

Dr Bonham in Woolf's Clothing? Sovereignty and the Rule of Law Today¹

Dr Lars Mosesson

Introduction

The issue at the heart of this paper is the emergence in recent years of a new attitude among some senior judges to the constitutional role of the courts in relation to the Queen-in-Parliament – which is also the re-emergence of a very old attitude. This issue may be seen in terms of the proper scope of judicial review of legislative action and, more strikingly, as a moving away from the Diceyan absolutist notion of the sovereignty of the Queen-in-Parliament.² Reference will be made first to how the judges see the constitutional role of the courts in relation to executive-administrative decision-making and actions, as the legal position on this is reasonably clear and it illustrates many of the underlying issues which will be developed later in the context of how the courts could and should approach the limits to legitimate legislative action by the Queen-in-Parliament.

¹ This article is developed from a paper presented at the ALT Conference in April 2006. I am grateful to the other participants for their comments on the argument. Since then, there have been further contributions on these issues, notably Jeffrey Jowell, speaking on the 'Demise of Sovereignty' at the University of Cambridge (June 2006); and in November 2006, Lord Bingham, choosing to give the Sir David Williams Lecture on the Rule of Law, in which he formulated and explored a set of sub-rules to flesh out what he understands by the phrase as it affects the constitutional role of the judges, with particular reference to the Constitutional Reform Act and to various responses to war and terrorism.

² I am grateful also to the anonymous referee who reminded me that there are some who may confuse the two doctrines of legal sovereignty, which have no logical connection with each other: the first concerns whether the Queen-in-Parliament has the legal competence to pass manifestly unjust legislation; and the second whether the Queen-in-Parliament may bind in law its own future action (entrenchment). On this second doctrine, recent comments in the House of Lords in *R (Jackson) v Attorney-General* [2005] UKHL 56 are of interest. However, this paper is concerned with only the first doctrine.

It is worth remembering that the legal powers of all organs in a constitution depend ultimately on the decisions of the judges.³ In our constitution this is particularly evident because of the absence of a documentary constitution, and the fundamental legal doctrines of judicial review and of sovereignty are purely judge-made. The courts have taken profound policy-decisions on these issues in a succession of cases over the centuries – some of the cases will be considered below – and they continue to do so.⁴ It is a truth universally acknowledged⁵ by constitutional lawyers that even the law on a number of key points in our constitution is neither clear nor settled; and this paper will show that the issue of the external legal limitations on the legal sovereignty of the Queen-in-Parliament, in particular, is being quietly re-appraised by the judges. Although the issues of entrenchment⁶ may be considered in passing, the paper will focus on the doctrine of sovereignty that relates to manifest injustice in a statute. It may be said that the judges are reluctant to exercise the role of keeping Parliament under check: they see this as more properly the role of the political processes and responsibility through the ballot-box. However, the unwillingness of the majority in the House of Commons to oppose the proposals, however ill-considered, of successive governments has meant that our constitution is under increasing threat; and this means that the judges may be forced to act.⁷

³ It is a matter on which Dicey and Hart agreed, albeit for different reasons. For Hart's views on the 'judge-made' nature of law, see *The Concept of Law* (Clarendon Press), Chap 5.

⁴ It is not inappropriate to think of our constitution as a volcanic area: the ground is firm enough to walk on at almost any time, but things are not so fixed or stable as they may seem at first: there are constant movements and occasional rumblings under the surface, broken by occasional eruptions, which may suddenly change the landscape significantly. This paper looks at the signs which may presage a dramatic shift on the surface in the near future.

⁵ This truth is not, however, quite so universally enjoyed by students of the subject.

⁶ The changes to this other legal doctrine of sovereignty are also significant – they, too, involve the rejection of the Diceyan 'traditional' view – but they are better known and are better explored separately. See note 2, *supra*.

⁷ Despite the reforms that have been introduced since Lord Scarman asserted in his Hamlyn Lectures 30 years ago that our constitution was in crisis, there has been no attempt to address the root-cause of most of our problems: the failure of the political processes, centred on the

Judicial Control of the Executive and of Other Inferior Bodies

Over the centuries it has become firmly established that the courts have the inherent power at Common Law to determine the legality of executive and administrative actions.

It was Bracton in the thirteenth century, who formulated so brilliantly the reasoning which makes clear why even the monarch is subject to the law: '*Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem*'⁸ (which means that the king is subject to the law, because it is the law which makes him king). If there were no law, he could not be the king as the office is created by the law; therefore, the law is prior and superior to the holder of the office, who is estopped from denying its authority over him.

In the *Case of Proclamations*⁹ Sir Edward Coke CJ built upon this by establishing that the law which binds the king is to be determined, not by the king himself, but by the judges of the Common-Law courts. This was ruled to be the position in law even though it was the king who appointed the judges and could dismiss them at will, the court proceedings were conducted in the king's name and the judges were exercising prerogative powers which derived from the king as the embodiment of the Crown. Frankenstein's monster is seen to be rising to overthrow his master's system based upon the Divine Right and to replace it with what we may now see as a manifestation of the Rule of Law.

'first-past-the-post' system of elections, the passivity of the House of Commons and the crude populism of governments. There is a *de facto* democratic deficit in our system and an abandonment of the commitment to the Liberal Democratic values on which our constitution depends. The system prioritises 'strong' government over open debate, participation and visible responsibility: see, for example, Tony Wright, *British Politics: A Very Short Introduction* (Oxford). The House of Lords has recently been more assertive in questioning and opposing proposals from the Government, but it can be brow-beaten into surrender or, ultimately, by-passed under the Parliament Acts. The Monarch could veto proposals, particularly bills, which threaten the constitution; but this would be even more controversial than possible action by the judges.

⁸ *De Legibus et Consuetudinibus Angliae (On the Laws and Customs of England)*. Quoted and relied upon by Sir Edward Coke CJ in *Prohibitions del Roy* (1607) 12 Co Rep 63.

⁹ (1610) 12 Co Rep 74.

After the Revolutionary Settlement, in *Entick v Carrington*,¹⁰ Lord Camden CJ confirmed that the Crown has only such powers as the law, determined by the judges, allows:

If it is law, it will be found in our books. If it is not found there, it is not law ... The king himself has no power to declare when the law ought to be violated for reason of state...

Much more recently, Lord Hoffman, in *R (Alconbury) v Environment Secretary*,¹¹ stated clearly the important connection between two features in our constitution: 'The principles of judicial review give effect to the rule of law.'

This echoed what Simon Brown J had said more fully in *ex p. Vijayatunga*:¹² 'Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not: in a word, to uphold the rule of law.'

Hence, it is clearly established that the courts can review all executive actions and decisions taken by subordinate bodies¹³ and do so to uphold the Rule of Law.¹⁴ However, the position of the courts in relation to actions by the Queen-in-Parliament, until recently thought to be settled, is becoming less clear.

¹⁰ (1765) 19 St Tr 1030.

¹¹ [2001] UKHL 23 at [73].

¹² *R v HM the Queen in Council, ex p Vijayatunga* [1988] QB 322, 343.

¹³ Although the courts themselves may decide not to review certain actions: for example, on the grounds that they relate to national security. See the views of the House of Lords on this in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

¹⁴ See also the views of the Court of Appeal in *R v Secretary of State for Social Security, ex p JCWI* [1996] 4 All ER 385; and the illuminating commentary on the reactions to the decision in Loveland, *Constitutional Law, Administrative Law & Human Rights*, 4th edn (Oxford), 706-7. '(W)hat the court invalidated in the *JCWI* case was not a "law" at all, but government abuse of the law' (*ibid.*). This is part of his interesting sections on human rights as an indigenous principle of Common Law and 'Judicial Supremacism', starting on page 694.

The Courts and Parliament: Manifest Injustice and Legal Sovereignty

The central issue is what the constitutional role of the courts is in relation to Acts of Parliament. In particular, are there any legal limitations on the legislative competence of the Queen-in-Parliament which the courts could enforce? The traditional view on this aspect of sovereignty, that is, the one taken from Dicey, is very simple: the courts have no power to question the legality of any statute 'good on its face'.¹⁵

This view has had many well-known judicial pronouncements to support it. In *Cheney v Conn*¹⁶ Ungood-Thomas J put it simply:

[Statute] is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal.

Lord Reid later put the same point in a historical context in *Pickin v British Rail Board*¹⁷:

In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded insofar as it was contrary to the law of God or the law of nature or natural justice; but, since the supremacy of

¹⁵ This phrase comes from Lord Campbell's dictum in *Edinburgh & Dalkeith Railway v Wauchope* (1842) 8 CL and F 710.

¹⁶ [1968] 1 All ER 779. Ungood-Thomas J was referring to the question of whether international law placed any legal limitations on the domestic competence of the Queen-in-Parliament, but the assertion may be taken as including other challenges to this competence in the domestic courts.

¹⁷ [1974] AC 765. There is a clear correlation between the rise of the political legitimacy of the House of Commons after 1832 and 1841, and the development of the judicial doctrine of the legal sovereignty of Parliament. It may be in part an appreciation of the falling legitimacy of Parliament in recent years which is making the judges reconsider this doctrine.

Parliament was finally demonstrated by the Revolution of 1688, any such idea has become obsolete.

More recently, Lord Steyn made an apparently similar comment in *R (Anderson) v Home Secretary*¹⁸: 'The supremacy of Parliament is the paramount principle of our constitution.'

This well-rehearsed view has the merit of being simple. However, it is both wrong in principle and unnecessarily dangerous to our constitution; and it is not what a number of judges have been saying recently.

The Court of Appeal recognised the openness of the issue in *R (Southall) v Foreign Secretary*,¹⁹ when they said:

The fact is that so far no court in the last century and more has set aside any provision of an Act of Parliament as being unlawful, save in the circumstances set out in the European Communities Act... We say nothing, because we need say nothing, about what has been much discussed in the legal literature, namely whether the courts could in some circumstances refuse to enforce an Act of Parliament which said that all babies under two years of age should be slaughtered. That is not this case...

The Court of Appeal was being sensibly careful to avoid ruling on a very important issue which was not central to the case before it. Nonetheless, the Court is clearly admitting that the traditional view has had to be abandoned at least in relation to EC Law; and it deliberately leaves open the question of how far manifest injustice is now to be seen as a legal limitation on the legislative powers of the

¹⁸ [2002] UKHL 46 at [39]. Compare his comment in n26, *infra*.

¹⁹ *R (Southall) v Foreign Secretary* [2003] EWCA Civ 1002 at [10].

Queen-in-Parliament.²⁰ Thus, we must turn to the more forthright views of some other judges, mostly of the House of Lords.

Alternative View of the Judges on Sovereignty and the Rule of Law

The classic early authority for the 'alternative' view is the dictum of Sir Edward Coke CJ in *Dr Bonham's Case*²¹:

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 an Act to be void.

It was this view which Lord Reid had in mind, apparently, in his dismissive comment in *Pickin*, cited above.²² However, despite this attempt thirty years ago to kill off as out-dated the view that there are legal limitations on the sovereignty of the Queen-in-Parliament, it has surfaced again and gained in vigour; and, in many cases, this different view about the proper balance within our constitution has been expressed in terms of the Rule of Law.

²⁰ S A de Smith remarked on the 'anomalous' case of *Green v Mortimer* (1861) 3 LT 642, in which a private Act of Parliament was treated as void because the court thought its provisions were absurd. See now de Smith & Brazier: *Constitutional & Administrative Law* (Penguin) p73.

²¹ (1610) 8 Co Rep 114, 118.

²² It may be that Lord Reid and the other judges in the House were concerned about the actual and possible actions of Lord Denning, if this judicial licence to override statutes were allowed. Lord Denning was the Master of the Rolls at the time and had led the CA in its unanimous decision in *Pickin*, which the Lords unanimously reversed. Otherwise, we may say that even Homer (in the form of Lord Reid) nods. For a more recent assessment of the historical dimension to Sir Edward Coke's comments and the rise of statutory legislation, see Noble & Schiff, *Jurisprudence*.

Thus, in *X v Morgan-Grampian*,²³ Lord Bridge asserted: 'The maintenance of the rule of law is in every way as important in a free society as the democratic function.' And in *R v Horseferry Road Magistrates, ex p Bennett*²⁴ he said: 'There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself.'

These and similar comments elsewhere could be treated as mere judicial rhetoric. However, their real importance depends on whether the Rule of Law is being seen in such contexts as merely a matter of politics or as a matter of law. It appears that more judges are seeing the issue in terms of law; and, indeed, as a kind of fundamental Common Law.

In *R v Home Secretary, ex p Simms*,²⁵ Lord Hoffman accepted the proposition that the courts cannot question the merits of primary legislation; but he went on to assert that they can question its 'constitutionality', based on 'principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'

Lord Steyn put the same point in a different way in *B v DPP*²⁶:

Parliament does not write on a blank sheet. The sovereignty of Parliament is the paramount principle of

²³ [1991] 1 AC 1, 48.

²⁴ [1994] AC 42, 67.

²⁵ [2000] 2 AC 115, 131.

²⁶ [2000] 2 WLR 452, 463. In a lecture to the Judicial Studies Board he said: 'It is the democratic and constitutional duty of the judges to stand up where necessary for individuals against the government ... If the judges of today teach a new generation of lawyers, and judges, that complaisance by the judiciary to the views of the legislature and the executive in policy areas is the best way forward, one of the pillars of our democracy will have been weakened.' (Reported by Joshua Rozenberg in news.telegraph for 26 November 2004.) See also his lecture to the British Institute of International and Comparative Law on 10 June 2005.

our constitution; but Parliament legislates against the background of the principle of legality.

Lord Woolf, the recently-retired Lord Chief Justice, has repeatedly made similar assertions. In a remarkable article in *Public Law* in 1995,²⁷ he said the courts would be very reluctant to declare invalid any statute; but he went on:

However, if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent ... Ultimately there are even limits on the supremacy of Parliament, which it is the courts' inalienable responsibility to identify and uphold. They are limits of the most modest dimensions, which I believe any democrat would accept. They are no more than are necessary to enable the rule of law to be preserved.

These assertions suggest that at least these senior judges²⁸ see Parliament's legal competence as legally limited, ie by 'constitutionality' or the 'principle of legality' or the 'rule of law' - terms which seem to mean essentially the same in this context - and that the courts have an 'inalienable responsibility' to uphold the proper balance in our 'democratic' constitution. They are identifying this as an inherent power or role under Common Law, in a way which is reminiscent of the US Supreme Court in the landmark case of *Marbury v Madison*.²⁹ Hence it is something that Parliament cannot

²⁷ Lord Woolf in *Public Law* (1995), pp57, 68-69.

²⁸ Among the other judges who have expressed similar views are Lord Cooke of Thorndon in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 and Laws LJ in [1995] PL 72.

²⁹ (1803) 5 US 137. This case established that, despite the enshrining of the Separation of Powers in the documentary constitution, the Federal Supreme Court had the inherent jurisdiction to judge the legality of actions by the other two branches of government.

take away³⁰ and it reminds us of the full significance of Dicey's comment that we have a 'judge-made' constitution.³¹

However, even if we accept that the exercise of sovereignty by the Queen-in-Parliament may be seen by the judges as limited by 'constitutionality' or 'the principle of legality' or 'the rule of law', there is the question of what these concepts require in substantive terms in reality.³² Do they mean something very different from what Sir Edward Coke had in mind in *Dr Bonham*?

Lord Woolf has said that the 'minimum' requirements of the Rule of Law are access to the independent courts (which was the issue at the centre of the turmoil about clause 11 of the Asylum and Immigration Bill 2004) and the right to a fair trial, a reasoned judgment within a reasonable time, effective enforcement powers, fair and reasonable court procedures, and a system of law that is 'reasonably certain, readily ascertainable, proportionate and fair.'³³ These are reasonable provisions for any Liberal Democracy and they are, it may be presumed, what he believes 'any democrat would accept' and what Sir Edward Coke had in mind as required by the Common Law.³⁴

³⁰ Indeed, the Human Rights Act 1998, with all its limitations, could be seen as a deliberate attempt by the government to limit *de facto* the power of the courts to resist the will of Parliament, by discouraging them from feeling the need or the right to develop their powers of review at Common Law. If the Human Rights Act were to be repealed or made even less effective, the courts might feel a stronger need to develop their role and powers at Common Law.

³¹ This goes beyond what Dicey intended, however, as he believed that there were only political limitations on the legal powers of Parliament. See *Law of the Constitution* (ed ECS Wade), 10th edn, 1959, p70.

³² The House of Commons in its debate on the Rule of Law on 31/1/2005 made no progress in defining it.

³³ Speech to the Commonwealth Law Conference in September 2005, reported by Joshua Rozenberg, *Telegraph* 22/9/05). See also his Squire Centenary Lecture at Cambridge on 3/4/2004, where his focus was more on the need for judicial independence and for robust review: 'Ultimately, it is the rule of law [upheld by the independent judges] which stops a democracy descending into an elected dictatorship.'

³⁴ Ie, in *Dr Bonham's Case*, supra: '... contrary to common right or reason, or repugnant, or impossible to be performed...'

However, the list would be seen by some³⁵ as a Trojan horse, which could be exploited by headstrong judges to subvert the will of the people.³⁶ Although most of the provisions in Lord Woolf's list relate to procedural justice, the last two in particular might allow the development of substantive rules as well. For example, it is not clear how far they follow the approach of the Declaration of Delhi³⁷ to include in 'the Rule of Law' substantive Human Rights provisions, such as are in the Universal Declaration and the European Convention on Human Rights. Whatever the merits of this view of the proper balance within a Liberal Democracy, what is remarkable is that the judges seem now to be presenting these values, not merely as having political force also, but as imposing legal limitations on the competence of the Queen-in-Parliament, which the courts could and would have to enforce. This would certainly be taking us back towards the territory of *Dr Bonham*; but it is still not clear how far the courts would feel forced or entitled to venture down this path.

Conclusion on the Present Position

Regardless of the possible details of the content of the Rule of Law, which may be fleshed out by the courts in due course if need be, there is a distinct move from the assumption of the Sovereignty of

³⁵ The reaction of the *Times* on 5/3/2004, reprinted in 'Civitas', is not untypical of a section of the media, to which any populist government may give undue attention. It is sadly ill-informed. '[Lord Woolf] wants a different kind of supreme court so that he and his colleagues will be able to strike down legislation to which they object. But by calling the proposed supreme court a "poor relation" compared with others he gives the game away – his real concern is to extend judicial power ... The role of judges in Britain has never been to make law (sic)... Lord Woolf reveals little sympathy for the British heritage of liberty and its intimate connection with the law...' Presumably those who run such newspapers do have this sympathy. See also the similar views of Melanie Phillips on 6/3/2004 at melaniephillips.com.

³⁶ The record of the judges in cases of judicial review of political decisions is not unblemished. Cases such as *Roberts v Hopwood* [1925] AC 578, *Secretary of State v Tameside MBC* [1977] AC 1014, *Bromley v GLC* [1983] 1 AC 768, *R v Lewisham, ex p Shell* [1988] 1 All ER 938 suggest that respect for the policies of (left-of-centre) elected bodies has not always been allowed to prevail. See, eg J A G. Griffith, *The Politics of the Judiciary* (Fontana).

³⁷ This was the broad formulation from the International Commission of Jurists, meeting in New Delhi. See (1959) 2 JI of ICJ 7.

Parliament as the sole foundation of our constitution to a bi-polar view, based on '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', as Lord Bridge put it in *X v Morgan-Grampian*.³⁸

To understand this view of the courts' proper role in relation to Parliament, it is necessary to clarify what 'democracy' means in a Liberal Democracy, such as the UK purports to be. The complementary view of Lord Bridge and others of the roles of the political (as in Parliament and the Government) and the judicial in our constitution corresponds with the two meanings of 'democracy' as the source of legitimacy in a Liberal Democracy. 'Democracy' is hard to define simply, but there are two particular meanings which complement and may, possibly, contradict each other in a Liberal Democracy. Any constitution has to find a way to harness and reconcile them; and in the UK, without a documentary constitution, it falls to the judges to do so.

The first meaning of 'democracy' is as majoritarianism. This view asserts that it is better, where there is a difference of opinion, to prefer the opinion of the majority to that of any minority; and that, if we have been able to participate in a fair decision-making process, such as an election, we are estopped from denying the legitimacy of the outcome, even if we voted against it and are sure it is wrong. It is this 'consent' which gives legitimacy to Parliament and the Government in that the House of Commons is elected on a universal adult suffrage and this House has power over both the House of Lords and the Government.³⁹ We may not like what Parliament or the Government have done, but we must accept that we are bound to accept the

³⁸ [1991] 1 AC 1, 48.

³⁹ See the Parliament Acts 1911 and 1949 on how the House of Lords may be circumvented in law in the passing of legislation; and the Resolution of the House of Commons in 1841, which established the right of the House of Commons to determine who should be the Government, by being entitled to remove a Government by passing a simple vote of no confidence in them at any time, as last happened in 1979.

legitimacy of it because of the 'democratic' process which led, directly or indirectly, to the decision.

The second meaning of 'democracy' is as the fundamental principles underpinning our system of Liberal Democracy, which do not depend on (and are not subject to) any vote, as they are constitutionally prior to it ('the background'). These values may be expressed as the Rule of Law or as 'constitutionality' or as Human Rights or in other ways. They may be enshrined in a special constitutional document, such as a Bill of Rights, or they may be seen as implicit in the system. In either case the courts may have an express or inherent role to uphold these values, even against overwhelmingly popular measures.

Although it is to be hoped and expected that these two meanings of 'democracy' as sources of legitimacy will complement each other, it is not impossible that they might conflict in practice. Suppose, for example, that legislation were passed by the Queen-in-Parliament in this country to deprive a group of people of the right to vote or be an MP because of the colour of their skin⁴⁰ or their religion⁴¹ or their gender;⁴² or so that members of a group could be locked up without charge indefinitely because a minister thought they might be dangerous;⁴³ or so that certain people could be denied access to the courts to challenge the illegality of their treatment.⁴⁴ These 'unthinkable' actions might be 'democratic' in the first (populist) sense; but they would be clearly undemocratic in the second

⁴⁰ As happened with the introduction of apartheid in South Africa from the 1940s.

⁴¹ As was the position in this country for being an MP if you were a Catholic until 1829 or a Jew until 1861. As for atheists, see *Bradlaugh v Gossett* (1884) 12 QBD 271.

⁴² As was the position for women in this country until 1918.

⁴³ See the strong views of the House of Lords in *A v Home Secretary* [2004] UKHL 56 on the powers under the Anti-terrorism, Crime and Security Act, which the majority of 8:1 held to be incompatible with the Human Rights Act. The Common-Law powers of the courts were not considered in this case.

⁴⁴ This was the issue raised by clause 11 of the Asylum and Immigration Bill in 2004. The Government was persuaded to drop the clause because of the likelihood that the judges would have declared it invalid. Similar issues arise when *habeas corpus* is suspended, although this is usually done only in wartime.

(substantive) sense. The practical issue for the judges is to decide how they would react if such a measure were passed in this country. Dicey, the traditionalists and the House of Lords in *Pickin* seem confident that the political processes will prevent such injustice; but others, from Sir Edward Coke to Lord Woolf, are not so sure of this. Apart from a concern about trusting the protection of our constitution and its fundamental values to political luck, there is the basic question of what justification or need there could be for the Queen-in-Parliament to have the legal power to pass manifestly unjust legislation. At best, it suggests a lack of balance and good sense in our formal arrangements.

The judges and others of this persuasion are seeing the inter-connection in our constitution of the notions of the Rule of Law, judicial review (both *ultra vires* and Natural Justice) and the inherent role of the courts in protecting our constitution, in partnership with the other institutions: and they see that the judges may have to depart from the practice of the last 150 years or so in relation to the review of statutes. These notions tie in with the notion of Human Rights as the atoms of Liberal Democracy which underpin our system; with an appreciation of the inherent limitations on the practical legitimacy (and wisdom) of Parliament, based on majoritarianism in an imperfect system of elections and of blunt political responsibility of the Executive; and with the need for a practical solution of the problems raised by manifest injustice in a statute, which there is neither need nor justification for Parliament to be able to enact. Dicey's late-Victorian confidence in the political processes is dangerously out-of-date, and the judges are seeking a proper way to respond to the changing realities.

The constitutional balance which these judges are beginning to reformulate satisfies the requirements of our system in a more effective way than the traditionalist view; but the judges and their supporters will have to continue to 'sell' the idea gently if they are to avoid a populist backlash. Moreover, the judges wish as much as anyone that they will not have to perform this function simply because it should not be necessary. They will have to do so, only if

the political side of the constitution has failed conspicuously;⁴⁵ but they cannot shirk their responsibilities as judges, and they are letting it be known that they realise this and are prepared to act if the worst came to the worst.

Lord Woolf put the position in these terms, in the paragraph before the one cited earlier,⁴⁶ perhaps as a warning-shot across the bows of the political institutions:

I see the courts and Parliament as being partners, both engaged in a common enterprise involving the upholding of the rule of law... Since [*Anisminic*, where the courts had to take a stand], Parliament has not again mounted such a challenge to the reviewing power of the High Court. There has been, and I am confident that there will continue to be, mutual respect for each other's roles. However, if Parliament did the unthinkable...

It appears that, in such a case, the courts would be reluctantly ready to protect our constitution in a way not unlike that articulated by Sir Edward Coke.

⁴⁵ This judicial role and power are not to be triggered by simply controversial measures - only by a measure that is *manifestly* unjust and, so, threatens our constitution.

⁴⁶ *Op cit*, n23, *supra*. Note how this quotation continues there. It may be observed that these comments were made by Lord Woolf in 1995, before David Blunkett and the present government embarked on their ministerial campaign against the judges and the constitution. The problems do not arise because of any particular party or person in government: they are deeper and more important than that. It was, after all, a Conservative minister who was the defendant in *ex p JCWI Case* [1996] 4 All ER 385, and it was under a Conservative government that the courts decided that they could hold a Minister to be in contempt of court for high-handed actions: see the decision finally of the House of Lords in *M v Home Secretary* [1993] 3 WLR 433.