No 2)* (note 8 above), [51].

authority to permit civil justice in secret without disclosure to one of the parties was soon followed by legislation to permit this, albeit subject to certain safeguards in the legislation.[52]

There may of course be room for disagreement over the 'rule of law' aspects of a particular situation. In 2008, the Divisional Court relied on the rule of law in holding that the Director of the Serious Fraud Office acted unlawfully in dropping an investigation into charges of bribery against BAE Systems plc, in the light of threats from Saudi Arabia to take action that would damage UK security, if the investigation continued. The Law Lords disagreed, holding that the Director's decision had been properly made and that the ordinary principles of judicial review gave effect to the rule of law.[53]

Is the rule of law then in this broad sense too subjective and uncertain to be of any value? Would discussion of changes in the law be clearer if the 'rule of law' were excluded from the vocabulary of debate? As Toulson LJ colourfully put it in the context of the press seeking access to the court file in extradition proceedings: 'The rule of law is a fine concept but fine words butter no parsnips'.[54]

One attempt to ascertain the values inherent in law was made by Lon Fuller, who argued that the enactment of secret laws would be contrary to the essential nature of a legal system, as would heavy reliance on retrospective legislation or on legislation imposing criminal sanctions for conduct which is not defined but may be deemed undesirable by an official.[55]

By contrast, Joseph Raz argues that the term 'rule of law' should be limited to formal values associated with the legal system. Thus, laws should be prospective, open, certain and capable of guiding human conduct; judges should be independent and the courts accessible; and litigants should receive a fair hearing. While these standards may ensure formal conformity to the rule of law, Raz emphasises that they do not ensure that the substance of the law meets the needs of the people; and that conformity to legal values is a matter of degree, to be balanced against competing claims.[56]

While Raz regards the rule of law as dealing with matters of form, other jurists favour a more substantive concept.[57] But the distinction between form and substance is not always clear-cut (is the case against 'arbitrary power' based on matters of form or substance or both?). For Raz, the rule of law is 'compatible with gross violations of human rights', but he also argued that 'deliberate disregard for the rule of law violates human dignity'.[58] He rightly warns against identifying the rule of law with utopia. But is the rule of law observed under a dictatorship in which the judges diligently apply the dictator's edicts, including one that permits indefinite detention without trial for those suspected of undesirable activity?

Many would conclude that the rule of law in a strong sense thrives only alongside values of human dignity, liberty and democracy. This view was shared by the late Lord Bingham,

[52] *Al Rawi* v *Security Service* [2011] UKSC 34, [2012] 1 AC 531; and Justice and Security Act 2013, part 2 (and see ch 26 D). Cf *Home Office* v *Tariq* [2011] UKSC 35, [2012] 1 AC 452 (closed procedure authorised by regulations, no breach of EU law or art 6 ECHR). See also *A* v *United Kingdom* (2009) 26 BHRC 1 and *A* v *Home Secretary (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

[53] *R (Corner House Research)* v *Director of SFO* [2008] UKHL 60, [2009] AC 756. See J Jowell [2008] JR 273 and Lord Steyn [2009] PL 338.

[54] *R (Guardian News and Media) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618 at [1].

[55] Fuller, *The Morality of Law*. Allan, *Constitutional Justice* endorses Fuller's approach. For a vivid illustration of the perversion of legal process, see Lord Steyn's quotation from Kafka's *The Trial* in *R (Roberts)* v *Parole Board* [2005] UKHL 45, [2005] 2 AC 738, [95].

[56] J Raz (1977) 93 LQR 195. See also Raz, *Ethics in the Public Domain*, ch 16.

[57] See P Craig [1997] PL 467 and (the same) in Feldman (ed.), *English Public Law*, ch 13 B.

[58] J Raz (1977) 93 LQR 195, 204 and 205.

for many years the presiding Law Lord; his book *The Rule of Law* identified eight principal ingredients of the concept:[59]

(1) The law must be accessible and so far as possible intelligible, clear and predictable.

(2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

(3) The laws should apply equally to all, save to the extent that objective differences justify differentiation.

(4) Public officers at all levels must exercise their powers in good faith, fairly, for the purposes for which the powers are conferred, without exceeding the limits of such powers and not unreasonably.

(5) The law must afford adequate protection for fundamental human rights.

(6) Means must be provided for resolving, without excessive cost or delay, civil disputes which the parties themselves cannot resolve.

(7) Adjudicative procedures provided by the state should be fair.

(8) The state must comply with its obligations in international law as in national law.

Among British judges there is an important vein of belief in the values to be upheld in a legal system. The nature of these values can be discovered from judicial decisions[60] and from many articles and lectures by judges.[61]

International aspects of the rule of law

Since 1945, there have been constant efforts to further the rule of law in international relations and to secure respect for human rights. The Universal Declaration of Human Rights, adopted in 1948, was followed by the European Convention on Human Rights (ECHR), signed at Rome in 1950.[62] The Convention recognised that European countries have 'a common heritage of political traditions, ideals, freedom and the rule of law' and created machinery for protecting certain human rights. In *Golder*'s case, upholding the right of a convicted prisoner in the United Kingdom to obtain legal advice regarding a civil action against the prison authorities, the European Court of Human Rights said, 'in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts'.[63]

Both the Convention and the case law of the Strasbourg Court support the analysis of the rule of law made in this chapter.[64] The Convention seeks to protect individuals against the arbitrary or unlawful exercise of state power, and it requires national legal systems to bear the primary burden of protecting Convention rights. In respect of those Convention rights

[59] See also his analysis of the rule of law at [2007] CLJ 67.

[60] See D Feldman (1990) 106 LQR 246. On the power of the court to stay proceedings which 'have only been made possible by acts which offend the court's conscience as being contrary to the rule of law', see *R* v *Horseferry Road Magistrates, ex p Bennett* [1994] 1 AC 42, 76 (Lord Lowry).

[61] Articles by senior judges include: J Laws (1994) 57 MLR 213, [1995] PL 72, [1996] PL 622, [1997] PL 455, [1998] PL 221; R Scott [1996] PL 410 and 427; S Sedley (1994) 110 LQR 260; Lord Steyn [1997] PL 84, (2004) 53 ICLQ 1; and Lord Woolf [1995] PL 57, [2004] CLJ 317.

[62] Ch 14 B. For the background, see Simpson, *Human Rights and the End of Empire*.

[63] *Golder* v *UK* (1975) 1 EHRR 524.

[64] Although the background to the term 'rule of law' is the common law, French law knows the term 'état de droit' and German law the concept of 'rechtsstaat'. The three concepts are the subject of a rich comparative analysis in Heuschling, *État de droit, Rechsstaat, Rule of Law*.

that (unlike the right not to be tortured) are not absolute, any restrictions in the public interest must (among other things) satisfy the test of being 'prescribed by law'. This test means (in outline) that (1) the restriction must be authorised in national law and (2) the 'quality' of the national law must be compatible with the Convention.[65] In English law, it was formerly held that public authorities might do anything which did not interfere with the rights of individuals, even if they had no express authority for such action.[66] This approach is not acceptable where Convention rights are concerned.

The ECHR, established through the Council of Europe, is one of many multilateral treaties that encourage states to protect human rights. Treaties adopted under the United Nations include the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention against Torture.

Social and economic aspects of the rule of law

The rule of law movement has broadened to include social and economic goals which lie far beyond the typical values associated with the courts, legal process and the legal profession. Such a broadening of the 'rule of law' raises issues that often arise from government policies in relation to the economy and social welfare. One extreme view is that individual autonomy and the ability to plan one's affairs will be prejudiced if governments retain powers to intervene in social and economic affairs.[67] Now certainty and predictability are values often associated with law. In a different context, Lord Diplock said in 1975: 'The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know what are the legal consequences that will flow from it.'[68] But, however desirable it may be that discretionary powers of government should be controlled by rules,[69] the principle is difficult to apply to the state's responsibilities for the economic and social well-being of its people.

A related question is whether legal protection for classic civil and political rights (such as personal liberty, freedom of expression and the right to vote) can or should be extended to economic and social rights (such as rights relating to employment, social security, health care and housing).[70] Protection for rights of these kinds is found in the national constitutions of many EU member states, and in other countries where new constitutions have recently been adopted. Some economic and social rights are, however, subject to problems of definition, implementation and enforcement, while others (such as employment rights) are addressed to private law relationships as well as the relationship between the individual and the state. But it is certainly arguable that individuals ought to have enforceable rights to the delivery of some public goods, such as education or medical care. In South Africa, constitutionally protected social rights (including rights to housing, health care, food and shelter) are enforceable by the Constitutional Court.[71]

[65] See *Sunday Times* v *UK* (1979) 2 EHRR 245; *Malone* v *UK* (1984) 7 EHRR 14. Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, pp 344–8. For a rather stricter version of the test applied in at least some situations, see the discussion in *R (T)* v *Chief Constable of Greater Manchester* [2014] UKSC 35, [2015] AC 49.

[66] *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344; cf *R* v *Somerset CC, ex p Fewings* [1995] 3 All ER 20.

[67] See the analysis of rule of law concepts in Hayek, *The Constitution of Liberty*; for a critique, see Loughlin, *Public Law and Political Theory*, pp 84–101.

[68] *Black-Clawson International Ltd* v *Papierwerke AG* [1975] AC 591, 638.

[69] Davis, *Discretionary Justice*, ch 3.

[70] See S Fredman and M Wesson in Feldman (ed.), *English Public Law*, ch 10. Also K D Ewing (2001) 5 Edin LR 297; G van Beuren [2002] PL 456 and [2013] PL 821; and in Rosenfeld and Sajó (eds), *Oxford Handbook of Comparative Constitutional Law*, ch 49 (D M Davis) and ch 50 (K D Ewing).

[71] See *Government of Republic of South Africa* v *Grootboom* 2001 (1) SA 46 (CC); M Wesson [2007] PL 748; and E Cameron and M Taylor [2017] PL 382.

Within the Council of Europe, there has since 1995 been a collective complaints procedure to enable cases to be taken to the Social Rights Committee by organisations claiming that a member state is in breach of an obligation under the European Social Charter. The United Kingdom has ratified the Social Charter of 1961, but not the collective complaints protocol, nor the Revised Social Charter of 1996, in which the collective complaints procedure is also included.[72] Otherwise, the Social Charter has become an important source used by the Strasbourg court in the interpretation of Convention rights (particularly in relation to articles 4 and 11).[73] In the United Kingdom, much detailed social legislation has long existed, and individuals may usually enforce rights under that legislation by appealing to the appropriate tribunal (where one exists) or, where there is no right of appeal, by recourse to judicial review.[74]

However, questions of how appropriate it is for unelected courts to determine such rights arise particularly starkly in the context of social and economic rights; why is it legitimate for a court to require the allocation of scarce resources – which such rights invariably require – in a way which Parliament, or an elected and/or accountable official, has not? Are judges well-placed or well-qualified to say that more money should be spent on *x*, even if it reduces the amount that can be spent on *y* and *z*? Social and economic rights are especially likely to give rise to such concerns, which are commonly known as polycentricity issues (i.e. where there are a number of interlocking and interacting interests and considerations). This is an important part of why courts have been traditionally less comfortable or confident in addressing such rights.[75]

Conclusion

In his study of the rule of law, Lord Bingham concluded that the core of the principle is 'that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.'[76] Surrounding this core are many principles of legal, political and democratic significance. A government's developing response to changing social needs may require these principles to be re-assessed, but no government should suppose that new areas of public action (such as the regulation of public utilities) can be insulated from the scope of law and subjected only to administrative or political controls.

Challenges to the orderly working of law and society are presented by phenomena such as hijacking, urban terrorism, direct action by militant groups, civil disobedience, and violent demonstrations. All these are sometimes described indiscriminately as a threat to the rule of law (by which may be meant a challenge to the authority of established institutions). There are many distinctions to be drawn between these different forms of political or criminal action. But, if we leave aside acts of criminal violence at one end of the scale and peaceful political action at the other, do acts of non-violent civil disobedience endanger the legal system? In particular, does the rule of law require obedience to the law at all times from all citizens and organisations?[77] It may be argued both that in a democracy there are important

[72] See Harris and Darcy, *The European Social Charter*. The EU Charter of Fundamental Rights (2000) includes both civil and political rights, and social and economic rights, and it seeks to break down the traditional distinction between the two: Fredman and Wesson (above), pp 473–8. See also ch 6 B.

[73] *Demir and Baycara* v *Turkey* [2008] ECHR 1345, (2009) 48 EHRR 54.

[74] Chs 23 A and 24.

[75] J W F Allison [1994] CLJ 367; (same) [1994] PL 452; J A King [2008] PL 101; Fredman and Campbell (eds), *Social and Economic Rights and Constitutional Law*; Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*.

[76] *The Rule of Law*, p 8.

[77] Marshall, *Constitutional Theory*, ch 9; Dworkin, *Taking Rights Seriously*, ch 8; Allan, *Law, Liberty, and Justice*, ch 5.

reasons for obeying the law which do not exist in other forms of government, and that there are forms of principled disobedience that do not run counter to the general justification for obedience. The last point applies particularly to actions that are planned to improve the working of democratic decision-making.[78] The claims of the state are not absolute, and individuals may be driven by their conscience to resist a law that they regard as unjust or immoral. Such action does not conflict with there being a general obligation to obey the law, including legal rules with which an individual disagrees.

Modern society requires willingness from most people for most of the time to observe the law, even law that is unpopular. It deserves to be remembered that law, like the democratic process, may protect the weaker and underprivileged sections of society against those who can exercise physical or economic force.

C. The separation of powers

In this section, we examine a principle which is found, in one form or another, in most modern constitutions. The need for some 'separation of powers' within the state is essential both in the interests of democracy and also for the legal system, where an independent judiciary is essential if the rule of law is to have any substance.[79]

The need for the separation of powers in what may be called a strong sense of the term has often been downplayed in respect of the United Kingdom. Thus Dicey referred in passing to the doctrine as being 'the offspring of a double misconception'.[80] In 1995, Lord Mustill sought to recognise its significance:

> It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.[81]

This model for the exercise of legislative, executive and judicial powers may be seen at work in such fields as the law of taxation, criminal law and administrative law. In reality, the validity of the model is more complex than the quotation suggests. Three questions need to be asked:

(*a*) to what extent are the three functions (legislative, executive and judicial) distinguishable?

(*b*) how and why should these three functions be 'separated'?

(*c*) to what extent are these functions exercised separately in the United Kingdom?

[78] Singer, *Democracy and Disobedience*. The Strasbourg Court has recognised that direct action may involve Convention rights to freedom of expression and association: *Steel* v *UK* (1998) 28 EHRR 603. See H Fenwick and G Phillipson [2000] PL 627 and (2001) 21 LS 535.

[79] Vile, *Constitutionalism and the Separation of Powers*; Allan, *Law, Liberty and Justice*, chs 1, 3, 8 and Allan, *Constitutional Justice*, ch 2. Also Mount, *The British Constitution Now*, pp 81–92; N W Barber [2001] CLJ 59 and Barber, *The Constitutional State*, ch 3.

[80] Dicey, *Law of the Constitution*, p 338. For a critical analysis, see Jennings, *Law and the Constitution*, pp 18–28 and App 1. Robson, a contemporary of Jennings, called separation of powers 'that antique and rickety chariot . . . , so long the favourite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas': *Justice and Administrative Law*, p 14.

[81] *R* v *Home Secretary*, *ex p Fire Brigades Union* [1995] 2 AC 513, 567. For an interesting analysis of the use of the separation of powers by the courts, see R Masterman and S Wheatle [2017] PL 469.

To what extent are the three functions (legislative, executive and judicial) distinguishable?

The *legislative function* involves the enactment of general rules determining the structure and powers of public authorities and regulating the conduct of citizens and private bodies. We have seen that supreme legislative authority in the United Kingdom is exercised by Parliament, generally on the proposal of the government, but not all new laws are made directly at Westminster. Parliament has created devolved assemblies in Scotland, Wales and Northern Ireland and frequently confers legislative powers on executive bodies such as ministers, government departments and local authorities. Under the European Communities Act 1972 (while it remains in force), some legislative authority for all EU member states, including the United Kingdom, is exercised at the European level. Despite the severe limits placed by history on the authority of the Crown to legislate without Parliament, a few legislative powers of the Crown have survived. An attempt by the government to use such a power to pre-empt legislation by Parliament was the subject of judicial review in 1995,[82] and the Brexit litigation concerned the ability of the Crown to act in a manner which could frustrate legislation or remove legislative rights derived from EU law.[83] As regards legislation by Parliament, the courts decide the effect of that legislation by the process of interpretation; and in the area of the common law the courts still exercise a role that may involve the making of new law. Moreover, in most areas of government, ministers and departments regularly formulate policies for the exercise of statutory powers and apply those policies to specific individuals: the power to make general rules and policies carries with it the power to make sub-rules and more detailed policies and may often become blurred with the making of decisions based on a person's individual circumstances.

The *executive function* is more difficult to define, since it broadly comprises the whole body of authority to govern, other than that involved in the legislative functions of Parliament and the judicial functions of the courts. The authority to govern includes such matters as initiating and implementing legislation, maintaining order and state security, promoting social welfare and the economy, and conducting the external relations of the state. Historically, the executive was identified with the monarch, but today the executive in a broad sense comprises all ministers, officials and public authorities by which functions of government are exercised. Executive functions are also performed by devolved authorities in Scotland, Wales and Northern Ireland, by local authorities and at a European level by the EU.

The primary *judicial function* is to determine disputes in accordance with the laws made by Parliament and decisions of the superior courts, and extends to matters of private and public law. It is exercised in the civil and criminal courts and in tribunals.

How and why should the functions be 'separated'?

Within a system of government based on law, the primary organs for performing legislative, executive and judicial functions are respectively the legislature, the executive and the courts. As a legal historian remarked:

> This threefold division of labour, between a legislator, an administrative official, and an independent judge, is a necessary condition for the rule of law in modern society and therefore for democratic government itself.[84]

In Britain, Parliament, the courts and central government all owe their historical origin to the monarchy. Before these institutions developed as distinct entities, the King and his

[82] *R* v *Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513 (E Barendt [1995] PL 357).
[83] *R (Miller)* v *Secretary of State for Exiting the EU* [2017] UKSC 5, [2017] 2 WLR 583.
[84] Henderson, *Foundations of English Administrative Law*, p 5.

Council dealt variously with legislative, executive and judicial work. Today these tasks are all performed in the name of the Crown, but with a differentiation of process and personnel: it is the relationships between these three distinct institutions that are of concern for present purposes.[85]

The doctrine of separation is associated particularly with the French jurist Montesquieu (1689–1755), who based his exposition on an idealised view of the English constitution in his day. For him, the essence of the doctrine was the achievement of liberty.

> When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty . . . Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.[86]

The framers of the US constitution of 1787 were fully aware of these implications for liberty. In a famous paper James Madison described the need for separation as a political truism:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[87]

But Madison's aim was to show that complete separation between legislature, executive and judiciary was neither possible nor desirable, and he defended the 1787 constitution for the manner in which it provided an elaborate structure of mutual restraints and influences ('checks and balances') between Congress, the President and the courts.

Not only the separation of powers is a prominent feature of the US constitution, but so also is the structure of checks and balances that it created. Legislative power is vested in Congress, consisting of the Senate and House of Representatives (art 1), executive power in the President (art 2) and judicial power in the Supreme Court and such other federal courts as might be established (art 3). The President holds office for a term of four years and is elected separately from Congress, so he may be of a different party from that which has a majority in either or both Houses. Neither the President nor members of his Cabinet may sit or vote in Congress; they have no direct power of initiating Bills or securing their passage through Congress. While the President has a power to veto legislation passed by Congress, his veto may be overridden by a two-thirds vote in each House of Congress. Some key executive powers, such as the negotiation of treaties and the appointment of federal judges, are subject to approval or confirmation by the Senate. The President is not directly responsible to Congress: in normal circumstances he is irremovable, but the constitution enables the President to be removed from office by impeachment at the hands of the Senate, 'for treason, bribery, or other high crimes and misdemeanours' (art 2(4)). Once appointed, the Supreme Court justices are independent of Congress and the President: they serve for life, but they too may be removed by impeachment. In one of its earliest decisions, *Marbury* v *Madison*, the Supreme Court assumed the power to declare acts of Congress and the President to be unconstitutional should they conflict with the constitution.[88]

[85] See Vile, note 79 above, for reassessment of the link between legal values and separation of powers; also Marshall, *Constitutional Theory*, ch 5; Munro, *Studies in Constitutional Law*, ch 9; and Masterman, *The Separation of Powers in the Contemporary Constitution*.

[86] Montesquieu, *The Spirit of the Laws* (ed. Cohler, Miller and Stone), book XI, ch 6.

[87] *The Federalist*, no 47.

[88] 1 Cranch 137 (1803). Cf *US* v *Nixon* 418 US 683 (1974). On separation of powers issues under the US constitution, see Tribe, *Constitutional Choices*, part II. For reassessment of US-style separation of powers as a constitutional model, see B Ackerman (2000) 113 Harv LR 634.

While most written constitutions contain separate chapters dealing with legislative, judicial and executive powers, they display no uniformity in the interrelation of the institutions that exercise these powers. In France, for instance, the doctrine of separation has manifested itself very differently from the American version. Thus it is considered to flow from the separation of powers that the ordinary courts should have no jurisdiction to review the legality of acts of the legislature or executive.[89] The constitutions of countries in the Commonwealth likewise vary widely in maintaining a 'separation' of powers. Under the Australian constitution, for example, delegation of legislative powers to executive agencies has been accepted more readily than the delegation to them of judicial powers.[90] The former constitution of Sri Lanka was held to be based on an implied separation of powers, so that legislation to provide special machinery for convicting the leaders of an unsuccessful coup infringed the principle that judicial power was vested only in the courts.[91] Where the constitution is based on an express or implied separation of powers, the courts may have to decide whether a power created by new legislation should be classified as legislative, executive or judicial.[92] British courts do not have this task, since there is no constitutional restraint to prevent Parliament from vesting in executive bodies powers that are in essence legislative or judicial.[93]

A comprehensive analysis of the separation of powers would have to deal with at least three meanings of the concept of 'separation'. First, that the same persons should not form part of more than one of the three branches (for example, that ministers as members of the executive should not sit in the legislature); second, that one branch of the state should not directly control the work of another (for example, that the executive should not be able to interfere in judicial decisions); and third, that one branch should not exercise the functions of another (so, for example, ministers should not have power to create criminal offences or to commit offenders to prison).

To what extent are these functions exercised separately in the United Kingdom?

Against this background, some features of the separation of powers are plainly incompatible with parliamentary government. Writing in 1867, Bagehot described the 'efficient secret' of the British constitution as 'the close union, the nearly complete fusion, of the legislative and executive powers'.[94] Bagehot's critics have rejected the concept of fusion, arguing that the close relationship between executive and legislature does not negate the constitutional distinction between the two. The fact that today all government ministers are required to be members of the Commons or the Lords has not taken away the distinction between the two institutions of government and Parliament.[95] For instance, there is a statutory limit on the number of ministers who may be members of the Commons.[96] Most persons who hold positions within the executive (including the civil service, the armed forces and the police) are disqualified from the

[89] See Bell, *French Constitutional Law*. The important powers of the Conseil d'Etat and the Conseil Constitutionnel over executive and legislative measures respectively are exercised outside the jurisdiction of the civil and criminal courts.

[90] Lumb, Trone and Moens, *The Constitution of the Commonwealth of Australia*, pp 23–7.

[91] *Liyanage* v *R* [1967] 1 AC 259.

[92] *Hinds* v *R* [1977] AC 195 (Jamaica). And see *DPP of Jamaica* v *Mollinson* [2003] UKPC 6, [2003] 2 AC 411, para [13].

[93] But see European Convention on Human Rights, art 6(1) (below).

[94] Bagehot, *The English Constitution*, p 65.

[95] Amery, *Thoughts on the Constitution*, p 28: also Vile, *Constitutionalism and the Separation of Powers*, pp 224–30, and Mount, *The British Constitution Now*, pp 39–47.

[96] Ch 7 G.

Commons. Only ministers are key figures in both Parliament and the executive. Moreover, the processes of the two Houses are very different from decision-making in Whitehall. No formula based on separation of powers can provide a lasting answer to the questions that arise from this relationship, but there are democratic reasons why a balance between government and Parliament should be achieved. In 1978, the Select Committee on Procedure concluded that

> the balance of advantage between Parliament and Government in the day to day working of the Constitution is now weighted in favour of the Government to a degree which arouses widespread anxiety and is inimical to the proper working of our parliamentary democracy.[97]

That report led directly to the creation of the system of department select committees, that has done much to increase the accountability of government to Parliament, and in the 1990s some measures were taken to modernise the procedures of the Commons. More recent reforms have concentrated on the need to strengthen the position of the House vis-à-vis the executive and on the need for the House to gain more control over its business.[98] But it has been commented that within the British system, the public at large see 'no visible distinction' between Parliament and government.[99]

Turning to the judicial branch, it must be stressed that independence of the judiciary calls for a strong form of separation between the courts on the one hand and the legislature and executive on the other. An obvious breach of that separation continued so long as the Lord Chancellor was both a senior Cabinet minister and head of the judiciary in England and Wales; and another breach continued so long as a committee of the House of Lords served as the final court of appeal. Under the Constitutional Reform Act 2005, the Lord Chief Justice became head of the judiciary in England and Wales, and the Supreme Court in 2009 took over the appellate function of the Lords. The courts are dependent on Parliament for their funding, but they must be able to function independently both of government and Parliament. Since the Act of Settlement 1700, the senior English judges have held office during good behaviour, not at pleasure of the executive. In 2005, Parliament declared that all ministers of the Crown 'and all with responsibility for matters relating to the judiciary . . . must uphold the continued independence of the judiciary'.[100] The need for judicial independence is reinforced by the European Convention on Human Rights, art 6(1) of which declares that 'in the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by *an independent and impartial tribunal* established by law' (emphasis supplied). Under the Tribunals, Courts and Enforcement Act 2007,[101] the judicial role of tribunal members has been recognised and their independent status enhanced.

The importance of judicial independence was reinforced in *M* v *Home Office*, when it was held that ministers are subject to the contempt jurisdiction of the courts: the Home Secretary was in contempt of court when he disobeyed a judge's order to return to London a Zairean teacher who had sought asylum in England.[102] A perceptive summary of the position was given by Nolan LJ:

> The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.[103]

[97] HC 588–I (1977–78), p viii.

[98] See report of House of Commons Reform Committee (Wright committee), HC 1117, 2008–9; and HC 82, 2013–14.

[99] HC 1117, 2008–9, p 9, quoting evidence by the Parliamentary Ombudsman.

[100] Constitutional Reform Act 2005, s 3(1).

[101] See ch 23 A.

[102] [1994] 1 AC 377; see G Marshall [1992] PL 7; M Gould [1993] PL 568.

[103] *M* v *Home Office* [1992] QB 270, 314.

An unusual trespass onto the territory of the separation of powers is contained in the Freedom of Information Act 2000. Section 53 contains a so-called 'executive override', allowing a minister in specified circumstances to override a decision notice (under s 50) of the Information Commissioner which has been served on a government department, or, more significantly, a judicial decision on an appeal against such a decision notice. This power – to be exercised by means of a ministerial certificate which must be laid before Parliament – reflects the government's belief that 'there will be certain cases dealing with the most sensitive issues where a senior member of the Government, able to seek advice from his Cabinet colleagues, should decide on the final question of public interest in relation to disclosure'.[104] This is a unique provision: it is always open to Parliament to legislate to overturn a judicial decision, but it is a basic principle of the rule of law, as we have seen, that when the courts deliver a judgment the executive respects and complies with it. That is doubtless why something like s 53 is so unusual, and why the Lord Chief Justice described it as a 'constitutional aberration'.[105]

In a lengthy judgment the Upper Tribunal had held that it was in the public interest that certain correspondence from the Prince of Wales to government departments advocating particular causes be disclosed.[106] The Attorney General disagreed, and exercised the s 53 override power, which was then judicially reviewed.[107] The case placed the rule of law – with its emphasis on the separation of powers and independence of the judiciary – in conflict with parliamentary supremacy, as Parliament had expressly authorised such a power in s 53. Two of the Supreme Court Justices (Lords Wilson and Hughes) held that Parliament had been sufficiently clear in what it wanted, and it was entitled to provide for an exception to the separation of powers if it wished. Three of the Justices (in a judgment of Lord Neuberger) considered that s 53 was contrary to the rule of law, and Parliament had not been sufficiently clear to allow such an outcome, meaning that the power could only be used in highly restrictive circumstances. The remaining two Justices (Lord Mance and Baroness Hale) appeared to agree with Lords Wilson and Hughes that s 53 had a wider scope than Lord Neuberger was prepared to give it, but found against the Attorney General on the basis that his reasoning was not nearly clear or compelling enough to rationally justify overturning the Upper Tribunal. All of the judgments encapsulate the critical difficulties in our key constitutional concepts, and how contested they are. They ask whether Parliament can depart from important elements of the rule of law and the separation of powers; how clear it must be to do so; what role the judges have in policing that departure; and how we prioritise Dicey's conflict between supremacy and the rule of law.[108]

As for the relationship between the judiciary and the legislature, judges of the superior courts may be removed by the Crown on an address from both Houses, but only once since the Act of Settlement has Parliament exercised the power of removal.[109] Rules of Commons procedure protect judges from certain forms of criticism. The doctrine of legislative supremacy generally protects Acts of Parliament from being questioned in the courts but, as we have seen, the European Communities Act 1972 and the Human Rights Act 1998 have extended the jurisdiction of the courts.[110] The effect of their decisions may be altered by Parliament, both prospectively and also if necessary retrospectively. Because of the doctrine of precedent,

[104] HL Deb, 14 November 2000, col 258.

[105] *R (Evans)* v *Attorney General* [2013] EWHC 1960 (Admin), [2013] 3 WLR 1631 at [2] (Lord Judge CJ).

[106] *Evans* v *Information Commissioner* [2012] UKUT 313 (AAC).

[107] *R (Evans)* v *Attorney General* [2015] UKSC 21, [2015] 1 AC 1787.

[108] For an introductory overview, see C J S Knight (2015) 131 LQR 548; for greater detail, see: M Elliott [2015] PL 529; T R S Allan [2016] CLJ 38.

[109] Ch 13 B.

[110] And see chs 6 C and 14 C.

the judicial function of declaring and applying the law enables the superior courts to make law by their decisions. But this power is much narrower than the ability of Parliament to legislate, since Parliament is unrestricted in its power to change established rules of law.

D. Conclusion

In the absence of a written constitution, there is no formal separation of powers in the United Kingdom. No legislation may be challenged on the ground that it confers powers in breach of the doctrine. The functions of legislature and executive are closely interrelated, and ministers are members of both. Yet '[it] is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain'.[111]

The formal process of legislation is different from the day-to-day conduct of government. Parliament frequently delegates power to legislate upon the executive, but it retains oversight of such delegated powers.[112] However close the relationship between Parliament and the executive may be, the continuing independence of the judiciary is a constitutional fundamental. If government is to be based on law, the constitutional structure must distinguish between the primary functions of law-making, law-executing and law-adjudicating. If these distinctions are abandoned, the concept of law itself can scarcely survive.[113]

[111] *R* v *Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513, 567 (Lord Mustill).

[112] Ch 22.

[113] See Allan, *Constitutional Justice*: 'When the idea of the rule of law is interpreted as a principle of constitutionalism, it assumes a division of governmental powers or functions that inhibits the exercise of arbitrary state power' (p 31).