MASTER OF THE ROLLS

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**CONSTITUTIONAL JUSTICE: LESSONS FROM MAGNA CARTA**

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## Introduction

1. It is a great honour to address you and deliver the fourth Magna Carta lecture – especially since the previous three lecturers were Lord Woolf, Professor Vernon Bogdanor and Baroness (Shirley) Williams. I appreciate that, in such company, I am very much the fourth team, especially since it is only very recently that I have been called from the subs bench to replace no less a personage than, Professor Ing Vaclav Klaus CSc, the President of the Czech Republic, who was to have given the lecture. My only qualification for being here is certainly not any deep knowledge of the constitution but the happenstance that one of the very pleasant by-products of being Master of the Rolls is that I am also Chairman of the Magna Carta Trust. My theme this evening touches on some of the issues discussed by Professor Bogdanor, whose lecture I read with great interest and admiration only after I had prepared a draft of what I might say this evening.

2. Magna Carta is rarely out of the news. The burning issue of last week, which I might call the 42 days' point, provoked much mention of Magna Carta. For example in his statement announcing his decision to stand down and cause a by-election in his constituency at which he will stand again David Davis noted that yesterday was the anniversary of Magna Carta, which he described as "a document that guarantees the fundamental element of British freedom, habeas corpus, the right not to be imprisoned by the state without charge or reason". He asked too what the House of Lords is there for if not to protect Magna Carta. It would not be appropriate for me to express my views on the 42 days point (let alone on Mr Davis' decision) but what the debate has shown yet again is that Magna Carta remains an enduring symbol of our freedom.

3. I met Sir Louis Blom-Cooper QC last week, which is always a pleasure. I think he is here this evening. He told me that some say that Magna Carta did no more than establish the principle 'one baron – one vote'. I could not possibly subscribe to that view in my capacity as Chairman of the Magna Carta Trust. This year, albeit a year late, we are celebrating the 50th anniversary of the Memorial at Runnymede so generously financed by the US Bar Association. We are doing so with a dinner in the Middle Temple in early October this year and we are looking forward to the 800th anniversary in 2015, which is coming ever nearer.

4. It is of course nearly eight hundred years since King John on 15 June 1215 met his recalcitrant Barons in the meadow at Runnymede and (as we all know)

reluctantly affixed the Great Seal to the *Great Charter of English Liberty*. It was perhaps fortunate for him that he did not have a son old enough at the time to have joined with the Barons on 15 June. If he had and if 15 June 1215 was, as it was this year, Father's Day, it might have been even less of a day of celebration for John. Rather than affixing his Great Seal to Magna Carta he may well have been abdicating in his son's favour. Fortunately for him there were no greetings card companies in existence at the time, the birth of Father's Day was some way off in the future and his son, the soon-to-be Henry III, was merely eight years old and in no position to accelerate his accession by making common cause with the Barons.

5. Before I go any further I must make a confession. I could certainly not have put together a lecture like this all by myself. So I should confess at once that all the good bits are due to the brilliance of John Sorabji, who is both a lawyer and a legal historian[1]. The errors are down to me.

6. Magna Carta's history and influence is remarkable; not least given that, it was swiftly declared by Pope Innocent III to have been procured through extortion and was thus of no validity. John used the Pope's stance as an excuse for reneging on his obligations under it. But for John's death in October 1216 Magna Carta might have been, like its predecessor, on which it was based, Henry I's Charter of Liberties, no more than a footnote in our history rather than a document whose significance has reverberated down through the centuries. I am sure you all know that the Charter of Liberties was issued by Henry I on his accession to the throne in 1100.

7. With John's death though, Magna Carta would be reissued three times by his son Henry, now Henry III, before Edward I entered it on the Parliament Rolls on 28 March 1297 and gave it statutory force.[2]

8. And, as they say, the rest is history. More poetically perhaps, we might say that just as philosophy is simply a footnote to Plato, our constitutional history has been a footnote to Magna Carta.[3] More prosaically, as Tony Robinson (that is to say Baldric for those of you better acquainted with him through his role in Rowan Atkinson's comedy Blackadder) recently put it in his television programme on Crime and Punishment through the ages, something happened in a field in Surrey which changed everything for ever.[4] In tonight's lecture I hope to add another footnote to Magna Carta.

9. Before doing so, I cannot resist a quotation from part of Rudyard Kipling's 'Runnymede'. I do so partly because we are so close to Runnymede and partly because I entirely agree with Lord Woolf that the poem describes so accurately the place of Runnymede in English history.

> *At Runnymede, at Runnymede,*
> *Oh, hear the reeds at Runnymede:*
> *'You musn't sell, delay, deny,*
> *A freeman's right or liberty.*

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[1] MA (Oxon), M Phil, LLM.

[2] Edward I was the King who is variously described as the 'father of Parliament' or 'England's Justinian' in recognition of his role in establishing both the basic structure of our polity and our judiciary.

[3] Whitehead, *Process and Reality,* (1979) (Free Press) at 39.

[4] Robinson, *Crime and Punishment*, (08 June 2008, broadcast on Channel 4 TV, 19:00 – 20:00); although there appears to be some debate as to whether it was actually signed in Berkshire.

*It wakes the stubborn Englishry,*
*We saw 'em roused at Runnymede!*
*When through our ranks the Barons came,*
*With little thought of praise or blame,*
*But resolute to play the game,*
*They lumbered up to Runnymede;*
*And there they launched in solid line*
*The first attack on Right Divine,*
*The curt uncompromising "Sign!"*
*They settled John at Runnymede.*
*At Runnymede, at Runnymede,*
*Your rights were won at Runnymede!*
*No freeman shall be fined or bound,*
*Or dispossessed of freehold ground,*
*Except by lawful judgment found*
*And passed upon him by his peers.*
*Forget not, after all these years,*
*The Charter signed at Runnymede.'*
*And still when mob or Monarch lays*
*Too rude a hand on English ways,*
*The whisper wakes, the shudder plays,*
*Across the reeds at Runnymede.*
*And Thames, that knows the moods of Kings,*
*And crowds and priests and suchlike things,*
*Rolls deep and dreadful as he brings*
*Their warning down from Runnymede!*[5]

Stirring stuff. But enough of self indulgence. I turn to Constitutional Justice.

**Constitutional Justice**

10. My focus tonight is not simply Magna Carta's potential future influence in general; it is its potential influence relative to constitutional justice. What then do I mean by constitutional justice?

11. Broadly speaking, constitutional justice refers to the power of courts, usually constitutional courts like the South African Constitutional Court, or more famously the US Supreme Court, to review the legality of legislation and, where appropriate, either strike it from the statute book or hold that despite it being and remaining on the statute book it is neither to be applied nor followed, so that, as Professor Waldron put it in his illuminating essay from 2006 entitled '*The Core of the Case Against Judicial Review*', it '*becomes in effect a dead letter.*'[6]

12. We are all of course familiar with this type of exercise. It is akin to judicial review in administrative law. The central difference, and that difference should not be underestimated, is that whereas judicial review in this context is concerned with an assessment by the court of whether an administrative decision, for instance a planning decision, was carried out lawfully or unlawfully, judicial review of legislation requires a court to assess whether a piece of legislation itself is intra or ultra vires. The questions are different. Answering the first type of question the court needs to look at whether a public authority has acted unlawfully or abused its powers. Answering the second type of question the court is required to ask

[5] Rudyard Kipling (1865-1936)
[6] Waldron, *The Core of the Case against Judicial Review*, (2006) Yale Law Journal (115) 1346 at 1354 (Waldron 2006).

whether Parliament, the legislature, has acted unlawfully or abused its powers. It often requires an answer to the question: is a statute ultra or intra vires?

13. This raises a further question: ultra vires in respect of what? In the administrative context the answer to this is usually straightforward, because an Act of Parliament or statutory instrument will be the source of the public authority's statutory power.[7] What is the source of power for a Parliament?. What is the basis on which a court can properly hold legislation – in the case of the United Kingdom, an Act of Parliament – to be ultra vires?

14. The answer to that question is readily discernible in countries like the US or South Africa: it is the Constitution. The Constitution, in both cases a codified written constitution, sets out the legislature's powers and, importantly, the limits of those powers. Moreover such a Constitution may specify a number of fundamental rights which are guaranteed to all the country's citizens, such as those contained in the US Bill of Rights, in chapter 2 of the South Africa Constitution or similarly, (albeit not with the same constitutional status as either of those two documents) the rights set out in the European Convention of Human Rights which since 2000 has been part of UK law in the Human Rights Act 1998. Such fundamental rights can encompass the right to life; the right to a fair trial; the right to liberty and security; and the right to freedom of expression, amongst others.[8] Violation by the legislature, either of the formal limits on its powers as set out in the Constitution or of the fundamental rights contained in it or a Bill of Rights forms the basis for holding a statute to be ultra vires. As Sir Francis Jacobs has recently put it, this is the idea

'. . . *that the constitution – or equivalent constitutional principles – is the fundamental law which entitles the courts to set aside even the laws enacted by democratic legislatures.*'[9]

15. In this context constitutional justice can require a number of things. The first is a fundamental law which is the supreme law in the land, which binds the legislature and which cannot be overridden by ordinary legislative enactment. Such status is, for example, expressly provided for in the United States by Article VI (2) of the US Constitution, which reads as follows:

*"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . ."*

The same status is provided for the contents of the South African Bill of Rights by Articles 2 and 8(1) of the South African Constitution. More explicitly than in the US Constitution they make it clear that the Bill of Rights binds not only the executive but also both the legislature and the judiciary. They are in these terms:

*"Article 2: This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.*

*Article 8 (1): The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."*[10]

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[7] *R v London Transport Executive, ex parte Greater London Authority* [1983] QB 484 at 490.

[8] E.g., European Convention on Human Rights, especially Articles 2, 5, 6, and 10; the US Bill of Rights; Chapter 7 – 39 of the South African Constitution, especially chapters 11, 34, 12, 16.

[9] Jacobs, *The Sovereignty of Law: The European Way*, (Cambridge University Press) (2006) at 6.

16. It is, however, one thing to set the bounds of lawful action; it is another to police it. Countries which adopt a supreme, fundamental law must also provide the mechanism through which it can be upheld. They do so, either through a Constitutional Court, as in the case of South Africa, or through a Supreme Court, as in the case of the US. Each such court is empowered to scrutinise legislation to ensure that it does not conflict with the fundamental law. It can be granted this power either explicitly or implicitly. The South African Constitution adopts the former approach and elucidates in detail the ambit of the Constitutional Court's power to adjudicate as to whether the bounds of legality set out in the Constitution have been transgressed. It puts it this way:

> *"Article 167*
> *(3) The Constitutional Court –*
> *a. is the highest court in all constitutional matters;*
> *b. may decide only constitutional matters, and those issues connected with decisions on constitutional matters; and*
> *c. makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.*
>
> *(4) Only the Constitutional Court may –*
> *a. decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs;*
> *b. decide on the constitutionality of any parliamentary or provincial Bill; . . .*
> *c. . . .*
> *d. decide on the constitutionality of any amendment to the Constitution;*
> *e. decide that Parliament or the President has failed to fulfil a constitutional obligation; . . .*
> *f. . . .*
>
> *(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."*

It goes on to state in Article 167(7) that constitutional matters include '*any issue involving the interpretation, protection or enforcement of the Constitution.*'

17. The South African approach is one which quite clearly defines the ambit of the Constitutional Court's supervisory role and the extent of its power to review the legality of national and provincial legislation, the interrelation between national and provincial government and executive acts. It provides a definitive answer to the question of which body is to adjudicate upon issues of constitutionality and what falls within the ambit of that adjudicative power.

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[10] Also see the Preamble to the South African Constitution: "*We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic . . .*"

18. Strange though it may seem to us, familiar as we are today with the US Supreme Court's role as the guardian of the Constitution and the part it has played in such decisions as *Brown v Board of Education* 347 US 483 (1954) or *Roe v Wade* 410 US 113 (1973) the US Constitution does not provide an answer to the question which John Locke framed as, "*. . . Who shall be Judge whether the . . . Legislative act contrary to their Trust?*"[11] There is no clause in the US Constitution comparable to Article 167 of the South African Constitution.

19. In the absence of express authority to act as the arbiter of whether or not action taken by the legislature (ie the US Congress) exceeded the powers granted to it by the US Constitution, the US Supreme Court held in the famous case of *Marbury v Madison* 5 US 137 (1803) that it had the power to review the legality of US laws and to render void those which it found to be, as Chief Justice Marshall put it, '*repugnant to the constitution.*'[12] The justification for this unilateral declaration of authority was that it was an inherent power of the courts wherever there was a supreme law which set the boundaries of lawful action by state bodies. Chief Justice Marshall explained it in these terms:

> "*. . . all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.*
>
> *This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.*
>
> *If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.*
>
> *It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.*
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> *If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.*
>
> *Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of*

[11] Locke, *Two Treatise of Government* (1690), (Cambridge, 1994) at 427.
[12] 5 US 137 (1803) at 180.

*maintaining that courts must close their eyes on the constitution, and see only the law.*

*This doctrine would subvert the very foundation of all written constitutions."*[13]

20. On this view it is irrelevant whether or not a Constitution contains an express authority for a Supreme Court to act as a Constitutional Court. It is irrelevant because it is an intrinsic aspect of constitutional arrangements, when a State is governed by a fundamental law, that the courts are required to give effect to that fundamental law. In doing so they will of necessity have to scrutinise legislative acts in order to ascertain whether they are intra vires the fundamental law.

21. Thus, notwithstanding the absence of express authority in the US Constitution, the US Supreme Court has the same power and authority as that expressly given by the South African Constitution to its Constitutional Court. On this basis the express provision of the South African Constitution might be said to be the explicit statement in the Constitution of the power which the US Supreme Court held it had in virtue of its status as a court of law operating in a polity where there was a fundamental law. The nature of the power which both courts have is what Waldron in his 2006 essay describes as a strong judicial review power, that is to say, one that enables a court to strike down legislative acts which are ultra vires the Constitution.[14]

22. Waldron contrasts this with a lesser power, which he describes as a weak judicial review power. Such a lesser form of power is in his view the type of judicial review power certain UK courts now have, following the enactment of the Human Rights Act 1998. It is a power to review the legality of legislation by reference to those parts of the ECHR that are incorporated into UK law by that Act, fundamental law or another statutory provision, which while not fundamental law has some of its qualities. It is a power however unlike that found in countries like the US or South Africa which adopt strong judicial review, as it simply enables the court to declare that the statute in question is in conflict with – in our terms incompatible with – the fundamental law. Weak judicial review is thus a scrutiny power which leaves the object of its scrutiny on the Statute books as a live and binding piece of legislation, which must be applied by the courts. While it calls into question its compatibility with fundamental law, it does not strike it down; it simply enables a Minister to amend the offending legislation.[15] The Minister may choose not to make any amendment to the Act.

23. Ours is just one version of weak judicial review. Others exist. In New Zealand, for instance, the courts are empowered by section 6 of the New Zealand Bill of Rights Act 1990 wherever possible to interpret legislation consistently with the rights and freedoms contained in that Act. This is of course an aspect of our weak judicial power as provided for by section 3 of the Human Rights Act 1998. Unlike the UK courts, though, the New Zealand Act does not give a power to make a declaration of incompatibility. And, while as Waldron points out, the New Zealand courts have shown a willingness to make such declarations *'of their own initiative . . . [they] . . . do not have any legal effect on the legislative process.'*[16] They do not as here enable a government minister to amend the offending

[13] 5 US 137 (1803) at 177 – 178.
[14] Waldron (2006) at 1354ff.
[15] Section 10 of the Human Rights Act 1998.
[16] Waldron (2006) at 1356.

legislation to render it compatible with the substantive terms of their Bill of Rights.

24. What then can we say about constitutional justice so far? To my mind there are four points which can be drawn from this all too brief outline. First, it is concerned, albeit not exclusively, with the review of the legality of legislative acts by a Supreme or Constitutional Court. Secondly, the legal basis of such a review is an inherent aspect of a polity which is governed by some form of basic or fundamental law, whether that takes the form of a codified written Constitution or a statute which, although it does not necessarily have constitutional status, sets out a number of basic rights and freedoms which cannot lawfully or ought not be infringed by the provisions of other statutes. Such fundamental laws typically set out basic human rights and freedoms, which give the appearance of being solely or primarily concerned with ensuring that a nation's government does not infringe such rights. Thirdly, there are different types of judicial review power. The type a state has will depend on whether or not its Constitution itself defines the power. If it does not, in all likelihood it will have a power of the kind seen in the United States. If it does, it may have the kind seen in South Africa. Equally, it may be drafted to give a weaker judicial review power, such as we in the UK have through the Human Rights Act or as New Zealand has through its Bill of Rights Act. It must also be the case that a written Constitution could deny the existence of this type of judicial review power in its entirety: codified Constitutions do not necessarily entail the existence of Constitutional courts or judicial power to review the legality of legislative acts. Finally, and I have deliberately saved this point until last, constitutional justice requires a State to have a fundamental law, which sets the bounds of lawful action by government.

**The United Kingdom and Fundamental Law**

25. One thing that the US, South Africa, Germany and many other countries have is a fundamental law. The United Kingdom has not historically contained anything equivalent to the US Constitution, the South Africa Constitution or Germany's Basic Law. Our constitution has been one which has, at least since the Glorious Revolution of 1688, been characterised by the well-known doctrine of Parliamentary Supremacy. This, as Dicey described it classically:

> *". . . means neither nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the Law of England as having a right to override or set aside the legislation of Parliament."*[17]

26. This is the view which Lord Bingham in slightly different terms expressed in his decision in *R (Jackson) v Her Majesty's Attorney-General* (*Jackson*) – more commonly known as the Hunting Act case – when he stated that: *"The bedrock of the British constitution is . . . the supremacy of the Crown in Parliament."*[18]

27. On this view, there can be and is no fundamental law in the UK. There cannot be any because Parliament is omnicompetent; it can create and repeal any law. There is no law which sets the framework for Parliamentary conduct. There is no fundamental law because, as James Madison put it, Parliament's power is both *'transcendent and uncontrollable'*[19]; transcendent because what Parliament

[17] Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), (Macmillan Press, 10th Edition, 1959) (Dicey 1959)) at 39 – 40.
[18] [2005] UKHL 56; [2006] 1 AC 262 at [9]; also see Bingham, *A Written Constitution,* (2004) (Judicial Studies Board Annual Lecture) (Bingham (2004)).
[19] Madison, Federalist Paper No. 53.

properly enacts cannot be challenged before any court or other body; uncontrollable, or perhaps it is more accurate to say legally uncontrollable for the same reason. Political and democratic control can always be exercised at the ballot box.

28. In recent years, in the absence of a US or South African style Constitution, a number of candidates have been put forward for fundamental law status. Those candidates were variously described in the opinions of Lord Steyn, Lord Hope and Baroness Hale in the Hunting Act case. They are: the Act of Union 1707, the European Communities Act 1972, the Scotland Act 1998 and the incorporation of the ECHR 1950 by the Human Rights Act 1998.[20] The difficulty with each of these candidates is that not one of them can properly be said to limit Parliamentary supremacy or sovereignty. Not one of them truly has the status of a fundamental law which sets the legal bounds of Parliament's powers. Not one of them can properly be said to give rise to an inherent power in the courts to strike down or disapply properly enacted legislation in the same way that the US Constitution gives rise to that power in the US Supreme Court. They do not have that effect because they can all simply be repealed by ordinary Act of Parliament.

29. This has of course happened on numerous occasions in the case of the provisions of the Act of Union. Equally, the European Communities Act 1972, while it is often said to have ceded sovereignty to what is now the European Union, could be repealed by Act of Parliament. The fact that the UK courts must give precedence to inconsistent EU law is simply a consequence of the terms of the 1972 Act. Repeal of the Act would remove the legal requirement that the courts give precedence to EU law. As Goldsworthy pointed out in *The Sovereignty of Parliament*, the 1972 Act simply provides a procedural rule to which the courts are required to give effect unless and until Parliament enacts the UK's withdrawal from the European Union. Parliamentary sovereignty remains substantively untrammelled by the 1972 Act, despite such decisions as *Ex parte Factortame* [1991] 1 AC 603, simply because there is nothing as a matter of UK law to stop the UK Parliament repealing it.[21] The same is equally true of the Scotland Act and the Human Rights Act. While the former delegates certain aspects of the UK Parliament's sovereignty to the Scottish Parliament and the latter limits the scope of judicial scrutiny to Waldron's weak judicial review, neither places a legal limit on the UK Parliament's ability to repeal it. I note id passing that whether or not there are democratic or political limits to the UK Parliament's ability to repeal any particular statute is of course not relevant to this debate. Nor is the fact that a repeal of parts of the 1972 act would put the UK in breach of its international obligations under, say, the Treaty of Rome.

30. The substantive difference (and it is a fundamental one) between each of these Acts and an Act of the US Congress is that they do not stand in the same relation to ordinary legislative Acts as the US Constitution does to Acts of Congress. In the US, the Constitution provides the legal framework within which the US Congress operates. In the UK Acts of Parliament, which is what the 1972 Act and the others are, do not stand as part of such a constitutional framework. The UK constitution has not historically drawn or accepted the existence of a constitutional framework of this kind.

31. In the absence of a fundamental law, the UK courts remain in the position that they must give effect to properly enacted law. The position remains as it did when

[20] [2005] UKHL 56; [2006] 1 AC 262 at [101] – [102], [104] and [159].
[21] Goldsworthy, *The Sovereignty of Parliament* (Oxford) (1999) at 15.

Willes J delivered his judgment in 1871 in *Lee v Bude & Torrington Junction Railway Co.* He put it this way:

*"Are we [the courts] to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."*[22]

Lord Mustill made the same point more recently in 1995 in *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union*, when he stated that:

*"It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed."*[23]

**Common Law Constitutionalism – Magna Carta – Fundamental Law**

32. There are however two further candidates for the role of fundamental law. The first of these is the common law itself. The second is Magna Carta. Recently the case for the common law to fulfil this role has been developed by a number of academics who have given it the name *common law constitutionalism*. This is the idea that, as Goldsworthy has recently summarised it:

*"Britain's "unwritten" constitution consists of common law principles, and therefore Parliament's authority to enact statutes derives from the common law."*[24]

33. Perhaps its most forceful advocate is T.R.S Allan of Cambridge University who has developed the idea in *The Common Law as Constitution: Fundamental Rights and First Principles*[25] and *Constitutional Justice: A Liberal Theory of the Rule of Law.*[26] The most famous historical exposition of it comes from a passage in Coke CJ's judgment in *Dr Bonham's case* in 1609. He put it this way:

*". . . it appears in our books, that in many cases, the common law will controul Acts of Parliament and sometime adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge it to be void."*[27]

34. More recently Lord Steyn suggested in his decision in the Hunting Act case that the idea that the common law was capable of controlling Parliament might well have to be considered in the future. It might, he suggested, do so because it was

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[22] (1871) LR 6 CP 576; *Edinburgh & Dalkeith Railway Co. v Wauchope* (1842) 8 Cl. & Fin. 710 at 725; *DPP of Jamaica v Mollison* [2003] UKPC 6; [2003] 2 AC 411 per Lord Bingham at [13].
[23] [1995] 2 AC 513 at 597.
[24] Goldsworthy, *The Myth of the Common Law Constitution*, in Edlin (ed), *Common Law Theory* (Cambridge) (2007) at 204.
[25] Allan, in Saunders (ed), Courts of Final Jurisdiction: the Mason Court in Australia (Federation Press) (1996)
[26] (Oxford) 2001.
[27] (1609) 8 Co. Rep. 107 at 118.

the common law which itself created Parliamentary Supremacy and it could equally abolish it. He put it this way:

*". . . the supremacy of Parliament is still the general principle of our constitution, it is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism."*[28]

35. In other words for both Coke CJ and Lord Steyn it is the common law which provides the framework of fundamental law within which Parliament acts. The common law sets the bounds of legality, just as the US and South African Constitutions do. At present the framework is one which permits the existence of Parliamentary Supremacy. It is however a more flexible creature than either of these Constitutions and one which, it is suggested, can be amended – or perhaps restated – by the judiciary rather than the People. As Brazier in *Constitutional Reform: Reshaping the British Political System* put it

*"It is for the judges . . . to say what they will recognize as valid and binding legislation. They invented the doctrine of parliamentary sovereignty; they have the power to curb their own invention."*[29]

36. There are however a number of problems which common law constitutionalism faces. In spite of Coke CJ's dicta. it appears that there never really was a time in our history where the courts accepted that they had the power to strike down legislation that was inconsistent with the common law. Goldsworthy, in his analysis of the historical position in *The Sovereignty of Parliament* and his more recent contribution to the debate in *The Myth of the Common Law Constitution* has cogently undermined any suggestion that the doctrine of Parliamentary Supremacy was a product of the common law and operated within the bounds set by a common law constitution.[30] For Goldsworthy, all the evidence points towards to there never having been a

*'golden age of constitutionalism, in which the judiciary enforced limits to the authority of Parliament imposed by the common law or natural law.'*[31]

37. If common law constitutionalism cannot assist us in providing a basis for constitutional justice in the 21st Century, what of the other remaining option: Magna Carta. Alexander Hamilton, one of the framers of the US Constitution certainly thought so. He put it this way in Federalist Paper No. 84:

*"The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights in Great Britain [by which he referred to the Magna Carta, the Petition of Right and the Declaration of Right] form its Constitution . . ."*

38. I cannot myself agree with Hamilton's analysis. The short answer to the question whether Magna Carta can come to the rescue as fundamental law is, in my opinion, no. If it was fundamental law, ie a Constitution in the US-Hamiltonian

[28] [2005] UKHL 56; [2006] 1 AC 262 at [102]; also see, Woolf, *Droit Public – English Style*, Public Law (1995) 57; Laws, *Law and Democracy*, Public Law (1995) 72.
[29] (Oxford) (1998) (2nd ed) at 155.
[30] Goldsworthy (1999) and (2007).
[31] Goldsworthy (1999) at 235.

sense, then it could not have been (as it was) almost entirely repealed by the Statute Law Revision Act 1863. That it was suggests to me that, just like the Act of Union and the other statutory candidates for a fundamental law, Magna Carta cannot fill the bill. The 1863 Act did however leave in force a number of Magna Carta's Chapters.

39. It left in force, chapter 1, which guarantees the freedom and rights of the English Church and chapter 9, which guarantees to the City of London *'all its ancient liberties and customs'*; similar rights and liberties are also guaranteed to the *'cities and boroughs and vills and barons of the Cinque Ports . . .'*[32]. Most significantly it left in force chapter 29, which in the original 1215 version was contained in chapters 39 and 40. It reads as follows:

*"No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers of by the law of the land. To no-one will we sell or deny or delay right or justice."*

40. This provision was be slightly redrafted in the Act of 1354, in which Edward III reaffirmed his commitment to Magna Carta. In that edition it read as follows:

*"... no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law."*[33]

41. Stirring stuff again. These powerful words express a fundamental commitment to the right to fair trial and, through it, to the rule of law. As Coke CJ put it in his *Institutes of the Law*, this statement of law, which he took to be a declaratory statement of the common law, was one to the effect:[34]

*"That the Common lawes of the Realme should by no meanes be delayed for the law is the surest sanctuary, that a man can take, and the strongest fortresse to protect the weakest of all."*[35]

42. These words and the idea they give expression to have resonated, and rightly resonated, down through the centuries. It is, for instance, given expression in the 5th Amendment to the US Constitution:

*"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*[36]

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[32] I refer to this in my capacity as Admiralty Judge of the Cinque Ports.

[33] 28 Edw. 3, c. 3.

[34] Coke, *Institutes of the Law*, Vol. II at 50: *"Wherein it is to be observed, that this Chapter is but declaratory of the old law of England."*

[35] Coke, ibid, at 55.

[36] And see Article 1 of the 14th Amendment to the US Constitution: *"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or*

43. Equally, it is the basis for the rights to liberty and fair trial guaranteed by Articles 5 and 6 of the European Convention on Human Rights. It might well be said with some justification that there was no need to incorporate Article 6 into UK law given that Chapter 29 retained its statutory force and was as Coke CJ put it *'per legum terrae'* – part of the law of the land.[37] Equally it is not difficult to see Magna Carta Chapter 29 as underpinning what Lord Diplock famously described as a plaintiff's "*. . . constitutional right of access* [to the court] *. . . to obtain the remedy which he claims to be entitled to in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.*"[38]

44. Do these three Chapters, and perhaps especially Chapter 29, amount to fundamental law? I do not think so. The search for fundamental law is not assisted by chapters 1 and 9, which remain in force, as they could be repealed just as the other chapters were repealed. Equally Chapter 29 does not assist us because it too could be repealed; if it has not already been to some extent impliedly repealed by the enactment of the Human Rights Act 1998. That however is not necessarily the end of the story.

**Magna Carta – Constitutional Justice – Lessons for the Future?**

45. It is not necessarily the end of the story because Magna Carta carries with it important lessons for the future; for the development of our constitutional future; and for the development of constitutional justice in Britain.

46. One of the strongest arguments deployed against judicial review of legislation is that it is a profoundly undemocratic means of resolving fundamental disputes, by which is usually meant fundamental disputes about rights. It does, it is said, place in the hands of unelected judges decisions on, as Dworkin put it *'intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries.'*[39] Judges may not shrink from taking on this task if it is given to them, but the question is whether it is right to place such a task in their hands. Again, as Dworkin put it:

> "*Who should make a constitution? Should the fundamental law be chosen by unelected judges appointed for life or in some more democratic fashion by legislators elected by and responsible to the people as a whole?*"[40]

47. Is it perhaps not better for a Parliament, democratically elected through a free and fair electoral process to decide such questions? Waldron, for one, takes the view that it is. There are other views, such as that expressed by Fallon in his reply to Waldron.[41] Equally, there is the view, as put by Lord Steyn, that safeguards are needed in a democracy to ensure that *'a sovereign Parliament acting at the behest of a complaisant House of Commons'* does not abuse its power and enact legislation contrary, for instance, to the rule of law.[42]

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*immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

[37] Coke, *ibid* at 45

[38] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp. Ltd* [1981] AC 909 at 979.

[39] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (74) 2006 as cited in Waldron (2006) at 1350.

[40] Dworkin, *Law's Empire*, (Hart) (1998) at 370.

[41] Fallon, *The Core of an Uneasy case for Judicial Review*, [2008] Harvard Law Review (121) 1693

[42] [2005] UKHL 56; [2006] 1 AC 262 at [102].

48. These are profound issues. They raise serious questions that require careful thought and deliberation. If we are to move to a position were the UK courts, led say by the new Supreme Court, are to have a power to judicially review legislation according to a fundamental law we ought only to do so after such a debate and full discussion. That is the democratic way. It is the only way in which judicial review of legislation can obtain any democratic legitimacy if it is to be introduced. Whether or not Dworkin's question is answered in Waldon's favour or Fallon's and Lord Steyn's favour, is it not appropriate in a liberal democracy for the elected representatives of the people, and thereby the people, to decide? The answer to that question appears to me to be one which is the most straightforward of all to answer: it is for the people to decide.

49. This is perhaps a lesson we can take from Magna Carta. When King John and the Barons sat down at Runneymede they did so having clearly defined their grievances and come to an accommodation as to how those grievances should be addressed. They did so according to the manner of the time in a way that would foreshadow constitutional assemblies, such as the Philadelphia Convention of 1787. They did this in a fashion that foreshadowed democratic debate. As a consequence: in Chapter 14 they established the original basis on which Parliaments could be called;[43] in Chapters 38 – 40 the basis of the right to fair trial and put the right to trial by jury on a statutory footing;[44] in Chapters 24 and 45 they ensured that only trained judges learned in the law would sit in court and adjudicate on disputes independently of external influence.[45]

50. If we are to consider changing our Constitution so as to create a fundamental law and legislative judicial review we would do well to look back to Runneymede. We would do well to remember that profound constitutional change ought properly to be brought about through genuine agreement. That John did not truly agree with it was evident by his subsequent actions. That it was however ultimately agreed to is equally evident by the numerous reaffirmations of Magna Carta by subsequent monarchs. Such change ought not to come, as some suggest, by the judiciary taking it upon themselves to effect a change in the common law; to elevate the common law into a US style Constitution. Were the judiciary to attempt to do so they would confuse Dworkin's question as to who is to decide what is fundamental law, with another question he identified, namely, *'What does the present Constitution, properly interpreted, actually require.?'*[46] This, as Dworkin put it is a legal question. It is properly within the province of the judiciary. His first question, is (as he put it) an enactment question. Is it for the judiciary to

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[43] "*. . . obtain the general consent of the realm for the assessment of an aid – except in the three cases specified above – or a scutage, we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be give) and at a fixed place. In all letters of summons, the cause of the summons will be stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.*"

[44] Chapter 39; Zane, The Attaint, (15) Michigan Law Review (1916 – 1917) 1 and 127, Zane speculates, at 5, that the first precedent to specify a jury of 12 dates from 1078 in an unnamed case presided over by Odo, Bishop of Bayeux. It is this case, and the writ upon which the jury's verdict was challenged that forms the precedent for the *writ of attaint*. 9. Baker, An Introduction to English Legal History, (Butterworths) (Fourth Edition) (2002) at 73 however cites a case dating from circa 1077, where 12 jurors were called.

[45] Chapter 45: "*We will not make men justices, constables, sheriffs, or bailiffs unless they are such as know the law of the realm, and are minded to observe it rightly.*""

[46] Dworkin, *ibid*, at 370.

choose, to enact the Constitution? Both to decide that there is a fundamental law and then to interpret it?

51. Where questions arise in a liberal democracy as to the status and legitimacy of legislative judicial review it is only right that a decision to provide the judiciary such a power should be granted by democratic means, because whether to do so is an enactment question. Neither democracy nor the rule of law is protected by unelected judges attempting to arrogate power to themselves by attempting to answer that question. The Barons did not attempt to arrogate power to themselves; they attempted to ensure by consent that John respected their ancient rights and liberties.

52. Moreover neither democracy nor the rule of law would seem to me to be best served by the judiciary entering unasked into the political arena. Such a step would carry with it the potential to engender a constitutional crisis unheard of here since 1688. Such a step could do serious damage to the fabric of the nation and tend to undermine the independence of the judiciary, which is and has since Magna Carta embedded into our national fabric one of the greatest strengths of our democracy. That independence could not but be called into question if the judiciary attempted to take upon themselves a power to strike down legislation and in so doing intermingled the judicial function with what has so far been the province of the legislature. Magna Carta reflected that separation of powers in guaranteeing that only those learned in the law and independent of the executive should try cases. We would do well to remember that both now and in the future. We need only look to Montesquieu, for the warning as to what can happen where the judicial function is improperly mixed with the legislative or executive arms of the State. He put it this way:

*"Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."*[47]

Or as Dworkin put it '*Judges . . . can be tyrants too.*'[48]

53. We would do well to take care not to undermine the independence of the judiciary in any such way. If we did we would undermine one of Magna Carta's greatest gifts to us; the tradition of justice and fair process handed down since the drafting of what were in its original 1215 version Chapters 38 – 40 and 45.

54. It is of course an open question as to what if any constitutional changes may come about in the future. In future when there is debate about a written constitution or about whether there ought to be a Constitutional Court with either strong, weak or no judicial review powers, we would do well to remember our heritage and its basis in Magna Carta. We would do well to remember that constitutional change arises through consent following deliberation and that that lies at the heart of our democracy; a democracy that can ultimately trace its roots to Runneymede.

[47] Montesquieu, *De L'Esprit des Lois* (1748), (Cambridge, 1989), Book XI, 6.
[48] Dworkin, *Law's Empire* (Hart) (1998) at 375

**CONCLUSIONS**

55. I would summarise my conclusions in this way, while stressing that they are arrived at without the benefit of adversarial argument and without prejudice to any conclusion I might reach judicially with the benefit of such argument.

1) Constitutional justice is the exercise of the power in a court to review the legality of legislation.
2) The English courts do not have such a power because:
    i. we have no written constitution that confers such a power;
    ii. we have no common law concept of fundamental law which would enable the courts to strike down a statute without the authority of Parliament;
    iii. that is because Parliament is sovereign; and
    iv. even Magna Carta cannot fill the gap.
3) The courts are, however far from powerless, as explained by Lord Hoffmann with his usual clarity in *R v Home Secretary ex parte Simms*[49]:

    *"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."*
4) I entirely agree with Professor Bogdanor that the judges should not go further by stealth. Any extension of the powers of the courts should be the result of democratic debate. Magna Carta points the way. Its principles are enshrined in the conscience of the people and anyone, whether executive or judiciary, who disregards those principles does so at his, her or its peril.



[49] [1999] 1 AC 69 at 131.