

JUSTICE *futures* series



# THE FUTURE OF THE RULE OF LAW



50 years of defending the rule of law



## *The Future of the Rule of Law*

A **JUSTICE** *futures* paper

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This paper is the second of a 'futures' series, designed to celebrate JUSTICE's 50th anniversary, in which staff members and others raise interesting and provocative ideas about the future direction of policy in essay form. It does not necessarily represent JUSTICE policy, but it does draw on JUSTICE's considerable experience as a leading human rights and law reform organisation.

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### **JUSTICE – 50 years of defending the rule of law**

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## Introduction

On 3 July 2007, Gordon Brown announced a green paper, entitled *The Governance of Britain*, in the foreword of which he and Jack Straw state that their aim is:

*To forge a new relationship between government and citizen and begin the journey towards a new constitutional settlement – a settlement that entrusts Parliament and the people with more power.*<sup>1</sup>

The green paper sets out a group of proposals, the principle of which JUSTICE has largely welcomed – subject to caution about the subsequent detail yet to emerge.<sup>2</sup> It ends with a final paragraph which acknowledges that the task of ‘renewing our democracy ... does not fall to government alone’.<sup>3</sup>

JUSTICE will respond specifically and in detail to the individual proposals in the green paper elsewhere. This paper, however, deals with an issue that will be crucial to any new constitutional settlement or renewal of our democracy: the true spirit in which it is undertaken. Adherence to the rule of law is the cornerstone of almost all conceivable descriptions of the values with which a British state should comply. In its essence, the rule of law signifies the spirit of legality within which any state must act. Whatever the result of the Prime Minister’s bold consultation, the success or failure of any subsequent measures will be determined by the spirit in which they are implemented. And, there will remain a core contradiction in any British constitution that remains true to our long-established model of Parliamentary sovereignty: the executive dominates at least one house of the legislature. Ministers would only be human in wishing to minimise the potential disruption to their plans that Parliament might present. In order to counteract this, we need not only greater powers for Parliament, some of which are proposed in the green paper. We also need a general respect for the rule of law. Recently, the demands of modern government have been marked by too little concern for the core values of the rule of law. Ministers have wanted to get things done and be seen to get things done. They have had a tendency to be impatient with process. At the extreme, we have witnessed the production of inaccurate dossiers to influence votes on going to war and apparent connivance with actions of the United States which manifestly breached human rights, Geneva Conventions and international law. But, more widely and more subtly, we have experienced a lack of regard for appropriate decision-making processes that amounts to a degradation of the rule of law.

This is more than a political point against a particular government. Behind this casualness with principle lies the ‘constitutional deficit’ in our system of government: the executive has too much power. This has given rise to unease for some time. It was, after all, the

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<sup>1</sup> *The Governance of Britain* Cm 7170, p3.

<sup>2</sup> *The Governance of Britain; a preliminary JUSTICE response*: see <http://www.justice.org.uk/inthenews/index.html>.

<sup>3</sup> *The Governance of Britain*, n1 above, para 215.

Conservative Lord Hailsham who coined the phrase ‘elective dictatorship’. In addition, British governments have been reluctant to give up international military adventurism, whether or not in defiance of the international rule of law. JUSTICE was founded in 1957 at a time when the credibility of the United Kingdom’s commitment to the rule of law in international affairs had been shredded by the ill-advised Suez invasion of the year before: 50 years later, much the same issues arise as a result of the invasion of Iraq. Thus, our current constitutional arrangements and conventions give too much power to the party in government – it can act without too much concern for domestic constraints by the legislature, on the one hand, and international law and treaty obligations, on the other. The UK Prime Minister has much greater power within the political process than, say, the US President. Tony Blair, in particular, was criticised for his style of individualised power exercised through ‘sofa government’ that challenged the paradigm of collective responsibility through cabinet. But this is an issue bigger than personality. The British form of parliamentarianism means that all too often governments see Parliament simply as an obstacle to be negotiated on the way to implementing policy.

The rule of law requires a respect for the processes by which laws and decisions are made. In the draft manifesto for the rule of law with which JUSTICE launched its 50th anniversary year, we identified seven principles to be upheld:

- adherence to the rule of law as a cornerstone of domestic and foreign policy;
- a right of equality for all before and under the law;
- a right of access to justice for all;
- protection for due process and the right to a fair trial;
- independence of the judiciary and legal profession;
- greater powers of Parliamentary scrutiny;
- greater protection for the rights of individuals within the European Union.

This paper focuses on the first: adherence to the rule of law as a cornerstone of constitutional principle in both domestic and foreign policy. What does this actually mean? And what lessons should we draw from current practice?

From such an examination emerges the need for greater clarity in the relationship of government with Parliament. What powers should lie where? If governments abuse the legislative process then what reforms are needed to prevent this? How should Prime Ministers, members of the government and legislature, and the people understand the appropriate balance of powers within the constitution? How do we commit a future government to regarding the processes, both of the United Nations and of the UK Parliament, with more respect? How do we make a reality of principles – such as the rule of law – which no-one in any foreseeable UK government would deny as principles but which suffer from such a lack of respect in practice?

One ultimate answer may be that floated at the end of the green paper: a written constitution which spells out the relationships between the different branches of government in ways that all can understand. But, there are so many difficult issues to decide before we get to that point – among them the importance that the rule of law should be accorded. This paper is a contribution to a discussion with the objectives of: encouraging acceptance that there is a problem to address; arguing for a change in culture; and proposing some particular reforms that may assist. Protection of the rule of law needs to take its place among the list of constitutional issues that are increasingly discussed as needing some form of greater written definition – such as the future pattern of devolution, reform of the House of Lords, protection for human rights, and the role of the judiciary – whether or not this goes as far as a demand for a written constitution. Notably, the rule of law is not explored in the green paper where different chapters cover ‘limiting the powers of the executive’; ‘making the executive more accountable’; ‘reinvigorating our democracy’; and ‘Britain’s future: the citizen and the state’. Our argument is that effectively there should be a further chapter entitled something like ‘reinvigorating the rule of law’.

### **Rule of law: the rhetoric and the reality**

Ministers in the UK, and indeed the US, do not stint on their verbal support for the principle of the rule of law. It is particularly useful to make the US-UK comparison, first because of the close linkage in foreign policy between the two countries (which through terrorism, affects internal policy as well) and, second because of the very evident contradiction between US rhetoric and its actions under its present President. For the UK, in 2006 Tony Blair identified as ‘our essential values’:

*Belief in democracy, the rule of law, tolerance and equal treatment.*<sup>4</sup>

Speaking on ‘Law Day’ in April 2007, President Bush averred that:

*Our nation is built on the rule of law.*<sup>5</sup>

And Jack Straw, then Foreign Secretary, told the Foreign Policy Centre in 2002:

*The respect in which the UK is held in the international community today derives from many factors: the quality of our armed forces, our political analysis, our regional expertise and our development programmes; but above all from our commitment to the international rule of law and to upholding it worldwide.*<sup>6</sup>

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<sup>4</sup> *Our Nation’s Future – multiculturalism and integration*, Lecture at Downing Street, 8 December 2006, [www.number-10.gov.uk/output/Page10563.asp](http://www.number-10.gov.uk/output/Page10563.asp).

<sup>5</sup> Proclamation by the President of the United States of America, Law Day 2007, 28 April 2007, [www.whitehouse.gov/news/releases/2007/04/20070428-1.html](http://www.whitehouse.gov/news/releases/2007/04/20070428-1.html).

<sup>6</sup> *Re-ordering The World*, Speech to the Foreign Policy Centre, 25 March 2002, [www.fco.gov.uk](http://www.fco.gov.uk).

Two things emerge from these pronouncements. First, whatever the rule of law means, the politicians are in favour of it. Second, its meaning includes values beyond the dry requirements of legal certainty. For Mr Straw, the phrase ‘international rule of law’ seems to imply adherence to a set of desirable values, even if they remain undefined.

The extent to which the rule of law should be construed as going beyond provisions requiring legal certainty is a jurisprudential chestnut that has given rise to long-standing academic debate. For the purpose of this paper, the rule of law is explicitly taken to have a very broad meaning: to include a requirement that, on the one hand, laws and policies comply with appropriate international obligations and, on the other, that the law is made through procedures that are open, transparent, and honestly conducted – in Parliament just as much as in the courts. A Parliamentary vote obtained by corruption or deception is, on this definition, just as much a breach of the rule of law as any dictatorial diktat that overrides a democratically elected legislature.

At this stage, a short diversion is required because there are other views about the meaning of the rule of law. For the great nineteenth century jurist Dicey, the rule of law meant three things:

- the supremacy of law over arbitrary or discretionary authority;
- the equality of all before the law;
- the supremacy of common law principles in providing a constitutional structure.<sup>7</sup>

A respectable school of thought continues to argue that the rule of law is limited to the formal values that are at the core of Dicey’s understanding. Thus, Sir John Laws argued in a JUSTICE-LSE lecture:

*The formal or supposedly procedural sense of the rule of law, that there should be lawful authority for the exercise of power ... or that everything must be done according to law ... is an uncontentious minimum: the rule of law **at least** means this.*<sup>8</sup>

He asserted that there is danger in going further:

*I think the term the rule of law is losing force, is in danger of becoming a wasted asset, in the advocacy of a free and tolerant society.*<sup>9</sup>

However, the case for a broader view is widely advanced. The former Lord Chief Justice Lord Bingham, in a major speech delivered in 2006 at the Cambridge Centre for Public Law,<sup>10</sup>

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<sup>7</sup> A V Dicey, *Law of the Constitution*, McMillan, 1885.

<sup>8</sup> Sir John Laws, ‘The rule of law: form or substance?’, *JUSTICE Journal* 2007 Vol 4 No 1, pp24-40, p28.

<sup>9</sup> *Ibid*, p28.

argued that no less than eight distinct elements could be identified in the concept:

- clarity;
- limitation of discretion;
- equal application of the law to all;
- adequate protection of human rights;
- capability appropriately to resolve civil disputes;
- appropriate exercise of public powers;
- fair adjudicative procedures; and
- ‘compliance by the state with its obligations in international law’.<sup>11</sup>

It is important to recognise that this is not a sterile debate about language. One’s perception of the rule of law informs how one sees the constitution. Professor Jowell makes this explicit:

*Britain, like so many countries in this new century, is moving steadily to a model of democracy that limits governmental power in certain areas, even where the majority may prefer otherwise. The rule of law supplies the foundation of that new model.*<sup>12</sup>

Writing with Professor Oliver, Professor Jowell makes the point again, saying that one of the functions of the rule of law is that it ‘constrains the abuse of governmental power’.<sup>13</sup>

This capacity of the rule of law to be a limitation on the power of government, even in the UK with its model of Parliamentary sovereignty, has begun to gain ground. For example, in the recent legal challenge to the foxhunting legislation,<sup>14</sup> Lady Hale stated that:

*The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.*

She was clearly contemplating the possibility of there being limits to Parliamentary supremacy, beyond which a judiciary – upholding the rule of law – might override legislation, even if enacted in a procedurally correct manner. Thus, Parliamentary democracy may be the subject of some constitutional limits.

Hitherto and conventionally, Parliamentary sovereignty has often been understood, much as articulated by Professor Dicey, as meaning:

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<sup>10</sup> *The rule of law*, The Sixth Sir David Williams Lecture, Cambridge Centre for Public Law, 16 November 2006, [www.cpl.law.cam.ac.uk/](http://www.cpl.law.cam.ac.uk/).

<sup>11</sup> *Ibid.*

<sup>12</sup> J Jowell, ‘The rule of law today’, in J Jowell and D Oliver, *The Changing Constitution*, 5th edn, Oxford, 2004, pp5-25, p25.

<sup>13</sup> *Ibid.*, p19.

<sup>14</sup> *Jackson v Attorney General* [2005] UKHL 56, para 159.

*neither more nor less than this, namely that ‘Parliament’ has ‘the right to make or unmake any law whatever; and further no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament’.*<sup>15</sup>

Lady Hale’s position implies that the concept of the rule of law has a substantive meaning. There exists a set of values that are not to be transgressed and which the courts will protect. Under this view, Parliament would not have the right to make or unmake *any* law whatever. The issue then becomes: where are the limits?

The rule of law is a useful concept to cover the issues discussed here but others can be substituted if required by those who, like Sir John Laws, wish to retain a strict, narrow meaning. The link between the rule of law, in any definition, and allied concepts is very close. Lord Bingham noted that:

*[t]he European Commission has consistently treated democratisation, the rule of law, respect for human rights and good governance as inseparably linked.*<sup>16</sup>

Taking a similar all-encompassing line, Lord Goldsmith, until recently Attorney General, celebrated the UK’s acceptance of the rule of law as ‘always striving to ensure our actions are justified and supported by the law’. But he also had no trouble in accepting that the UK should ‘adher[e] to ... domestic and legal obligations’, such as the European Convention on Human Rights (ECHR), as well as act in accordance with ‘fundamental rights and freedoms’ and with proportionality.<sup>17</sup>

Thus, the rule of law is here taken to mean legislation and policies that:

- meet the test of legal certainty and the equality of all before the law;
- conform to core constitutional values – including human rights, international treaty obligations and the independence of lawyers and judges;
- have passed through a Parliamentary process which is open, transparent and honest.

Traditionalists who object to this wide definition should not give up. If not included within their definition of the rule of law, these principles are certainly important to good governance. And, for them, the terms can be substituted.

In our current uncertain world, it is perhaps unsurprising that the rule of law is attracting attention from significant organisations of lawyers. The rule of law is currently at the heart of

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<sup>15</sup> AV Dicey, *Introduction to the Law of the Constitution*, 8th edn, Macmillan, 1927, pxviii.

<sup>16</sup> *The rule of law*, see n10 above.

<sup>17</sup> Lord Goldsmith, *The rule of law*, Speech to the International Rule of Law Symposium, Chicago, 16 September 2006.

two significant campaigns. The American Bar Association has launched a ‘world justice project’ to defend the ‘rule of law’ as:

*a rules-based system of self-government with a strong and accessible legal process. It features a system based on fair, publicised, broadly understood and stable laws; and diverse, competent and independent lawyers and judges. The rule of law is the foundation for sustainable communities and opportunities.*<sup>18</sup>

The International Bar Association has also launched a rule of law project with a similar focus but with more emphasis on the position of lawyers.<sup>19</sup> The two organisations collaborated in a conference in Chicago in September 2006, at which Lord Goldsmith extolled the commitment of the UK government to the rule of law and Mary Robinson, former President of Ireland and UN High Commissioner for human rights, took a rather less laudatory position on the role of the US, and by inference, the UK in the ‘war on terror’:

*What is needed now is legislation that reaffirms the United States’ adherence to [international obligations such as the Geneva Conventions] ... It would be important to remove any provision which seeks to grant broad immunity from liability for war crimes backdated to September 2001. Rule of law requires that there be accountability for serious wrongdoing by those responsible.*<sup>20</sup>

Thus, the two contributions emphasise the connection to be drawn in relation to adherence to the rule of law both internationally and domestically.

### **A better balance of powers**

The rule of law is essentially about the mediation of power. It can be traced back to Aristotle’s ideas of government by laws not men. Its emergence in the UK can be traced through the great constitutional settlements. In Magna Carta, King John agreed with his barons to limit his power to the effect, for example, that:

*To none shall we sell, to none deny or delay, right or justice.*<sup>21</sup>

The 1688 Bill of Rights continues the same theme of limitation of the powers of the Crown in its declarations enshrining rule of law principles:

*That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;*

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<sup>18</sup> World Justice Project, American Bar Association – see [www.abanet.org](http://www.abanet.org).

<sup>19</sup> See [www.iba.net](http://www.iba.net).

<sup>20</sup> Mary Robinson, *The rule of law: striking a balance in an era of terrorism*, Speech at the International Rule of Law Symposium, Chicago, 16 September 2006.

<sup>21</sup> Article 40, Magna Carta 1215.

*That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal ...*<sup>22</sup>

More than 300 years later, we may need to rework the constitutional settlement so that we strengthen the powers of Parliament against not the king but the executive.

In many ways, the lack of a written constitution and the doctrine of Parliamentary sovereignty have served the UK well. The flexibility of these arrangements has, for example, allowed the judiciary to develop principles of judicial review over the last 30 years that have transformed the accountability of public officials. The strength of our democratic tradition has meant that Parliament has continued its control over social legislation, such as that on abortion, in a way that is very different from the US where this issue has been ceded to the judiciary.

A major requirement of the rule of law is that there must be a degree of separation of powers. In particular, the judiciary must be independent of the executive so that judicial decisions are reached impartially without government intervention. So too, at least beyond a certain point, must the legislature be separate from the executive. Many constitutions are clear about this proposition, for example, that of Massachusetts:

*In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.*<sup>23</sup>

The existence first of an all-powerful Crown and then the emergence of a Parliamentary democracy has meant at best partial adherence to such principles. Only with the Constitutional Reform Act 2005 (CRA) did the office of Lord Chancellor lose its unique combination of executive, legislative and judicial powers. This was also the first statute expressly to bind government ministers to the rule of law.<sup>24</sup> Under our Parliamentary system only rarely does a government lack direct control over the majority of the House of Commons and lesser, but still considerable, control over the majority of the House of Lords. As a consequence, Parliament can be very weak in applying appropriate scrutiny to government legislation – even in circumstances like the present where there are occasional rebellions against the government by MPs from its own party.

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<sup>22</sup> Bill of Rights Act 1689.

<sup>23</sup> Art XXX Part the First, Massachusetts Constitution 1780.

<sup>24</sup> S1 CRA 2005.

### Three tricks for the government

Control of the Parliamentary process leads to the use by government of at least three particular tactics designed to evade Parliamentary scrutiny: expanding the use of secondary legislation that attracts much less scrutiny than primary legislation; overlong legislation that curtails debate (mitigated in some, though as yet by no means all, circumstances by pre-legislative scrutiny); the setting of overly tight deadlines to get legislation through Parliament. These are not in themselves breaches of the rule of law and they do not imply the assumption of dictatorial powers. But they are challenges to the powers of the legislature by the executive that can, in this context, be said to raise issues about substantive compliance with the rule of law.

A recent example of an attempted improper use of procedures for making subordinate legislation is best provided by early versions of the Legislative and Regulatory Reform Act 2006. As originally drafted, this contained provisions that would have allowed the government of the day to amend primary legislation by way of statutory instruments, all in the name of removing regulatory burdens and giving greater legislative access to the proposals of the Law Commission. In the event, the government bowed to pressure and considerably scaled down the ambition of the statute. However, it only did so in the face of withering fire from its critics. Six Cambridge law professors wrote to the *Times* to indicate just how wide were the proposals:

*The Bill subjects this drastic power to limits, but these are few and weak. If enacted as it stands, we believe the Bill would make it possible for the Government, by delegated legislation, to do (inter alia) the following: create a new offence of incitement to religious hatred, punishable with two years' imprisonment; curtail or abolish jury trial; permit the Home Secretary to place citizens under house arrest; allow the Prime Minister to sack judges; rewrite the law on nationality and immigration; reform Magna Carta (or what remains of it). It would, in short, create a major shift of power within the state, which in other countries would require an amendment to the constitution; and one in which the winner would be the executive, and the loser Parliament.<sup>25</sup>*

After widespread opposition, the government backed down and severely limited the use of secondary legislation to override Acts of Parliament – something that otherwise would have been a violation of fundamental constitutional convention sufficiently great to be said to be a breach of the rule of law.

The second tactic is the promulgation of legislation so great in length or quantity that it simply defeats Parliament's resources for scrutiny. The Criminal Justice Act 2003 provides a

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<sup>25</sup> *Times*, 15 February 2006.

good example. Much of its content is controversial. But its length is monstrous. It has 338 sections and 38 schedules. This was an Act heralded as ‘rebalancing the criminal justice system’, which amended basic civil rights such as that of jury trial and the rule against double jeopardy, and widened the circumstances in which bad character evidence could be admitted in a trial. As a bill, it was just too large properly to be scrutinised by Parliament. In addition, there has just been so much legislation, particularly relating to crime and criminal justice, that it risks overwhelming both Parliamentarians and practitioners. There are various estimates of the precise number of new offences created since May 1997: that of 3,023 from May 1997 to August 2006 received some publicity.<sup>26</sup> In any event, the welter of criminal legislation since 1997 has been of such a magnitude as to threaten to prevent adequate scrutiny. Lord Bingham pointed out:

*The legislative hyperactivity which appears to have become a permanent feature of our governance – in 2004, some 3,500 pages of primary legislation; in 2003, nearly 9,000 pages of statutory instruments – the sheer volume of current legislation raises serious problems of accessibility, despite the internet.<sup>27</sup>*

The third way of inappropriately cowing Parliament is through unnecessary haste. Alarmingly, examples are provided by two recent pieces of major anti-terrorism legislation. These relate to the need to deal with fundamental threats to the realm. The measures involved significant infringement of major civil liberties, requiring careful consideration of the extent to which these were justifiable. Yet, the Prevention of Terrorism Act 2005 (PTA) was rushed through all its Parliamentary stages in 18 days, with the Prime Minister taunting the opposition with being weak on terrorism and Lords sleeping in the corridors overnight. The bill was delayed for several months after the government lost a challenge before the Law Lords and the legislation had to be passed just before the forthcoming 2005 election. The Anti-Terrorism, Crime and Security Act 2001 (ATCSA) was pushed through in a month.

It is not surprising that it was left to the courts, rather than the Parliamentary process, to expose the weaknesses of both Acts. This pattern of rushed legislation repeated what happened in the US. In relation to the ATCSA, the government may have been unduly influenced by the US example and wanted to emulate it. The USA Patriot Act was introduced to Congress on 2 October 2001 and signed into law by President Bush on 26 October, despite the closure of the Senate office in the meantime in response to letters containing anthrax.<sup>28</sup>

Of all policies, anti-terrorism should surely be, so far as is possible, a non-party political issue with adequate time for Parliamentarians to discuss the delicate balances that have to be made. This politicised haste is profoundly immature and contributes to an unnecessarily

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<sup>26</sup> By Nick Clegg MP and repeated, eg, by *Daily Mail*, 16 August 2006.

<sup>27</sup> *The rule of law*, see n10 above.

<sup>28</sup> see [www.cooperativeresearch.org/context.jsp?item=a1001anthraxattacks](http://www.cooperativeresearch.org/context.jsp?item=a1001anthraxattacks).

febrile atmosphere around issues of civil liberties. It is all the more galling because, to its credit, the government has sometimes been willing to expand on the practice of pre-legislative scrutiny and there are occasions when it can be shown to be really effective. The Civil Contingencies Act 2004 and the Extradition Act 2003 provide good examples of potentially contentious bills engaging civil liberties that were ultimately improved by consultation during the pre-legislative phase.

Abuse of process arises in other ways. There are threats to the independence of the judiciary. The then Home Secretary Charles Clarke expressed his dismay that he could not explain government policy to the judges. Lord Phillips (now Lord Chief Justice) reviewed this in a recent speech where he explained in relation to control orders that Mr Clarke:

*has complained that it is quite wrong that judges are not prepared to discuss with him at the outset what precautions are lawful. He is particularly bitter that the Senior Law Lord, Lord Bingham, declined an invitation to meet him to discuss the situation.*<sup>29</sup>

Mr Clarke made it clear that he was not after a meeting for meeting's sake:

*For legislation to be overturned by the House of Lords years later [Mr Clarke] described as 'a ludicrous way of proceeding which dangerously undermines confidence in every aspect of the police and criminal justice system when the public first and foremost seeks protection against terrorist threats'. He went on to comment: 'I do not accept that the practical meaning of "upholding the rule of law" and its impact on the security of our society can be resolved only by the most senior judiciary, the Law Lords.'*<sup>30</sup>

A more systematic attempt to limit judicial oversight of executive action came in the form of the Asylum and Immigration (Treatment of Claimants) Act 2004. As a bill, this threatened to precipitate an unprecedented revolt by the judiciary over its exclusion from judicial review of determinations made in relation to asylum. The government persisted in its ouster clause in the face of the recommendations of the House of Commons Constitutional Affairs Committee:

*As a matter of constitutional principle, some form of higher judicial oversight of lower tribunals and executive decisions should be retained. This is particularly true when life and liberty are at stake.*<sup>31</sup>

Lord Woolf, then Lord Chief Justice, reported on the judiciary's battles with government:

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<sup>29</sup> Lord Phillips of Worth Matravers, speech to Cardiff Business Club, 26 February 2007, [www.judiciary.gov.uk/docs/speeches/lcj260207.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj260207.pdf).

<sup>30</sup> Ibid.

<sup>31</sup> Report published on 26 February 2004, as quoted by Lord Woolf below.

*Our advice was that [an ouster clause of the kind proposed] was fundamentally in conflict with the rule of law and should not be contemplated by any government if it had any respect for the rule of law ... The implementation of the clause would be a blot on the reputation of the government and undermine its attempts to be a champion of the rule of law overseas.*<sup>32</sup>

The government, somewhat belatedly, and only after major dispute with the House of Lords, withdrew its ouster clause and pulled the plug on what appeared to be little short of a forthcoming constitutional crisis. Certainly, former judges like Lord Donaldson were spoiling for serving colleagues to fight as he told the House of Lords that if the clause was enacted the judges:

*... would have to say: 'We are an independent estate of the realm and it's not open to the legislature to put us out of business. And so we will simply ignore your ouster clause.'*<sup>33</sup>

For his pains on this issue and in devising the concordat that saved the government's Constitutional Reform Act, Lord Woolf became the target of very personal invective from the then Home Secretary, who apparently called him a 'muddled and confused old codger'.<sup>34</sup>

Finally, and in a rather different challenge to the rule of law, there is a trend for legislation to give over-broad powers to those enforcing it – particularly in the context of assaults on civil liberties. This government has, of course, come under attack for its civil liberties record in general – as Henry Porter argued with characteristic gusto in an exchange of emails with the Prime Minister:

*I would never have imagined that I'd come to view you as a serious threat to British democracy. But regrettably I have. Either by accident or design, your 'modernising' Labour government has steadily attacked our rights and freedoms, eroding the Rule of Law and profoundly altering the relationship between authority and the people.*<sup>35</sup>

Mr Blair's reply was not well judged to assuage his critics:

*Go and look at the placards of those camped outside Parliament – they are most certainly not blank and usually contain words not entirely favourable to your correspondent.*

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<sup>32</sup> Lord Woolf, *The rule of law and a change to the constitution*, Squire Centenary Lecture, Cambridge University, 3 March 2004, [www.dca.gov.uk/judicial/speeches/lcj030304.htm](http://www.dca.gov.uk/judicial/speeches/lcj030304.htm).

<sup>33</sup> C Dyer, 'Judges reveal anger over curbs on power', *Guardian*, 26 April 2005.

<sup>34</sup> 'Chief Justice to quit in Blunkett row', *Sunday Times*, 31 October 2004.

<sup>35</sup> 'Blair's liberties: the great debate', *Observer*, 23 April 2006.

As a matter of fact, most of these placards were placed by Brian Haw, who became the target of s132 Serious Organised Crime and Police Act 2005 (SOCPA). Had he not fought his case through the courts, it is doubtful that he, and the placards so celebrated by the Prime Minister, would have remained – if reduced in number. Equally unhelpful in defence of the libertarian credentials of the government is the case of Maya Evans. She was arrested at the Cenotaph, a few hundred metres up Whitehall from Brian Haw's Parliament Square demonstration, under the same provisions: demonstrating without a licence. She was conditionally discharged after a three-hour trial. She was reading out the names of those killed in Iraq in protest against the war. After conviction, she said:

*I think I got the minimum sentence but I still feel aggrieved that I have been found guilty. I do not agree with the [Serious Organised Crime and Police] Act. I just think it's a shame that you can't voice your freedom of speech in this country any more and it is illegal to hold a remembrance ceremony for the dead.<sup>36</sup>*

The restrictions on protests within one kilometre of Parliament in SOCPA were so egregious that the green paper announces that 'the Government is aware of the strong views expressed in reaction'<sup>37</sup> and will consult on its provisions. The government has been aware of the strong views raised by the provision since the legislation proceeded through Parliament. A JUSTICE briefing argued:

*JUSTICE has grave concerns about the severe restrictions on peaceful protest proposed by these clauses. In light of the weight given to the protection of political speech under Article 10 of the Convention, we are particularly concerned at measures that seek to inhibit public protest on the doorstep of Parliamentary democracy itself. It seems an unpleasant irony that, should these provisions become law, freedom of expression will be most at risk in the one place where it should be most protected.<sup>38</sup>*

After the passage of SOCPA, Parliament became even bolder in opposing vague offences that allow an enormous discretion to the prosecuting authorities. Notably, the Racial and Religious Hatred Act 2006 raised major objections in Parliament, particularly the House of Lords, and has remained unimplemented.

Over-broad offences have been complemented by over-wide discretion in the outlawing of certain types of behaviour. Conventional legal safeguards have been discounted and increasing use made of civil procedures to attack behaviour that can ultimately be sanctioned by imprisonment. A whole suite of orders has been developed with the express intention of seeking to bypass criminal justice safeguards – culminating in control orders,

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<sup>36</sup> 'Activist convicted under demo law', BBC News website, 7 December 2005.

<sup>37</sup> *The Governance of Britain*, n1 above, Para 164.

the more draconian use of which has had to be checked by the courts.<sup>39</sup> These include anti-social behaviour (ASBOs), control, community treatment and an increasing number of other orders which are civil in form, but have potential implications in terms of criminal sanctions or the deprivation of liberty. Were it not for the intervention of the courts, which required a criminal standard of proof, ASBOs would have been available simply on the balance of probabilities and the threshold for intervention and, ultimately, imprisonment significantly lowered.<sup>40</sup> JUSTICE's position is not one of total hostility to ASBOs, but to argue that they must be proportionate and targeted. The absence of criminal procedural safeguards makes the operation of ASBOs vulnerable to arbitrariness. It appears that this is precisely what is occurring, particularly as the numbers being granted accelerate.<sup>41</sup> The Runnymede Trust is concerned that no data is kept on the ethnic origin of those subject to ASBOs so that we cannot be sure that they are not disproportionately used against ethnic minorities.<sup>42</sup> The Youth Justice Board has recently recommended on the basis of research that further refinement is needed to ensure that ASBOs are used only as part of a tiered approach of escalating intervention and with more care and proportion.<sup>43</sup>

### **Institutions, the intersection of powers and the rule of law**

Even states that profess a separation of powers must find some way of bridging them. This is most obvious in relation to budgets. The judiciary's budget has to be transferred from the executive by some mechanism. Some minister is likely to have charge of the budget in some form or other. But the interface between the executive and the judiciary goes beyond that. Some ministers, particularly those close to the justice system, have responsibilities with judicial aspects where independence from the interests of the executive may be required. The US is worth considering as an example, because the problems that faced its former Attorney General, Alberto Gonzales, not only provide an intersection between the executive and the legal system but also between domestic and international policy on crucial issues that also affect the UK.

Mr Gonzales was the author of one of a series of memoranda relating to the treatment of 'unlawful enemy combatants'<sup>44</sup> and a participant in, and approver of, others. As reported by *Newsweek*:

*In the first months after 9/11, Gonzales helped to craft some of the most momentous and controversial decisions of Bush's presidency. Among them: to create military commissions for the trials of terrorists, to designate U.S. citizens as*

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<sup>38</sup> JUSTICE Serious Organised Crime and Police Bill Parts 3-6 (not including cl.124): Briefing for House of Lords Second Reading, March 2005, Para 51.

<sup>39</sup> *Re JJ* [2006] All ER (D) 330 (Jun).

<sup>40</sup> *R (on the application of McCann) v Manchester Crown Court* [2002] UKHL 39.

<sup>41</sup> For latest figures see *House of Commons Written Answers* 9 January 2007, col 528W.

<sup>42</sup> *Equal Respect – ASBOs and Race Equality*, Runnymede Trust, 2006.

<sup>43</sup> *Anti-Social Behaviour Order Research*, Youth Justice Board, 2 November 2006.

<sup>44</sup> Memorandum, 25 January 2002.

*'enemy combatants' and to disregard the Geneva Conventions in the treatment of prisoners at Guantanamo Bay.*<sup>45</sup>

Indeed, more recent coverage suggests that Mr Gonzales successfully argued within the US administration, in the face of calls for its closure, that Guantanamo Bay should remain open.<sup>46</sup> In addition, Mr Gonzales faced accusations that he participated in the sacking of eight federal prosecutors on political grounds.<sup>47</sup> These, Mr Gonzales did not survive. The case against him was ultimately that he allowed his office to breach the tenets of the rule of law because he discarded his legal impartiality in the advice he gave or actions he took in a ministerial role.

Mr Gonzales' position is vastly more dire than that of his counterpart in the UK. Indeed, when he was Attorney General, Lord Goldsmith condemned the creation of Guantanamo Bay, though doubts have now surfaced about his advice on the applicability of human rights to those in the hands of British soldiers.<sup>48</sup> The green paper announced a consultation into the role of the Attorney General. Again, this is not so much a personal problem as a structural one. It recurs at regular intervals, as when Sam Silkin QC was criticised for non-prosecution of Labour councillors, and Sir Nicholas Lyell QC over his role in the 'arms to Iraq' affair.

Lord Goldsmith's position was extensively reviewed in relation to his advice on the Iraq war, but controversy emerged more recently in relation to the termination of a corruption investigation against BAE Systems PLC. For this, the UK has been censured by the OECD for breach of an international convention to which it is a signatory. Lord Goldsmith insisted that the decision to drop the prosecution on grounds of the national interest was taken by the director of the Serious Fraud Office (SFO), not himself but:

*admitted that Sir John Scarlett, the head of MI6, had never possessed intelligence that Saudi Arabia planned to cut security links with Britain. This admission appears to undermine government claims that Britain's national security was at stake unless the SFO inquiry was called off. Lord Goldsmith conceded to the Liberal Democrats that Sir John 'did not say that the Saudis would be bound to withdraw cooperation'. He said he had personally approached Sir John to convey Mr Blair's view that the police inquiry should be dropped.*<sup>49</sup>

Thus, the case against Lord Goldsmith was somewhat different from – and considerably lesser than – that against Alberto Gonzales. However, the point remains that the UK signed

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<sup>45</sup> *Newsweek*, 27 December 2006.

<sup>46</sup> 'New to job, Gates argues for closing Guantanamo', *New York Times*, 22 March 2007.

<sup>47</sup> 'Justice department would have kept loyal "Bushies"', *Washington Post*, 16 March 2007.

<sup>48</sup> Eg 'Human rights in Iraq: a case to answer', *Independent*, 29 May 2007.

<sup>49</sup> 'Britain censured over decision to drop BAE inquiry', *Guardian*, 19 January 2007.

an international treaty about corruption and then pretty clearly breached its terms when faced with an inconvenient inquiry. The treaty's relevant provisions are:

*Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.*<sup>50</sup>

The relevant OECD working group was not impressed by the performance of the UK government in relation to the BAE investigation:

*The Working Group welcomed the additional explanations from the UK authorities and the openness of the UK delegation. Nonetheless, it maintains its serious concerns as to whether the decision was consistent with the OECD Anti-Bribery Convention.*<sup>51</sup>

Lord Goldsmith himself stated the problem with precision:

*it has been necessary to balance the need to maintain the rule of law against the wider public interest.*<sup>52</sup>

In an interestingly circular motion, the action that may have been taken by Lord Goldsmith has become controversial in the US, where BAE faces the possibility of investigation by both a Congressional committee and the US Justice Department.<sup>53</sup> The fundamental issue may be less the formal role of the Attorney General and more the management of the conflicting pressures on the executive. There will always have to be ways in which ministers make judgments that balance political and legal considerations. What is important is that they receive legal advice on their obligations which is transparent and honest, in the sense of upholding the spirit of the rule of law, both international and domestic.

The now-restyled Ministry of Justice (MoJ) provides the main institutional link between the judiciary and the government in relation to England and Wales for all courts up to the Court of Appeal, and the UK for the House of Lords. Its creation, like that of its predecessor, the Department for Constitutional Affairs, was blighted by poor liaison with the judiciary. One legacy of the bungled launch of the former ministry and the demise of the post of Lord Chancellor is that the Constitutional Reform Act 2005, heavily scrutinised by the House of Lords in its passage, still covers the responsibilities of the Secretary of State for Justice. This is

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<sup>50</sup> Article 5 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997.

<sup>51</sup> 'OECD to conduct a further examination of UK efforts against bribery', OECD website, 4 March 2007.

<sup>52</sup> *HL Debates* 14 December 2006, col 1714.

<sup>53</sup> 'Pressure over Saudi allegations mounts as BAE expands in US', *Independent*, 9 May 2007.

supplemented by a concordat negotiated between Lord Woolf, then Lord Chief Justice, and Lord Falconer, then Lord Chancellor.<sup>54</sup>

The Constitutional Reform Act contains the first reference to the rule of law in any UK statute in its somewhat delphic statement that:

*This Act does not adversely affect –  
the existing constitutional principle of the rule of law;  
the Lord Chancellor’s existing constitutional role in relation to that principle.*

Accordingly, section 17 repeats the term in an amended oath of office in which the new minister swears to:

*Respect the rule of law, defend the independence of the judiciary, and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts.*

The constitutional issue is whether the duty to uphold the rule of law and the independence of the judiciary on the one hand, and the taking of lead responsibility for criminal justice on the other, present an unacceptable conflict for the new Secretary of State. Criticism of the move has centred on the practical consequences of the transfer of responsibility for prisons and offender management. Lord Woolf reported in the context of his earlier battles over the demise of the Lord Chancellor’s Department that ‘there is a lack of appreciation of the significance of the judiciary in the corridors of government’. He has also recounted his successful resistance, on the part of the judiciary, to the proposed transfer of the Court Service to the Home Office:

*it was not appreciated within government that it was inappropriate for the department that most frequently had to defend judicial review in the courts and that had lead responsibility for criminal justice policy to be in charge of what should be seen as an impartial Court Service.<sup>55</sup>*

Lord Woolf was pointing to the fact that the majority of judicial review applications are taken against the Home Secretary. This has, however, been largely because of the dominance of applications relating to immigration and asylum (3,149 out of a total of 5,381 applications in 2005).<sup>56</sup> His concern was presumably that a minister responsible for the administration of the court would face conflict if also a party to actions within it.

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<sup>54</sup> *Constitutional Reform, The Lord Chancellor’s judiciary-related functions: Proposals*, [also known as the Concordat], January 2004, available at <http://www.dca.gov.uk/consult/lcoffice/judiciary.htm#part2>.

<sup>55</sup> Lord Woolf, n29 above.

<sup>56</sup> *Judicial Statistics 2005 (revised)* Cm 6903, The Stationery Office.

The present arrangements do not encounter quite the same objection because asylum and immigration has been retained within another department, the residual Home Office. However, the new Secretary of State would face the same potential conflicts in relation to criminal matters, both within the criminal courts and in civil cases. Two hundred and fifty-one applications for permission for judicial review related to criminal matters. Nevertheless, these are probably manageable, primarily because the independence of the judiciary will not be affected by which ministry is also responsible for court and judicial administration. However, the likely practical consequence of these further responsibilities for the MoJ will be that the Secretary of State must be a member of the House of Commons and not necessarily a lawyer of any kind. The CRA imposes statutory requirements on the Secretary of State for Constitutional Affairs, who must ‘appear to the Prime Minister to be qualified by experience’<sup>57</sup> for which qualification as a practising or academic lawyer might be an indication – but so would such ‘other experience as the Prime Minister considers relevant’.<sup>58</sup>

In these circumstances, it is unsurprising that there is unease at the potential distance between the judiciary and a minister who should have the rule of law as a primary concern rather than the administration of a difficult and controversial area of criminal justice policy. In addition, there is a very material worry about budgets at a time when prisons are under unprecedented pressure. Lord Phillips, the current Lord Chief Justice, has taken what must be the proper position: ‘the senior judiciary have no objections in principle to the creation of a Ministry of Justice, subject to the provision of safeguards to protect the administration of justice’.<sup>59</sup> He might have added ‘and the rule of law’. These safeguards need consideration because the dangers of the arrangements that have been implemented are clear.

### **Adherence to international obligations**

Domestic legislation raises issues about the effectiveness of democratic scrutiny and the exercise of discretion; in relation to the institutions of government the concern is about the interface of judicial and executive powers; in international affairs concern about the rule of law is more direct. Has its close alliance with the US encouraged the UK into complicity with actions which are substantively in breach of the rule of law?

Any government would have been challenged both by the threat that emerged from non-state actors in the aftermath of 9/11 and the determination of the US to designate the attacks as a declaration of war rather than a crime against humanity. At home, any UK Home Secretary would have been concerned to maximise the tools to be deployed against prospective terrorists and this would have presented any government with the need to undertake very difficult balancing acts. Abroad, any UK government would want to stay close to the US. To its enormous credit, the Labour government incorporated the

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<sup>57</sup> S2(1) Constitutional Reform Act 2005.

<sup>58</sup> S2(2) Constitutional Reform Act 2005.

<sup>59</sup> *HL Debates* 26 April 2007, col 767.

substantive rights of the ECHR into the UK legal order by passing the Human Rights Act 1998. The advent of 9/11, coming so close to the Human Rights Act, provided a much earlier test for its sinews than anyone could have anticipated.

The UK judiciary has emerged from the consequent trials with considerable credit. The judgment of the House of Lords against the use of evidence obtained by torture in any court or tribunal is a landmark decision and seen as such around the world.<sup>60</sup> The Secretary General of the Council of Europe stated:

*This is a clear message that our governments must not be allowed to condone or encourage torture or subcontract torture to anyone else in the world.*<sup>61</sup>

The *International Herald Tribune* was clear as to the global importance of the case:

*Thrusting itself into the middle of a stormy international debate, Britain's highest court declared Thursday that evidence obtained through torture – no matter who had done the torturing – was not admissible in British courts.*<sup>62</sup>

And a US website put the point somewhat more insouciantly, referring to the implicit message to the US Secretary of State:

*Law Lords to Condi – Up Yours*<sup>63</sup>

The Bush administration has posed a particular challenge to the rule of law with its policies and practices in its 'war on terror'. The US administration has exempted 'unlawful enemy combatants' from the provisions of the Geneva Convention;<sup>64</sup> established prison facilities at Guantanamo Bay and other detention camps outside the US; established a process of 'extraordinary rendition', dismissed as 'kidnapping' by Lord Steyn;<sup>65</sup> and acted on advice that 'certain acts may be cruel, inhuman and degrading' but still lawful for US officials because US legislation bans only the use of torture, thus permitting such treatment as 'water boarding'.<sup>66</sup> Perhaps unfairly, the UK government has been seen as complicit in this behaviour although its own policy is manifestly different and, for example, the former Attorney General Lord Goldsmith roundly condemned the existence of Guantanamo Bay.<sup>67</sup>

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<sup>60</sup> *A v Secretary of State for the Home Department* [2005] UKHL 71.

<sup>61</sup> Statement, 9 December 2005, Terry Davies, Council of Europe Secretary-General.

<sup>62</sup> *International Herald Tribune*, 8 December 2005.

<sup>63</sup> *The left coaster*, 9 December 2005; <http://www.theleftcoaster.com/archives/006235.php>.

<sup>64</sup> Military Commissions Act 2006.

<sup>65</sup> Lord Steyn, *Democracy, the Rule of Law and the Role of Judges*, The Atlee Foundation lecture, 11 April 2006.

<sup>66</sup> Memorandum from Alberto Gonzales to the counsel to the President, 'Standards of Conduct for Interrogation under 18 USC ss2340-2340A', August 2002.

<sup>67</sup> Eg, Lord Goldsmith called it 'a symbol of injustice', *Times*, 10 May 2006, though Mr Blair went no further than saying it was 'an anomaly' [see 'Blair: Guantanamo Bay is an anomaly', *Guardian*, 17 February 2006].

The UK is unavoidably tarnished by the maverick approach to the rule of law of the US because of the decision publicly to restrict criticism of its closest ally and joint participation in the invasion of Iraq. We should also note that the Council of Europe accepts that there is credible evidence that the UK, though denying it, has been complicit in the extraordinary rendition of individuals for the purpose of torture.<sup>68</sup> Indeed, it seems inherently improbable that the UK government was unaware of the use by the CIA of UK airfields and airspace for its rendition programme, for all that the former Foreign Secretary could find nothing in the official records.<sup>69</sup>

There is, thus, something of a contradiction in relation to the UK's response to torture and ill-treatment, manifest breaches of international obligations and human rights. The judiciary, through the House of Lords, has taken a strong stand. The position of the UK government has appeared stronger in principle than practice. It is true that the government has incurred opprobrium from the military for its willingness to court-martial soldiers where a breach of human rights has allegedly taken place. However powerful the ties of being well-established allies, the UK needed publicly to oppose some of the current policies of the US and has suffered from not doing so. Lord Steyn has argued:

*While our government condones Guantanamo Bay the world is perplexed about our approach to the rule of law. But I hope the world also knows that if the matter was within the jurisdiction of the British courts our judges would unanimously condemn Guantanamo Bay. You may ask: how will it help in regard to the continuing outrage at Guantanamo Bay for our government now to condemn it? The answer is that it would at last be a powerful signal to the world that Britain supports the international rule of law.*<sup>70</sup>

At the base of concern about the UK's respect for the international rule of law and international obligations lie the well-explored arguments over the legality of the Iraq War. The legality of the war was the subject of superb early analysis by former JUSTICE chair, Lord Alexander of Weedon QC, to be republished as part of our 50th anniversary programme.<sup>71</sup> For this purpose, his argument is adopted in its entirety. As he remarked in giving the lecture, the government's position amounted to 'scraping the bottom of the legal barrel'.<sup>72</sup>

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<sup>68</sup> Council of Europe, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions in Council of Europe member states*, 22 January 2006.

<sup>69</sup> 'Straw denies 'torture' cover-up', BBC News website, 20 January 2006 .

<sup>70</sup> *Democracy, the Rule of Law and the Role of Judges* , n65 above.

<sup>71</sup> Lord Alexander of Weedon QC 'Iraq: the pax Americana and the law', *JUSTICE Journal* 2004 Vol 1 No 1, pp8-35.

<sup>72</sup> 'Goldsmith scraped legal barrel over Iraq war', *Guardian*, 13 October 2003.

## What is to be done?

Professor Dicey provides what could be a very contemporary summary of contemporary threats to the rule of law. Writing in 1927 in the eighth edition of his mighty tome on the constitution, first published in 1885, he remarked:

*The ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline. The truth of this assertion is proved by actual legislation, by the existence among some classes of a certain distrust both of the law and of the judges and by a marked tendency towards the use of lawless methods for the attainment of social and political ends.*<sup>73</sup>

Things have not got much better. Indeed, the casualness of government to the rule of law is much worse – both internationally and domestically. And the UK has a particular difficulty when its closest ally, the US, is perfectly happy to ignore international obligations that the UK itself would uphold.

The legality of the Iraq war has been exhaustively explored but the lesson has to be learned that this was an ill-advised venture and must never happen again. The safest way is for the UK actually to ensure that foreign military interventions always have support from the Security Council – unless in immediate self-defence. It would do no harm publicly to assert that, whatever accounts may be given in relation to the past, the UK will henceforth act in accordance with the UN Charter and ensure real support for any military action undertaken in alleged accordance with UN resolutions. It might be argued, as Lord Alexander did in his lecture and Tony Blair in a speech in 1999,<sup>74</sup> that there should be more discussion and wider agreement of the terms on which a humanitarian intervention may be undertaken by force. If so, this should be a collective debate within the UN, not one in which the UK or the US take unilateral positions. These are issues which need to be included within the constitutional debate that Gordon Brown has precipitated.

It might be possible to go further in the enforcement of international treaties. The draft constitution for the UK, published by the Institute for Public Policy Research (IPPR) in 1991, dealt with international relations by requiring the government to lay any treaty before Parliament for consent before it became binding.<sup>75</sup> This was built upon the model of a draft Israeli constitution.<sup>76</sup> The IPPR also added a clause to the effect that:

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<sup>73</sup> A V Dicey, n15 above, pxxxviii.

<sup>74</sup> Speech to the Chicago Economic Club, 22 April 1999.

<sup>75</sup> *The Constitution of the United Kingdom*, IPPR, 1991, para 51, p45.

<sup>76</sup> *Ibid*, p36.

*A treaty to which the Government has given consent ... has effect, on coming into force, as part of the domestic law of the United Kingdom to the extent that it is capable of coming into effect.*<sup>77</sup>

This would bring the UK into line with most other states in Europe where this is the case. The green paper notes only that:

*The government is of the view that Parliament may wish to hold a debate and vote on some treaties ...*<sup>78</sup>

Domestically, there are five issues to be considered. First, and most important, is the need for a change of culture. A single thread links together matters as apparently diverse as the Iraq war, ASBOs and the Legislative and Regulatory Reform Bill. That thread is an impatience by ministers with due process – either in the legislative process of policy or its execution. Judges, Parliamentarians, and the international community through the UN all have a legitimate role in scrutiny at an appropriate level to ensure that policy which, in Dicey’s words, is ‘lawless’, is not implemented. Governments need not only to recognise this but to cherish and learn from it: the process can improve policy, not only hinder it.

Second, there is a need to improve certain legislative procedures. Above all, Parliament needs greater powers of scrutiny over the executive. This is extremely difficult because it is an issue which appeals, for obvious reasons, more to parties in opposition than in government. But Parliament as a whole needs somehow to have the authority to demand a better deal from the government of the day than it currently gets. The timetabling of the Prevention of Terrorism Act 2005 was little short of a disgrace. Parliament’s Joint Committee on Human Rights has produced a battery of excellent reports on human rights legislation, which, if followed, would have precluded a considerable amount of the subsequent litigation. Parliament needs to review its procedures in the context of the experience of government since 1979, when two parties have held office for long periods with large majorities. The Parliamentary role of detailed legislative scrutiny, rather than political opposition, has been too much located in the House of Lords and too little in the Commons.

Third, the fiction of Parliamentary sovereignty in the Diceyan sense can no longer be maintained, though it is rife in popular culture – particularly the tabloids. ‘Who rules Britain, Mr Blair?’ taunted the *Daily Express*, answering ‘You should ask Mr Justice Collins’.<sup>79</sup> But, actually, we need to modify too crude a version of Parliamentary sovereignty. In a state that accepted the separation of powers along the lines of the Massachusetts constitution quoted above, it would be accepted that the judiciary, the executive and the legislature all governed Britain together. There is a whole variety of constraints on the sovereignty of Parliament that

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<sup>77</sup> Ibid, para 51.3.

<sup>78</sup> *The Governance of Britain*, n1 above, Para 33.

<sup>79</sup> Quoted in A Bradley ‘Judicial Independence under Attack’, *Public Law*, Autumn 2003, pp397-407.

needs to be recognised. If we are to move, as looks likely, towards a period where there is increasing pressure to reduce the key elements of our constitution to writing then we need to be able to identify the ways in which we intend our governments to be held accountable beyond the exercise of the vote at irregular intervals of time.

Fourth, although the creation of the Ministry of Justice was in no way a direct attack on the rule of law, it does raise questions about governmental respect for the institutions of the rule of law. Attention needs to be given to the safeguards requested by Lord Phillips. These should be wider than simply protection of the judicial and court budget. They should include a memorandum from the Lord Chancellor/Secretary of State for Justice setting out the government's understanding of the rule of law obligation in s1 Constitutional Reform Act 2005. This must include the legal aid budget. As importantly, it must include an obligation on the minister to be a conduit for the concerns of the judiciary within government and to restrain other ministers who might wish to criticise individual judges.

Finally, we have to look seriously at the reasons why the public has tolerated the abuse of the rule of law and the principles of good governance. The Iraq war did touch a deep nerve in public consciousness and there is widespread British unease about other elements of the 'war on terror', such as Guantanamo Bay and complicity with rendition. However, there has been little overt public concern at many of the matters raised above. The reasons for this may be complex. Among them may well be a sense of powerlessness and alienation from the political process. Hopefully, one consequence of a serious debate about a written constitution may be a re-engagement in constitutional issues and a greater understanding of the value of the rule of law.

Dicey argued that the twin pillars of the UK's constitution were the rule of law and Parliamentary sovereignty. The composition of Parliament is under major consideration in relation to the House of Lords. We need also to take seriously demands that legislation, institutional arrangements and foreign policy all reflect the requirements of adherence to what we may reasonably call the rule of law. We need to give renewed recognition to the constitutional importance of the rule of law just as much as to that of Parliament. Let us hope that this emerges from the constitutional debate that will follow the government's green paper.

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- for a change in political culture – to one where ministers respect due process
- for a change in the legislative process – to ensure that Parliament has the time and powers it needs to scrutinise and improve laws before they reach the statute book
- that the Victorian concept of Parliamentary sovereignty is an outmoded fiction – and that Britain is ruled by a balanced combination of the executive, the legislature and the judiciary
- that governments must respect the institutions of the rule of law
- that there is a widespread sense of powerlessness and alienation from the political process – which should be addressed by a serious debate about constitutional issues and a greater understanding of the value of the rule of law

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