THE RULE OF LAW IN BLAIR'S BRITAIN

ADAM TOMKINS

1 INTRODUCTION

Blair’s Britain came to an end in June 2007 when, after ten years and one month, Tony Blair stepped down as Prime Minister. His decade in office will be remembered for many things: for ending eighteen years of electoral wilderness for the Labour party, albeit only by re-branding it as ‘New Labour’; for delivering unprecedented Labour majorities in the House of Commons; for the ruinous foreign policy misadventure in Iraq; for a curious and from no point of view altogether satisfactory combination of continuity and change in domestic public service reform; and for historic constitutional change. It is with this last feature that the present paper is concerned. Blair never wanted his legacy to be constitutional reform. He was never much interested in it and he inherited Labour’s commitment to deliver important parts of it from his (Scottish) predecessor, John Smith. Had Blair felt able to escape from these commitments, it is likely that devolution, at least, would not have been delivered under his premiership. As it is, however, constitutional reform might turn out to be the single most positive achievement of his decade in Downing Street. That said, two caveats need immediately to be entered. First, only bits of the British constitution have been reformed: much remains largely as it was before. And secondly, it is not only under Blair that the British constitution has recently been reformed. Previous Prime Ministers, too, have pushed through particular policies of constitutional reform, albeit not to the same extent as during the Blair years (thus, Edward Heath took Britain into the European Union (as it now is) and Margaret Thatcher transformed the size and governance of the civil service, to give just two examples).

The highlights of Blair’s constitutional reforms are as follows: (1) the Human Rights Act 1998, which incorporated most of the substantive provisions of the European Convention on Human Rights into domestic law; (2) the devolution legislation, devolving various combinations of legislative and executive power to Scotland, Wales and Northern Ireland (Scotland Act 1998, Government of Wales Act 2006, Northern Ireland Act 1998); (3) the Constitutional Reform Act 2005, which radically reduced the powers of the Lord Chancellor, transferring many of them to the Lord Chief Justice, which made some reforms to the appointment of the judiciary and which provides for the establishment of a new Supreme Court, currently due to

* John Millar Professor of Public Law, University of Glasgow. Earlier versions of this paper were delivered as the 2007 Sir Frank Kitto Lecture at the University of New England (17 April 2007) and at research seminars at the Centre for Comparative Constitutional Studies at the University of Melbourne and at the TC Beirne School of Law, University of Queensland. I am grateful to the organisers of these events for their generous invitations and to the audiences for their insightful comments. I would particularly like to thank Robert Burrell, Simon Evans, Jeffrey Goldsworthy, Mark Lunney and Adrienne Stone. Thanks also to my Glasgow colleague Aileen McHarg for her comments on an earlier draft. I would like to express my deep thanks to Charles Rickett, Ross Grantham and Brad Sherman at the School of Law, University of Queensland for their hospitality in accommodating me while I was on leave in March-April 2007. Finally, I gratefully acknowledge financial support from the Carnegie Trust for the Universities of Scotland.
commence operation in October 2009 (replacing the appellate committee of the House of Lords); (4) the *House of Lords Act 1999*, reforming the composition of the House of Lords through the removal of the vast majority of hereditary peers from Parliament; (5) the *Freedom of Information Act 2000*; and (6) the *Greater London Authority Act 1999*, creating a new Mayor of London and a new Greater London Authority. At the same time there have been reforms to local government, to the funding and conduct of political parties, to executive powers (see especially the *Legislative and Regulatory Reform Act 2006*), and to civil liberties (see especially the *Crime and Disorder Act 1998*, the *Regulation of Investigatory Powers Act 2000*, the *Terrorism Act 2000*, the *Anti-terrorism, Crime and Security Act 2001*, the *Asylum and Immigration (Treatment of Claimants) Act 2004*, the *Civil Contingencies Act 2004*, the *Serious Organised Crime and Police Act 2005*, the *Prevention of Terrorism Act 2005* and the *Terrorism Act 2006*).

At the same time, further constitutional reforms have been effected through the judicial development of the common law. The decade from 1997-2007 saw a remarkable series of cases in which senior judges – inspired at least in part, no doubt, by measures such as the *Human Rights Act 1998* – handed down decisions that both complemented and furthered aspects of the legislative reforms just listed. We will encounter numerous examples in the pages that follow. Among the most important are *R v Secretary of State for the Home Department, ex parte Simms* and *Jackson v Attorney General*. We return to both of these in a moment.

This paper is primarily concerned with the collective impact of this body of reform – both direct and indirect – on one particular dimension of public law: namely, the idea of legality or of the rule of law. For the purposes of this paper, the ‘principle of legality’ or the ‘rule of law’ mean simply the idea that the institutions and practices of parliamentary government are subject to legal controls and, in particular, are liable to judicial review by the courts. Underlying the argument of the paper is a straightforward and, I think, largely uncontroversial thesis: that in Blair’s Britain the rule of law grew considerably both in its importance and in its reach. As Robert Hazell has recently expressed it, ‘The judges would not admit it, but they have emerged immensely stronger’ as a result of the statutory and common law constitutional reforms witnessed in Britain in the past decade. This paper will not rehearse this argument again. Rather, and proceeding on the basis of this argument,

---


3 [2006] 1 AC 262.

4 In this paper the expressions ‘principle of legality’ and ‘rule of law’ are taken to have the same meaning and are used inter-changeably. I recognise that, for some commentators, the ‘rule of law’ embraces a deeper and richer set of values than this and that, on such accounts, the equation of the rule of law with judicial review may be problematic. That this paper adopts a narrow view of the rule of law (as does, in my view, the British constitution) is not to be taken as suggesting that I necessarily think there is no room for richer or grander conceptions. It is just that, for the purposes of the argument of this paper, there is no need to adopt a more expansive understanding of the rule of law.


this paper explores two sets of questions. First, how has the growth in the rule of law manifested itself? What has caused it? Who has carried it out, for what motivations, and to what ends? And secondly, what, thus far, have been the achievements which may be ascribed to the growth in the rule of law?

To set the scene, consider the following quotations. The first is a leading dictum of Lord Hoffmann’s that summarises, from the point of view of the common law, the relationship between ‘constitutional rights’ and parliamentary government. The quotation comes from Simms, a case decided by the House of Lords after the Human Rights Act 1998 had been passed, but before it had come into effect.

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply 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 Hoffmann’s dictum may be read as refining and replacing Lord Steyn’s earlier statement about the rule of law and parliamentary government, uttered in a case decided right at the beginning of our period: Pierson. Here Lord Steyn had stated that ‘Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law’. Next, consider the following, taken from Lord Hope’s opinion in Jackson v Attorney General, a case to which we shall return.

Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if ever it was, absolute … The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.

These are grand statements, which assert the rule of law in bold, foundational terms. Remnants of British (Diceyan) exceptionalism are minimised; despite the

---

7 On common law constitutional rights, see A Tomkins, Public Law (2003) 184-8; Turpin and Tomkins, above n 1, 729-32.
9 R v Secretary of State for the Home Department, ex parte Pierson [1998] AC 539, 591. Earlier in his opinion in the case, Lord Steyn stated that ‘Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law, and the courts may approach legislation on this initial assumption’.
10 Jackson v Attorney General [2006] I AC 262, [104], [107].
unwritten constitution and regardless of the sovereignty of Parliament, constitutional adjudication is declared to have become ‘little different’ from elsewhere – where the jurisprudence is not of the ‘political constitution’\footnote{See J A G Griffith, ‘The Political Constitution’ (1979) 42 Modern Law Review 1.} but of supreme courts enforcing the ‘ultimate control’ of the rule of law. With this context in mind, the paper is structured around the three main ways in which I consider the growth in the rule of law manifested itself in Blair’s Britain: first, through the development of the separation of powers; secondly, through various challenges to the sovereignty of Parliament; and thirdly, through case law concerned with fundamental rights. Each of these will now be considered in turn.

### II The Separation of Powers

The British constitution, or so we are generally led to believe, is famously not based on the separation of powers.\footnote{The \textit{locus classicus} is W Bagehot, \textit{The English Constitution} (M Taylor ed, first published 1867, 2001 ed).} While we may readily identify a legislature, an executive and a judiciary, considerable overlaps of personnel and of function between the three branches are constitutionally tolerated.\footnote{The traditional British tolerance of (or complacency about) breaches of the separation of powers began to lessen towards the end of the twentieth century: see, eg, E Barendt, \textit{An Introduction to Constitutional Law} (1998).} A remarkable feature of the constitutional development witnessed in Blair’s Britain was the degree to which such traditional toleration came to be limited.\footnote{See generally Turpin and Tomkins, above n 1, 103-32, from which some of the analysis which follows in this section is taken. See also A Tomkins ‘The Struggle to Delimit Executive Power in Britain’ in P Craig and A Tomkins (eds), \textit{The Executive and Public Law: Power and Accountability in Comparative Perspective} (2006) esp 26-37.} A leading example is offered in the law and practice of sentencing.

Until recently, if a young offender was convicted of murder and sentenced to be detained during Her Majesty’s pleasure, the practice was for the Home Secretary to fix a period of detention (the ‘penal element’ or ‘tariff’), sufficient to meet the requirements of retribution and deterrence, which must be served before the release of the offender could be considered by the Parole Board. In \textit{R v Secretary of State for the Home Department, ex parte Venables}, Lord Steyn said: ‘In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of separation of powers, a classic judicial function.’\footnote{[1998] AC 407, 526.} The House of Lords did not conclude that the infringement of the separation of powers made the ministerial fixing of a tariff unlawful (although it was held on other grounds that the Home Secretary had acted unlawfully in the case). But in subsequent proceedings the European Court of Human Rights ruled that the fixing of the tariff amounted to a sentencing exercise, that the Home Secretary as a member of the executive was not an ‘independent and impartial tribunal’, and accordingly that there had been a breach of Article 6(1) of the \textit{European Convention on Human Rights} (the right to a fair trial).\footnote{\textit{V and T v United Kingdom} (1999) 30 EHRR 121. Article 6(1) provides 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.’} As a result of this decision it was provided by the \textit{Criminal Justice and Courts Services Act 2000},...
section 60, that in respect of young offenders convicted of murder and detained at Her Majesty’s pleasure, the tariff should be set by the trial judge in open court.

A different regime, resting on section 29 of the Crime (Sentences) Act 1997, continued to apply to an adult prisoner serving a mandatory life sentence for murder. Here the Home Secretary remained responsible for setting the penal tariff and for the eventual decision on release. In this context the government contended that the Home Secretary was not fixing the sentence (a judicial task) but deciding whether a person sentenced by a court to life imprisonment should be prematurely released (an administrative task). Somewhat surprisingly, perhaps, this argument initially found favour with the European Court of Human Rights, in Wynne v United Kingdom.17 However, the matter was reconsidered by the European Court of Human Rights in Stafford v United Kingdom.18 The Home Secretary had rejected a recommendation of the Parole Board that Stafford, who was serving a life sentence for murder, should be released on licence. A challenge to this decision in the English courts having failed,19 Stafford took his complaint to the European Court of Human Rights. The Court reassessed its decision in Wynne and concluded that Stafford’s continued detention by decision of the executive was not in accord with the spirit of the Convention ‘with its emphasis on the rule of law and protection from arbitrariness’ and was not compatible with Article 5(1) of the Convention (the right to liberty and security of person). Moreover, the fact that Stafford’s continued detention was dependent on the discretion of the Home Secretary constituted a violation of Article 5(4) (the right of a detained person to have the lawfulness of his detention decided by a court). In the course of its judgment the Court noted that ‘the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner’s release following its expiry has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary’.20 The matter came before the House of Lords in R (Anderson) v Secretary of State for the Home Department.21 Anderson had been sentenced by a court to mandatory life imprisonment for murder. The trial judge and the Lord Chief Justice recommended a tariff of 15 years to be served by him, to satisfy the requirements of retribution and deterrence. The Home Secretary rejected this advice and fixed the tariff at 20 years. Anderson brought proceedings to challenge the Home Secretary’s decision to set the 20-year tariff. This decision, he contended, was contrary to Article 6(1) of the European Convention on Human Rights, given effect in the United Kingdom by the Human Rights Act 1998. Anderson argued that setting the tariff was a sentencing exercise and as such was part of the determination of a criminal charge in terms of Article 6(1): it must accordingly be carried out by an independent and impartial tribunal and not by a member of the executive. For the Home Secretary, the argument was renewed that had been accepted by the European Court of Human Rights in Wynne but rejected in Stafford, that fixing the tariff was not the imposition of a sentence but the administration of a sentence of life imprisonment already passed by the trial court. On this central point the Law Lords (sitting as a panel of seven) accepted the reasoning of Stafford v United Kingdom: setting the tariff was a sentencing exercise. Lord Bingham explained that ‘What happens in practice is that, having taken advice from the trial judge, the Lord Chief Justice and departmental officials, the Home Secretary assesses the term of imprisonment which the convicted

17 (1994) 19 EHRR 333.
19 See R v Secretary of State for the Home Department, ex parte Stafford [1999] 2 AC 38.
20 Stafford v United Kingdom (2002) 35 EHRR 32, [78].
murderer should serve as punishment for his crime or crimes. That decision defines the period to be served before release on licence is considered. This is a classical sentencing function. It is what, in the case of other crimes, judges and magistrates do every day.\textsuperscript{22} The Law Lords approved the following passage from the judgment in \textit{Stafford}:\textsuperscript{23}

\begin{quote}
The Court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment.\textsuperscript{23}
\end{quote}

It followed from the Law Lords’ conclusion on this point that the existing procedure did not comply with Article 6(1), for it was plain that the imposition of a sentence was part of the criminal trial, and that the Home Secretary was not independent of the executive.\textsuperscript{24}

In arriving at this result the House of Lords emphasised the importance of the principle of the separation of powers between the executive and the judiciary. Lord Steyn stated that ‘In a series of decisions … the House of Lords has described the Home Secretary’s role in determining the tariff period to be served by a convicted murderer as punishment akin to a sentencing exercise. In our system of law the sentencing of persons convicted of crimes is classically regarded as a judicial rather than executive task.’ While he conceded that the British constitution has ‘never embraced a rigid doctrine of separation of powers’ because, in particular, ‘the relationship between the legislature and the executive is close’, he insisted none the less that ‘the separation of powers between the judiciary [on the one hand] and the legislative and executive branches of government [on the other] is a strong principle of our system of government’ which is ‘reinforced by constitutional principles of judicial independence, access to justice, and the rule of law’.\textsuperscript{25}

Thus, Article 6(1) of the Convention and its interpretation by the courts have given a powerful reinforcement to the principle of the separation of judicial and executive powers. To quote from Lord Steyn in \textit{Anderson} once again, ‘Article 6(1) requires effective separation between the courts and the executive, and further requires that what can in shorthand be called judicial functions may only be discharged by the courts.’\textsuperscript{26} Indeed, it may be that one effect of the \textit{Human Rights Act 1998} is to encourage British courts to enforce the separation of powers as a legal principle more than they have previously been prepared to do. Before the \textit{Human Rights Act} the separation of powers was a political ideal that could be variously used to describe or to criticise aspects of the British constitution, but it was not generally regarded as being a judicially enforceable rule. The sentencing context is one area

\begin{itemize}
\item \textsuperscript{22} Ibid [13].
\item \textsuperscript{23} \textit{Stafford v United Kingdom} (2002) 35 EHRR 32, [79].
\item \textsuperscript{24} In response to the judgment in this case, provision was made in the \textit{Criminal Justice Act 2003} for the tariff or minimum term to be served by mandatory life prisoners to be fixed by the sentencing judge. When the minimum term has been served, the Parole Board decides on the prisoner’s suitability for release.
\item \textsuperscript{25} \textit{R (Anderson) v Secretary of State for the Home Department} [2003] 1 AC 837, [39].
\item \textsuperscript{26} Ibid [40].
\end{itemize}
where the courts have begun to talk of the separation of powers in more juridical terms, but it is not the only one.

Matthews v Ministry of Defence, for example, concerned an unsuccessful challenge to the legality of a statutory bar that prevented servicemen from suing the Crown in tort for personal injury suffered in the course of military duty. Matthews argued that the bar constituted a breach of Article 6(1). In the result the House of Lords disagreed, holding that in the circumstances of the case there was no ‘civil right’ to which Article 6 could apply. But in the course of his opinion, Lord Hoffmann made a series of statements in which he explicitly connected the right to a fair trial under Article 6 with the doctrine of the separation of powers. His starting point was that ‘the right to an independent and impartial tribunal for the determination of one’s civil rights did not mean only that if you could get yourself before a court, it had to be independent and impartial. It meant that if you claimed on arguable grounds to have a civil right, you had a right to have that question determined by a court’. He continued as follows:

A right to the independence and impartiality of the judicial branch of government would not be worth much if the executive branch could stop you from getting to the court in the first place. The executive would in effect be deciding the case against you. That would contravene the rule of law and the principle of the separation of powers. These principles require not only that you should be able to get to the court-room door. The rule of law and separation of powers would be equally at risk if the executive government was entitled, as a matter of arbitrary discretion, to instruct the court to dismiss your action.

His Lordship explained that ‘There are different ways in which one could draft a law to give the executive such a power. It might say that the cause of action was not complete without the government’s consent. That would look like a rule of substantive law. Or it could provide that the government could issue a certificate saying that the action was not to proceed. That looks like a procedural bar.’ He then concluded that ‘provided one holds onto the underlying principle, which is to maintain the rule of law and the separation of powers, it should not matter how the law is framed. What matters is whether the effect is to give the executive a power to make decisions about people’s rights which under the rule of law should be made by the judicial branch of government.

A different sort of example of the separation of powers being discussed in newly juridical terms comes from R (Alconbury) v Secretary of State for the Environment. This case – the first Human Rights Act case to reach the House of Lords – concerned a series of challenges to British planning laws. The challenges

---

30 Ibid [28]-[29].
31 Ibid [29]. Lord Hoffmann’s remarks in Matthews have since been cited with approval by Lord Nicholls in a case concerning the enforceability of consumer credit agreements (Wilson v Secretary of State for Trade and Industry [2004] 1 AC 816) and by Lord Hope in a case concerning child maintenance and the Child Support Agency (R (Kehoe) v Secretary of State for Work and Pensions [2006] 1 AC 42).
centred on Article 6(1). British planning laws provide for an intricate decision-making process. Most planning applications are dealt with routinely by local authorities but a small number – those which raise particularly complex, delicate or contested issues – may under the relevant legislation be ‘recovered’ or ‘called-in’ by the Secretary of State (that is, by the minister in central government with responsibility for planning). To give an indication of scale, in the region of 500,000 planning applications are considered each year in Britain, of which about 250 annually are recovered or called-in. When the Secretary of State recovers or calls-in a planning application, the application will be considered by a planning inspector who will conduct a public inquiry and will then make recommendations in a report to the Secretary of State. The Secretary of State makes the final decision on the application. He or she is not bound by the recommendations contained in the inspector’s report, although in practice the Secretary of State will follow the recommendations of the planning inspector in about 95% of cases. The issue in Alconbury was whether this decision-making process was compatible with Article 6(1) given that the final decision-maker, the Secretary of State, is a government minister rather than an ‘independent and impartial tribunal’.

At first instance, the Divisional Court held that Article 6 was violated. It granted a declaration under the HRA that the relevant provisions of Britain’s town and country planning legislation were incompatible with a Convention right. The appeal to the House of Lords was successful, their Lordships unanimously ruling that Article 6(1), while engaged, was not violated. Two main reasons underpinned the Lords’ decision. The first related to the case law of the European Court of Human Rights, case law which under the terms of the HRA the domestic courts are required to take into account (although having taken it into account they are not required to follow it). The key case, Bryan v United Kingdom, offered authority for the proposition that even where a decision-maker is lacking in independence and impartiality, Article 6(1) will not necessarily be breached if the decision-maker is subject to a certain degree of judicial review or other scrutiny by a sufficiently independent and impartial supervisory body. Applying Bryan, the House of Lords held that, as the decisions of the Secretary of State were fully subject to judicial review, the requirements of Article 6 were satisfied.

The second reason underpinning their Lordships’ ruling is what principally concerns us here. All five Law Lords hearing the appeals in Alconbury gave opinions. All five spoke about the need to ensure that the Human Rights Act did not undermine the essential democratic requirement that, as Lord Hoffmann expressed it, ‘decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them’. The kind of complex, contested planning application that is recovered or called-in by the Secretary of State is one that is likely to raise acute questions of policy. Should a fifth terminal be constructed at London’s Heathrow airport? Should an additional motorway be constructed between Birmingham and Manchester? Should a new high-speed rail-link be developed to reduce travelling time between London and the Channel tunnel? These are the sorts of questions that fall to be addressed in the biggest planning applications. All the Law Lords stressed the delicate political nature of such decisions. And they all emphasised the importance in a democracy of having political decisions such as these made by political actors who are democratically

35 [2003] 2 AC 295, [69].
answerable for their decisions, rather than by independent and impartial courts. In
other words, the court stressed that planning decisions were principally matters for
the executive rather than the judiciary. Lord Slynn expressed it in the following
terms:

The adoption of planning policy and its application to particular facts
is quite different from the judicial function. It is for elected members
of Parliament and ministers to decide what are the objectives of
planning policy, objectives which may be of national, environmental,
social or political significance …

Lord Nolan agreed, stating that while electoral accountability alone would be
‘plainly insufficient to satisfy the rule of law’, in the context of the making of
planning decisions which have ‘acute social, economic and environmental
implications, … to substitute for the Secretary of State an independent and impartial
body with no electoral accountability … would be profoundly undemocratic.’
Lord Hoffmann spoke in similar terms, declaring that such cases

[I]nvolve general social and economic issues. They concern the rights
of individuals to use, enjoy and own their land. But the number of
persons potentially interested is very large and the decisions involve
the consideration of questions of general welfare, such as the national
or local economy, the preservation of the environment, the public
safety, the convenience of the road network, all of which transcend the
interests of any particular individual.

Getting to the heart of the reason why their Lordships considered planning
decisions to be matters for the executive rather than for the judiciary is not altogether
simple. Three discrete factors are relied on in the passages from Lords Slynn, Nolan
and Hoffmann cited here. The first is that planning decisions are said to have
implications for ‘national’, ‘environmental’, ‘social’, or ‘economic’ policy, although
this term ‘policy’ is neither defined nor distinguished from ‘law’ or ‘rights’. The
second is that Parliament has entrusted such decisions to the government, which is
then liable to be held to account both in Parliament and electorally for the decisions
it makes. The third is that even though individuals’ property rights may be directly
affected by planning decisions, such rights are not necessarily determinative of
planning applications, which may be resolved in the public or general interest even
where such resolution infringes individuals’ interests in property usage or
ownership.

What is particularly striking about such analysis is how uneasily it sits with that
offered in cases such as Anderson and Matthews. If there is a public interest in
planning decisions, then surely so too is there a public interest in the sentencing of
those convicted of serious criminal offences. Similarly, if ministers are accountable
to Parliament for planning decisions then surely they are likewise accountable to
Parliament for decisions concerning criminal justice. Yet while in the planning
context these factors were held to indicate that the decision belonged to the

36 Ibid [48].
37 Ibid [61].
38 Ibid [60].
39 Ibid [68]. Lord Clyde (at [139]-[140]) and Lord Hutton (at [198]) spoke in the same
terms.
executive, in the sentencing context they were overlooked as the decision was held to belong instead to the judiciary.⁴⁰ Everything, it appears, depends on whether the decision at stake is classified as being one of ‘people’s rights which under the rule of law should be made by the judicial branch’ (Lord Hoffmann in Matthews) or as one of what the ‘general interest requires’, which should be made by ‘democratically elected bodies’ (Lord Hoffmann in Alconbury). The problem, of course, is that both planning and sentencing cases can reasonably be classified as being either, as the quotations extracted here testify. Lord Slynn conceded that Alconbury was concerned not only with planning policy, but with its ‘application to particular facts’; and Lord Hoffmann likewise conceded that such cases concern the ‘rights of individuals to use, enjoy and own … land’.

What conclusions may be drawn from these cases on the separation of powers? The first is surely that attempting to draw bright lines between executive and judicial tasks is fraught with difficulty, as our reading of Alconbury in the light of Anderson and Matthews reveals.⁴¹ Secondly and, for our purposes more pertinently, all three cases strongly suggest a growing judicial awareness of the importance of the separation of powers and a sharpening of it as a juridical matter in British constitutional law. That said, however, even while support for the principle is strongly expressed in Anderson and Matthews, the separation of powers is hardly a trump card and it can, apparently, itself be trumped, at least in some contexts, by something called policy, where it is held to be more important that decisions are taken democratically than judicially. Closely related to this point is a third conclusion: while Anderson and Matthews clearly strengthen the separation of powers and the rule of law, this is counter-balanced in other cases by a striking judicial desire not to over-judicialise government decision-making. We see this in Alconbury, but we see it even more starkly in a case which followed Alconbury, Runa Begum v Tower Hamlets London Borough Council.⁴² Here Begum complained that the local government officer who determined her claim for public housing was not an independent and impartial tribunal and that the decision-making process therefore violated Article 6. The House of Lords accepted that Article 6 was engaged but unanimously ruled, as in Alconbury, that it was not breached. The Bryan point (that the decision-making process was supervised by the courts through statutory appeal and judicial review) was relied upon in Begum as it had been in Alconbury. But the difference between the two cases is that in Begum there is no question of democratic accountability: here we are dealing not with a minister making a politically sensitive decision of national importance but with a local government officer (note: an officer, not an elected councillor) making a routine decision of administrative justice. In Britain schemes of social welfare (such as housing) are laid out in complex and detailed Acts of Parliament, such as the Housing Act 1996. Such Acts typically rely heavily on local government officers to administer the schemes of social welfare, subject to supervision through the courts. In Begum, Lord Hoffmann ruled, amplifying what he had stated in Alconbury, that with this in mind the courts


⁴¹ One is reminded of Geoffrey Marshall’s famously dismissive view of the separation of powers: that it is ‘infected with so much imprecision and inconsistency that it may be counted little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds.’ See G Marshall, Constitutional Theory (1971) 124.

⁴² [2003] 2 AC 430.
should enforce the constitutional principles of the rule of law and the separation of powers with regard not only to democratic accountability but with regard also to ‘efficient administration and the sovereignty of Parliament’. For all the sharpening of the separation of powers in cases such as *Anderson* and *Matthews*, *Alconbury* and *Begum* suggest that, even now, it remains limited as juridical tool.

On one reading, *Begum* is an extraordinary decision. It is one thing for the House of Lords to hold, as in *Alconbury*, that Convention rights should be read and enforced in the light of the constitutional fundamental of government ministers’ democratic accountability to Parliament. But to say that Convention rights should also be read and enforced in the light of ‘efficient administration’ and the sovereignty of Parliament is surely significantly to undermine the very point of human rights law. Are Convention rights not supposed to be more robust than to crumple at the mere suggestion that it would be more convenient for the government if Council officers rather than independent tribunals determine housing disputes? And since when has it been a sound argument that Convention rights must give way simply because Parliament has legislated to confer discretion on Council employees rather than on impartial decision-making bodies? Clearly there is something odd going on here. One does not have to look very far to discover what it is. The House of Lords did not want to rule in the way it felt compelled to rule in *Alconbury* and *Begum*. It would have preferred to rule that in neither case was Article 6 engaged. It would have preferred the solution that neither the property developers in *Alconbury* nor Mrs Begum were on trial. The Secretary of State in *Alconbury* and the local government officer in *Begum* were not determining the claimants’ ‘civil rights and obligations’, but were making administrative decisions. This elegant solution, however, was effectively denied to the House of Lords because of the case law of the European Court of Human Rights. That court has vastly extended the reach of Article 6 to embrace not only trials *stricto sensu* but all sorts of decision-making forums, including those making administrative decisions. Had the House of Lords ruled in *Alconbury* or in *Begum* that Article 6 was not breached because it did not apply, the claimants would surely have gone on to Strasbourg and would have won on the point. Therefore their Lordships had to find some other way of holding that Article 6 was not breached, no matter how inelegant and odd the reasoning became.

Lord Hoffmann revealed as much when he returned to the matter in *R (Hammond) v Secretary of State for the Home Department*.

Like *Anderson*, this was another sentencing case. In the course of his opinion Lord Hoffmann referred to what he called the ‘doctrinal peculiarities’ of *Alconbury* and *Begum* and he explained that they had arisen from the fact that ‘although one of the main purposes of Article 6 is to maintain the principle of the separation of powers and the basic principles of justice which must be observed by the judicial branch … the Strasbourg court has held the Article applicable to executive and domestic decisions as well.’

For our purposes, then, perhaps we should not read too much into the limitations of the separation of powers as a juridical tool that *Alconbury* and *Begum* suggest. The true law, perhaps, is as stated in *Anderson* and *Matthews*. *Alconbury* and *Begum* may appear to limit it, but the appearance is deceptive, as it is meant as a device not for re-blunting the separation of powers, but for avoiding (or evading) an
aspect of European human rights law the House of Lords finds itself to be profoundly in disagreement with.46

A fourth point to note is that, despite the variety of factual contexts out of which these cases have arisen, all the case law considered in this section is concerned with the same separation: i.e. with the separation of executive and judicial powers. The cases are not concerned with the separation of legislative and judicial powers;47 nor are they concerned with the separation of legislative and executive powers.48 They are all concerned with an attempt to demarcate judicial power and to demarcate it, principally, from the executive. One may ask: ‘Why?’ Why should the courts have become so interested in seeking to demarcate their powers from those of other constitutional actors? This question is central to the core issues of this paper. To recap, we are seeking here to understand the ways in which the growth in the rule of law manifested itself in Blair’s Britain. What caused its growth, who carried it out, and what, thus far, have been its achievements? These are our questions. What we can offer thus far by way of answers is as follows: a sharpening of the separation of powers as a juridical tool is one of the ways in which the growth in the rule of law manifested itself in Blair’s Britain. More precisely, a sharpening of the distinction between the judicial power and the powers of parliamentary government is one of the ways in which the growth in the rule of law manifested itself. A direct cause of this sharpening was the way in which the courts reacted to the incorporation into domestic law of Article 6(1) of the European Convention on Human Rights. This appears to have caused the courts to re-articulate the division between judicial, executive, democratic and administrative decision-making, such that sentencing decisions have been held to be judicial, planning decisions to be democratic and decisions as to the allocation of welfare entitlements to be administrative, albeit that the latter two categories are subject to judicial supervision (and albeit that the reasoning in these cases has been described by the very judge who crafted it as ‘peculiar’). As for our final question (what has been achieved?), we will leave this open for the moment and return to it later. First, we must turn to the second area of British constitutional law where the growth in the rule of law has manifested itself: in case law concerning the sovereignty of Parliament.

III CHALLENGES TO THE SOVEREIGNTY OF PARLIAMENT

It is well known that the Diceyan doctrine of the sovereignty of Parliament (i.e., that Parliament may make or unmake any law whatsoever, and that no-one may override or set aside Parliament’s legislation) has for some time come under a range of challenges, both political and legal. In the 1950s the Court of Session in Edinburgh famously doubted the applicability of the doctrine in Scots law.49 The late


47 On the changing relationship of the judiciary to the legislature, see the case law considered in the next section, on the sovereignty of Parliament.

48 On this issue, see R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513; for commentary, see A Tomkins, Public Law (2003) ch 1.

1980s and early 1990s witnessed the severest test for the sovereignty of Parliament thus far posed by the United Kingdom’s membership of the European Union. And Britain’s numerous obligations in international law and the broader geopolitical reality of globalisation surely constrain at least in fact (if not also in law) the practical operation of parliamentary sovereignty. These are all real and considerable challenges to the sovereignty of Parliament. In this paper, however, we will leave them to one side and will focus instead on two further challenges. The first may be dealt with relatively swiftly; the second will require fuller analysis. The first is the challenge posed by the *Human Rights Act 1998*; the second is that posed by what may be called ‘common law radicalism’.

Sections 3 and 4 of the *Human Rights Act* govern the relationship between Convention rights and Acts of Parliament. Section 3(1) provides that ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’. Section 4 provides that, if a court is satisfied that a provision of primary legislation is incompatible with a Convention right, the court ‘may make a declaration of that incompatibility’. Such a declaration ‘does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given’ (section 4(6)(a)). Thus, courts in the United Kingdom do not have the power, even after the *Human Rights Act*, to strike down Acts of Parliament which they deem to be incompatible with Convention rights. All they may do is ‘declare’ the incompatibility. It is then a matter for Parliament to decide whether it wishes to continue with the legislation, to amend it, or to replace it.

As far as the implications of these provisions for the sovereignty of Parliament are concerned, the key issue is when should the courts use section 4 and when should they use section 3? Suppose that the courts are faced with a statutory provision they consider to be incompatible with a Convention right. Depending on the wording of the provision and on the nature of the incompatibility, it may be that the court has a choice. Either it could use its power under section 3 to interpret the provision so as to make it compatible with Convention rights; or it could declare the provision to be incompatible. The more the courts use section 4 the more the matter will remain one for Parliament. Conversely, by using section 3 to stretch or perhaps even to change the meaning of legislation, the more it will be the case that Parliament legislates subject to the interpretation imposed by the courts. In other words, an over-use of section 3 will lead to the *Human Rights Act* becoming a greater restriction on the sovereignty of Parliament.

There is now a growing body of case law (and attendant academic commentary) on this issue. Early tensions within the House of Lords were revealed in *R v A*, where Lord Steyn considered that the only limit on the use of section 3 was where the provision in question expressly contradicted a Convention right. Other members of the House of Lords hearing the appeal were not prepared to go so far, and Lord Steyn’s position was criticised by Lord Nicholls in *Re S*. In *R (Anderson) v Secretary of State for the Home Department* Lord Steyn seems to have relented somewhat, as he stated that ‘section 3(1) is not available where the

---


51 See, eg, Turpin and Tomkhins, above n 1, 16-21, 74-6.

52 *[2002] 1 AC 45.*

53 *[2002] 2 AC 291.*

54 *[2003] 1 AC 837.*
suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute’. In Bellinger v Bellinger\(^{55}\) the House of Lords declined to interpret a provision of the Matrimonial Causes Act 1973 to include single-sex marriages when one of the parties had undergone a gender reassignment. Lord Nicholls stated that:

the recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender. These areas include education, child care, occupational qualifications, criminal law.\(^{56}\)

For these reasons, the issue was properly for Parliament and not for the courts, and the House of Lords granted a declaration of incompatibility under section 4 of the Human Rights Act. If Re S, Anderson and Bellinger seemed to indicate that the more robust approach proposed by Lord Steyn in R v A was not to be preferred, the majority decision in Ghaidan v Godin-Mendoza\(^{57}\) again casts doubt on the matter.

This case concerned a claim of discrimination, contrary to Articles 8 and 14 of the European Convention on Human Rights, in the application of the Rent Act. On the death of a protected tenant of a dwelling-house his or her surviving spouse, if then living in the house, becomes a statutory tenant by succession. Marriage is not essential for this purpose. A person who was living with the original tenant ‘as his or her wife or husband’ is treated as the spouse of the original tenant.\(^{58}\) In Fitzpatrick v Sterling Housing Association\(^{59}\) the House of Lords decided that this provision did not include persons in a same-sex relationship. The question in Ghaidan v Godin-Mendoza was whether this reading of the provision survived the Human Rights Act. The House of Lords ruled that it did not. The majority reinterpreted the provision under section 3 of the Human Rights Act. Lord Millett, dissenting, ruled that a declaration of incompatibility under section 4 should have been granted. Lord Nicholls, one of the judges in the majority, ruled as follows:

\[T]\he interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation … [T]\he intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect, of primary and secondary legislation. Parliament, however, cannot have intended that in the discharge of this extended

\(^{55}\)[2003] 2 AC 467.

\(^{56}\)Ibid [45].

\(^{57}\)[2004] 2 AC 557.

\(^{58}\)Rent Act 1977 sch 1, para 2(2), as amended by the Housing Act 1988.

\(^{59}\)[2001] 1 AC 27.
interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of the legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve.60

Lord Nicholls referred to Bellinger v Bellinger (above) and distinguished it. He ruled that ‘No difficulty arises in the present case. Paragraph 2 of Schedule 1 to the Rent Act 1977 is unambiguous. But the social policy underlying the … extension of security and tenure under paragraph 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship’.61 He relied on section 3 of the Human Rights Act to construe the legislation accordingly.

Lord Millett dissented. He correctly pointed out that the question of whether section 3 or section 4 should be used is of ‘great constitutional importance, for it goes to the relationship between the legislature and the judiciary, and hence ultimately to the supremacy of Parliament’.62 His Lordship continued as follows:

Sections 3 and 4 of the Human Rights Act were carefully crafted to preserve the existing constitutional doctrine, and any application of the ambit of section 3 beyond its proper scope subverts it. This is not to say that the doctrine of parliamentary supremacy is sacrosanct, but only that any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning.63

Lord Millett insisted that in order to rely on section 3 it must be possible, ‘by a process of interpretation alone, to read the offending statute in a way which is compatible with the Convention.’64 The court, he said, ‘can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point … But it is not entitled to give it an impossible [interpretation], however much it would wish to do so’.65 In particular, ‘section 3 does not entitle the court to supply missing words which are inconsistent with a fundamental feature of the legislative scheme; nor to repeal, delete, or contradict the language of the offending statute’.66 This, in his view, was precisely the effect of the majority’s decision in the case, an effect which Lord Millett deemed constitutionally inappropriate. Lord Millett ruled that, instead, a declaration of incompatibility should be granted under section 4. The ruling of the majority is a powerful illustration of the very real potential of the Human Rights Act significantly to rewrite the law of parliamentary sovereignty.

Significant as measures such as the European Communities Act 1972 and the Human Rights Act 1998 undoubtedly are, however, it may be that an even more potent challenge to the sovereignty of Parliament comes from the common law. The past fifteen years have seen a remarkable renaissance in what might be called

60 [2004] 2 AC 557, [30]-[33].
61 Ibid [35].
62 Ibid [57].
63 Ibid.
64 Ibid [66] (emphasis in original).
65 Ibid [67].
66 Ibid [68].
‘common law radicalism’. Consider, for example, the following statement from a lecture delivered in 1994 by Lord Woolf: if Parliament ‘did the unthinkable’ in depriving the court of its role in reviewing the legality of executive action, he said,

then I would say that the courts would also be required to act in a manner which would be without precedent. Some judges might choose to do so by saying that it was an unrebuttable presumption that Parliament could never intend such a result. I myself would consider there were advantages in making it clear that 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.

In 2003-04 the government came alarmingly close to proposing what Lord Woolf had described as ‘unthinkable’. Its Asylum and Immigration (Treatment of Claimants etc) Bill included a clause that would have ousted judicial review in almost all asylum cases. This was greeted with uproar. Lord Woolf CJ stated in a further lecture that the provision ‘was fundamentally in conflict with the rule of law’ and that ‘if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution’; a written constitution, his Lordship implied, that would not include the doctrine of parliamentary sovereignty among its provisions. Two former Lord Chancellors, including Lord Irvine of Lairg (who had until 2003 been a member of the government that was now proposing the measure) made it clear that they would denounce it in the House of Lords. In the event, the government dropped the clause before the measure could be debated in the Lords. The Act as passed does not include it, although it does contain a range of measures designed to make it more difficult to gain the assistance of the courts in seeking asylum in the United Kingdom.

In the light of this controversy, Lord Steyn conjectured that, while the sovereignty of Parliament is ‘the first principle of our constitution’, if a statute should unequivocally oust the reviewing jurisdiction of the courts, ‘the House of Lords may have to consider whether judicial..."

---

67 See further Turpin and Tomkins, above n 1, 66-74, from which some of analysis in this section is derived.
review is a constitutional fundamental which even a sovereign Parliament cannot abolish’.  

The statements quoted here from Lords Woolf and Steyn were uttered extra-curially. The question here is to what extent has such common law radicalism found its way into case law (as opposed to the text of public lectures). To address this matter, two cases will now be considered. *Robinson v Secretary of State for Northern Ireland* concerned a challenge to the legality of the election in November 2001 of David Trimble and Mark Durkan as First Minister and Deputy First Minister, respectively, of Northern Ireland. Section 16(1) of the *Northern Ireland Act 1998* provides that ‘Each Assembly shall, within a period of six weeks beginning with its first meeting, elect from among its members the First Minister and the Deputy First Minister’. Section 16(3) provides that ‘Two candidates standing jointly shall not be elected to the two offices without the support of a majority of the members voting in the election, a majority of the designated Nationalists voting and a majority of the designated Unionists voting’. Section 16 leaves open the question of what is to happen if the six week period expires with no First Minister and Deputy First Minister being elected. The nearest the Act comes to answering this question is in section 32(3), which provides that ‘If the period mentioned in section 16 ends without a First Minister and a Deputy First Minister having been elected, the Secretary of State shall propose a date for the poll for the election of the next Assembly’ (emphasis added).

After devolution to Northern Ireland under the 1998 Act commenced it was suspended and restored on numerous occasions. When it was restored on 23 September 2001 the offices of First Minister and Deputy First Minister were vacant. The six-week period provided for by section 16(1) would therefore expire on 4 November 2001. On 2 November the Assembly held an election to fill the offices but the candidates (Trimble and Durkan) did not receive the measure of cross-community support required under section 16(3). After a number of previously non-designated members of the Assembly re-designated themselves as Unionists for the purpose of electing a First Minister and Deputy First Minister a further election was held on 6 November 2001, at which the candidates did obtain the support they needed.

Robinson, a leading member of the DUP (and a member of the Assembly), challenged the legality of this election. He argued that the Assembly had no power to elect a First Minister and Deputy First Minister after the expiry of the six-week period and that fresh elections to the Assembly should have been called, in accordance with section 32(3). The Assembly, according to this argument, is a creature of statute and has only such powers as are conferred upon it by the 1998 Act. The Court of Appeal of Northern Ireland held, by a two-to-one majority, that the election was lawful. On appeal, the House of Lords agreed, albeit by a three-to-two majority. The contrast between the approaches of the judges in the majority and those in the minority is striking. Lord Bingham was one of the judges in the majority. He ruled in the following terms:

> The 1998 Act … was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in

---

72 *[2002] UKHL 32.*
73 Lords Bingham, Hoffmann and Millett in the majority; Lords Hutton and Hobhouse dissenting.
participation by the Unionist and Nationalist communities in shared political institutions ... If these shared institutions were to deliver the benefits which their progenitors intended, they had to have time to operate and take root. The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody. [Counsel for Robinson] submitted that the resolution of political problems by resort to the vote of the people in a free election lies at the heart of any democracy and that this democratic principle is one embodied in this constitution. He is of course correct ... But elections held with undue frequency are not necessarily productive. While elections may produce solutions they can also deepen divisions. Nor is the democratic ideal the only constitutional ideal which this constitution should be understood to embody. It is in general desirable that the government should be carried on, that there be no governmental vacuum.74

Lord Hutton dissented. He ruled that ‘despite the attractiveness of the … argument based on the purpose of the Belfast Agreement, I have come to the conclusion that the appeal should succeed. The Northern Ireland Assembly is a body created by a Westminster statute and it has no powers other than those given to it by statute … In my opinion the wording of section 32(3) … makes it clear that Parliament intended that if there was not a successful election within the six weeks’ period, the Secretary of State would fix an early date for the poll … [T]he objective of the Belfast Agreement cannot operate to alter the meaning of the [statutory] words.’75

It is important to understand something of the political background to this dispute. Had there been a further election to the Assembly in late 2001 or early 2002, it was likely that the DUP (the Democratic Unionist Party, led by Ian Paisley) would have replaced Mr Trimble’s UUP (the Ulster Unionists) as the largest Unionist party. Likewise, it was felt that Sinn Fein would stand a good chance of replacing Mr Durkan’s SDLP as the largest Nationalist party. This was a result that both the London and the Dublin governments (as well as the UUP and SDLP) were eager to avoid. Coalition government was difficult enough with the more moderate UUP and the SDLP as the largest parties. With the DUP and Sinn Fein as the largest parties it was considered almost unthinkable. The irony, of course, is that since the 2003 elections to the Assembly the DUP and Sinn Fein have indeed been the largest Unionist and Nationalist parties. While devolution to Northern Ireland was suspended from October 2002 until the spring of 2007, since its reinstatement in 2007 Mr Paisley of the DUP and Mr McGuinness of Sinn Fein have been First Minister and Deputy First Minister respectively.

So much for the political background to the dispute in Robinson. The question of constitutional law which the case raises is the extent to which the courts should take political background such as this into consideration when interpreting what Lord Bingham described as a constitutional statute. The majority of the House of Lords interpreted the legislation purposively, the purpose being to maintain devolved

75  Ibid [54], [59]-[61].
government in Northern Ireland. But why should this purpose have been privileged over other purposes embodied in the 1998 Act and in the Belfast Agreement that preceded it? Why, in particular, should it have been privileged over the value of electoral democracy? Is the fact that elections may sometimes ‘deepen divisions’, as Lord Bingham expressed it, a proper and relevant consideration for the court? Even if the purposive approach was appropriate in principle, what of Lord Hutton’s objection that no matter how noble, no purpose should be permitted to displace the clear meaning of the statutory language in sections 16 and 32 of the Act? Robinson suggests that, when it comes to the interpretation of what the courts deem to be ‘constitutional statutes’ (whatever that may mean in the unwritten constitution), different rules may apply from those which govern the interpretation of ordinary (i.e. non-constitutional) legislation.\(^\text{76}\)

Our second case on common law radicalism and the sovereignty of Parliament is *Jackson v Attorney General*.\(^\text{77}\) As is well known, the normal procedure for the enactment of statute is that a Bill must be ‘read’ and passed three times by each House – Commons and Lords – and will then receive the royal assent. Since the *Parliament Act 1911*, however, the Commons and the Crown have enjoyed a limited power to legislate without the consent of the House of Lords. If the Commons passes a Bill which is then repeatedly rejected by the Lords, after a certain period the Bill may none the less proceed to receive the royal assent (and thereby become an Act) despite the opposition of the House of Lords. The effect of the *Parliament Act 1911* was, for most Bills, to replace the Lords’ veto over legislation with a power to delay legislation. The one exception written into the statute is that a Bill to extend the life of a Parliament (i.e., to postpone a general election) continues to require the assent of both Houses. These arrangements were amended by the *Parliament Act 1949*, which reduced the length by which the House of Lords may delay a Bill from two years to one year (much shorter periods of delay apply to ‘money Bills’, such as the government’s budget, but that need not concern us here). The 1949 Act was itself passed under the *Parliament Act* procedure. Since 1949, only four Acts have been passed using this procedure: the *War Crimes Act 1991*, the *European Parliamentary Elections Act 1999*, the *Sexual Offences (Amendment) Act 2000* and the *Hunting Act 2004*. Three of these measures, it may be noted, were passed while Tony Blair was Prime Minister.

In *Jackson v Attorney General* a challenge was launched to the constitutional validity of the *Hunting Act 2004* and the *Parliament Act 1949*. The Divisional Court, the Court of Appeal and a nine-judge bench of the House of Lords each unanimously held that both Acts were lawful (thus, Jackson lost, 14-0). What is of great interest, however, is not the straightforwardness of the outcome, but a number of *obiter dicta* uttered by their Lordships in the course of their opinions. The first matter of interest about the *obiter dicta* in *Jackson* is their sheer quantity, which, by the standards of British judges, is out of all proportion to the actual decision. That nine judges heard the appeal in *Jackson* in the House of Lords and that eight of these felt moved to deliver substantive speeches suggests that there is considerably more to *Jackson* than the rather narrow issues which directly arose on its facts. Notwithstanding their prolixity, however, the *obiter dicta* in *Jackson* do not expressly reveal the reasons why the judges felt compelled to opine at such great lengths. These reasons, it is submitted, are contained in the background to *Jackson* – in the Robinson case and in the 2003-04 Asylum and Immigration (Treatment of Claimants) Bill. While neither

\(^{76}\) See further on ‘constitutional statutes’ the decision of the Divisional Court in *Thoburn v Sunderland City Council* [2003] QB 151.

\(^{77}\) [2006] 1 AC 262.
was actually cited in the opinions in *Jackson*, both, it seems to me, are essential to a proper understanding of the case.

In *Jackson*, as in *Robinson*, one of the matters considered was the category of ‘constitutional statutes’. The Court of Appeal in *Jackson* ruled that, while neither the *Parliament Act* 1949 nor the *Hunting Act* 2004 were invalid, the *Parliament Act* procedure would not be available to pass any bill into law. A bill, for example, to abolish the House of Lords would be a change so fundamental to the constitution that it could be enacted only in the usual way (i.e., with the assent of the Commons, Lords and Crown) and could not be lawfully enacted under the *Parliament Act* procedure. This view was rejected by the nine Law Lords who heard the appeal in the House of Lords, not least because when it was passed in 1911 both Houses knew well that the *Parliament Act* was more than likely to be used to enact measures of considerable constitutional importance: *viz.*, the *Government of Ireland Act* 1914 and the *Welsh Church Act* 1914. Among the most interesting *obiter* comments in *Jackson* are the following from Lords Bingham, Steyn and Hope.

**LORD BINGHAM:** The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament … Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority …

**LORD STEYN:** We do not in the United Kingdom have an uncontrolled constitution … In the European context the second *Factortame* decision made that clear: [1991] 1 AC 603. The settlement contained in the Scotland Act 1998 also points to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998 created a new legal order … The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal.

**LORD HOPE:** Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute … Step by step, gradually but surely, the English principle of the absolute sovereignty of Parliament which Dicey derived from Coke and

---

79 [2006] 1 AC 262, [9].
80 Ibid [102].
Blackstone is being qualified … The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based … Each of the two main parties has made use of the 1949 Act’s timetable, and in subsequent legislation passed by both Houses each of these Acts has been dealt with in a way that has acknowledged its validity … The political reality is that of a general acceptance by all the main parties and by both Houses of the amended timetable which the 1949 Act introduced. I do not think that it is open to a court of law to ignore that reality … Trust will be eroded if the [Parliament Act] procedure is used to enact measures which are, as Lord Steyn puts it, exorbitant or are not proportionate. Nevertheless, the final exercise of judgment on these matters must be left to the House of Commons as the elected chamber …

Several comments may be made about these various statements. First, as the contrast of approaches between Lord Bingham on the one hand and Lords Steyn and Hope on the other shows, their Lordships were not unanimous in terms of their thoughts about sovereignty. For Lord Bingham, outwith contexts in which the European Union was relevant (and it was not relevant here) there was no difference between the doctrine of sovereignty as it stood in 1911 and the doctrine of sovereignty now. For Lords Steyn and Hope, by contrast, even if the sovereignty of Parliament persists as a ‘general’ doctrine, it does so in a way that is heavily qualified both by statute and by the common law. For Lord Steyn, moreover, Dicey’s account, while apparently accepted by Lord Bingham, is ‘out of place in the modern United Kingdom’.

Secondly, is there not something curious about the construction of Lord Steyn’s argument? At the beginning of the passage from his opinion he cites three respects in which, in his view, the sovereignty of Parliament is now limited. These are: the United Kingdom’s membership of the European Union, the devolution ‘settlement’ of 1998, and the incorporation by the Human Rights Act of fundamental rights into domestic law. Each of these, it is to be observed, came about as a result of legislation. Yet from this starting point his Lordship goes on to state that the sovereignty of Parliament is a ‘construct of the common law’, ‘created’ by judges and alterable by them. Even if this is correct (on which more below) does the conclusion follow from the evidence his Lordship cites? The changes he outlines were made through legislation by Parliament; not through common law adjudication by judges.

Thirdly, two of Lord Steyn’s descriptions are worth noting. First, he describes the devolution legislation of 1998 as pointing to ‘a divided sovereignty’. It is not at all clear what this means. The Scottish Parliament, created by the Scotland Act 1998, which his Lordship cites, is anything but a sovereign legislature, as the Scotland Act makes abundantly plain. Moreover, the existence of the Scottish Parliament has done nothing to limit the legal power of the Westminster Parliament to legislate for Scotland, even on ostensibly devolved matters: see Scotland Act 1998, section 28(7). The political reality may for the time being be that the Westminster Parliament will not legislate for Scotland on devolved matters without the consent of the Scottish Parliament, but this behaviour results from a political agreement which is not legally enforceable and has nothing to do with the legal principles that Lord Steyn is concerned with in this passage. Secondly, he describes the Human Rights Act as having created a ‘new legal order’. This is obvious mimicry of the European Court of Justice, which in 1963 famously described the European Union as having created

---

81 Ibid [104], [107], [124], [127].
a ‘new legal order of international law’, a new legal order that dealt with matters of national sovereignty, for example, differently from the way in which they were understood in ordinary international law. Again, however, is his Lordship’s terminology not somewhat tendentious? Lord Steyn may wish that the Human Rights Act had created a new legal order of judicial supremacy, but is the reality not that it was expressly intended to do no such thing? Surely, the Act seeks to balance Convention rights with parliamentary sovereignty, and seeks to ensure that the sovereignty of Parliament is preserved in the scheme of the Act.

Fourthly, there is some difficulty in reconciling all of the statements that Lord Hope makes. He starts with the (some would say) sweeping proposition that the rule of law is the ‘ultimate controlling factor on which our constitution is based’. This sounds very much like the common law radicalism of Lord Steyn and others, as outlined above. But Lord Hope goes on to make two further comments, which seem significantly to dent the extent to which he can really believe what he says about the rule of law. First, he offers as a reason for the court holding that the Parliament Act 1949 is valid that each of the two main parties has made use of the Act, that both Houses have treated legislation made under the Act as valid, that the political reality is of a ‘general acceptance’ of the Act’s procedures and, moreover, that ‘it is not open to a court of law to ignore that reality’. Secondly, and similarly, he states that the ‘final exercise of judgment’ as to when the Parliament Act procedures may be used should be left to the House of Commons ‘as the elected chamber’, not to a court of law. Now, if the constitution really were based on the rule of law as its ‘ultimate controlling factor’, neither of these would be the case. Neither the ‘political reality’ nor the judgment of the House of Commons would stand in the way of the court stating that the rule of law had been violated. The rule of law would trump both. As it is, Lord Hope holds that the rule of law has to be conditioned by – has to give way, even? – to political reality and to the Commons’ democratic superiority. Given this, how can the rule of law be the ultimate controlling factor on which the constitution is based?

Finally, and related to the previous point, what is perhaps most important about Lord Hope’s opinion is the reliance he places on political fact. What is the source of the authority for the proposition that Acts of Parliament enjoy legal supremacy in the British constitution? Lord Steyn and the common law radicals would say that it is a rule of the common law, which, like any other rule of the common law, was created and may be altered by the courts. Lord Hope, however, would appear to take the view that its source lies in political fact – or, more precisely, in judicial recognition of political fact. This argument was famously put by Sir William Wade in the 1950s. As Wade argued, it was the political fact of Parliament’s seventeenth-century victories over the Crown that the courts took into account when articulating the orthodoxy of parliamentary sovereignty. Similarly, the political facts of the United Kingdom’s membership of the European Union and of its incorporation into domestic law of Convention rights may be recognised by the courts as conditioning the constitutional environment in which the doctrine of sovereignty now operates. This is surely the better view. Just as the sovereignty of Parliament is a doctrine

---

which Parliament, acting alone, would struggle to change so too is it a legal doctrine which the courts, acting alone, should not imagine they could change.

What conclusions can we draw from these various observations? Perhaps four sets of concluding remarks can be offered here before we move to the final section of our analysis. As with our conclusions on the rule of law and separation of powers (above) some of what follows will necessarily remain tentative. The first conclusion is to note the similarities between the recent separation of powers cases and the recent sovereignty of Parliament cases. Both sets of cases may be read as pushing in the same general direction: namely, to enhance the ability of the courts to subject the institutions and instruments of parliamentary government to closer and greater account. For all the differences and contradictions apparent in Jackson, there is nothing in the case to suggest a strengthening of the sovereignty of Parliament. Quite the reverse: the case is the clearest expression to date of the range and scale of doubt entertained by Britain’s most senior judges about the law and the future of parliamentary sovereignty, even where (let us remind ourselves) no question of EU law or of European human rights law is in issue. In this sense, case law on the sovereignty of Parliament is a second area in which the recent growth in the rule of law has manifested itself in Britain’s constitutional order. Secondly, however, we can conclude that while our first conclusion describes the general trajectory of the law, not all of their Lordships agree either about what the foundation of parliamentary sovereignty is (for Lord Steyn and others it is the common law; for Lord Hope and others it appears to be judicial recognition of political fact), or about its status as a doctrine of today’s constitutional law (compare Lord Bingham in Jackson with Lords Steyn and Hope). It may be, therefore, that there is greater disagreement within the senior judiciary about this dimension of the recent growth in the rule of law than there is with regard to its other dimensions. Thirdly, as was suggested above, it is notable that the vast bulk of what was said judicially in Jackson about the sovereignty of Parliament did not need to be said given the facts of the case and given the resolution of the legal issue to which those facts gave rise. It is clear that their Lordships, in offering their various opinions on the sovereignty of Parliament cannot have been wholly focused on the case before them. Whether they had an eye cocked more on the ‘nearly case’ (on the 2003-04 Asylum and Immigration (Treatment of Claimants) Bill) or on the ‘future case’, in which sovereignty is finally declared no longer to vest in the Crown in Parliament, but in judicial supervision of the Acts made by the Crown in Parliament, is a matter of speculation. If it is the latter, of course, the precedential value of much of what was said in Jackson may prove to be immense. Even the obiter dicta of the House of Lords may carry considerable weight. Finally, we must ask once again the question ‘Why?’ Given the outcome of Jackson, and given the judicial unanimity as to its outcome, what has been gained or achieved? Formally, at least, the sovereignty of Parliament remains intact: no earlier authority on parliamentary sovereignty was overruled in Jackson. So why bother? What is going on here? This question, it will

---

85 Indeed, in October 2007 Lord Bingham gave a lecture at King’s College London [copy on file with author] in which he explicitly distanced himself from the positions adopted in Jackson by Lords Steyn and Hope, stating that ‘they have no authority as precedent’, that ‘I cannot for my part accept that my colleagues’ observations are correct’, and that ‘It has … been convincingly shown that the principle of parliamentary sovereignty has been recognised as fundamental in this country no because the judges invented it …’ Lord Bingham cited with apparent approval Richard Ekins’ condemnation of Lord Steyn’s position as ‘unargued and unsound’, ‘historically false’ and ‘jurisprudentially absurd’ (see R Ekins, ‘Acts of Parliament and the Parliament Acts’ (2007) 123 Law Quarterly Review 91, 103).
be recalled, was left open in the context of our earlier conclusions on the separation of powers. It is now time to seek to answer it.

IV FUNDAMENTAL RIGHTS

The growth of the rule of law has not happened by accident. In the cases we have considered in this paper the courts have deliberately developed ways in which both government and Parliament may be subjected to further and deeper judicial scrutiny. They have done so, of course, because the previous relationship between the courts and parliamentary government was considered to be unsatisfactory. Now, the central feature of such dissatisfaction lay with the difficulties the courts faced, in the absence of a Bill of Rights in Britain, in seeking to enforce fundamental rights and to protect individual liberties against public authorities, government and Parliament.86 For sure, the common law had for centuries contained some notion of the rule of law87 and there were several well-known decisions in which the common law was able to offer safeguards for individual liberty notwithstanding the absence of a Bill of Rights88 but, by the end of the twentieth century it was felt that greater legal protections than these were required, particularly in the context of the array of legislation passed under the Conservative governments of Margaret Thatcher and John Major in which civil liberties were alarmingly curtailed.89

In short, even if it is not the only reason, the central reason why the judges have been seeking to strengthen the rule of law is to give greater expression in the British constitutional order to the protection of individual liberty and to the enforcement of fundamental rights. To this end, the developments we have surveyed here with regard to the separation of powers and the sovereignty of Parliament go hand in hand with the growing body of case law to have emerged under the Human Rights Act itself. If the judges were searching for the ‘tools’ with which they could enhance liberty and rights, they have clearly now obtained them – both from Parliament (the Human Rights Act) and through the force of their own development of common law constitutionalism.90 The question now is, what have they achieved with their new tools? A decade on from the Human Rights Act being introduced into Parliament, how does the judicial record now look?

From a civil libertarian perspective, the answer is that the record is generally bad. Personally, I do not find this surprising. In the 1990s my position on the Bill of Rights debate was that I was against the incorporation of the European Convention

---

86 Consider, eg, the arguments of Lords Woolf and Bingham and of Sir John Laws and Sir Stephen Sedley in the public lectures cited above n 68.
87 See, famously, Entick v Carrington (1765) 19 St Tr 1029.
88 See, eg, Beatty v Gillbanks (1882) 9 QBD 308 (but cf Duncan v Jones [1936] 1 KB 218).
into British law. This was for two main reasons: first, I thought that the courts would use their powers under a Bill of Rights to entrench conservative or illiberal positions and, secondly, I feared that the courts would use a Bill of Rights to quash or limit the extent of socially progressive legislation. While I agreed with Ronald Dworkin’s famous diagnosis that ‘liberty is ill in Britain’, I could not see that turning to the courts could sensibly be viewed as the solution. For me, what was needed was a change in political direction (and a change in government), not an increase in the powers of the courts. These views were informed by and based upon my reading of British case law (and, to some extent, also of case law from other jurisdictions) which, I thought, amply demonstrated the illiberal and socially conservative preferences of the judges. Ten years on, my views are largely unchanged. For sure, it has turned out that my second fear need not have bothered me so much: but this is because precious little socially progressive legislation has been passed under the New Labour governments of Tony Blair and Gordon Brown, not because of a change in the case law. My first objection has, I think, proved largely sustainable, as I shall seek to demonstrate in the analysis that follows. As we shall see, while there have been some surprisingly welcome and progressive decisions, in every instance such decisions have been heavily qualified and, further, there have been several decisions in which the old, illiberal conservatism of the courts has been depressingly repeated. If this analysis is right, of course, it leaves unanswered our core question: if the reason for the growth in the rule of law is not so as to achieve better judicial protection of individual liberties and fundamental rights, what is the reason? We will return to this question in the conclusion.

First, we need to examine the judicial record on fundamental rights so that the claims made in the previous paragraph can be demonstrated. We will do this in two stages. First, a series of four decisions will be outlined in which, it will be argued, the courts failed to rise to the challenge of protecting individual liberty in the face of competing governmental claims. Secondly, we will examine three rather more remarkable cases, in which it may be said that the courts did rise to the challenge. We will see, however, that in each of these instances any victory for liberty was qualified at best, and perhaps even illusory. Our first four cases are *R v Shayler*, *R v Z*, *R (Gillan) v Metropolitan Police Commissioner* and *R (Haw) v Secretary of State for the Home Department*. *R v Shayler* was a challenge to the compatibility with Article 10 of the European Convention on Human Rights of certain provisions of the Official Secrets Act 1989. At the time of its enactment critics saw the Act as one of the Thatcher government’s most obnoxious assaults on freedom of political expression. Section

---

91 The influence of my two senior colleagues at King’s College London (where I taught in the 1990s), Keith Ewing and Conor Gearty, will be obvious to anyone familiar with their work from this period. It is a pleasure once again to record how much I learned from their scholarship. As the remainder of this paper will make clear, however, I do not share Professor Gearty’s new-found enthusiasm for the Human Rights Act. As will become clear, I strongly disagree with him that it has been what he describes as ‘a great success’ (see C Gearty, *Principles of Human Rights Adjudication* (2004) v).


95 [2005] 2 AC 645.


97 [2006] QB 780.

1 of the 1989 Act makes it a criminal offence for a member or former member of the security and intelligence services to disclose any information relating to security or intelligence which came into that person’s possession by virtue of his employment in the services. No damage to Britain’s national security need actually (or even potentially) be caused by the disclosure and it is no defence to a charge under section 1 that the disclosure was in the public interest (on the ground that, for example, it revealed corruption in the services). In Shayler the House of Lords ruled that, notwithstanding the breathtaking scope of this section, it did not breach the protection of freedom of expression afforded by Article 10. Had the Act’s ban on the disclosure of such information been absolute, Lord Bingham suggested, Article 10 would have been breached. But, as it was, the Act allowed members and former members of the services to disclose concerns they may have as to the lawfulness of the service’s activities to the Attorney General, to the Director of Public Prosecutions or to the Metropolitan Police Commissioner, and to disclose concerns about misbehaviour, irregularity, maladministration or incompetence in the services to the Home, Foreign or Northern Ireland Secretaries, to the Prime Minister, to the Cabinet Secretary or to the Joint Intelligence Committee. Their Lordships ruled that such avenues were sufficient, given what Lord Bingham described as “the need for a security or intelligence service to be secure.”

R v Z concerned proscription of terrorist organisations. Section 3 of the Terrorism Act 2000 provides that ‘an organisation is proscribed if (a) it is listed in Schedule 2 to the Act or (b) it operates under the same name as an organisation listed in that Schedule’. The consequences of proscription could hardly be more serious: section 11 of the Act makes it a criminal offence, punishable by up to ten years imprisonment, to belong or even to profess to belong to a proscribed organisation. A number of defendants were charged with being members of the Real Irish Republican Army (‘Real IRA’), contrary to section 11. They argued in their defence that the Real IRA was not proscribed, as it was not listed in Schedule 2 to the Terrorism Act. Whereas the ‘Irish Republican Army’ (IRA) was proscribed, as was the ‘Continuity Army Council’, the Real IRA was not. The trial judge accepted the defence and acquitted the defendants on that ground. The Attorney General for Northern Ireland referred the matter to the Court of Appeal of Northern Ireland, which ruled, contrary to the trial judge, that a person does commit an offence under section 11 if he or she belongs, or professes to belong, to the Real IRA. On appeal to the House of Lords their Lordships unanimously agreed with the Court of Appeal. The House of Lords noted that the Real IRA was distinguished from other organisations in other contexts: the Northern Ireland (Sentences) Act 1998 provides for the accelerated release of certain prisoners convicted of terrorist offences, but not if the prisoners are supporters of a specified organisation. Four such organisations have been specified by the Secretary of State: the Continuity IRA, the Real IRA, the Irish National Liberation Army and the Loyalist Volunteer Force. In this context, care has been taken to distinguish the IRA from the Continuity IRA and from the Real IRA, both of which have been recognised as different for these purposes from the IRA itself. Nonetheless, the House ruled that in the context of the Terrorism Act 2000 the inclusion on the list of proscribed organisations of the IRA was to be read as including the Real IRA. Counsel for the defendants conceded that the Real IRA is a terrorist organisation deserving of proscription but he insisted that the task of the courts is to interpret the provision that Parliament has actually enacted and not (in the words of Lord Bingham) ‘to give effect to an inferred intention of Parliament not

fairly to be derived from the language of the statute'.

100 Lord Carswell defended the decision of the House of Lords by referring to the ‘mischief’ rule of interpretation: namely, that the courts will have regard not only to the language of the statute, but also to the mischief which the statute was intended to remedy. Parliament had intended that the Real IRA be proscribed, even if it had not stated so expressly, and the Act should be interpreted accordingly.

101 We may well wonder whether such a method of interpretation is appropriate in the criminal context or, indeed, when fundamental rights such as the right to liberty and to security of the person are at stake.

It may be objected that the facts of *Shayler* and *R v Z* are unpromising in terms of a search for effective judicial protection of liberty and fundamental rights. After all, in *R v Z* counsel for the defendants conceded that the Real IRA ought to have been proscribed; and Shayler was a former MI5 officer who had leaked classified information to the *Mail on Sunday* newspaper without having gone through any of the channels for voicing grievances available to him; he had then fled the country for three years, before returning to face charges. In the event he was jailed for six months (of which term he served seven weeks before being released). It may be countered, however, that it is of the essence of human rights that they belong to all of us, even extremists, terrorists and criminals, and that it undermines the very idea of human rights for the courts to be somehow less rigorous in their enforcement when the court is out of sympathy with the politics of the party before it.

Of our next two cases, however, no such issue arises. *R (Gillan) v Metropolitan Police Commissioner* concerned a protester on a bicycle who was stopped and searched under the *Terrorism Act* when all he wanted to do was to protest peacefully against an arms fair in London, and *R (Haw) v Secretary of State for the Home Department* concerned the lawful protest of one Brian Haw, who spent many years camped outside in Parliament Square protesting against policy with regard to Iraq. The decisions of the courts in these two cases are, from a civil liberties perspective, thoroughly disturbing. In *Gillan* the House of Lords unanimously ruled that what had been described in a lower court as the ‘extraordinary’ and ‘sweeping’ stop and search powers contained in sections 44-47 of the *Terrorism Act 2000* may lawfully be used in the context of the police stopping apparently peaceful protesters from approaching an international arms fair to protest against Britain’s involvement in the arms trade. The appellants’ argument that the powers should be read as being available only where there were reasonable grounds for considering that their use was necessary and suitable for the prevention of terrorism was summarily dismissed. Lord Bingham ruled that ‘the principle of legality [whereby general legislative words are to be read subject to fundamental rights102] has no application in this context, since even if these sections [of the *Terrorism Act*] are accepted as infringing a fundamental human right, itself a debatable proposition, they do not do so by general words but by provisions of a detailed, specific and unambiguous character’.

*R (Haw) v Secretary of State for the Home Department* concerned Mr Brian Haw, who had been conducting a demonstration outside the Houses of Parliament in Westminster since 2001. Living on the pavement and displaying a number of placards he had been demonstrating, first, about sanctions against Iraq and, more recently, about British government policy in Iraq. In 2002 Westminster City Council
sought an injunction requiring Mr Haw to move his placards on the basis that they were an obstruction to the highway. The application for an injunction failed: the court held that Mr Haw’s demonstration neither caused an obstruction to the highway nor gave rise to any fear that a breach of the peace might arise. The court held, on these grounds, that the demonstration was lawful.\(^\text{104}\)

In 2005 Parliament passed the **Serious Organised Crime and Police Act**. Sections 132-38 of that Act seek to give to the Metropolitan Police a significant measure of control over demonstrations which take place within a designated area in the vicinity of Parliament. The Act does not forbid such demonstrations but, by section 133(1), it requires any person who intends to organise a demonstration in the area to apply to the police for authorisation to do so. Under section 132(1),

\[
\text{Any person who (a) organises a demonstration in a public place in the designated area, or (b) takes part in a demonstration in a public place in the designated area, or (c) carries on a demonstration by himself in a public place in the designated area, is guilty of an offence if, when the demonstration starts, authorisation for the demonstration has not been given...}
\]

Shortly after the Act came into force Mr Haw sought a declaration that the regime in sections 132-38 of the Act did not apply to him, on the basis that his demonstration did not ‘start’ (within the meaning of section 132(1)) while the 2005 Act was in force: his demonstration had started several years previously and was continuing when the 2005 Act came into force. The Divisional Court, by a majority, agreed that the Act did not apply to Mr Haw’s demonstration.\(^\text{105}\) The Secretary of State appealed to the Court of Appeal, which allowed the appeal. In the judgment of the Court of Appeal, handed down by Sir Anthony Clarke MR, even though there was express statutory reference to the ‘start’ of demonstrations, Parliament did not intend to confine the new legal regime to new demonstrations but meant to include within it pre-existing demonstrations, and the legislation should be read accordingly. As in *R v Z* and *Gillan*, so too in *Haw* is a statute judicially interpreted against the interests of individual liberty, even where an alternative and perfectly plausible interpretation is available.

The grave restrictions imposed by the **Serious Organised Crime and Police Act 2005** have proved controversial and unpopular. Upon becoming Prime Minister in June 2007 Gordon Brown swiftly published a consultation paper on constitutional reform, in which, among many other things, the government undertook to ‘consult widely’ on the provisions of the 2005 Act, ‘with a view to ensuring that people’s right to protest is not subject to unnecessary restrictions’.\(^\text{106}\) It is indicative of such an initiative should have been taken by the government without prompting from the courts. The courts had their opportunity, but they chose not to take it. As suggested above, no one with knowledge of the history of the British courts’ many rulings on liberty and security in the twentieth century should be surprised by the dismal rulings in *Gillan* and *Haw*.

Rather more surprising are some of the decisions we will now move to examine. While *Shayler*, *R v Z*, *Gillan* and *Haw* show that the courts have made

\(^{104}\) Westminster CC v Haw (2002) 146 SJLB 221.

\(^{105}\) [2006] QB 359.

\(^{106}\) The Governance of Britain (Cm 7170, July 2007) [166]. A consultation document, Managing Protest Around Parliament, was published in October 2007 (Cm 7235).
numerous decisions in the Human Rights Act era in which they have failed to protect fundamental rights and individual liberties, this is not to say that there are no cases that go the other way. Three decisions stand out as remarkable instances of judicial protection of rights. The trouble is, as we shall see, that each instance is subject to heavy qualification. The three decisions referred to are: A v Secretary of State for the Home Department,107 R (Limbuela) v Secretary of State for the Home Department108 and R (Laporte) v Chief Constable of Gloucestershire.109 Each of these will now be considered in turn.

A v Secretary of State for the Home Department is a very well known case – perhaps the most famous case thus far decided under the Human Rights Act.110 Sometimes referred to as the case of the ‘Belmarsh Detainees’, this is the case in which the House of Lords ruled by an eight-to-one majority that the indefinite detention without trial of suspected international terrorists, authorised under the Anti-terrorism, Crime and Security Act 2001, was unlawful as being both a disproportionate interference with the right to liberty under Article 5 of the European Convention on Human Rights and a discriminatory measure in breach of Article 14 of the Convention. The background is as follows. When it introduced the Anti-terrorism, Crime and Security Bill into Parliament the government knew that the provisions concerning indefinite detention without trial would be in breach of Article 5. As a result, the government ‘derogated’ from Article 5 for the purposes of these provisions. Derogation from the Convention is governed by Article 15(1) of the Convention, which provides that ‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation …’ Now, it is important to understand that the regime of indefinite detention without trial was not what the government ideally wanted for suspected international terrorists. The government would prefer that suspected international terrorists were deported. This option is not always available, however, as a result of the ruling of the European Court of Human Rights in Chahal v United Kingdom.111 In that case the European Court held that it would be a breach of Article 3 of the Convention for a state to deport a person where ‘substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country’.112 Article 3 is non-derogable: the terms of Article 15(2) make it impossible for a state to derogate from Article 3. This is the problem that the regime of indefinite detention without trial was meant to be the solution to and, crucially, it explains why the scheme applied only to persons who were subject to immigration control. Nationals cannot be deported in any event.

For the House of Lords to rule (as the majority did) that the scheme of indefinite detention without trial was in breach of Article 5 their Lordships first had to deal with the legality of the derogation. If the derogation from Article 5 was lawful the Act’s interference with the right to liberty could not be unlawful. There

---

107 [2005] 2 AC 68.
111 (1996) 23 EHRR 413.
112 Ibid [74].
are two main tests contained in Article 15(1), both of which must be satisfied for a derogation to be lawful. The first is that the derogation must be made in ‘time of war or other public emergency threatening the life of the nation’; the second is that the measures taken must be ‘strictly required by the exigencies of the situation’. In A, eight of the law lords (i.e., all except Lord Hoffmann) accepted that the derogation was made in time of public emergency threatening the life of the nation. Of these eight, all but one (Lord Walker) held that the derogating measures were not strictly required and were therefore unlawful.

The scheme of indefinite detention without trial was held to suffer from two flaws, both of which undermined its claim to be ‘strictly required’ within the meaning of Article 15(1). The first was that while the government conceded that the threat from international terrorism was not limited to non-nationals, the power to detain without trial was so limited. If measures short of indefinite detention without trial were sufficient for British citizens suspected of involvement in or support for international terrorism, then so too were they sufficient for non-nationals. The second was that all those detained under the scheme were ‘free to leave’ the United Kingdom if they chose to do so – indeed, as we have seen, the government claimed that it wanted the detainees to leave and would have deported them if it had been legal to do so. A number of those detained did indeed leave the UK for other countries. One left for France, where he was subsequently released. Yet, if the detainees were such a threat to the United Kingdom that their indefinite incarceration was required, why allow them to leave for and potentially to be released in other countries, where they would be relatively free to plot their treachery?

The final aspect of their Lordships’ ruling in A concerned discrimination. We saw above why the government presented the measures in the Act as ‘immigration measures’ that could apply only to persons subject to immigration control (i.e., to non-nationals). While the Court of Appeal accepted this analysis, the majority of the House of Lords did not. For the majority of their Lordships the appropriate comparator with the detainees was not those with no right of abode who are not suspected international terrorists but those with a right of abode who are suspected international terrorists. Seen in this light the measures were discriminatory and were, accordingly, held to be in breach of Article 14 of the Convention as well as being in breach of Article 5.

A great deal has been written about this case. It has been widely celebrated as a great vindication of the Human Rights Act. David Feldman, for example, went so far as to describe it as ‘perhaps the most powerful judicial defence of liberty since Leach v Money (1765) 3 Burr 1692 and Somersett v Stewart (1772) 20 St Tr 1’ and claimed that it ‘will long remain a benchmark in public law’.\footnote{Cambridge Law Journal 271, 273.} It is, in some respects, a remarkable decision but, even so, we should not allow ourselves to be carried away. One of the remarkable features of the case is the rhetoric employed by a number of their Lordships. Lord Rodger, for example, stated that ‘national security can be used as a pretext for repressive measures that are really taken for other reasons’,\footnote{2 AC 68, [177].} while Baroness Hale stated that ‘Unwarranted declarations of emergency are a familiar tool of tyranny’.\footnote{Ibid [226].} Even Lord Walker, who dissented and who would have upheld the legality of the measures, conceded that ‘a portentous but non-specific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government’ and that ‘national security can be the last refuge of
the tyrant’. It was Lord Hoffmann, however, who delivered the fieriest rhetoric when, in concluding that there was no ‘public emergency threatening the life of the nation’, he declared that ‘the real threat to the life of the nation … comes not from terrorism but from laws such as these.’ A second remarkable feature of the decision is how starkly it stands at odds with earlier British case law concerning measures taken in the interests of national security. In a series of cases ranging from the First World War at the beginning of the twentieth century to the Cold War at its end (and beyond), the courts had repeatedly upheld the legality of a wide variety of oppressive measures taken by the state in the name of national security. What is so immediately arresting about the decision in A is precisely its novelty.

All of this said, however, we should take great care not to exaggerate what was achieved by the A case. For one thing, we need to consider what happened next and, for another, we need to consider the extent to which A appears to have set any sort of precedent. After A was decided those detained under the 2001 Act remained in detention: none was released. The following year Parliament passed the Prevention of Terrorism Act 2005, which replaced the system of indefinite detention without trial with a new system of ‘control orders’. Under section 2(1) of the 2005 Act the Secretary of State may impose a ‘control order’ on any individual (whether a British national or not)

if he (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.

Control orders may include a considerable range of restrictions on an individual, listed in section 1(4). As well as round the clock surveillance, these include restrictions on where a person may live, on the hours of the day when a person is permitted to leave his house and on the people a person is able to meet, as well as other matters. Control orders made by the Secretary of State are known as ‘non-derogating control orders’. Control orders that infringe the right to liberty under Article 5 and that, to be lawful, require a derogation to be made from Article 5, may be imposed only by a court.

Control orders have been challenged in two sets of legal proceedings. In the first, several individuals who had been subjected to non-derogating control orders argued that the restrictions on their liberty were so severe as to engage – and to infringe – their Convention rights under Article 5. Sullivan J in the Administrative Court ruled in the individuals’ favour and both the Court of Appeal and House of Lords dismissed the Secretary of State’s appeal: Secretary of State for the Home Department v JJ and others. The control orders at issue in this case required the

---

116 Ibid [193].
117 Ibid [97].
119 [2006] EWHC 1623 (Admin); [2006] 3 WLR 866 (CA); [2007] 3 WLR 642 (HL). The House of Lords was split three-to-two. Lords Bingham, Hale and Brown were in the majority; Lords Hoffmann and Carswell dissented. A second set of legal proceedings
individuals concerned to remain within their one-bedroom flats at all times save for a period of six hours from 10.00am until 4.00pm; visitors had to be authorised by the Home Office, to which name, address, date of birth and photographic identity had to be supplied; the flats were subject to spot searches by the police; and during the six hours of the day when the individuals were not confined to their flats they remained confined to certain restricted urban areas, which deliberately did not extend (except in one case) to areas where the individuals had previously lived. As Sullivan J expressed it,

I do not consider that this is a borderline case. The collective impact of the obligations [imposed] could not sensibly be described as mere restrictions upon the respondents’ liberty of movement. In terms of the length of the curfew period (18 hours), the extent of the obligations and their intrusive impact on the respondents’ ability to lead a normal life, whether inside their residences within the curfew period, or for the six hour period outside it, these control orders go far beyond the restrictions in those cases where the European Court of Human Rights has concluded that there has been a restriction upon but not a deprivation of liberty.

It is to be noted that it was not the overall system of control orders that was held to be unlawful in this case: it was merely that the particular control orders affecting the claimants had been made by the Secretary of State and not by a court. It is also to be noted that, even though Sullivan J did not consider this to be a borderline case, the House of Lords evidently did. Their Lordships were divided three-to-two on whether the control orders in this case violated Article 5 or not. Two Law Lords (Lords Hoffmann and Carswell) held that they did not.

A second factor we should bear in mind when assessing the impact of the House of Lords’ decision in A is the extent to which the more robust – or more critical – attitude the majority of their Lordships displayed towards the relationship between personal freedom and national security has been sustained in subsequent case law. We have already considered the judgment in R (Gillan) v Metropolitan Police Commissioner. A further case which, like Gillan, shows the decidedly limited commitment of the House of Lords to the interests of liberty in the context of national security is R v Jones.120 Here, several anti-war protesters were prosecuted for various offences (such as criminal damage and aggravated trespass) that they had committed while breaking into military bases in order to protest against the Iraq War. Their actions were described by Lord Bingham as ‘entirely peaceable and involv[ing] no violence of any kind to any person’, albeit that they caused damage to property. The defendants argued in their defence that their actions were lawful under the Criminal Law Act 1967, section 3, which provides that ‘a person may use such force as is reasonable in the circumstances in the prevention of crime’. The Iraq War, they argued, was a crime of aggression, contrary to customary international law, customary international law being recognised and enforced by domestic law and falling, therefore, within the meaning of ‘crime’ for the purposes of section 3. This argument was unsuccessful. Lord Bingham ruled that the 1967 Act applied only to domestic crime and not to crimes contrary to international law. He noted that it had

120 [2007] 1 AC 136.
never been a defence to a charge under the Treason Act 1351 or under the common law of sedition that the Crown or the government had committed itself to an unjust or unlawful cause. Lord Hoffmann ruled that, ‘The decision to go to war, whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs’. Moreover, his Lordship added to his opinion several paragraphs on what he termed ‘the limits of self-help’ and civil disobedience, in which he stated as follows:

Of course citizens are entitled, indeed required, to refuse to participate in war crimes. But if they are allowed to use force against military installations simply to give effect to their own honestly held view of the legality of what the armed forces of the Crown are doing, the Statute of Treason would become a dead letter. In my opinion, therefore, the District Judges would have been right to convict even if aggression had been a crime in domestic law. The apprehension, however honest, that such a crime was about to be committed could not have made it reasonable for the defendants to use force of any kind to obstruct military activities …

In short, while A v Secretary of State for the Home Department is a fascinating and remarkable decision, the extent to which it can genuinely be said to be a landmark of judicial protection of individual liberty must surely be questioned both by the severe regime of control orders to which the decision gave rise and by the tone and outcome of subsequent cases such as Gillan and Jones.

Our last two examples of judicial protection of fundamental rights – Limbuela and Laporte – can be dealt with more swiftly. Limbuela concerned the extent to which Article 3 of the European Convention on Human Rights (the prohibition on torture, degrading and inhuman treatment) imposes positive obligations on the state. The background is as follows. Section 95 of the Immigration and Asylum Act 1999 provides that the Secretary of State may arrange for the provision of a range of support services for asylum seekers ‘who appear to the Secretary of State to be destitute or to be likely to become destitute’ within a certain period of time. Section 55 of the Nationality, Immigration and Asylum Act 2002 provides, by way of exception, that the Secretary of State may refuse support services to asylum seekers whose claims for asylum were not made as soon as reasonably practicable after the person’s arrival in the United Kingdom. (In practice this provision has restricted benefits and support services to those asylum seekers who claimed asylum only at the port of entry: a claim made at any point after the person had passed the point of immigration control was likely to be regarded as having been made too late, unless there were special circumstances.) Section 55(5)(a) of the 2002 Act provides that ‘This section shall not prevent the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person’s Convention rights’. This provision needs to be read together with section 6(1) of the Human Rights Act, which provides that ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’.

Limbuela, a national of Angola, maintained that he arrived in the United Kingdom at an unknown airport accompanied by an agent and that on the same day he claimed asylum at the Asylum Screening Unit at Croydon. He was provided with emergency accommodation but it was subsequently decided that he had not claimed

---

121 Ibid [87]-[88] (emphasis added).
asylum as soon as reasonably practicable and he was evicted from his accommodation. He spent two nights sleeping rough, during which time he had no money and no access to food or to washing facilities. After being advised to contact a solicitor he obtained interim relief and permission to seek judicial review. He argued that his treatment violated his rights under Article 3 (in that he was subjected to inhuman or degrading treatment). The House of Lords unanimously agreed.

Professor Sandra Fredman has written of this case that it shows how in a human rights framework positive duties play a ‘pivotal role’. ‘The House of Lords in *Limbuela,*’ she adds, ‘has articulated a basic value of our unwritten constitution, namely that the state is responsible for preventing destitution which arises as a consequence of the statutory regime.’ As with the Belmarsh Detainees’ case, however, the value of the ruling in *Limbuela* is strictly limited. Consider, for example, the tragic case of *N v Secretary of State for the Home Department.* *N,* born in Uganda, sought asylum in the United Kingdom. Her claim was refused and the Secretary of State proposed to deport her. She suffered from advanced HIV/AIDS. With medical treatment her condition had stabilised such that, if the treatment continued, she could live for decades. Without continuing treatment (principally medication), however, her prognosis was ‘appalling’: as Lord Nicholls reported it, ‘she will suffer ill-health, discomfort, pain and death within a year or two’. As Lord Nicholls went on to say, ‘The cruel reality is that if [N] returns to Uganda her ability to obtain the necessary medication is problematic. So if she returns to Uganda and cannot obtain the medical assistance she needs to keep her illness under control, her condition will be similar to having a life-support machine switched off.’ She argued that, in these circumstances, deporting her to Uganda would be incompatible with her rights under Article 3. The House of Lords unanimously rejected this argument. Lord Nicholls ruled that ‘Article 3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment lacking in their home countries … Article 3 cannot be interpreted as requiring contracting states to admit and treat AIDS sufferers from all over the world for the rest of their lives.’ Were this an exceptional case, he suggested, ‘the pressing humanitarian considerations of her case would prevail’ but, alas, it was far from exceptional, the prevalence of AIDS worldwide, and particularly in southern Africa, being ‘a present-day human tragedy on an immense scale.’

Our final case is *R (Laporte) v Chief Constable of Gloucestershire.* Ms Laporte was travelling on a coach from London to Gloucestershire in order to take part in a protest against the Iraq War at a US Air Force base at Fairford. Several coach-loads of protesters were making the same journey. The police had received intelligence that a number of the passengers intended to breach the peace and that not all of the protesters would act peacefully. A few miles from Fairford, at Lechlade, the police stopped the coaches, boarded them and searched them. It was apparently impossible for the police to identify with certainty which of the passengers intended to protest violently and which peacefully. All the passengers

125  Ibid [3].
126  Ibid [4].
127  Ibid [15], [17].
128  Ibid [9].
129  [2007] 2 AC 105.
were ordered to return to London and were escorted throughout the two-and-a-half hour journey by the police. The coaches were not allowed to stop and no passenger was permitted to disembark until the coaches reached London. On an application for judicial review the claimant argued that the police had acted unlawfully (1) in preventing her from travelling to the demonstration at Fairford and (2) in returning her to London in the manner described above. The Divisional Court and the Court of Appeal held against the claimant on the first point and for the claimant on the second point. The House of Lords unanimously allowed the claimant’s appeal (and unanimously dismissed the Chief Constable’s cross-appeal). Lord Carswell summarised the legal issues in *Laporte* in the following, stark manner: ‘the appellant … was prevented from taking part in a lawful demonstration at the Fairford air base. In a country which prides itself on the degree of liberty available to all citizens the law must take this curtailment of her freedom of action seriously.’130 Lord Bingham ruled as follows:

[Counsel for Laporte] argued that the Chief Constable’s interference was not prescribed by law because not warranted by domestic legal authority. According to that authority there is a power and duty resting on constable and private citizen alike to prevent a breach of the peace which reasonably appears to be about to be committed. That is the test laid down in *Albert v Lavin* [1982] AC 546 … It refers to an event which is imminent, on the point of happening. The test is the same whether the intervention is by arrest or … by action short of arrest. There is nothing in domestic authority to support the proposition that action short of arrest may be taken when a breach of the peace is not so imminent as would be necessary to justify an arrest … [Counsel for the Chief Constable] took issue with this argument. The true principle of domestic law is, he submitted, that the police may and must do whatever they reasonably judge to be reasonable to prevent a breach of the peace. The only legal restriction on what steps may be taken by the police is one of reasonableness. There is no absolute requirement of imminence before the power to take reasonable steps arises, although questions of imminence will be relevant to what is reasonable. A breach of the peace need not be apprehended to take place in the immediate future for the power and duty to prevent it to arise … I am persuaded, for very much the reasons advanced by [counsel for Laporte] … that the Chief Constable’s interference with the claimant’s right to demonstrate at a lawful assembly at RAF Fairford was not prescribed by law … The action was premature because there was no hint of disorder at Lechlade and no reason to apprehend an immediate outburst of disorder by the claimant and her fellow passengers when they left their coaches at the designated drop-off points in Fairford and gathered in the designated assembly area before processing to the base. Because the action was premature it was necessarily indiscriminate because the police could not at that stage identify those (if any) of the passengers who appeared to be about to commit a breach of the peace … 131

The decision is welcome and is a rare example of the courts not upholding the legality of police action in the context of public order law. But, as with *A* and *Limbuela*, we should be hesitant to conclude that *Laporte* heralds a new general

130 Ibid [92].
131 Ibid [39], [40], [45], [53].
direction in the law. Laporte may be contrasted, for example, with the decision in Austin v Metropolitan Police Commissioner. Austin concerned the policing in London of the May Day protests of 2001, when the police kept about 3,000 assorted anti-globalisation and anti-capitalist protesters confined at Oxford Circus for seven hours (from about 2.30pm until about 9.30pm). Tugendhat J held that this action engaged but did not breach Article 5 of the European Convention on Human Rights and that while the confinement constituted false imprisonment, it was justified under the doctrine of necessity.

To sum up, we have seen in this section that, in a number of instances, the courts have maintained their disappointing record in civil liberties law and that there are many continuities in the post Human Rights Act case law with the position as it stood in 1998. We have also seen that, while there have been some remarkable and apparently bold instances of the judicial protection of individual liberty – even in the face of strong governmental or police claims as to what is necessary in the interests of national security or public order – even the most apparently progressive decisions are limited and heavily qualified, either in their own terms or when read in the light of other cases. None can yet be said to have made general changes in the overall direction of the law.

V CONCLUSION

In this paper I have made two basic arguments. The first is that Blair’s Britain, owing to a combination of legislative and common law factors, witnessed significant growth in the reach of the rule of law as a doctrine whereby the institutions and instruments of parliamentary government are subject to legal control. As we saw in Parts 2 and 3 of this paper, this growth in the rule of law manifested itself, in particular, in case law concerning the separation of powers and the sovereignty of Parliament. As we also saw, while the increased prominence in domestic law of Convention rights is part of the explanation for this growth, it cannot be the entire explanation. The internal development of common law constitutionalism has provided an additional impetus. The second basic argument is that, even though the enhanced protection of fundamental rights and individual liberty was widely stated to be a core justification of this growth in the rule of law, the judicial record in civil liberties law was markedly similar in Blair’s Britain to its all too dismal record in the pre Human Rights Act era. Despite the notoriety of one or two apparently progressive decisions under the Human Rights Act (notably A v Secretary of State for the Home Department) a close examination of the case law reveals that little has been achieved by way of increased judicial protection of civil liberties.

What has been achieved is a deeper underscoring of the dividing line between the judiciary on the one hand and the institutions of parliamentary government on the other. This is evident in the case law both on the separation of powers and on the sovereignty of Parliament. Thus, the rule of law was principally used in Blair’s Britain not so much to safeguard fundamental rights as to loosen ties between the judiciary and the other branches of the state. What has happened amounts to an exercise in re-positioning, so that the courts are better placed now than they were a decade ago to embark on a constitutional move against the government and/or Parliament, whenever that time should come. For all the background noise we have heard from various judges’ public lectures, for all the obiter in Jackson and for all

the rhetoric in the A case, that fundamental move against Britain’s still parliamentary (rather than juridical) government has not yet occurred. Simms, Anderson, Robinson, Jackson and even the A case mean that the courts are more strongly placed now to make such a move than they have been at any time in living memory – and that is the true significance, constitutionally, of these cases. They require us to think less in terms of what the British constitution would look like if the judges asserted themselves and more in terms of what it will look like when they do so. As has been the case for much of the constitutional reform we have seen in Britain since 1997, such a move, when it comes, may well be made in the name of individual liberty, but whether it is actually individual liberty that is strengthened, or merely the constitutional power of the judiciary, remains to be seen. If the past – even the recent past – is any guide, it is clear which of these is the more likely.