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Homogenising constitutions

I Introduction

From the late eighteenth century until recently, the common law world included just two alternative constitutional models for the protection of individual rights. The first, developed in Britain, is the model of parliamentary sovereignty, which reposes primary responsibility for protecting rights in parliaments. The second, developed in the United States, is the model of judicial review, which reposes that responsibility in courts of law. In countries founded by Britain, the first model was established; even when federations were formed, in Australia and Canada, judicial review was adopted only as a means of policing the federal distribution of powers, and not (generally speaking) as a means of protecting rights. Some former British dominions adopted the American model upon or after achieving independence, such as Ireland, India and (more recently) South Africa. But otherwise, the British model predominated throughout the common law world.

Recently, Canada, New Zealand and Britain have adopted 'hybrid' models, which allocate much greater responsibility for protecting rights to courts, without altogether abandoning the principle of parliamentary sovereignty. In Canada, judicial enforcement of the Charter of Rights 1982 is for the most part subject to s. 33, which permits legislatures by express provision to override most of the rights protected by the Charter. To that extent, the principle of parliamentary sovereignty has been retained, although in practice the power of override is seldom used.[1] In Britain, the Human Rights Act 1998 requires courts to 'interpret' (which in practice might mean to some extent 're-write') legislation, wherever possible, to ensure that it is compatible with protected rights. But where that is not possible, the courts cannot declare the legislation invalid; they can only issue a declaration of

[1] Discussed in Chapter 8, below.

incompatibility, which may or may not persuade Parliament to make an amendment.

The creation of these hybrid models is clearly a very important development.[2] This is because both the traditional models, of parliamentary sovereignty and of judicial review, are subject to well known objections: the former, for endangering individual rights, and the latter, for undermining democracy. Parliamentary sovereignty has always had domestic critics, who have advocated adoption of the rival model of judicial review. But the grass may not be greener on the other side: an increasing number of Americans now question their own model, and advocate a greater role for legislative supremacy.[3] The apparent need to choose between the traditional models required a judgment as to which of their alleged dangers – to individual rights, or to democracy – was more to be feared. But the hybrid models now offer the possibility of a compromise that combines the best features of both the traditional models, by conferring on courts constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word.

In view of the apparent possibility of choice among a variety of constitutional models, it is somewhat surprising to encounter an argument that in reality there is only one basic model for protecting rights common to all Western liberal democracies. In his latest book, Trevor Allan argues that all such democracies are committed to the rule of law, which entails an independent judiciary with authority to invalidate legislation that it regards as inconsistent with various rights, including due process, equality and free speech.[4] This is essentially the American model, but according to Allan, it is implicit in a commitment to the rule of law, and to a concomitant concept of law, that is independent of any written constitution. On his view, rights-protecting judicial review is to a large extent intrinsic to the concept of law in liberal democracies, written constitutions are to that extent superfluous, and alternative models (especially unqualified parliamentary sovereignty) are ruled out by the meaning of 'law'. Every genuine liberal democracy has an unwritten bill

[2] See, e.g., S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' *American Journal of Comparative Law* 49 (2001) 707; M. Perry, 'Protecting Rights in a Democracy: What Role For the Courts?' *Wake Forest Law Review* 38 (2003).

[3] M. Tushnet, *Taking the Constitution Away From the Courts* (Princeton: Princeton University Press, 2000); D. Lazar, *The Frozen Republic: How the Constitution is Paralyzing Democracy* (New York: Harcourt Brace, 1996).

[4] T.R.S. Allan, *Constitutional Justice, A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001).

of rights that is judicially enforceable, whether or not it also has a written bill of rights.

I should declare at the outset that this chapter is the latest round of an ongoing debate between Allan and myself. In an earlier book, Allan attempted to show that the doctrine of parliamentary sovereignty was incompatible with the true foundations of the British constitution, which he purported to clarify through Dworkinian 'interpretation'.[5] I subsequently criticised that attempt, and defended the doctrine's legal and philosophical credentials as a fundamental element of the British constitution.[6] I did so both on legal positivist grounds and, in the alternative, on 'interpretive' grounds that include evaluative as well as descriptive criteria.[7] In his latest book, Allan responds at some length to my criticisms.

But Allan now canvasses broader issues than the doctrine of parliamentary sovereignty in Britain. He is concerned with the nature of constitutionalism in all Western liberal democracies. His critique of parliamentary sovereignty, and advocacy of rights-protecting judicial review, now rests not just on an interpretation of the British constitution in particular, but on a philosophical account of the concept of law to which he believes all liberal democracies subscribe. That account has enormous implications for all those countries. For example, it follows that their courts have authority to protect due process, equality or free speech – if necessary, by invalidating legislation – even if their written constitutions are completely silent on those subjects. This is hardly surprising. If judicial authority to protect these principles can exist in the complete absence of a written constitution, as in Britain, it can also exist in the absence of express provisions in a written constitution. On this view, written constitutions are only part – and arguably, the lesser part – of the full constitutions that courts in liberal democracies are legally bound to enforce. Allan's thesis therefore offers comfort to those who have argued that the United States Supreme Court has authority to enforce 'unenumerated rights', and that the Supreme Court of Canada has authority to enforce unwritten 'constitutional principles'.[8] Furthermore, Allan goes so far as to deny that the written constitution of a liberal democracy can validly be

[5] T.R.S. Allan, *Law, Liberty, and Justice, The Legal Foundations of British Constitutionalism* (Oxford: Oxford University Press, 1993).

[6] J. Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Oxford: Clarendon Press, 1999), esp. ch. 10.

[7] *Ibid*., esp. pp. 254 and 271–2.

[8] On the United States literature, see T.B. McAffee, 'Inalienable Rights, Legal Enforceability, and American Constitutions: the Fourteenth Amendment and the Concept of Unenumerated Rights' *Wake Forest Law Review* 36 (2001) 747. On recent Canadian

amended in ways that are incompatible with the rule of law and the fundamental rights it embodies. Here, too, his arguments could be invoked to support a position that has occasionally been defended in the United States.[9]

Before resuming my debate with Allan, I should say at the outset that his book is unquestionably an important contribution to legal theory and comparative public law. It is brimming with insights distilled from many years of reflection on the basic principles of public law in liberal democracies. In analysing those principles and their implications, Allan draws on the case law of many countries throughout the common law world, including Australia, Britain, Canada, India, New Zealand and the United States. He ranges over the whole of public law, administrative as well as constitutional, insofar as civil liberties are concerned, including aspects of criminal procedure and evidence that implicate the relationship between the state and the citizen. He discusses such diverse issues as free speech, due process, equality and discrimination, retrospectivity, ad hominem legislation, civil disobedience and conscientious objection, the right to silence, police trickery, rule-governed versus case-sensitive modes of decision-making, justiciability and 'political questions', constitutional conventions, and locus standi. In developing the concrete implications of his abstract conception of the rule of law, his arguments are always illuminating and often persuasive.

That said, I will concentrate in what follows on the jurisprudential and constitutional arguments that underpin his discussion of substantive issues. I will argue that the former are less persuasive than the latter.

II The rule of law in liberal democracies

Allan describes his book as 'an essay in general constitutional theory', which attempts 'to identify and illustrate the basic principles of liberal constitutionalism, broadly applicable to every liberal democracy of the familiar Western type'.[10] The most fundamental of these shared principles

jurisprudence, see M. Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' *University of Toronto Law Journal* 51 (2001) 91.

[9] On implicit limits to constitutional change, see e.g. the essays by Walter F. Murphy, John R. Vile and Mark E. Brandon, in S. Levinson (ed.), *Responding to Imperfection; The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995).

[10] Allan, *Constitutional Justice*, p. vii ('Preface'). See also p. 1. Sometimes, though, Allan suggests that he is providing an account of 'all forms of legitimate government': *ibid*., p. 245.

constitute what is known as the rule of law, which is 'the core of the doctrine or theory of constitutionalism, and hence a necessary component of any genuine liberal or constitutional democratic polity'.[11] In explicating the rule of law, he relies mainly on the work of Fuller, but also on that of Hayek and Dworkin. Each of them, he says, 'illuminates different aspects of an integrated vision of constitutional justice', 'whose requirements any acceptable version of liberal democracy should be expected to satisfy'.[12]

He defends Fuller's claim that compliance with the eight well-known 'principles of legality' is of inherent moral value, but rejects Fuller's argument that this is because it facilitates the governance of human conduct by rules. Allan denies that such a purpose is of inherent moral value.[13] He argues, instead, that compliance with the principles is of inherent moral value because it enhances the autonomy and dignity of citizens. It does this first, by giving them fair warning of the exercise of state power, so they can organize their affairs accordingly,[14] and second, by helping them to evaluate and criticise government coercion, as a result of officials having to act consistently with publicised rules rather than through the secret exercise of unfettered discretion.[15]

Allan concludes that the equal dignity of citizens is 'the basic premise of liberal constitutionalism and … the ultimate meaning of the rule of law'.[16] 'The citizen of a constitutional democracy is to be honoured as an equal, autonomous, moral agent, who takes responsibility for his own actions.'[17] Indeed, 'the role of the individual moral conscience' is '[a]t the heart of the rule of law'.[18] Ultimately, 'the rule of law is most persuasively understood as an ideal of consent to just laws, freely given by all those to whom they apply'.[19] A legal system committed to the rule of law therefore aspires to every citizen's consent: it seeks the citizen's acceptance that its demands ought morally to be obeyed.[20] Indeed, as we will see, Allan claims that the implicit appeal to the rational consent of the citizen is built into the very concept of law in a liberal democracy.[21]

The two most fundamental principles of the rule of law – due process (or procedural fairness) and equality – are designed to implement this aspiration to popular assent.[22] Compliance with these principles helps to ensure that all government acts can be given a reasonable justification – shown

[11] *Ibid*., p. 1.
[12] *Ibid*., pp. 25 and 29. Allan also relies on A.V. Dicey's influential examination of the rule of law, pp. 13–21.
[13] *Ibid*., p. 61. [14] *Ibid*., p. 62. [15] *Ibid*., p. 75. [16] *Ibid*., p. 2. [17] *Ibid*., p. 6.
[18] *Ibid*., p. 89. [19] *Ibid*., p. 90. [20] *Ibid*., pp. 6, 24–5 and 64–5.
[21] *Ibid*., pp. 65–7, discussed in section IV, below. [22] *Ibid*., pp. 16–17.

to serve a defensible view of the common good, in which all citizens are accorded equal respect and dignity.[23] For example, due process requires that citizens be provided with an initial right to be heard, so that their interests and point of view must be taken into account, and a subsequent right to require that government actions be justified both legally and (therefore) morally before an independent judge.[24] The principle of equality requires that 'all forms of government discrimination between persons should be adequately justified … [and] reasonably related to legitimate public purposes, reflecting an intelligible view of the common good, consistently maintained, and compatible with the basic principles of the legal and constitutional order'.[25] Those basic principles include a number of 'fundamental freedoms', of thought, speech, conscience and association, which are necessary pre-requisites for the moral autonomy of citizens, including their ability to evaluate whether their putative legal obligations are truly obligatory.[26]

Allan anticipates the criticism that this account of the rule of law is so substantive that it amounts to a complete theory of justice. He describes the rule of law as 'a modest theory of *constitutional* justice', which does not guarantee a perfectly just society, and may even form part of a political culture that is hostile to liberty and careless of human dignity.[27] But it is hard to understand how this could be, given that the rule of law is based on the principle of the equal dignity of all citizens, and the principle of equality requires that all forms of discrimination must be justified to independent courts and, indeed, to every individual citizen affected by them. It is not easy to reconcile his claim that the rule of law is only one political virtue among many, and does not guarantee a just society, with his other claim that at the heart of the rule of law is the ideal of consent on the part of every citizen to just laws.[28] These claims pull in different directions. I suspect that Allan's theory would also not seem particularly modest if a list were made of all the procedural and substantive rights that he maintains are protected from legislative interference.

III Institutional authority

According to Allan, the rule of law has institutional implications. It 'assumes a division of governmental powers or functions that inhibits the

[23] *Ibid*., p. 2. [24] *Ibid*., pp. 8–9 and 79.
[25] *Ibid*., p. 22. The requirement of consistency is essentially what Dworkin has called 'integrity', p. 40.
[26] *Ibid*., pp. 3, 23 and 90–5. [27] *Ibid*., pp. 29 and 23; see also pp. 202 and 218.
[28] See n. 19, above.

exercise of arbitrary state power'.[29] It requires that the legislature enact general laws, 'formulated in ignorance of the consequences of their subsequent application to particular (identifiable) cases'.[30] An elected legislature broadly representative of the community is particularly well suited to this task.[31] It must be separate from the executive, which is responsible for applying those laws 'impartially to each case without fear or favour'.[32] 'The division of power ensures that public officials cannot create new rules and enforce them at the same time, making people subject to their will as it evolves from case to case.'[33] The rule of law also 'assumes the existence of' independent courts, which act as servants of the constitutional order as a whole rather than of the other branches of government. It is the duty of the courts to ensure that the legislature and the executive comply with the principles of the rule of law, and to invalidate their acts if they do not.[34]

Allan describes the rule of law as a 'rule of reason', because it requires all government actions affecting individuals to be justified, by being shown to serve a defensible view of the common good.[35] The question naturally arises: justified, and defensible, to whom? His theory might be seen as representing a jurisprudential tradition maintaining that law must ultimately be founded on 'reason' rather than 'will'. But that tradition must grapple with a dilemma. It is all very well to assert that judges must ultimately be bound by 'reason', rather than the arbitrary 'will' of a legislature, and that therefore they can invalidate legislation that they deem unreasonable. But what about their own decisions? There are two alternatives. On the one hand, consistency would seem to require that no-one else can be bound by the judges' arbitrary 'will', and therefore that other officials and citizens can invalidate judicial decisions that they deem unreasonable. But as the same reasoning would apply to the decisions of every legal official, and ultimately of every citizen, that risks the complete unravelling of legal authority, and the collapse of law into anarchy.[36] On the other hand, if judicial decisions are legally authoritative, and binding on other officials and citizens even if they deem those decisions unreasonable, the initial denial that legislation can enjoy the same authority seems dubious. Why should courts, but not legislatures, have authority to make decisions that legally bind other officials and citizens regardless of their own views of the merits?

Allan prefers to grasp the first horn of this dilemma, although this is sometimes obscured by his descriptions of judicial authority as 'ultimate'

[29] Allan, *Constitutional Justice*, p. 32. [30] *Ibid*., pp. 31, 38 and 48. [31] *Ibid*., p. 50.
[32] *Ibid*., p. 39. [33] *Ibid*., p. 48. [34] *Ibid*., pp. 2, 3, 12–13, 31 and 41. [35] *Ibid*., p. 2.
[36] See Goldsworthy, *The Sovereignty of Parliament*, pp. 255–71 and 274–5.

or 'final'. For example, not only is it the 'ordinary constitutional function' of a court to be 'necessarily concerned with the legality, and hence validity, of legislation or an executive order or decision'.[37] 'It is ultimately for the courts to determine the validity of statutes in accordance with the principle of equality and with due regard for the other essential constituents of the rule of law.'[38] He refers to 'the legal sovereignty of the courts, as the final arbiters of the law in particular cases'.[39] 'The authority of the court's decision' – 'its claim to be a uniquely valid resolution of the matter in dispute' – rests on 'its character as a fully reasoned response to specific, and opposing, arguments' concerning 'questions of legal principle'.[40]

I understand these statements to refer only to the relationship between courts and the other branches of government. In other words, judicial decisions are 'ultimate' or 'final' from their point of view. But they are not ultimate or final from the point of view of ordinary citizens. One of Allan's most distinctive and frequently repeated claims is that 'the rule of law attributes responsibility for the identification of "valid" law, in the last analysis, to the conscience of the individual citizen, acting on his own understanding of the needs of the common good'. It follows that 'purported "laws" or policies that are gravely unjust (in the citizen's view) lack both legal and moral authority'.[41] '[T]he rule of law is ultimately premised … on the "sovereign autonomy" of the individual citizen.'[42] He says that 'it is right to treat the judge's duty as analogous to that of the ordinary citizen: each is equally entitled, and bound, to act on the basis of what he believes to be the correct interpretation of the law.'[43] Individuals who repudiate oppressive laws play 'a role analogous to that of a constitutional court, or its common law equivalent'.[44] On this view, legal judgment, being a species of moral judgment, partakes of the same inescapable autonomy as moral judgment. Every individual is ultimately responsible for deciding how he or she morally, and therefore legally, ought to act.[45]

This is a striking claim, which directly challenges legal positivist understandings of authority, law and the rule of law. Before examining that challenge in the next section, it is worth noting that some lingering uncertainties are left by Allan's different descriptions of judicial authority

[37] Allan, *Constitutional Justice*, p. 162. [38] *Ibid*., p. 3.
[39] *Ibid*. See also p. 202: 'judicial sovereignty as regards the application of law to particular cases'.
[40] *Ibid*., p. 190. [41] Both quotes p. 7. See also pp. 220–1. [42] *Ibid*., p. 281.
[43] *Ibid*., p. 217. [44] *Ibid*., p. 312. [45] *Ibid*., p. 89.

to invalidate legislation that violates the rule of law. First, legal officials are also individual citizens, and so if judicial decisions are not ultimately or finally authoritative for individual citizens, it is not entirely clear how they can be for officials of the other branches of government. They are presumably just as entitled as ordinary citizens to act on the basis of their own sovereign autonomy. Secondly, if judges possess only the same authority as ordinary citizens, then it is arguably confined to very unusual circumstances of quite extreme legislative injustice. This seems to be confirmed by Allan's choice of horrific Nazi laws as examples of the kind of legislation that judges would be justified in holding invalid.[46] If, on the other hand, it is part of the judges' 'ordinary constitutional function' to invalidate legislation inconsistent with the rule of law, then arguably it is properly exercisable much more frequently – even routinely – with a much lower threshold of deference owed to legislative judgment.

IV The concept of law

Allan urges us to 'reject an ethically neutral, "positivist" definition of law, in favour of the "liberal" conception implicit in the constitutional ideal of the rule of law'.[47] He relies heavily on a Fullerian account of the concept of law, while also invoking Dworkin in support.[48] 'Fuller's basic (if partly disguised) jurisprudential endeavour', he claims, was 'to illuminate the value-laden character of the concept of law on which liberal democracy is founded'.[49] On this view, 'the basic values of human dignity and individual autonomy are taken to be instrinsic features of law.'[50] He takes Fuller to have demonstrated 'that there are modest, but significant, constraints on the nature and content of law': most importantly, 'the principles of procedural due process and equality impose constitutional limits on the kinds of enactment that can qualify as "law".'[51]

Allan has to show first, that certain principles constitute the 'rule of law', and secondly, that they are not only political ideals within Western liberal democracies, but also internal to the concept of law itself. That is essential to his claim that putative legislation inconsistent with the rule of law is not valid law. He says that '[a]t the heart of the analysis of the rule of law, as an ideal of constitutionalism, lies [a] distinctive concept of

[46] *Ibid*., pp. 69–72. [47] *Ibid*., p. 75.

[48] The emphasis is on Fuller at, e.g., p. 202. At p. 72, Dworkin's theory of law is said to be 'squarely built on these Fullerian foundations'.

[49] *Ibid*., pp. 62 and 66–7. See also p. 6. [50] *Ibid*., p. 6. [51] *Ibid*., p. 202.

"law".'[52] But argument is required to demonstrate that the concept 'law' in the phrase 'the rule of law' is necessarily the same as the concept in professional legal usage. It is far from obvious that it is. Although the content of 'the rule of law' is contested, it is generally agreed to be a morally laden principle or ideal. Many legal positivists, who maintain that the concept 'law' in professional legal usage is morally neutral, therefore deny that 'the rule of law' is identical to 'the rule of *the* law' in that professional sense (and vice versa).[53] They insist that 'the rule of law' is a distinctive concept, which includes moral criteria that are inapplicable to the concept of 'law' per se. They might therefore agree with much of Allan's analysis of 'the rule of law', and acknowledge that it is an ideal to which (for the most part) liberal democracies aspire, but reject his claim that it also informs the meaning of 'law' per se and therefore the validity of legislation.

Allan maintains that we currently have more than one concept of law. One is broader, morally neutral, and descriptive, and the other is narrower, morally loaded, and evaluative. He argues that whatever the utility of the former in the general descriptive jurisprudence pursued by legal positivists, the latter is essential to practical reasoning about authority and obligation (legal and moral) within the context of a liberal democracy, including the reasoning of judges.[54] But there is some tension in Allan's account between, on the one hand, statements suggesting that he is merely analyzing a concept of law that we already accept – at least implicitly – and on the other hand, statements suggesting that he is recommending a revised concept of law, on the ground that it would advance our moral aspirations and practical deliberations.[55]

He insists that the ideal of the rule of law, and the concomitant concept of legal obligation, 'forge the link between law and justice'.[56] A government committed to the rule of law is committed to respecting the dignity and autonomy of its citizens, and therefore to seeking its citizens' assent to the legal obligations it purports to impose on them. Allan infers from this that those purported obligations are genuine obligations only if the citizens ought to assent to them, and therefore that legal obligations are a species of moral obligation. 'If the law should be understood as demanding the citizen's assent, the existence of legal obligations (as

[52] *Ibid*., p. 6. See also p. 1.
[53] For general discussion, see Chapter 3, above.
[54] Allan, *Constitutional Justice,* pp. 6 and 71–2.
[55] The word 'implicit' is frequently used: see, e.g., pp. 64–6. For examples of statements suggesting a revisionary purpose, see *ibid*., pp. 62, 64, 66 and 72.
[56] *Ibid*., pp. 61 and 67.

opposed to illegitimate demands) must be in every case a matter of moral judgment.'[57] I am not sure that I understand exactly how this argument proceeds. At one point, he observes that the law claims to be authoritative, and to impose obligations, and argues that such claims 'differ from mere assertions of will or power in seeking the co-operation of the citizen as a rational, responsible and autonomous agent'.[58] But that argument seems independent of the liberal democratic concept of the rule of law, because as Raz has insisted, it is true of law everywhere that it claims to be authoritative and to impose obligations.[59]

But however the argument proceeds, its conclusion does not follow from its premise. A government might be committed to seeking its citizens' assent to the legal obligations it imposes on them – and might even sincerely believe that they ought to assent to them – without their having to be conceived of as moral obligations. Legal obligations could be conceived of as the government's posited declarations of what its citizens morally ought to do. It does not follow from the fact that the government seeks the citizens' agreement with its posited declarations, that if a citizen rightly disagrees with one of them, it is not a genuine legal obligation. All that follows, at most, is that the citizen has no moral obligation to obey that legal obligation – which is, of course, just how a legal positivist would describe the situation. Allan needs an additional premise to establish that in liberal democracies, legal obligations are conceived of as moral obligations rather than as posited declarations of moral obligations.

Allan does advance a further argument to support his conclusion. This is that legal positivist conceptions of law and legal obligation offer no guidance to those faced with difficult practical questions concerning authority, obligation and law enforcement. Whatever analytical clarity legal positivism may achieve, it offers 'empty counsel in the face of pressing moral dilemmas, which demand legal solution'.[60] This may be so – but then, legal positivism does not purport to offer solutions to moral dilemmas. Allan quotes Fuller's complaint that the positivist severance of law from morality removes any way of weighing the obligation to obey the law against other, competing moral obligations.[61] But this is not so.

[57] *Ibid*., p. 67, see also p. 218. [58] *Ibid*., p. 65, see also p. 202.

[59] J. Raz, *Ethics in the Public Domain, Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), pp. 215–26.

[60] Allan, *Constitutional Justice*, pp. 68–9.

[61] *Ibid*., p. 68. Later Allan objects that positivists cannot account for the citizen's moral obligation to obey the law, p. 218. But legal positivists can account for such an obligation, provided that it is understood to be a contingent rather than a necessary and universal obligation.

Legal positivists would concede that legal obligations and moral obligations are, in themselves, incommensurate. This is because legal obligations, unlike moral obligations, are matters of fact, which by themselves have no practical, action-guiding force. But positivists would argue that legal obligations are usually (although not necessarily) accompanied by moral obligations to obey the law, and it is always possible to weigh those moral obligations against competing ones. There is no practical difficulty here at all.

Allan also appeals to practical dilemmas confronting West German courts after the Second World War. By adopting a non-positivist conception of law similar to Fuller's, those courts were able to declare egregious Nazi statutes legally void, and therefore ineffective to deprive Jewish citizens of basic rights or to provide Nazi spies and informers with a defence of legality.[62] But as H.L.A. Hart argued in response to Fuller, there is more than one way to achieve the same results. He argued that openly retrospective legislation would be a more frank and clear-headed way of dealing with the problem. It is worth noting that Allan's preferred Fullerian solution also involves an element of retrospectivity: it involves culling the Nazi statute book to accord with a concept of law that Allan claims is distinctive to liberal democracies, and which therefore was presumably alien to Nazism itself. As Hart observed, a 'case of retrospective punishment should not be made to look like an ordinary case of punishment for an act illegal at the time'.[63] In addition, the maxim 'hard cases make bad laws' might be invoked here – rephrased as 'hard cases make bad concepts of law'. It is arguably unwise to advocate a particular concept of law for all liberal democracies on the ground that it has proved useful in dealing with a very unusual situation that existed only at the birth of one or two of them, and not thereafter, especially when that situation can be dealt with in other ways. Even if that concept was practically useful in that unusual situation, it might prove to be counter-productive in other situations that are much more likely to arise in a majority of liberal democracies.[64]

Allan summarises his position thus: 'it serve[s] no useful purpose, relevant to any question of practical governance, to attribute legal validity to a measure that wholly lack[s] moral legitimacy and ought, so far as

[62] *Ibid*., p. 69.

[63] H.L.A. Hart, *The Concept of Law* (2nd edn) (Oxford: Clarendon Press, 1994), pp. 211–12.

[64] See Goldsworthy, *The Sovereignty of Parliament,* pp. 267–9, for general discussion of this issue.

possible, to be resolutely resisted'.[65] But at least four arguments can be made to the contrary.

The first argument, which forms an influential strand in the legal positivist tradition, is that making legal validity partly dependent on moral criteria would create an undesirable risk of legitimating unjust laws and regimes. The argument has recently been developed at length by Liam Murphy, who concludes that:

> So long as a moral test is thought to play a role in the determination of what the law already is, there will be the danger that apparent laws will be given the benefit of the doubt, assumed to be true law, and thus assumed to have satisfied the moral test. And there is the second danger too, that when official directives are regarded as unjust, this will be characterized as a kind of internal malfunction on the part of the legal regime, not in itself cause for great alarm, certainly not cause to subject the legal system as a whole to searching criticism.[66]

It could possibly be argued by those sympathetic to Allan's normative commitments that his project risks just this kind of complacency. He is arguing, in effect, that constitutions such as those in Britain and Australia do not need fundamental reforms to ensure adequate protection of rights, because such protection is already enabled by their abstract commitment to the rule of law. On his view, the courts already possess all the powers they need, and if they are not exercising them properly, criticism should be directed at the judges rather than at the constitution.

The second argument emphasises the need for precision and predictability in legal reasoning. The argument is made by Finnis, although he is not a legal positivist.[67] He distinguishes between the moral senses of words such as authority, obligation and validity, when they are used in unfettered practical reasoning that is ultimately governed by moral norms, and the purely legal senses of the same words when they are used by lawyers for professional purposes.[68] He argues that these distinctions are motivated by sound, practical reasons for insulating legal reasoning from the general flow of practical reasoning.[69] One such reason concerns predictability. An important objective of law is to bring 'definition, specificity,

[65] Allan, *Constitutional Justice*, p. 72.

[66] L. Murphy, 'The Political Question of the Concept of Law', in J. Coleman (ed.), *Hart's Postscript, Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001), p. 371.

[67] Allan notes and responds to Finnis's argument in *Constitutional Justice*, p. 76.

[68] J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 27, 234–7, 276–280, 282–3, 309–12, 316–321 and 354.

[69] *Ibid*., pp. 277–80, 309–12, 316–20, 354–7 and 363–6.

clarity, and thus predictability' to human affairs, by way of rule-governed institutions charged with establishing a stable framework for social interaction.[70] Evaluation of authority, obligation and validity, in their moral senses, often leads to conclusions of degree – of 'more or less' – that are too imprecise for lawyers' purposes. Such concepts have, in legal usage, an invariant, 'black and white' quality because the law seeks to be 'relatively impervious to discretionary assessments of competing values'.[71]

The third argument, an extension of the second, applies this concern for clarity to the legal rules that allocate decision-making authority among legal institutions. It alleges that this allocation of authority might be eroded or confused if it also depended on unwritten, abstract and imprecise moral criteria. The argument is most powerful where the authority of democratically elected legislatures is concerned. In developing his theory of 'ethical positivism', for example, Tom Campbell places considerable weight on the dangers to democracy of unelected judges claiming authority to invalidate laws enacted by elected legislatures, on the basis of vague moral criteria of authority and validity.[72]

Finnis, too, emphasises the importance of basic legal norms that confer law-making authority on some institutions rather than others, and limit when and how they may exercise it.[73] When judges swear to do justice 'according to law', they accept these basic norms, which constitute the framework for legal reasoning 'for intra-systemic purposes (rather than for private moral reasoning about the law)'.[74] Finnis accepts that judges, no less than citizens, are entitled to evaluate laws from the broader perspective of practical reason. They might be justified in condemning an egregiously unjust law as lacking authority and validity, in the unrestricted, moral senses of those terms, and in an extreme case, as undeserving of obedience. But there are sound practical reasons for insulating questions of legal validity and authority from such moral evaluations.

These reasons can perhaps be illuminated by considering Allan's claims that legal and moral authority and validity are ultimately indistinguishable, and that legal authority and validity are ultimately matters for determination by individual citizens.[75] Legal positivists would argue that although individual citizens must ultimately decide whether or not

[70] *Ibid*., p. 268. [71] *Ibid*., pp. 312 and 319–20.

[72] T. Campbell, 'Democratic Aspects of Ethical Positivism', in T. Campbell and J. Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism* (Aldershot: Ashgate/Dartmouth, 2000), p. 3.

[73] Finnis, *Natural Law*, pp. 312 and 317. [74] *Ibid*., pp. 317–18.

[75] See text to nn. 41–45, above.

they ought morally to obey legally valid legislation, the obliteration of any distinction between moral and legal validity would tend to obscure the likely costs and benefits of such decisions. As Allan acknowledges, there are powerful reasons, concerning the maintenance of legal authority, why individuals often ought morally to obey legislation that they regard as morally wrong.[76] These reasons are likely to be obscured if legislation that is deemed morally wrong is for that reason also deemed legally invalid. This is because disobeying legally invalid legislation does not directly challenge legal authority, and therefore does not obviously threaten its maintenance. The threat is more plainly apparent if the legislation in question is regarded as legally valid. To put this another way: while it is clear that there can be good reasons for obeying legislation that is immoral but legally valid, it is not so clear that there can be good reasons for obeying legislation that is both immoral and legally invalid.

Much the same point bears on how we should think about judicial obedience to Parliament. Allan and I agree that judges should disobey egregiously immoral legislation.[77] I suspect that we also agree that outright disobedience is an extra-ordinary response – a remedy of last resort – that should be reserved for quite exceptional circumstances. We agree, in other words, that the judges' normal stance should be one of obedience, albeit tempered by strict interpretation of legislation impinging on common law rights. But whereas I conceive of disobedience as an exercise of moral authority, which overrides the judges' legal duty, Allan conceives of it as an exercise of both moral and legal authority. I regard the distinction between legal and moral authority as a conceptual device that helps prevent the extra-ordinary response of disobedience being resorted to excessively, thereby eroding the normal judicial stance of obedience, and undermining democracy. I previously showed that precisely this concern contributed to the historical development of the doctrine of parliamentary sovereignty.[78] Allan, on the other hand, is motivated by the opposite concern, that adherence to the distinction might deter judges from departing from their normal stance of obedience when necessary, leading to craven judicial acquiescence in egregious injustice. That is also a legitimate concern, but not necessarily the paramount one:

> The price that must be paid for giving judges authority to invalidate a few laws that are clearly unjust or undemocratic is that they must also be

[76] Allan, *Constitutional Justice*, pp. 76 and 221.
[77] Goldsworthy, *The Sovereignty of Parliament*, pp. 261–70.
[78] *Ibid*., pp. 178–82, 196 and 267–9.

> given authority to overrule the democratic process in a much larger number of cases where the requirements of justice or democracy are debatable. The danger of excessive judicial interference with democratic decision-making might be worse than that of parliamentary tyranny, given the relative probabilities of their actually occurring.[79]

This leads to the fourth argument. For the reason just given, the desirability of judicial authority to invalidate legislation is a question of institutional design that cannot have any straight-forward and universally applicable answer. Much depends on the culture, social structure and political organization in which each legal system operates.[80] No single answer will fit all cases. For example, it now seems that hybrid constitutional models might strike an attractive compromise between the competing traditional models. The point is that legal positivism is neutral between all the options: it is compatible with parliamentary sovereignty, full judicial protection of constitutional rights, and the various hybrid models. But Allan's non-positivist theory is not neutral: it builds moral criteria into the concept of law in such a way that judicial review of fundamental rights is required by definition. Excluding alternative constitutional models by definitional fiat would severely hamper practical institutional design. That is a further reason for legal positivists to argue that their concept of law is superior for practical purposes.

These four arguments are not, of course, necessarily conclusive. But they demonstrate that the question of which concept of law is superior for practical purposes is far from easy. Allan needs to provide much more argumentation to rebut them.

Worse still for Allan, it is not obvious that the answer he gives greatly assists his main thesis. That thesis concerns what concept of law does in fact prevail in liberal democracies such as Britain, not what concept of law ought to prevail for reasons of practical utility. Showing that one concept of law would be superior to an alternative, in terms of practical utility, does not show that it already prevails. Allan's own text sometimes suggests that he is recommending a revised concept of law, rather than analysing a concept already in use.[81] He would no doubt reply that he is engaged in Dworkinian interpretation, a partly evaluative exercise, rather than purely empirical description. But interpretation is not purely evaluative either: any plausible interpretation must satisfy a 'dimension of fit'

[79] *Ibid*., p. 269.

[80] *Ibid*., p. 279. See also W. Sadurski, 'Judicial Review and the Protection of Constitutional Rights' *Oxford Journal of Legal Studies* 22 (2002) 275.

[81] See n. 55, above.

as well as a 'dimension of morality'.[82] Opponents of legal positivism deny that 'what the law is' can be cleanly separated from 'what the law ought to be'.[83] But even they accept that there is a distinction: no-one argues that the law is whatever it ought to be. The same goes for concepts of law.

Since liberal democracies have in fact adopted very different constitutional models, they surely cannot accept the uniform concept of law that Allan recommends. Otherwise, those democracies that have not adopted his preferred model would be guilty of misunderstanding and systematically misusing their own concept of law, which is implausible. Allan comes close to claiming that they are guilty of this, when he asserts that 'the doctrine of absolute or unqualified parliamentary sovereignty, though generally treated as a characteristic feature of English law, is none the less seriously confused as a matter of constitutional theory'.[84] But there must be some basis within local practice for this assertion: some evidence that despite what senior legal officials usually say, they do not really accept that Parliament is sovereign. That is the crucial issue, to which I now turn.

V The rule of law as law

Allan acknowledges that his project requires him to show that his conclusions are sound not only as a matter of abstract political theory, but also as a matter of substantive law.[85] In other words, it is one thing to construct a normative theory of the rule of law, by fitting together the contributions of philosophers such as Fuller, Hayek and Dworkin. It is another thing to show that the theory accurately describes, or (for Dworkinians) interprets, the constitutions of the liberal democracies he is concerned with.

Britain poses the toughest test for Allan where, he concedes, 'important individual liberties and safeguards are widely thought to be wholly at the mercy of an omnipotent legislature'.[86] Indeed, he acknowledges that A.V. Dicey's insistence on the unqualified nature of parliamentary sovereignty 'has become established as current orthodoxy'.[87] Given the long history of the doctrine of parliamentary sovereignty, and the frequency with which it has been affirmed by judges throughout the twentieth

[82] See n. 7, above. [83] Allan, *Constitutional Justice*, p. 71.
[84] *Ibid*., p. 201. [85] *Ibid*., p. 4. [86] *Ibid*., p. 5.
[87] *Ibid*., p. 13. See also p. 201: it is 'generally treated as a characteristic feature of English law'.

century, Allan must attempt to show that it is an 'error' attributable to a 'failure to understand the full implications of the rule of law'.[88]

He maintains that there is '[a] general commitment to certain foundational values that underlie and inform the purpose and character of constitutional government, at least as it has been understood in the Western democracies'.[89] For example, 'it is a basic premise of a liberal, democratic constitutional order that the legislature is bound by fundamental principles of equality and procedural due process'.[90] A critic might agree that this is true of Britain, but only if 'bound by' does not entail judicial enforceability. Senior legal officials in Britain have long regarded Parliament as bound by such principles as a matter of political morality and constitutional convention, rather than judicially enforceable law.

Allan, of course, regards this as insufficient protection of the rule of law. But where, in addition to constitutional conventions, might we find a commitment to these foundational values in the British constitution? He refers to the 'constitutional role' of the common law 'in reflecting and preserving the rule of law'.[91] Indeed, he describes the common law as the ultimate foundation of the British constitution, and claims that the authority of Parliament is itself conferred by the common law.[92] This is a claim that I previously disputed. I argued that the fundamental norms of the British constitution could not be regarded as creatures of common law in the modern sense of judge-made law.[93] Allan now concedes my principal contention. 'Goldsworthy rightly reminds us', he says, that a rule of recognition 'does not rest on the practices and convictions of the judiciary alone'.[94] '[I]t is undoubtedly true … that the power of judges to settle constitutional questions depends in the last resort on the acquiescence of other senior officials.'[95] Fundamental secondary rules such as rules of recognition are constituted by a consensus among the most senior legal officials of a legal system, from all branches of government. The common law can be described as the ultimate foundation of the British constitution only in an older sense of 'common law', meaning a body of custom (in this case, custom among senior legal officials) that the courts have recognised, but did not unilaterally create.[96] Allan must show that there is a general

[88] *Ibid*., pp. 5 and 13. See also p. 201: it is 'seriously confused as a matter of constitutional theory' and 'mistaken'.
[89] *Ibid*., p. 4. [90] *Ibid*., p. 232. [91] *Ibid*., p. 240.
[92] *Ibid*., pp. 139, 225, 229, 243 and 271.
[93] See Chapter 2, above, and Goldsworthy, *The Sovereignty of Parliament*, pp. 238–43.
[94] Allan, *Constitutional Justice*, p. 219. [95] *Ibid*., pp. 223–4.
[96] Chapter 2, above, and Goldsworthy, *The Sovereignty of Parliament*, p. 243.

commitment to the rule of law, as he understands it, not just in ordinary doctrines of judge-made common law, but implicit in the official consensus that constitutes Britain's constitutional foundation. He says that:

> … legal validity ultimately depends on compliance with basic constitutional values or assumptions: for it is these values, reflecting considerations of justice and propriety (however conceived), that account for the consensus, at least among officials, on which the survival of any system of government depends.[97]

But since Allan agrees that the issue turns on the consensus among senior legal officials that underpins the legal system, one might expect him to carefully examine the evidence of what that consensus actually is. An example of relevant evidence is the government's White Paper that accompanied the Human Rights Bill when it was introduced into the House of Lords in 1997. It reaffirmed the doctrine of parliamentary sovereignty, and asserted that a power to invalidate Acts of Parliament is something 'which under our present constitutional arrangements they [the judges] do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it.'[98] A second example is a lengthy discussion that took place in the House of Lords in 1996, concerning the relationship between the three branches of government. The present (then Shadow) Lord Chancellor, Lord Irvine of Lairg, criticised statements by senior judges challenging the doctrine of parliamentary sovereignty as 'unwise', and disparaged the alternative they advocated as 'obsolete'.[99] Two of those judges, Lords Woolf and Cooke, were present, and neither mounted a defence of the opinions that Lord Irvine criticised. Lord Woolf expressed confidence that the judges would faithfully obey every statute that he could contemplate Parliament enacting.[100] The then Lord Chancellor, Lord Mackay, and Lord Wilberforce, strongly affirmed Parliament's sovereignty.[101]

These are just two examples of a mountain of evidence that could be assembled to demonstrate that the doctrine of parliamentary sovereignty is, as Allan actually concedes, the 'current orthodoxy'. Statements to that effect, by judges as well politicians, are both numerous and explicit. The

[97] Allan, *Constitutional Justice*, p. 219.
[98] *Rights Brought Home: The Human Rights Bill, Presented to Parliament by the Secretary of State for the Home Department* (October 1997), 2.13.
[99] *Parliamentary Debates, Fifth Series*, House of Lords, vol. 572, 5 June 1996, 1254–1313.
[100] *Ibid*., 1273. [101] *Ibid*., 1310 and 1268 respectively.

counter-evidence that Allan presents is, by comparison, either sparse, or inexplicit and inconclusive.

His main strategy is to rely on cases in which courts interpret legislation narrowly and sometimes non-literally, to give effect to the presumption that traditional common law rights and liberties should not be infringed.[102] He says that 'it is when we turn to the interpretative power of the courts … that we discover the dual nature of sovereignty in the British constitution' (whereby the courts possess 'legal sovereignty' as the final arbiters of individual cases).[103] He offers two different justifications for this interpretive practice, but seems reluctant to choose between them. The first is fully consistent with parliamentary sovereignty. For example, after explaining why general rules are necessarily insensitive to morally relevant circumstances in some individual cases, he comments that in applying legislative rules the courts

> … should seek to limit adverse consequences, incidental to the statutory purpose. Quite apart from overriding constitutional limitations, it is usually reasonable to assume that a general rule was not intended to cause serious harm to individuals without any (or sufficient) countervailing benefit to the public good. The discovery of such *implicit* qualifications … is none the less entailed by an intelligent construction of the 'statutory meaning': such assumptions show proper respect for the legislators' general good faith and moral integrity.[104]
>
> It is unlikely, in practice, that members of the legislature will have specifically addressed the precise question of interpretation that the court must now decide; and it is rarely, if ever, safe to assume that a majority of members necessarily agreed (or would have agreed) on any particular answer … It is precisely because there is no legislative intention with regard to the particular case, as opposed to the general objective to be attained, that judicial interpretation faithful to basic constitutional values is consistent with parliamentary sovereignty, properly understood.[105]

This is the orthodox justification of this interpretive practice, which I happily accept (although Allan seems to think otherwise).[106] We part company only when he offers a second, very different, justification: for example, when he refers to 'the controlling influence of transcendent constitutional

[102] Allan, *Constitutional Justice*, pp. 13–14,
[103] *Ibid*., pp. 13–14; and see also pp. 3 and 201–2.
[104] *Ibid*., pp. 127–8, emphasis in original.
[105] *Ibid*., p. 206. See also pp. 45, 210 and 211–12.
[106] See Chapter 9, Section II, Part A below, and Goldsworthy, *The Sovereignty of Parliament,* pp. 250–2.

values', and suggests that Parliament would be unable to override them even by express provision.[107] This is inconsistent with parliamentary sovereignty and, if sound, renders the first justification otiose and disingenuous. It would justify judicial 'interpretations' of statutes that are plainly contrary both to clear statutory language and Parliament's general objective, when the individual case falls squarely within that objective and cannot plausibly be regarded as implicitly excepted from it.[108] This could not plausibly be justified by presumptions of legislative intent. As Allan acknowledges, '[t]here are limits to the extent to which language can be read inconsistently with its "natural" or "ordinary" meaning, even when the wider context is fully taken into account. When enactments are deprived of all practical authority to change existing law, interpretation has indisputably given way to judicial disobedience.'[109]

Allan at one point suggests that the power to determine the meaning of statutes in particular cases may be all that is needed to maintain the rule of law: '[e]ven the most egregious violation of fundamental rights … may properly be averted' by the presumption that Parliament intends the rule of law to be preserved.[110] He even says that 'legislative supremacy may be accepted with equanimity on the understanding that statutes must always be interpreted in accordance with the rule of law' (i.e., even when that was clearly not Parliament's intention).[111] But elsewhere he acknowledges that:

> [w]hen the courts are confronted by the starkest violations of equality and due process, an interpretive approach may be too weak (or implausible) to provide adequate protection against arbitrary power. It may therefore be necessary … to repudiate the offending legislative provision altogether.[112]

It is his claim that British courts possess legal authority to do so that is inconsistent with constitutional orthodoxy, and which he fails to substantiate.

Allan does not provide any example of a British court purporting to invalidate a statute. It is true that decisions can be found – especially in the field of administrative law – which raise at least a strong suspicion that the judges defied Parliament, and covertly overrode a statutory provision

[107] Allan, *Constitutional Justice*, pp. 202–3 and 205.
[108] See *ibid*., p. 145. [109] *Ibid*., pp. 229–30.
[110] *Ibid*., p. 207; see also p. 202. At p. 210, the lesser claim is made that the power of interpretation will 'almost always' be sufficient to preserve the rule of law.
[111] *Ibid*., p. 214; see also p. 210. [112] *Ibid*., p. 233.

while pretending to interpret it.[113] But the occasional judicial 'noble lie' does not demonstrate that the legal system as a whole is committed to judges having constitutional authority to do this. As Allan concedes, a rule of recognition 'does not rest on the practices and convictions of the judiciary alone'.[114] Moreover, as I argued previously, 'the fact that the lie is felt to be required indicates that the judges themselves realize that their disobedience is, legally speaking, illicit'.[115]

Another of Allan's strategies is to rely on judicial decisions that protect basic rights indirectly without claiming constitutional authority to do so directly. An example is a decision of the Australian High Court to invalidate a statute that required a state Supreme Court to decide whether a particular, named individual should be imprisoned in the interest of public safety.[116] The High Court managed to do this by manipulating the doctrine of the separation of federal judicial power, which had never before been applied to state courts, rather than by objecting directly to the *ad hominem* nature of the law or its authorisation of preventive detention. Allan says that 'judges have often reached correct legal conclusions – those indicated by a persuasive conception of the rule of law – which are none the less poorly supported by the reasons offered in their defence. A bolder, if less conventional, analysis, that frankly acknowledged the constraints on governmental decision-making inherent in the rule of law, would have strengthened these judicial opinions.'[117] But of course, what is really happening in such cases is that although the judges would prefer to be able to protect certain rights directly, they know that they lack the constitutional authority to do so. They reach the result they desire by bending or stretching other legal doctrines, or inventing new ones, that are less controversial than a naked assertion of the constitutional authority they lack. Allan would prefer them to declare their objective more openly, even though this would be 'less conventional'. But the very fact that they do not openly claim constitutional authority to invalidate legislation in order to protect the rights in question, surely indicates that their legal systems do not recognise that they possess it. That is why they proceed indirectly.

[113] Although Allan does not seem to suggest that this was true in the celebrated *Anisminic* case, which is usually cited in this regard: *ibid*., pp. 211–12.

[114] *Ibid*., p. 219.

[115] Goldsworthy, *The Sovereignty of Parliament*, p. 252.

[116] *Kable* v. *Director of Public Prosecutions (NSW)* (1996) 138 ALR 577, discussed in Allan, *Constitutional Justice*, pp. 5, 234–40 and 245–6.

[117] Allan, *Constitutional Justice*, p. 5.

Allan claims that any interpretation of the British constitution is likely to be controversial, and that 'in the absence of conclusive "evidence" to resolve such questions of interpretation, the outcome is likely to depend on the strength of a theory's appeal on grounds of political morality'.[118] I submit that the evidence *is* conclusive, and only wishful thinking, not 'interpretation', can evade the conclusion that the doctrine of parliamentary sovereignty is fundamental to the British constitution. Even Dworkinian interpretation must be generally consistent with the thought and practice of participants in the institution being interpreted.[119]

I will next argue that Allan also fails to provide an accurate account of the constitutional law of some other liberal democracies that have written constitutions.

VI The interpretation of written constitutions

Allan argues that all Western liberal democracies, by virtue of their commitment to the rule of law, are based on similar unwritten, but nevertheless justiciable, constitutional principles. Because these democracies evince 'a general commitment to certain foundational values', they 'should, to that extent, be understood to *share* a common law constitution … These shared features are … ultimately more important than such differences as the presence or absence of a "written" constitution, with formally entrenched provisions, whose practical significance may easily be overestimated.'[120] Whether or not they also have written constitutions expressly protecting those principles is therefore less significant than might be thought. Although Britain lacks a written constitution, its courts possess authority to protect those principles, by interpretation or, if necessary, invalidation of legislation. The same goes for Australia, whose written constitution does not expressly protect equality, due process, or freedoms of speech and association.

The Australian High Court in 1992 purported to find some of these principles to be implied by the written constitution, and its more activist members urged it to go even further in that regard. For example, it found that by implication, the constitution guarantees freedom of political speech, and some of the judges have also accepted the existence of an

[118] *Ibid*.
[119] Goldsworthy, *The Sovereignty of Parliament*, pp. 253–4 and 271–2.
[120] Allan, *Constitutional Justice*, pp. 4–5. See also *ibid*., p. 243.

implied right to equality.[121] Allan argues that the reasoning in such cases would often be more plausible if the judges frankly admitted that the true source of these implied rights is not the constitutional text, but deeper, unwritten principles:

> The absence of explicit guarantees of due process and the equal protection of the laws in the Commonwealth constitution, though frequently noted by the High Court's critics, is immaterial if, as I have argued, these principles are inherent in a constitution founded on the rule of law.[122]
>
> [T]he written document is, in effect, subordinated to 'higher principles' of 'natural' or 'fundamental law' – the principles that together embody a coherent theory of liberal constitutionalism.[123]

He rejects counter-arguments based on the undisputed fact that the founders of the Constitution deliberately chose not to include such protections within it:

> It was not open to the framers to choose only partial implementation of the rule of law, or to leave its enforcement to other organs of government, or to rely on the tolerant goodwill of the community at large: such a choice would only have betrayed confusion about the nature of law in a constitutional democracy. Admittedly, the framers may have entertained a narrower conception of the rule of law than that defended in this book, one that accorded a more closely circumscribed role for courts … We cannot, however, now ignore our own conclusions about the proper reconciliation of these basic legal doctrines [parliamentary sovereignty, and the rule of law]: our present understanding inevitably, and rightly, colours our attempt to make sense of the constitutional scheme. It is only by engaging in the philosophical debate that constitutional interpretation entails that the original text can be made to serve the needs of the polity today. Every generation must read the text in the light of its own understanding of the essentials of legitimate government, as informed by study and experience.[124]

These are remarkable claims. Those who frame a written constitution usually deliberate very carefully about what institutions it should establish, what authority it should confer on them, what rights it should guarantee and protect through judicial review, and so on. But according to Allan, if they make 'mistakes', by not giving courts sufficient authority to protect

[121] Discussed in L. Zines, *The High Court and the Constitution* (4th edn) (Sydney: Butterworths, 1997), pp. 202–12, 377–99 and 415–23. There is a much stronger case for implied protection of due process than of free speech or equality.

[122] Allan, *Constitutional Justice*, p. 250. [123] *Ibid*., p. 263.

[124] *Ibid*., p. 264. See also p. 259.

the rule of law, their mistakes should be overridden – by judicial fiat, rather than subsequent constitutional amendment. Neither the framers, nor subsequent majorities who approve of their 'mistakes' (and oppose a constitutional amendment), should be permitted to opt for institutional arrangements that (in Allan's opinion) offer insufficient protection of the rule of law. Indeed, Allan goes so far as to deny that the constitution of a liberal democracy could be validly amended so as to remove judicial protection of fundamental rights essential to the rule of law:

> There are certain freedoms so elementary … that it was unnecessary to mention them in the constitution, and which cannot be destroyed … Popular sovereignty should no more be identified with power to repudiate such values, by resort to constitutional amendment, than equated with ordinary majoritarianism. In the same way that Parliament enacts laws for a constitutional democracy, whose essentials therefore limit the scope of legislative power, a constitutional 'amendment' (if properly so described) must truly serve the polity – the legally constituted political community – for whose governance the constitution provides.[125]

It surely follows from this that s. 33 of the Canadian Charter of Rights should be nullified, at least in part, by Canadian courts. Section 33 expressly authorises Canadian legislatures to override most Charter rights, including rights to equality, free speech and due process, by enacting a 'notwithstanding clause'. Allan would have to say that this contradicts the rule of law as he has defined it. It would then seem to follow that 'it was not open to the framers [of the Charter] to choose only partial implementation of the rule of law', and that Canadian courts should ignore any notwithstanding clause that overrides a right that is essential to the rule of law, thereby treating s. 33 as, in effect, partly invalid.

Allan's assessment of Britain's Human Rights Act 1998 is of interest for similar reasons.[126] The Act authorises courts to declare legislation incompatible with protected rights, if they cannot achieve compatibility through 'interpretation', but it does not mention any power of invalidation. It is undeniably based on an assumption that the courts do not possess such a power, and on a decision not to give it to them.[127] This is problematic for Allan, because he holds that such a power does pre-exist the Act. I would expect him to argue that the Act does not remove that power. He could do so on the ground that the assumption underlying the Act should be ignored, because it is both erroneous, and extrinsic to the Act. On this view, since British courts already possess power to invalidate

[125] *Ibid*., p. 263. [126] Human Rights Act 1998 (UK). [127] See text to n. 98, above.

legislation in order to protect rights essential to the rule of law, the Act does not affect that power, but merely grants the courts a supplementary power to declare legislation incompatible with other rights that are not essential to the rule of law. It might be argued, to the contrary, that the assumption and decision underlying the Act justify its being interpreted as impliedly revoking any power to invalidate legislation that the judges may previously have possessed. But Allan would surely reply that this would be invalid, because (like s. 33 in Canada) it would contravene the rule of law. 'It was not open to the framers [of the Act] to choose only partial implementation of the rule of law, or to leave its enforcement to other organs of government.'[128] Surprisingly, however, Allan does not explicitly draw these conclusions, although he does say that 'the new arrangements serve to emphasise the dual sovereignty that previously existed'.[129]

VII Conclusions

Allan's conception of the rule of law, encompassing rights to due process, equality, free speech and association, and strong judicial review to protect them, is powerful and attractive from a normative point of view. But his claim that it lies at the heart of the constitution of every liberal democracy is implausible. It is no doubt true that all liberal democracies are committed to the rule of law, in some sense of the term, as an ideal. But Allan relies too heavily on claims about what he supposes to be 'implicit' in this ideal.[130] The rule of law is an abstract, vague and contestable ideal, which is compatible with a variety of understandings and institutional arrangements. That is why there is such a variety among the constitutions of liberal democracies. The most fundamental principles to which they are committed may be homogeneous, but the means by which they attempt to implement them are not. Allan could have argued that some of those means are inadequate or misguided, and should be reformed or replaced. Instead, he suggests, in effect, that reforms are unnecessary, because all liberal democracies are committed to protecting the rule of law in much the same way. This homogenisation of constitutions ignores crucial differences that currently exist, and if accepted, could stultify or frustrate creative reforms that do not fit his preferred model.

As previously noted, the two traditional constitutional models are both subject to well known criticisms: that of parliamentary sovereignty, for

[128] See text to n. 124, above.
[129] Allan, *Constitutional Justice*, pp. 225–8.
[130] See, e.g., *ibid*., pp. 64–5.

endangering individual rights, and that of judicial review, for endangering democracy. The constitutional traditions of different countries reflect different views as to which of those dangers is more to be feared, a question that continues to engage legal and political theorists. It is surely possible that the answer varies from one country to another, depending on their different political, social and cultural circumstances.[131] Yet Allan assumes that there is a single answer to the question, which applies to all liberal democracies: namely, that the danger to individual rights posed by legislative sovereignty is more to be feared than the danger to democracy posed by judicial review. Moreover, his approach makes it impossible to achieve the kind of compromise sought by the 'hybrid' models recently adopted in Canada, New Zealand and Britain, which aim to combine the more attractive features, while minimising the dangers, of the traditional models. According to Allan, the rule of law requires that basic rights be protected by an independent judiciary with authority to invalidate legislation if necessary. There can be no compromise.

Allan acknowledges that whether or not legislation is just, or violates rights, is frequently a subject of reasonable disagreement, and that courts should then defer to the outcome of the democratic process.[132] But he fails to acknowledge that much the same is true of constitutions. He is inclined to reject institutional arrangements he disapproves of as erroneous. But whether or not judges should have authority to invalidate legislation is in many communities itself a subject of reasonable disagreement. When a constitution is based on the reasonable opinion that judges should not have it, they should defer to that opinion, at least if the constitution was originally adopted, and is open to amendment, by democratic processes.

[131] See n. 80, above. [132] See, e.g., Allan, *Constitutional Justice*, pp. 22 and 163.