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3

Legislative sovereignty and the rule of law

I Introduction

Throughout the common law world, it is increasingly assumed that legislative sovereignty – legislative power that is legally unlimited[1] – is incompatible with 'the rule of law'.[2] Those who regard the rule of law as an actual legal principle sometimes argue that it necessarily excludes or overrides any doctrine of legislative sovereignty. Others, who regard the rule of law as a political ideal or aspiration, sometimes argue that it requires any doctrine of legislative sovereignty to be repealed, and legislative power subordinated to constitutionally entrenched rights.

In this chapter I will challenge the assumption, common to both arguments, that legislative sovereignty is incompatible with the rule of law. Strong opinions have been expressed for and against. It has been claimed that '[i]f parliament … can change any law at any moment … then the rule of law is nothing more than a bad joke'.[3] On the other hand, claims of that kind have been disparaged as 'judicial supremacist rhetoric',[4] and judicial review of legislation as a 'corrupting constitutional innovation – which [only] in vulgar jurisprudence is thought to support the doctrine of the rule of law'.[5] The disagreement is not a new one. Over fifty years ago, F.A. Hayek's argument that bills of rights enhanced the rule of law was severely criticised for confusing 'the Rule of Law' with 'the Rule of

[1] This can be treated as a stipulative definition of 'legislative sovereignty' for the purposes of this chapter. In addition, by 'legal limit' I will mean a judicially enforceable limit.

[2] See, e.g., F. Jacobs, *The Sovereignty of Law: the European Way, The Hamlyn Lectures 2006* (Cambridge: Cambridge University Press, 2007), p. 5; V. Bogdanor, 'The Sovereignty of Parliament or the Rule of Law?', Magna Carta Lecture, 15 June 2006, p. 20, available at http://royalholloway.org.uk/About/magna-carta/2006-lecture.pdf.

[3] G. de Q. Walker, *The Rule of Law, Foundation of Constitutional Democracy* (Melbourne: Melbourne University Press, 1988), p. 159.

[4] M. Elliott, 'Reconciling Constitutional Rights and Constitutional Orthodoxy' *Cambridge Law Journal* 474 (1997) 56 at 476.

[5] P. Morton, *An Institutional Theory of Law; Keeping Law in its Place* (Oxford: Clarendon Press, 1998), p. 371.

Hayek'.[6] The critic, Herman Finer, strongly defended majoritarian democracy, claiming that in Britain '[t]he Rule of Law is not juridical, it is parliamentary.'[7]

II Legal principle or political ideal?

The rule of law is first and foremost a political principle, an ideal or aspiration that may or may not be guaranteed by law. It can be regarded as a constitutional (but non-legal) principle, if a constitutional convention requires compliance with it.[8] If and insofar as it is judicially enforceable, it can also serve as a legal principle.

Most if not all common law jurisdictions treat the rule of law as a principle of common law, which unquestionably governs the decisions and actions of the executive and judicial branches of government. In addition, it is sometimes expressly mentioned in written constitutions, or regarded as implicit in them. Whether it is common law, constitutional, or both, the principle is sometimes said to govern the legislature as well as the other branches of government, and to be capable of overriding legislation. Trevor Allan and Sir John Laws, for example, claim that the doctrine of parliamentary sovereignty is incompatible with more fundamental legal principles, including the rule of law, which are supposedly embedded in Britain's largely unwritten constitution.[9] In Canada, the Supreme Court has often stated that the rule of law, expressly mentioned in the Preamble to the Charter of Rights, is also by implication fundamental to the Constitution as a whole.[10] According to one commentator, Supreme Court dicta support the proposition that this constitutional principle binds the legislative as well as the executive branch of government, and could therefore be used to invalidate legislation.[11] In

[6] H. Finer, *The Road to Reaction* (London: Dennis Dobson, 1945), ch. 4 *passim*.

[7] *Ibid*., p. 38.

[8] Constitutional conventions are rules or principles governing the exercise of governmental powers, which officials accept as obligatory even though they are not judicially enforceable.

[9] T.R.S. Allan, *Law, Liberty and Justice: the Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), p. 16; Sir John Laws, 'Law and Democracy' *Public Law* 72 (1995) at 85 and 88.

[10] *Reference Re Manitoba Language Rights* [1985] 1 S.C.R. 721 at 750–1, quoted in P. Monahan, 'Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government' *Osgoode Hall Law Journal* 33 (1995) 411 at 421–2.

[11] *Ibid*., *passim*.

Australia too, the rule of law has frequently been described as a fundamental principle implied by the Constitution, and two members of the High Court have hinted that it might justify the invalidation of certain kinds of unjust legislation.[12]

Notwithstanding the importance and interest of such claims, I will be concerned in this chapter with the rule of law considered as a political rather than as a legal principle. The fundamental issue is the incompatibility of legislative sovereignty with that political principle. It is an important issue in its own right, for both political philosophy and constitutional design. Moreover, the content and scope of the rule of law as a legal principle is ultimately determined by that political principle, subject to limitations and qualifications due to other legal principles. These limitations and qualifications vary from one jurisdiction to another, and raise complex legal questions that are beyond the scope of this chapter.[13] As a political principle, the rule of law is a 'supra-national concept' of potentially universal significance, rather than a legal principle of a particular jurisdiction.[14]

It is important not to confuse two different questions. The first is whether legislatures are bound by the rule of law considered as a political principle. Few people would deny that they are, just as few would deny that legislatures are also bound by other political principles, such as equality and justice. This is perfectly compatible with legislative sovereignty, which I have defined as legislative power that is legally – not morally or politically – unlimited. In Britain, the doctrine of parliamentary sovereignty co-exists with constitutional conventions requiring Parliament to comply with many principles of political morality, including the rule of law.[15]

I am interested in a different question: namely, whether legislative sovereignty is incompatible with the rule of law – or in other words, whether the rule of law requires that legislative power be subject to legal (judicially enforceable) limits.[16] That legislative sovereignty and

[12] *Kartinyeri* v. *Commonwealth* (1998) 152 ALR 540 at 569 (Gummow and Hayne JJ). See also the remarks of Justice John Toohey, in 'A Government of Laws, and Not of Men?' *Public Law Review* 4 (1993) 158 at 160 and 174.

[13] Chapters 2, 9 and 10 deal with arguments to the effect that legislative sovereignty is limited by the common law. See also J. Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Oxford: Clarendon Press, 1999), esp. ch. 10.

[14] See Norman Marsh, 'The Rule of Law as a Supra-National Concept', in A.G. Guest (ed.), *Oxford Essays in Jurisprudence* (1st series) (Oxford: Oxford University Press, 1961), p. 223.

[15] G. Marshall, *Constitutional Conventions* (Oxford: Clarendon Press, 1994), pp. 9 and 201.

[16] See n. 1, above.

the rule of law are incompatible has been assumed by critics who have accused A.V. Dicey of inconsistency for simultaneously adhering to both principles.[17] As Martin Loughlin puts it, '[h]ow can an absolutist doctrine of sovereignty rest in harmony with the idea of the rule of law? From the standpoint of mainstream contemporary jurisprudence the issue seems irreconcilable.'[18] Trevor Allan asserts that 'it is ultimately impossible to reconcile … the rule of law with the unlimited sovereignty of Parliament … An insistence on there being a source of ultimate political authority, which is free of all legal restraint … is incompatible with constitutionalism.'[19] More recently, Geoffrey de Q. Walker has proclaimed 'the simple truth that parliamentary omnipotence is an absurdity and that legislative power must be balanced by the rule of law, not just as a set of procedural safeguards, but as a minimum standard for the substantive content of enacted law.'[20]

The increasing popularity of the idea that the rule of law requires even elected legislatures to be subject to judicially enforceable limits is easy to understand. It seems to involve a simple and natural extension of much less controversial requirements that on any view are close to the heart of the rule of law. If the rule of law can be reduced to a single core proposition, it is that laws should limit or control what would otherwise be arbitrary power. It is therefore uncontroversial that administrative officials, even at the highest levels of the executive branch of government, should not enjoy arbitrary power. Their decisions and acts should be governed by judicially enforceable rules or principles. But if so, it might seem that the legislative branch of government should also be denied arbitrary power – that its Acts, too, should be governed by judicially enforceable rules and principles. That is why the American system of limiting legislative power by a bill of rights is sometimes hailed as 'the elevation of the Rule of Law concept to its highest level'.[21]

[17] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn), (E.W.S. Wade, ed.) (London: MacMillan, 1959).

[18] M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992), p. 151.

[19] Allan, *Law, Liberty and Justice*, p. 16. See also Sir John Laws, 'Law and Democracy' *Public Law* 72 (1995) at 85 and 88; F.A. Hayek, *The Constitution of Liberty* (London and Henley: Routledge & Kegan Paul, 1960), ch. 12.

[20] Walker, *The Rule of Law*, p. 359. On the other hand, Walker also says that '[i]n principle it does not matter whether these restrictions are imposed by way of written constitutional provisions and enforceable by courts, or by the dictates of custom that are enforceable by other means': *ibid*., p. 26; see also p. 159. The second option is consistent with legislative sovereignty being subject only to non-legal constitutional conventions, as in Britain today.

[21] P.G. Kauper, 'The Supreme Court and the Rule of Law' *Michigan Law Review* 59 (1961) 531 at 532.

A full assessment of the force of such arguments requires two questions to be answered. The first is whether legislative sovereignty is inconsistent with the rule of law. The second is whether, even if it is, it is therefore unjustified. Even if it is inconsistent with the rule of law, it might nevertheless be justified on the ground that in this case the rule of law is outweighed by the principle of democracy. In this chapter, I will touch on the second question only in passing. Arguments to the effect that democracy trumps the rule of law have been made by others.[22] I believe it has been too readily conceded that legislative sovereignty is inconsistent with the rule of law. I will therefore concentrate on the first question, and argue that it is not. But the answers to both questions depend partly on the meaning and content of the rule of law as a political principle, to which I now turn.

III The content of the rule of law

The rule of law is notoriously vague and contested. Sceptics and critics complain that it is 'often used as a mere rhetorical device, a vague ideal by contrast with which legislation, official action, or the assertion of private power is mysteriously measured and found wanting';[23] that it is 'often hazy and unclear, liable to take on any features of law which the writer finds attractive';[24] and so on.

It is generally agreed that the rule of law requires more than 'mere legality', in the sense of compliance with whatever the law of a particular jurisdiction happens to be. The rule of law requires more than the rule of the law: in other words, the law itself might not adequately protect the rule of law.[25] But how much more the rule of law requires is debatable. Proponents of 'thin' or 'formal' conceptions of the rule of law maintain that it requires compliance only with certain procedural and institutional norms: for example, that laws be general, public, prospective and enforceable by an independent judiciary. Proponents of 'thick' or 'substantive'

[22] E.g., A. Hutchinson and P. Monahan, 'Democracy and the Rule of Law', in A. Hutchinson and P. Monahan (eds.), *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987).

[23] H.W. Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' *Osgoode Hall Law Journal* 17 (1979) 1 at 3.

[24] A. Palmer and C. Sampford, 'Retrospective Legislation in Australia: Looking Back at the 1980s' *Federal Law Review* 22 (1994) 213 at 227.

[25] This is true, at least, if the law is conceived of in legal positivist terms. A natural lawyer, who conceives of the law as including transcendent and overriding moral principles, might think that the rule of law requires no more than the rule of the law, which is, ultimately, the rule of those principles.

conceptions maintain that it also includes requirements concerning the substantive content of the law.[26]

Some thick conceptions are criticised for shoe-horning every political virtue into the rule of law, which then amounts to the rule of justice or the rule of good law. These conceptions are too broad: while the rule of law is more than the rule of the law, it must be less than the rule of good law. A conception of the rule of law that incorporated every political virtue, properly weighted and balanced, would be useless for practical purposes. Our question, for example, is whether or not the rule of law requires that legislative power be limited by law. If the answer depended on whether judicial review of legislation is desirable all-things-considered, such as majority rule, minority rights, institutional competence, and so on, then the rule of law would contribute nothing in itself to the enquiry. It would be merely a way of expressing whatever conclusion we reached, without helping us to reach it.

On the other hand, there do seem to be good reasons to go beyond a purely formal conception. Arguably, the rule of law is mainly concerned with limiting or controlling what would otherwise be arbitrary power, whether it be exercised by public officials or private citizens. For example, chronic lawless violence inflicted by some citizens on others would surely be as antithetical to the rule of law as the lawless tyranny of a king or emperor.[27] The same goes for some kinds of lawful violence. If it would be contrary to the rule of law for a king to possess a legally uncontrolled power of life or death over his subjects, then surely it would equally be contrary to the rule of law for a husband or father to possess the same power over his wife or children. But if so, then every kind of power that one person, group or organisation can exercise over others – such as the power of employers over their employees – would be open to question on rule of law grounds. The rule of law would be concerned with the distribution and extent of all forms of power throughout society, and would be difficult to distinguish from the rule of good law.

Perhaps this would so inflate the rule of law that it would no longer serve a useful function. Fortunately, we are concerned with the exercise of legislative power, not private power. We can therefore bypass the question of the extent to which the rule of law is concerned with the exercise of private as well as public power. For the sake of argument, we will proceed

[26] See P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' *Public Law* (1997) 467.

[27] Walker, *The Rule of Law*, pp. 2–3.

on the basis that in political and legal theory, it requires only 'that the government should be ruled by law and subject to it'.[28]

IV 'Thin' conceptions of the rule of law

Thin conceptions of the rule of law have become so popular that a consensus about its content may finally have been reached.[29] Joseph Raz's influential analysis exemplifies these conceptions.[30] He denies that the rule of law means the rule of good law: it must be distinguished from other political ideals such as democracy, justice, equality, and human rights of any kind.[31] The basic goal of the rule of law is to ensure that the law is capable of guiding the behaviour of its subjects.[32] This requires that all laws be prospective, adequately publicised, clear and relatively stable; that the making of particular legal orders or directives be governed by general laws that satisfy the criteria just listed, and by the principles of natural justice; and that the implementation of all these requirements be subject to review by a readily accessible and independent judiciary.[33]

Raz insists that full compliance with these requirements is neither a necessary nor a sufficient condition for the achievement of justice. It is not a necessary condition because compliance is a matter of degree, and 'maximal possible conformity is on the whole undesirable (some controlled administrative discretion is better than none)'.[34] Since the rule of law is only one of many political ideals, it can occasionally be outweighed by others.[35] It is not a sufficient condition because '[t]he rule of law … is compatible with gross violation of human rights';[36] '[m]any forms of arbitrary rule are compatible with the rule of law. A ruler can promote general rules based on whim or self-interest, etc., without offending against the rule of law.'[37]

It is clear that such a thin conception of the rule of law does not require legislative power to be limited by a bill of rights. It is not aimed at eliminating all kinds of arbitrary governmental powers, but only those whose

[28] J. Raz, 'The Rule of Law and Its Virtue', in *The Authority of Law* (Oxford: Clarendon Press, 1981) 210 at p. 212.

[29] T. Endicott suggests that it has, in 'The Impossibility of the Rule of Law' *Oxford Journal of Legal Studies* 19 (1999) 1 at 1–2.

[30] Raz, 'The Rule of Law and Its Virtue'. Other examples are J. Waldron, 'The Rule of Law in Contemporary Liberal Theory' *Ratio Juris* 2 (1989) 79; R.S. Summers, 'The Principles of the Rule of Law' *Notre Dame Law Review* 74 (1999) 1691.

[31] Raz, 'The Rule of Law and Its Virtue', p. 211.

[32] *Ibid*., p. 214. [33] *Ibid*., pp. 214–17. [34] *Ibid*., p. 222.

[35] *Ibid*., pp. 219 and 228–9. [36] *Ibid*., pp. 220–1. [37] *Ibid*., p. 219.

exercise can unfairly upset citizens' expectations about their legal obligations and rights. Extremely unjust or tyrannical laws that are well known to citizens, because they are prospective, adequately publicised, clear and relatively stable, are not objectionable on rule of law grounds.

It does not follow that on this conception, legislative power can be completely uncontrolled. Raz suggests that judicial review of parliamentary legislation is needed to ensure conformity with the formal requirements of the rule of law, although he adds that this is 'very limited review'.[38] He does not elaborate, but presumably means that the judiciary should be able to invalidate legislation that violates the requirements that legislation be prospective, adequately publicised, clear, relatively stable, and not confer excessive discretion on administrators.[39]

But judicial review of legislation on these grounds would be highly impractical. Consider the last four of them. None can possibly be absolute. Legislators cannot be required to ensure that every detail of every new law is brought to the attention of every citizen, that no law include any vague terms, that the law never be changed, or that no administrator ever be granted any discretionary power. Such requirements would be highly undesirable from the point of view of the rule of law itself. For example, the rule of law would suffer if citizens were immune from any law not specifically brought to their attention. In addition, some vagueness in the law is often necessary if the law is not to be irrational and arbitrary.[40] The same is true of legal change, and the granting of discretionary powers to administrators.[41] These requirements raise questions of degree – of more or less – that can be settled only by value judgments. What methods of publicising new laws give citizens adequate notice of them? When does vagueness in the law, legal change and administrative discretion cease to be desirable and become excessive? These questions require legislators to balance the competing values at stake, and there is no good reason to think that judges would be better at doing this.

The requirement that seems most conducive to judicial enforcement is that of prospectivity. But not even this should be made absolute. Legislation that changes the law retrospectively can often be justified,

[38] *Ibid*., p. 217.

[39] If Raz meant merely that judicial review of 'manner and form' requirements is required, that would not ensure that legislation conformed to the requirements of the rule of law that he lists.

[40] See Endicott, 'The Impossibility of the Rule of Law', 4–8.

[41] *Ibid*., pp. 8–9, on legal change; Raz, 'The Rule of Law and Its Virtue', p. 222, on administrative discretion.

sometimes by the rule of law itself. In rare cases even retrospective changes to criminal laws can be justified. The strongest argument against retrospectivity is that it is unfair to upset expectations reasonably based on the state of the law at a particular time. But if expectations are based on mistaken but reasonable beliefs about the state of the law, retrospective legislation may be justified to prevent them from being upset. In addition, some expectations, such as an expectation of legal immunity for grossly immoral conduct, are unworthy of respect, and the threat of subsequent retrospective legislation might help deter such conduct.[42] In other words, it might help to deter the exercise of lawless, arbitrary power. That is why '[t]he trial of the German leaders at Nuremberg by a law made *ex parte*, *ex post facto*, and *ad hoc* has been hailed as a vindication of the rule of law'.[43] Recent legislation retrospectively made it an offence against Australian law for persons in Europe during the Second World War, who may have had no connection with Australia at the time, to have committed 'war crimes'.[44] The legislation was justified, notwithstanding its retrospective operation. Moreover, even legitimate expectations can be outweighed by considerations of justice. It has been persuasively argued that the British Parliament in 1965 was entirely justified, by considerations of justice and equality, in enacting legislation that not only retrospectively abolished a legal right to compensation, but reversed a recent judicial decision awarding compensation to a particular party.[45] For similar reasons, judicial decisions altering the common law may justifiably have retrospective effects, even in criminal cases, which can no longer be concealed by resort to the old 'fairy tale' that judges only declare what the law has always been, and do not really change it.[46] German courts dealing with the prosecution of former East German border guards for shooting people attempting to enter West Berlin have felt justified in adopting novel interpretations of relevant East German

[42] For an excellent and thorough discussion of all these themes, see Palmer and Sampford, 'Retrospective Legislation'.

[43] F. Wormuth, 'Aristotle on Law', in M.R. Konvitz and A.E. Murphy (eds.), *Essays in Political Theory Presented to George H. Sabine* (New York and London: Kennikat Press, 1948) 45 at p. 45.

[44] See *Polyukhovich* v. *Commonwealth* (1991) 172 CLR 501.

[45] A.L. Goodhart, 'The Burmah Oil Case and the War Damage Act 1965' *Law Quarterly Review* 82 (1966) 97, discussing the *War Damage Act* 1965 (UK), which retrospectively deprived the Burmah Oil Company of a right to compensation that had been upheld by the House of Lords in *Burmah Oil Co. Ltd* v. *Lord Advocate* [1965] AC 75.

[46] A recent example is *R* v. *R* [1992] AC 599, in which the House of Lords in effect abolished the common law immunity of a husband against being convicted for the rape of his wife, in the course of a case involving a husband charged with that very offence.

laws that in effect amended them retrospectively.[47] The following conclusion to a thorough examination of retrospective legislation in Australia would no doubt be true of most countries:

> Retrospective law-making is neither particularly rare nor necessarily evil. It plays a more significant part in Australian legislation than most would imagine. Much of it can be justified. Some of it is very contentious and the justification should be subject to intensive and, hopefully, rigorous debate … However, the fact that the proposed statute is 'retrospective' should merely be the starting-point of that debate, not its conclusion.[48]

The same goes for another requirement often regarded as central to the rule of law, although not discussed by Raz. This is that legislation should be general in scope rather than aimed at particular persons. Even today, legislation that changes the legal rights or duties of particular legal persons is often regarded as justified, for example, to enable major public works, or unique enterprises such as the staging of an Olympic Games, to proceed expeditiously, by conferring special legal powers and rights on their organisers. Sometimes Acts of indemnity or amnesty, which relieve individuals or groups of liability for breaches of the law, are justified. Usually such breaches have been inadvertent. But as Dicey pointed out, in extraordinary situations of internal disorder or war, the executive might have to break the law deliberately 'for the sake of legality itself' – to uphold the rule of law – and then seek an Act of Indemnity.[49]

To sum up, thin conceptions of the rule of law do not require that legislative power be limited by a bill of rights. Moreover, there are powerful reasons for denying that even the specific requirements they do impose should be constitutionally guaranteed and made judicially enforceable. They are too vague, and defeasible.[50]

V 'Thicker' conceptions of the rule of law

To argue that the rule of law requires something like a bill of rights, one must first defend a thicker conception of the principle. Rather than attempt that task myself, I will leave it to those who seek to make such

[47] See J. Rivers, 'The Interpretation and Invalidity of Unjust Laws', in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999) p. 40.

[48] Palmer and Sampford, 'Retrospective Legislation', p. 277.

[49] Dicey, *An Introduction*, pp. 411–13.

[50] There may be one or two narrow exceptions – such as a prohibition on Acts of Attainder – but this does not undermine the general conclusion.

an argument. I will consider whether the argument is plausible even if a thicker conception is acceptable.

It is pertinent to observe that proponents of thicker conceptions do not always maintain that legislative power should be limited by judicially enforceable rights. The International Congress of Jurists that met in New Delhi in 1959 endorsed a thick conception of the rule of law, which Raz criticises for mentioning 'just about every political ideal which has found support in any part of the globe during the post-war years'.[51] Yet the Congress did not insist that judicial review of legislation was an inherent requirement of the rule of law. Instead, the 'Declaration of Delhi' stated that:

> In many societies, particularly those which have not yet fully established traditions of democratic legislative behaviour, it is essential that certain limitations on legislative power … should be incorporated in a written constitution, and that the safeguards therein contained should be protected by an independent judicial tribunal; in other societies, established standards of legislative behaviour may serve to ensure that the same limitations are observed … notwithstanding that their sanction may be of a political nature.[52]

No doubt the desire to achieve consensus among the representatives of many different legal systems, some of which included doctrines of legislative sovereignty, was one reason for this conclusion. But there are sound reasons of principle for doubting that the rule of law, even when broadly conceived of, requires that legislative power be subject to judicially enforceable limits.

It has frequently been pointed out that the rule of law should not be taken to such extravagant lengths as to condemn all discretionary power. 'No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been *a government of laws and of men*.'[53] Rules and discretionary power are both essential, and the problem is to find the best combination, given the nature of the task in question and the social and political context in which it must be performed. Among the many powers of government that are necessarily discretionary – which include many judicial as well as other powers – is the legislative power. For practical reasons,

[51] Raz, 'The Rule of Law and Its Virtue', p. 211.

[52] 'The Declaration of Delhi', International Congress of Jurists, New Delhi, India, 5–10 January, *Journal of the International Committee of Jurists* 2 (1959) 7 at 8.

[53] K.C. Davis, *Administrative Law: Cases-Text-Problems* (6th edn) (St Paul, Minnesota: West Publishing Co., 1977), p. 26.

it is necessarily the most discretionary of all governmental powers; in addition, unlike all others, it is discretionary by definition. Since it is by definition the power to make new laws and repeal old ones, it cannot be completely controlled by pre-existing laws.

Of course, it does not follow that a legislature's powers cannot be limited by special pre-existing laws that it cannot itself amend or repeal. But as to whether doing so would necessarily enhance the rule of law, two possible problems spring to mind.

The first possible problem is that limiting a legislature's powers in this way may achieve little more than to shift the objectionable phenomenon – legally unlimited legislative power – to a higher level. For how could the law-making power of whoever imposed those limits be itself limited? There cannot be an infinite regress of law-makers able to impose limits on the authority of each one in turn.

One possible solution would be to rely on limits to law-making power that have not been imposed by any human law-maker, such as natural law. But on closer inspection, this would not help. According to natural law theories, the most fundamental legal standards are moral standards prescribed by God or built into nature. But as Jeremy Waldron has persuasively argued, even if such a theory could satisfy our worries about the objectivity of moral standards, none has yet been able to provide a methodology that makes moral disagreements any easier to settle.[54] The identity and content of moral standards is often highly controversial and interminably debatable. If they are to perform the legal function envisaged, some official or institution must be accepted as having ultimate authority to decide which of the competing views will have legal force. A decision of that kind is best described as a legislative decision. But that takes us back to our starting point: that the decision-maker could not be controlled by any standards other than those it decides it ought to be controlled by.

A related difficulty, or perhaps the same one differently described, is this. One of the core requirements of the rule of law is that decision-making be governed by legal norms whose identity and content can be ascertained without excessive difficulty. They must be relatively clear, adequately publicised, and so on. It would seem difficult for moral standards, whose identity and content are often elusive and controversial, to play that role. If so, decisions that are controlled only by moral standards

[54] J. Waldron, 'The Irrelevance of Moral Objectivity', in R. George (ed.), *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press and New York: Oxford University Press, 1992) and in J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press and New York: Oxford University Press, 1999).

are not subject to the rule of law – which is no doubt obvious, since that is the complaint about legislative sovereignty that we started with. If legislatures governed by nothing more determinate than moral principles are not subject to the rule of law, why should judges be regarded any differently?

An alternative solution would be to rely on 'reason', as opposed to 'will'. Aristotle's conception of government by law rather than by men is said to have amounted to government by reason.[55] But the bare concept of reason, like Kant's categorical imperative, lacks substantive content – which it needs if it is to perform the function required of it. And the moment we try to give it content, we run into the same problem that plagues moral argument: the requisite content is inherently controversial and debatable. In practice, pure reason is unavailable to us: we only have access to the variable, fallible and disputable reason of particular human beings. To say that the rule of law is the rule of reason rather than of will is to beg the question of *whose* reason should rule, and whose should be overridden or discounted on the ground that it is mere 'will'. Should law be based ultimately on the reason of elected legislators, or the reason of judges? It is difficult to see why the rule of law would favour judges rather than legislators.

Another alternative would be to rely on long-standing and immutable customs, rather than deliberately made laws, to limit legislative power. That would be the situation in Britain if the thesis that it has a 'common law constitution', which controls even Parliament, were correct – and if the common law consisted of customs that are 'found but not made' by the judges. But among many difficulties with this idea, it is far too conservative and would cripple the power of elected legislatures. In the modern world of rapid change, legislatures cannot be prohibited from reforming or abolishing customary practices, especially ones that have come to seem oppressive and unjust. Imagine women being told, in the 1970s, that elected legislatures could not validly enact legislation inconsistent with the customary practices that defined their traditional role as wives and mothers! A judicially enforceable 'customary constitution' would be workable only if the judges were able and willing to allow some customs, but not others, to be reformed or abolished. But on what grounds could they do so? Custom itself could not provide them. The judges would have to exercise moral judgment, of exactly the same

[55] J. Sklar, 'Political Theory and the Rule of Law', in Hutchinson and Monahan (eds.), *Ideal or Ideology*, 1 at pp. 1–3.

kind that legislatures currently exercise in deciding when to override established customs.

It seems, then, that at the foundation of any modern legal system there must be a human law-maker able to make the requisite moral judgments and override even long-standing customs. But this returns us to the problem of how to subject the power of that law-maker to the rule of law. F.A. Hayek believed that the rule of law would be properly safeguarded only if the power to enact ordinary legislation were limited. But he also believed that the only effective way of doing so was for a superior law-maker to enact a binding constitution, and that its power to alter that constitution could not itself be limited. Ultimately, therefore, the rule of law could not be 'a rule of the law, but [only] a meta-legal doctrine or a political ideal … [that] will be effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community.'[56] On this view, Hobbes was essentially right to claim that at the foundation of any legal system there must be an unlimited and arbitrary power, which cannot itself be bound by law. It is merely a question of whether that power should belong to a monarch, a legislature, a court, 'the people', or some combination of them. Ultimately there cannot be a government of laws rather than a government of men, or people (as we should now say). And if there must be a government of people at the foundation of any legal system, there are obvious reasons to prefer a government of 'the people', or their elected representatives, to a government of judges.

But this kind of Hobbesian thinking is now discredited.[57] There is no logical reason that prevents constitutions from including provisions that are unalterable, even by the process of constitutional amendment they themselves prescribe, and some constitutions do so. A prohibition on amendment, like any other element of a rule of recognition, can be effective provided that it is generally accepted as binding.[58] Of course, a constitution prohibiting the amendment of some part of it could be overturned by revolution, but the same is true of any constitution.

On the other hand, although constitutional provisions can be made legally unchangeable, it might be unwise to do so, because it is impossible accurately to foresee what changes may be justified in response to unpredictable future events. Each generation should be equally free to reform

[56] Hayek, *Constitution of Liberty*, p. 206.
[57] See Goldsworthy, *The Sovereignty of Parliament*, pp. 236–8.
[58] See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), ch. 4.

its laws – including its constitution – as it deems appropriate. Only very abstract moral principles, such as democracy, justice and the rule of law, should be regarded as immutable. But they can be embodied in a variety of constitutional arrangements. For example, the rule of law may require that legal disputes be decided by independent judges, but not that any particular judicial structure be preserved for all time. On this view, for practical rather than logical reasons, nothing in a constitution should be made unamendable. If so, we return once again to the problem we started with: the existence of a law-making power that is unlimited by law.

However, this may be less of a problem at the level of constitutional amendment than at the level of ordinary legislation. It can plausibly be argued that the rule of law would be enhanced by the imposition of constitutional limits on ordinary legislative power, even if the extra-ordinary power of constitutional amendment cannot be limited, and can be used to release the ordinary legislative power from those limits. This is so provided that the amending power is more difficult to use than the ordinary legislative power, and is therefore less likely to be used (or abused). So the first possible problem with the idea of limiting legislative power by superior laws is not insurmountable.

The second possible problem is less tractable. It is difficult to think of any limits even to ordinary legislative power that should be made absolute, in the sense of being indefeasible come what may. All human rights can justifiably be outweighed or overridden by ordinary legislation in some circumstances. All the rights that are central to modern bills of rights are sometimes outweighed by other important rights and interests. For example, legislatures enact, and courts uphold, laws restricting free speech in order to protect public safety, public decency, national security, confidential information, privacy, reputation, and so on. Even the right to life itself can be outweighed in unusual situations, such as where self-defence is involved. There is no subject-matter over which legislatures should be denied power altogether. All that should be denied them is the unjustified exercise of their power. That is why, in the enforcement of a bill of rights, the crucial question is never simply whether a law intrudes on some protected subject-matter such as 'speech', but whether it does so unjustifiably.[59]

[59] In the Canadian Charter of Rights this necessary value judgment is made explicit: s. 1 provides that the Charter 'guarantees the right and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

This has been known for centuries. It has frequently been pointed out that if rigid limits are imposed on legislative power, and judges appointed to enforce them, the legislature may be disabled from doing good as well as from doing evil, and the disadvantages of the former disability may outweigh the advantages of the latter. The need for some power to alter or override any law whatsoever, if only in an emergency, is a theme that runs through centuries of disquisitions on sovereignty.[60] The seventeenth–century lawyer, Bulstrode Whitelocke, argued that no subject-matter could safely be excluded from the reach of legislative power, because what might be required in order to promote peace and good government could not be predicted in advance.

> If it be demanded, what is the subject matter of that good and peace? It will be said: every thing, according as accidents and emergencies, may make application of them, in the wisdom, and judgment, of a public council. And consequently, all matters whatsoever may be accounted legislative affairs, within the authority of parliament.[61]

Constitutional limits to legislative power should therefore not be rigid and absolute. They should allow scope for justifiable qualifications and exceptions. But to decide whether and to what extent a qualification or exception is justified requires judges to make judgments of political morality. They must assess and compare the variable, context-dependent moral weights of all the competing rights or interests that may be affected. The problem with regarding this as a necessary requirement of the rule of law is similar to the problem, mentioned previously, with relying on moral principles as limits to legislative power. The contents of a judicially enforceable bill of rights are principles of political morality whose 'interpretation' is indistinguishable from moral and political philosophy. The fact that they are written is irrelevant. Whether elected legislators, or judges, have ultimate authority to weigh up competing moral principles, and decide which of them ought to prevail, their decisions necessarily depend on controversial judgments of political morality. But why should judges, charged with weighing up and balancing moral principles in concrete cases, be regarded as bound by the rule of law if an elected legislature, responsible for translating the same moral principles into legislation, is not? The judges may or may not be better at making moral

[60] See Goldsworthy, *The Sovereignty of Parliament*, 'Index of Subjects', p. 319 ('necessity of power to override law in emergencies').

[61] B. Whitelocke, *Whitelocke's Notes uppon the Kings Writt for Choosing Members of Parliament [etc]* (London: C. Morton, 1766), vol. 2, p. 335; see also *ibid*., p. 185.

judgments affecting rights, but that is beside the present point. The rule of judges may be preferable to the rule of legislatures, but we are concerned with the rule of law. If in both cases decisions involve weighing up competing abstract moral principles, why should the judges, but not the legislature, be regarded as 'ruled by law'? The identity of the decision-maker may be different, but the character of the decision itself remains the same. As J.A.G. Griffith put the point:

> For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do bills of rights. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.[62]

This point can be taken further. It can be argued, counter-intuitively, that judicially enforceable bills of rights might not only fail to enhance the rule of law, but actually diminish it. Whether or not bills of rights enhance the rule of law must depend on how they affect the exercise of judicial power as well as legislative power. When bills of rights transfer the ultimate review of legislation from legislatures to judges, they make the law that is likely to be applied by the judges less predictable. Instead of being bound to apply legislation, the judges are authorised to reject it for what are essentially reasons of political morality. Judgments of political morality are generally less predictable than judgments about the proper meaning and interpretation of legislation, which depend on the meanings of words and the probable intentions of legislators in enacting them.[63] As Atiyah and Summers argue, content-oriented standards, such as moral principles, generate more uncertainty in the law than do source-oriented (pedigree) standards.[64] In general, legislation that is alleged to violate constitutional rights does not obviously do so. It is usually possible to make reasonable arguments on both sides, and courts then decide such cases in the same way that legislatures do: by making finely balanced and controversial judgments of political morality, and settling outstanding disagreements by majority vote.

[62] J.A.G. Griffith, 'The Political Constitution' *Modern Law Review* 42 (1979) 1 at 16.

[63] Of course, they are not always less predictable. Some issues of political morality are obvious and uncontroversial (such as the immorality of torturing children), and some issues of statutory interpretation are not (words and legislative intentions can both be obscure).

[64] See P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law* (Oxford: Clarendon Press, 1987), p. 53.

Whether legislation will be subject to constitutional challenge, and whether a challenge is likely to be successful, are often difficult to predict. Legislation that has been widely relied on for some time may unexpectedly be challenged and held invalid, possibly as a result of a perceived or predicted change in judicial philosophy.

All this necessarily produces greater uncertainty about what laws are binding, which should be of some concern to proponents of the rule of law. Indeed, the rule of law has traditionally been concerned much more with the exercise of judicial and executive powers than that of legislative power. As previously observed, legislative power is by definition difficult to limit by pre-existing laws. By contrast, judicial power is by definition ideally suited to it, because in large part it is precisely the power dutifully to apply pre-existing laws. Chief Justice John Marshall expressed this idea in exaggerated terms when he said: 'Judicial power, as contra-distinguished from the power of laws, has no existence. Courts are the mere instruments of the law, and can will nothing.'[65] This is exaggerated because judges necessarily exercise powers other than that of applying pre-existing laws. For example, they must sometimes supplement the law, when it is insufficiently determinate to resolve a dispute, or stray from the strict terms of a law in order to do 'equity' in particular cases. Nevertheless, their ability to stray beyond pre-existing law in exercising such powers is supposed to be strictly confined. In his list of the principles of the rule of law, Robert Summers includes this requirement:

> [A]ny exceptional power of courts or other tribunals to modify or depart from antecedent law at point of application [should] be a power that, so far as feasible, is itself explicitly specified and duly circumscribed in rules, so that this is a power the exercise of which is itself law-governed.[66]

Of course, Summers is not concerned here with judicial power to invalidate legislation inconsistent with a bill of rights. But his requirement reflects the traditional conception of the judicial function, which does not sit altogether comfortably with the enforcement of bills of rights. In effect, they confer on judges a power to veto legislation retrospectively, on the basis of judgments of political morality.[67] It is a power similar to

[65] *Osborn* v. *Bank of the United States* (1824) 22 US 738 at 866.

[66] Summers, 'The Principles', 1694.

[67] Of course, in theory the power is not one of changing the law at all, but merely of declaring what the law has always been. But insofar as its exercise is based on unpredictable judgments of political morality, its effect can be indistinguishable from that of retrospective repeal.

that exercised by upper houses of review, except that it is exercised after legislation has been enacted.[68] This involves adding to the judicial function a kind of power traditionally associated with the legislative function, except that the unpredictability inherent in its exercise is exacerbated by its retrospective effects. That is why, on balance, it may diminish rather than enhance the rule of law.

This problem cannot be evaded by definition. If 'law' is defined to mean any norm that is enforceable by the courts, then it might seem that to subject legislation to review according to judicially enforceable principles is *by definition* to increase the rule of law. That definition is the subject of debate between so-called 'exclusive' and 'inclusive' legal positivists. The former assert that constitutionally protected rights are principles of political morality, which judges are legally required to enforce, and not principles of law.[69] But even if the inclusive legal positivists are right to argue that such rights are both principles of political morality *and* principles of law, that would not settle the question of the effect of bills of rights on the rule of law. This is because, as previously noted, the rule of law is not the same as the rule of the law. The issue is one of substance, not terminology: it concerns the extent to which governmental acts overall are subject to the rule of the right kinds of laws, such as those that enhance predictability. The rule of other kinds of laws can diminish, rather than enhance, the rule of law. Requiring judges to enforce abstract, vague and defeasible principles of political morality arguably have precisely that effect.

The point is not that bills of rights are therefore unjustified. It is merely that they may diminish rather than enhance the rule of law. The point holds even if they do so only to a small extent. But other political principles, such as justice, must also be taken into account. The rule of law is not the rule of justice. It can be argued that judicial enforcement of a bill of rights is likely to enhance substantive justice, to such an extent that

[68] It is no accident that judicial review of legislation emerged in the United States as an alternative to non-judicial mechanisms for ensuring legislative compliance with constitutional laws. For example, New York State created a Council of Revision, which included the Governor, Chancellor, and Supreme Court Justices, armed with a limited but not final veto over legislation deemed inconsistent 'with the spirit of [the] constitution'. Similar institutions, regarded as political rather than judicial, were proposed in other states. At the Philadelphia Convention, which proposed the new federal Constitution for ratification by the states, James Wilson and James Madison supported judicial review only after a majority rejected their proposal for a Council of Revision. See Goldsworthy, *The Sovereignty of Parliament*, pp. 212–13.

[69] See W. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

substantive justice outweighs the rule of law. Whether or not that is so is beyond the scope of this essay. Either way, it is substantive justice, not the rule of law, which best explains the attractions of bills of rights.

In reply, it might be argued that judicial enforcement of a bill of rights is no more unpredictable in its effects than the exercise of some other judicial powers, such as that of overruling earlier decisions at common law, or applying moral principles enshrined in legislation or case-law. But perhaps that merely shows that other judicial powers also tend to diminish rather than enhance the rule of law, whatever their overall merits may be.

It might also be pointed out that judges exercise their powers according to strict procedures that guarantee natural justice: they must reach a decision only after all interested parties have had an opportunity to be heard, they must give reasons for their decisions, and so on. It might then be argued that even if the substance of their power is little different from that of a legislative house of review, their procedures ensure that it is less likely to be exercised in an arbitrary fashion. But it should not be forgotten that legislatures also exercise their power in accordance with mandatory procedures. Legislation in modern democracies does not issue from the mouth of an omnipotent individual. It emerges from the deliberations of a complex, artificial body whose composition, procedures and forms of legislation are defined and structured by laws and standing orders.[70] The laws that govern these matters of composition, procedure and form include the entire legal apparatus of representative democracy. Standing orders may be self-imposed and not legally binding, but many judicial procedures are also self-imposed, including the duty of courts to give reasons for their decisions.

This question of procedures is important. It is often too readily assumed that any legislature whose power is not subject to substantive legal limits has 'arbitrary' power that is uncontrolled by law. But laws governing the composition of legislatures, and the procedures and forms by which they must legislate, in themselves exert a powerful kind of legal control.[71] Historically, the requirement that legislation desired by a monarch could not be enacted without the assent of representatives of the community was a major advance for the rule of law, even though this did not involve the imposition of substantive limits on the power to legislate. The same goes for the other constitutional reforms

[70] Dicey relied partly on this: *An Introduction*, 402 and 405.

[71] See A.L. Goodhart, 'The Rule of Law and Absolute Sovereignty' *University of Pennsylvania Law Review* 106 (1958) 943 at 950–2.

that gave birth to modern representative democracy: the development of bi-cameralism, electoral reform, the extension of the franchise, and so on. Indeed, British constitutionalism has always relied on representation, together with 'checks and balances' internal to the legislative process, rather than substantive limits to legislative power enforced by an external agency.[72] These methods of controlling legislative power exemplify what Kenneth Culp Davis famously called 'structuring', as opposed to 'confining' and 'checking', the exercise of discretionary power.[73] All three methods of controlling by law the exercise of what would otherwise be arbitrary power can legitimately be regarded as contributing to the rule of law.

The extent to which laws governing these matters of composition, procedure and form succeed in preventing the arbitrary or tyrannical exercise of legislative power no doubt varies from one country to another. In Britain, deficiencies in the method by which members of the lower house are elected, the length of time between elections, the domination of the lower house by the executive government, and the lack of an adequate upper house of review, may explain most of the widespread contemporary disenchantment with parliamentary democracy. These alleged deficiencies of the British system of parliamentary democracy as it currently operates should not be mistaken for deficiencies of representative democracy as such. It follows that the best remedy may not be the enactment of a judicially enforceable bill of rights, but reform of the laws that govern the electoral process, the composition of the legislature, and the procedures and forms by which it must legislate. In other words, if the problem is that the electoral process, and checks and balances internal to the legislature, are now ineffective or non-existent, the best remedy may be to reconstitute or reinvigorate them. It is often argued that such reforms would be preferable to an American-style bill of rights on democratic grounds. Why not improve the system of representative democracy rather than diminish it even further? But less obviously, it can also be argued that such reforms would be preferable on rule of law grounds. They could make more effective review or veto of legislation part of the legislative process itself, taking place before legislation is enacted and relied on as law by the community. The alternative of a bill of rights inserts a power of legislative review and veto into subsequent judicial processes, where its exercise on grounds of

[72] See Goldsworthy, *The Sovereignty of Parliament*, pp. 7–8, 75, 105–6, 200–1 and 234.

[73] K.C. Davis, *Discretionary Justice, A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), chs. 3–5.

political morality can have unpredictable, retrospective effects on legislation that has already been enacted, and may have been relied on as law.

VI Conclusion

My objective has not been to completely discredit the idea of subjecting legislative power to judicially enforceable bills of rights. It has merely been to challenge one increasingly popular argument in favour of doing so: namely, that it is required by the rule of law. I have made the counter-intuitive argument that such a reform might actually detract from the rule of law. I do not claim that this argument is sufficiently powerful to be deployed as a positive argument against bills of rights. But it is useful in a defensive role, to refute the argument that bills of rights are required by the rule of law. Even if they do not detract from the rule of law, they are clearly not required by it. They are certainly not required by 'thin' conceptions of the rule of law, and even if a 'thick' conception is preferable, there are other ways of subjecting the exercise of legislative power to appropriate legal control. Perhaps, in the end, all I have succeeded in doing is to show that the issue is relatively unimportant, both because the rule of law is too indeterminate to provide useful guidance, and because in this context other political principles, such as democracy and justice, are much more important. If so, I will be satisfied.