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THE GOOD CONSTITUTION¹

SIR DAVID WILLIAMS LECTURE

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INTRODUCTION

1. I knew Sir David Williams only in the last years of his life, and was much the richer in consequence. He illuminated every assembly; not only by his formidable intellectual gifts, but by his humour and his warmth. These lectures, begun in his lifetime, are now a memorial. I am honoured to be allowed a place within it.
2. What makes a good constitution? The question touches everyone who lives in society; we are all of us therefore – all of us save Pericles' useless man, the *idiotis*² – interested in finding it. In this lecture I will describe what I think is an important feature of the good constitution: its possession of two political moralities, which I will call the morality of law and the morality of government.
3. I intend the term “constitution” to mean that set of laws which in a sovereign State establish the relationship between the ruler and the ruled. It must therefore set the conditions by which the ruler is defined, specify the principal organs of government

¹ This is a revision of the 12th Sir David Williams Lecture, given at Cambridge on 4 May 2012. I am grateful to my friend Patrick Elias (Lord Justice Elias) for his insights during conversations since the lecture was delivered: they have allowed me to present a more nuanced argument. I remain, of course, responsible for its shortcomings.

² The funeral speech: Thucydides, *Peloponnesian War*, 2.40.

(in Western models the legislature, executive and judiciary), and prescribe their powers and duties. The good constitution will possess one characteristic upon which reasonable men and women will agree, namely that the ruler should exercise the power of the State for the benefit of the people and not for his own. But it is in the nature of unruly humankind that what benefits the people will always be contentious. The suggestion that the public good inheres in a single set of ideas that can be conclusively ascertained is contradicted by reason and experience. It takes wing only as an article of faith, secular or religious. Such an article of faith offers, moreover, a spurious justification for suppression and arbitrary rule: a ruler who claims a monopoly of wisdom necessarily aspires to tyranny, because by definition he is always right. And the people are sometimes too easily seduced by such claims. In his seminal essay, *The Power of the Powerless* Vaclav Havel said:

“Ideology is a specious way of relating to the world. It offers human beings the illusion of an identity, of dignity, and of morality while making it easier for them to part with them.”³

4. Therefore in order to secure the benefit of the people and for the avoidance of tyranny, the good constitution must allow for difference and disputation; in short for pluralism. And the imperative of pluralism is the best justification for democratic rule. Democracy is a means and not an end. It tends to promote pluralism and to disable would-be tyrants, because the sanction of the polling-booth provides a corrective medicine: albeit more of an emetic than an antidote.
5. The good constitution, then, in which I will introduce the two political moralities, the morality of law and the morality of government, is a democratic one. And our present democratic arrangements provide the starting-point for my discussion. Our public affairs have lately been marked by controversies which seem to betray a power struggle between the courts and the elected government. Should a court possess the authority to confer the franchise on serving prisoners? Or is it an issue which should

³ Trans. Paul Wilson.

be reserved to elected government? Should a court have a free hand to determine whether an alien criminal should be allowed to stay here because he has fathered British children? Who should decide whether someone who is a threat to national security should escape removal abroad because of what might happen to him there? If government and court each has a part to play, how are the parts to be assigned? What would the good constitution say about these matters?

6. These controversies may be viewed at three ascending levels of abstraction. They are usually discussed at the first, sometimes at the second. This lecture is about the third level of abstraction. It reveals a contrast between two values. These are the political moralities, the morality of law and the morality of government. The first and second levels cannot be fully understood without recourse to these two political moralities. They have much to teach as to the nature of the good constitution.

THREE LEVELS OF ABSTRACTION

7. The first of these levels of abstraction at which our latter-day controversies may be considered is the perception of them as a function of the law of human rights, whether administered by the European Court of Human Rights at Strasbourg or, since the coming into force of the Human Rights Act 1998, by our own courts and tribunals. There is a lively and important debate, to which there have been distinguished contributions, upon the question whether our courts have bound our own human rights law too tightly to the Strasbourg jurisprudence⁴, about which I will have a little more to say. But public utterances at this level of abstraction are all too often marked by unthinking rhetoric, especially by those who have little time for the difficult ideals of human rights. I was depressed to read a letter in *The Sunday Telegraph* on 22 April 2012 whose author stated: “This is a democracy. If the

⁴ See for example the Attorney General’s speech at Lincoln’s Inn on 24 October 2011: *The European Convention on Human Rights: Current Challenges*; Lord Irvine of Lairg, *A British Interpretation of Convention Rights*, UCL Judicial Institute and the Bingham Centre for the Rule of Law, 14 December 2011; and note the proceedings of the Brighton Conference on the European Court of Human Rights, April 2012.

majority want to remove Abu Qatada from the country, that is what this Government should do. It should not be browbeaten by a court that cares nothing for this country or its people". This is not an appeal to democracy. It is an appeal to what the Greeks called ochlocracy, rule by the mob.

8. For my purpose this first level of abstraction merely provides the occasion, though a very important occasion, of the controversies to which I have referred. The sinews of the good constitution lie deeper. The second level of abstraction brings us closer to the core of my discussion. It may be described in this way. Our controversies are the symptoms of a constitutional phenomenon: namely, a shift in the nature of our constitution from a parliamentary supremacy towards a constitutional supremacy. In *International Transport Roth GmbH v Secretary of State*⁵, after referring to an observation of Iacobucci J in the Supreme Court of Canada⁶, I said this:

“70. Not very long ago, the British system was one of parliamentary supremacy pure and simple. Then, the very assertion of constitutional rights as such would have been something of a misnomer, for there was in general no hierarchy of rights, no distinction between ‘constitutional’ and other rights. Every Act of Parliament had the same standing in law as every other, and so far as rights were given by judge-made law, they could offer no competition to the status of statutes. The courts evolved rules of interpretation which favoured the protection of certain basic freedoms, but in essence Parliament legislated uninhibited by claims of fundamental rights.

71. In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy, to use the language of the Canadian case. Parliament remains the sovereign legislature; there is no superior text to which it must defer (I leave aside the refinements flowing from our membership of the European Union); there is no statute which by law it cannot make. But at the same time, the common law has come to recognise and endorse the notion of constitutional, or fundamental rights. These are broadly the rights given expression in the European Convention on Human Rights and Fundamental Freedoms..., but their recognition in the common law is autonomous...”

9. However the shift from a parliamentary towards a constitutional supremacy, the aspiration to have fundamental rights recognised in the law, encounters an important

⁵ [2003] QB 728.

⁶ In *Vriend* [1998] SCR 493 at 563.

difficulty. Fundamental rights and government policy are liable to be in conflict with one another. Fundamental rights, being a legal construct, are generally in the hands of the judges. Government policy is, of course, in the hands of government. And so the progression from a parliamentary towards a constitutional supremacy, and not merely the ramifications of the Strasbourg Convention, are the genesis of the seeming turf wars between courts and politicians. Professor Vernon Bogdanor, in *The New British Constitution*⁷, recalls Sir Stephen Sedley's reference to "a new and still emerging paradigm [comprising] a bi-polar sovereignty of the Crown in Parliament and the Crown in the courts". Bogdanor continues⁸:

"The difficulty with such a paradigm, of course, is that the two poles of the new bi-polar sovereignty, far from collaborating in the sharing of authority, can all too easily come into conflict."

10. In light of this actual or potential conflict, it is useful at this second level of abstraction – the progression from a parliamentary towards a constitutional supremacy – to introduce some recent contributions to the debate about the controversies I have mentioned. In his F A Mann Lecture at Lincoln's Inn last year⁹ Jonathan Sumption QC (now Lord Sumption) put this question: "How far can judicial review go before it trespasses on the proper function of government and the legislature in a democracy?" And later: "Where does law end and policy begin?" His answer, broadly, is a call for judicial restraint, a summons to the judges not to trespass in political territory:

"[F]or those who are concerned with the proper functioning of our democratic institutions, the judicial resolution of inherently political issues is difficult to defend. It has no legitimate basis in public consent, because judges are quite rightly not accountable to the public for their decisions... In those areas of policy-making where the courts have traditionally been reticent about interfering, much the most compelling reason for their reticence is that by long-standing constitutional convention they fall within the special domain of the executive or the legislature. In the interests of democratic accountability,

⁷ Hart Publishing, 2009; Ch. 3, p. 82.

⁸ Ibid.

⁹ *Judicial and Political Decision-Making: The Uncertain Boundary*.

there must be a case for generalising this approach across the whole range of governmental activity, where the real issue is the appropriateness of the policy choices made by a different branch of the state.”

11. Lord Sumption gives instances where in his view this self-denying ordinance has not been observed. He clearly believes that this state of affairs has been exacerbated by the operation of the Human Rights Act, and has some muscular things to say about the jurisprudence of the Strasbourg court; but his appeal for judicial restraint is based on what he sees as the wisdom of respect for conventional constitutional territory.

12. Lord Sumption’s thesis was challenged by Sir Stephen Sedley in the *London Review of Books* in February this year¹⁰. Sir Stephen offers a robust critique of Lord Sumption’s exegesis of the constitutional progressions of France and the United States, and I would, with respect, recommend the stimulus of the historical debate between them. Sir Stephen assembles a sustained and weighty case to the effect that the judges administering our public law have not trespassed on territory where they should not go. He denies Lord Sumption’s instances to the contrary. He says:

“The courts go to considerable lengths to respect the constitutional supremacy of Parliament; Sumption gives no serious instances to the contrary. It is the executive – the departments of state over which ministers preside, along with quangos and local government – which is subject to public law controls.”

13. I think Lord Sumption underplays the distinction between primary legislation and executive action, and the courts’ continuing respect for the former; and though he acknowledges it, gives less weight than is due to the plain fact that the legislature has in the Human Rights Act left the judiciary with no choice but to enter into what might be called strategic issues. But Sir Stephen for his part does not plainly confront the progression from a parliamentary to a constitutional supremacy, and its effects on the distribution of State power between the judicial and political authorities.

¹⁰ Sir Stephen Sedley, *Judicial Politics*, *London Review of Books* vol. 34 No. 4, 23 February 2012.

14. These then are the first two levels of abstraction at which our controversies between courts and politicians may be discussed: the impact of human rights law, and the progression from a parliamentary to a constitutional supremacy. But they raise dilemmas rather than provide solutions. If we are to obtain a greater insight into the direction of the good constitution, as regards these controversies and generally, I think we must confront and understand the two political moralities: the morality of law and the morality of government. This is the third level of abstraction.

TWO POLITICAL MORALITIES

15. What are these two moralities? They constitute two contrasting values which the decisions of State authority in the good constitution must strive to deliver or uphold. They may be summarised as (1) the autonomy of every individual, and (2) the interests of the people as a whole. These are the moralities of law and of government. The first of them inheres in the notion that duties should be honoured and rights should be vindicated, whether the general welfare of the State and its citizens is thereby enhanced or not. But the second puts the general welfare of the State and its citizens centre stage: “the greatest happiness of the greatest number”. It is obvious that they may very readily be in conflict.

16. The two moralities possess immediate and powerful echoes of Professor Ronald Dworkin’s well known distinction between principle and policy¹¹. More broadly they reflect two major and very familiar post-Enlightenment traditions of moral philosophy: the philosophy of duties and rights on the one hand, and the philosophy of utilitarianism on the other: Kant and Bentham. These traditions are intricate and difficult. There are for example many problems with the idea of Kant’s categorical imperative, one version of which reads “Act only on that maxim which you can at the same time will that it should become a universal law”¹². And the associated idea that

¹¹ See for example *Law’s Empire* (Hart Publishing, 1998), pp. 221-4, 243-4, 310-12, 338-9, 381.

¹² In *On What Matters* (Oxford University Press, 2011), to which I refer further in the text, Derek Parfit suggests (Ch. 14, p. 342) that a revised version – “Everyone ought to follow the principles whose

every person is to be treated as an end and not a means is only telling if it is heavily qualified. Utilitarianism is also beset by notorious problems leading to theoretical adjustments and the wobble between what is called rule-utilitarianism and act-utilitarianism.

17. One reason why, in elaborating these opposing theories, the philosophers have faced formidable difficulties is their insistent quest for the Holy Grail of uniformity – the search for a single moral theory that can be shown to be correct for all cases. Thus in his recent book *On What Matters*, already acknowledged as a work of great philosophical importance¹³, Derek Parfit seeks to synthesise the three major normative traditions of Kantianism, contractualism and consequentialism (of which utilitarianism is a variety) into a unified whole which he calls “Triple Theory”¹⁴. However, since I do not propose to follow the quest for the Sangreal of uniformity, I need say nothing about the conceptual challenges encountered by those who do. It is enough for my deployment of the two political moralities to recognise the practical contrast between the two values to which they give substance, the autonomy of every individual and the interests of the people as a whole. Whatever the problems of either as an all-embracing moral theory, as distinctive values they are perfectly coherent and the contrast between them, though not absolute, is perfectly real.

18. I am concerned to draw out the implications of these contrasting values for our understanding of the good constitution. The issues and debates at the first two levels of abstraction at which our initial controversies may be considered, that is to say human rights law and the progression from a parliamentary to a constitutional supremacy, are functions of the tension between the two political moralities. More than this: the tenour of our constitution, the relationship between the ruler and the

universal acceptance everyone could rationally will” – “might be what Kant was trying to find: the supreme principle of morality”.

¹³ See for example Peter Singer’s review in the *Times Literary Supplement* for 20 May 2011.

¹⁴ Parfit, *op. cit.* Ch. 17 pp. 411-417.

ruled, is given by the relative weight our law accords to each. The good constitution requires that the two political moralities are in harmony; each of them served to the least prejudice of the other.

CONTRASTS BETWEEN THE TWO MORALITIES

19. I should explain the contrast between the two moralities, and therefore the nature of each of them, more closely. First, it must already be apparent that whereas the autonomy of every individual is a function of justice and therefore the natural province of the courts, the interest of the people as a whole is a function of democratic government and therefore the natural province of the politicians. These two agents of the State may trespass into each other's territory, and that will be a large part of my discussion, but this allocation of space between them is the paradigm.
20. Secondly, it is no coincidence that the courts' natural territory is, marked, broadly at least, by a Kantian philosophy and that of government by a utilitarian philosophy. The administration of justice is necessarily concerned with the adjudication of duties and rights in the particular case according to established rules and principles. The systematic application of a utilitarian philosophy would be inconsistent with this adjudicative function. It would require the judges to be prepared, if they thought it in the public interest, to set aside applicable law in the name of some perceived greater good. But that would be a denial of justice; it would be a denial of law.
21. By contrast politicians, governments, are by necessity utilitarians. It is because their special task is to judge, not settled rights and duties, but conflicting, and often strategic, *interests* – between hospitals and schools, between social security and defence, between the opposing claims of high tax and low tax policies. I acknowledge of course that government may and does from time to time concern itself with rights and duties; and with the administration of justice (to which, however, they may apply utilitarian policies which sit uneasily with individual justice). Indeed criminal lawyers and judges frequently bemoan the plethora of statutes which complicate the

criminal law. I acknowledge also that since government may speak (and act) on any subject, the motivating force of all policy and legislation cannot be reduced to a single set of norms, utilitarian or otherwise. But it is especially the function of democratic government to promote or procure in any field what it sees as the best *outcome* in the general interest. This is a consequentialist position, and may be called utilitarian because it looks for the best outcome for all the people, or at any rate for all members of the class or classes of persons being considered.

22. The impetus of utilitarianism is thus the paradigm philosophy of politics. Whereas rights and duties are necessarily and honourably the moral language of justice and therefore of law, utilitarianism is necessarily and honourably the moral language of government.
23. There is next a point to be made about the political moralities' respective content. Both, of course, presume reason and honesty, without which everything else is writ in water. But notice this contrast: the morality of law is given effect through settled principles, but the morality of government is not. The principles which inform the morality of law are hardly controversial. They include consistency, proportionality, fair process and the presumption of liberty. Law has to rest on principles, for if it does not, its outcomes are nothing but the bare choices of the judge, and that is not law, but merely power. But no such principles are integral to the morality of government. As I said earlier, what is in the general interest of the people will always be contentious, and the rival contentions cannot be reduced to or derived from settled principles to which all the rivals subscribe. I do not of course by any means suggest that the process of government is generally unprincipled in some pejorative sense. It may be constrained by many factors: the ballot-box, the party machine, Parliamentary arithmetic, external circumstances, public opinion, and the sheer political commitment of its actors. Political opponents will have their own strongly held political principles; but these are, necessarily and rightly, partisan, and may be volatile. There are important qualities which straddle the political divide: apart from

reason and honesty, they include a presumption of goodwill and an aspiration of competence. But these are not principles which apply to decisions. They are characteristics of decision-makers.

24. In summary: politicians may re-invent the wheel; judges may not. Law is evolutive. Politics is revolutionary. Law and government both make new lamps; but law, certainly the common law, makes new lamps from old. A consequence is that the morality of government is much more open-ended than the morality of law. The core principles of the morality of law – consistency, proportionality, fair process and the presumption of liberty – are by their nature bound to condition the administration of individual rights and duties very closely, and to that extent direct the outcome of judicial decisions. But the core qualities of the morality of government – goodwill and competence – though vital, have only a strategic influence on the outcome of government activity, the construction of policy. Law is a much tamer beast than government.

IMPLICATIONS OF THE TWO MORALITIES FOR THE GOOD CONSTITUTION

25. These, then, are the principal contrasting features of the morality of law and the morality of government. Now let me consider their implications for the good constitution. Here is the easiest question: what would a constitution be like if neither morality played any part in it? It would be no constitution at all, or none worth the name. If there were anything called law, it would lack all principle. If there were anything called government, its rule would be vicious and inhumane. What marks a brutal autocracy is its lack of both moralities.
26. Closer to our enquiry, however, is this question: how do matters stand in the constitution according as either of the political moralities has a louder or softer voice relative to the other? It is clear that the good constitution requires a balance between the two moralities, each having substantial weight in the distribution of State power. If one is all but expunged by the onward march of the other, the good constitution is good no longer. Consider each extreme. First, the case where the morality of

government has vastly greater force than the morality of law. In such a case individual rights – the claims of justice – are liable to be crushed by the utilitarian imperatives of government. Now consider the converse case: the morality of law has vastly greater force than the morality of government. Then the general public interest is stifled: its voice unheard in the tumult of competing claims.

27. We may be in no doubt, then, that the good constitution requires a balance between the two moralities, each having substantial weight. The morality of law must not forget the impact of individual claims on the community; and the morality of government must not forget the impact of community claims on individuals. But it is not only that both moralities are needed for their own sake. It is also because in each of the extreme cases the prevailing morality is corrupted by its own inherent weakness. What are these weaknesses? The weakness of the morality of government is the side-effect of democracy's corrective medicine: populism, which is the price of the polling-booth. But the morality of law, given practical effect by the institution of enforceable rights, has its weakness too. The great American jurist Oliver Wendell Holmes said in a case in the Supreme Court in 1908 that "[a]ll rights tend to declare themselves absolute to their logical extreme"¹⁵. And this is surely true. It is in the nature of rights that given an inch they claim a mile.
28. Each of these weaknesses will be at its strongest when the morality to which it belongs is decisively in the ascendant. But government restrains law, and law restrains government. Popular pressure tends to put a brake on overweening claims of right. Conversely, the justice of individual causes tends to put a brake on measures fuelled by populist excess. And so the good constitution needs both moralities, for their own sake and also because each mitigates the other's weakness.
29. In the United Kingdom this substantial balance is suggested, to some extent at least, by A V Dicey's twin peaks, parliamentary sovereignty and the rule of law. The rule of

¹⁵ *Hudson County Water Co v McCarter* 209 US 349, 355.

law is a notoriously difficult concept, despite its common currency. There is the “thin” theory: it says that action by the State must be grounded in promulgated laws which are not retrospective, but has nothing to say about the content or quality of such laws. Then there is the “thick” theory. It says that the rule of law is only fulfilled if the law is substantively virtuous in a number of respects¹⁶. But while protagonists of the thick theory are generally vigorous advocates of the autonomy of the individual, I do not think that Dicey’s dichotomy, however precisely understood, throws much light on the specific contrasts between the two political moralities and the need for the constitution to balance the two.

30. These contrasts are, however, illuminated by the second level of abstraction at which the controversies with which I began may be considered: the progression from a parliamentary to a constitutional supremacy; for this represents a shift from the morality of government towards the morality of law. The shift has gone further over the eleven years and more since the Human Rights Act 1998 came into force in October 2000. One may compare Professor Bogdanor’s opinion¹⁷ that “constitutional reforms since 1997 [he includes the Human Rights Act], together with Britain’s membership of the European Union, have served to provide us with a new British constitution”.

31. How, then, should the balance between the political moralities be struck in the democratic State? The balance is bound to vary under the influence of circumstance. In times of national danger the morality of government will, rightly, have a louder voice. But still, a balance must be struck; the tension between the demands of

¹⁶ See generally Bingham, *The Rule of Law*. In ch. 7 (p.66) Lord Bingham quotes Joseph Raz on the “thin” theory (Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) pp. 211, 221). Lord Bingham himself is firmly in the “thick” theory camp: see *The Rule of Law*, p. 67.

¹⁷ Op. cit., Ch. 11, p. 271.

security and the claims of rights is necessary as well as familiar¹⁸; and it constitutes, of course, one of the very controversies with which I began. More generally, the balance will differ from State to State, tending this way or that under the influence of distinctive cultural and political traditions. There is not a universal ideal, a single perfect striking of the balance to which every State should aspire. There is no Platonic Form for a constitution. This is itself significant: not least because this differential allocation of the two political moralities from one State to another, this variation among constitutions, is what in truth justifies and requires the doctrine of the margin of appreciation which informs the jurisprudence of the European Court of Human Rights: a doctrine which Lord Sumption¹⁹ thinks has been shrunk by the Strasbourg court “to almost nothing”. But because there is no Platonic form for a constitution, the margin of appreciation is a very condition of the confidence which the signatory States may repose in the international human rights court.

32. I should next emphasise that in striking the balance between the political moralities so that neither overwhelms the other there is an important difficulty. I have already anticipated it. It is that each will to some extent invade the other’s territory. To take a notorious example: our adoption in domestic law of the European Convention requires that the courts should assess the proportionality of removing undesirable aliens who claim rights under Article 8. This has invited the judges onto the territory of the morality of government. And the response is for government to occupy the territory of the morality of law, by putting pressure on individual rights in the name of policy. These cross-invasions are the true cause of the seeming turf wars between government and courts, including the European Court of Human Rights at Strasbourg. But they tend to disturb the tranquillity of the State. As I have said, the

¹⁸ See, amongst many discussions, *Human Rights and their Limitations: The Role of Proportionality*, Professor Aharon Barak, FLJS Annual Lecture in Law and Society, Rhodes House, Oxford, 4 June 2009.

¹⁹ Op. cit.

two political moralities should be in harmony; each served to the least prejudice of the other.

33. Article 8 claims are, of course, only an example, albeit a graphic one, of these territorial incursions. But the tendency of each of the moralities to invade the other's territory is a general consequence of the attribution to each of substantial weight. With that in mind let me go on to consider particular features of the arrangements for the distribution of State power here in the United Kingdom which are important for the striking of the balance between the political moralities.

THE TWO MORALITIES IN THE UNITED KINGDOM CONSTITUTION

34. The first such domestic feature is that we have no written, codified constitution, no single sovereign text. I cannot in this lecture enter at length upon the issue whether we would be better with such a text. I will merely say that for my own part I do not think we would, for three reasons. First, a written constitution tends to convert questions of substance into questions of interpretation. Secondly, much time might be spent, and much heat generated, in debating whether the constitution should be treated as the pure voice of the founding fathers or as a living instrument. Thirdly, the flexibility and adaptability of the common law may be prejudiced. But here I am only concerned with an important consequence of our lacking such a sovereign text. It means that the judges must bear a heavy responsibility for setting the balance between the two moralities. Parliament could legislate, but the evolutive method of the common law is a better tool to fashion something so delicate. An Act of Parliament speaks all at once and with a single voice, though of course it can speak again. The law speaks over time and with many voices. And the fact of this judicial role has a further implication, which marks the true importance, in this context, of the absence here of a written constitution. In deciding how Convention cases should be approached we are not merely doing what the Human Rights Act tells us. We are striking the balance between the two political moralities; and we are therefore shaping our own constitution. This is a powerful reason why our courts should

develop a municipal law of human rights. It means, with great respect, that we should take care in our approach to exhortations such as Lord Bingham's observation in *R v Special Adjudicator ex parte Ullah*²⁰: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." To fashion the distribution of power in our own constitution, to shape our own constitution, is *par excellence* a domestic responsibility.

35. The second feature of our own arrangements which should be borne in mind in striking the balance is that in this jurisdiction both political moralities rest on very strong traditions. Our political tradition's most distinctive feature is the sovereignty of the legislature, though it faces increasing modification, not least under the twin influences of the law of the European Union and the European Convention on Human Rights, and also by force of the general progression from a parliamentary towards a constitutional democracy²¹. Our legal tradition rests on the adversarial justice of the common law, and the judiciary's robust and non-negotiable independence of government. These vigorous traditions have given us a marked and distinct separation between courts of law and government. Whatever the depth of current cynicism about practitioners of the art of politics, there is emphatically no public appetite for the consignment of utilitarian questions of the general good to the bailiwick of the judges. Nor should there be.

36. These traditions lend added weight to the ideal of harmony between the political moralities. And the force, I would say the virtue, of these traditions is best served by striking the balance so as to diminish rather than increase the likelihood that each of the moralities will invade the other's territory. Accordingly our constitutional arrangements should in my opinion provide an imperative of restraint on the part of the courts when they venture onto the territory of the morality of government. This

²⁰ [2004] 2 AC 323, paragraph 20.

²¹ Note the observations of Lord Steyn (paragraph 102) and Lord Hope (paragraph 159) in *Jackson & Ors v Attorney General* [2005] UKHL 56.

imperative is no less important because the judges enter that territory at the behest of statute – the Human Rights Act. It is justified against the background of our constitutional traditions because the legitimacy of elected power, the authority of the ballot-box, are the gatekeepers of the morality of government. But judicial restraint is not just a question of democratic accountability. You will recall a contrast between the two moralities which I have drawn already: while the morality of law is given effect through settled principles, the morality of government is not. Therefore, when the judges enter into the latter territory, the armoury of principles by which they wield the law cannot help them. What works in that territory is a utilitarian perception of the general interest; and that is not the judges' *metier*.

37. How to give effect to an imperative of restraint? The very want of an armoury of principle suggests an answer. Because the judges have no tools which are special to them for measuring the force or weight to be accorded to government policy, their judgment of such matters should be remote rather than intrusive. Thus for example in an Article 8 case the weight to be attached to a policy of firm immigration control, or the desirability of removing alien criminals, cannot be measured by reference to the kind of legal principles which the judges apply when they administer rights and duties; for they do not depend on any such principles. Such policy issues are for the utilitarian choice of government, as to which the judges have no distinctive voice. Accordingly, unless the policy is unlawful (and that would be a wholly different case) the force or weight to be accorded to it is something close to a given, an axiom, and the courts should generally treat it as such.

38. It will be apparent that on this view the legitimacy of elected power, and the want of principles by which to judge policy, need to be borne firmly in mind when the courts are called on to decide questions of the proportionality of a government policy's impact. That is an issue which characteristically arises in the adjudication of claims under Articles 8 – 11 of the Convention, which guarantee what are sometimes called the political rights. But while the policy and the weight to be given it are or should be

close to axiomatic, by contrast the courts are bound to see to it that in adumbrating and applying its policy, the government has given proper consideration to the right with which the policy interferes. Some kind of balance must be struck, restraint or no restraint. The Human Rights Act demands at least as much, and indeed so should the common law. The challenge is to find a means of articulating this balance consistently with the imperative of restraint. In adjudicating proportionality issues concerning the political rights, the question has seemed to be, how far does the policy interfere with the right? Paragraph 2 of each of Articles 8 – 11 is couched in terms of such a question. So, broadly, is the jurisprudence. But what about the other end of the telescope? Given the need of restraint, would it be possible and appropriate to find room for the converse question, how far does the right interfere with the policy? Might it at least be open to our courts to develop a jurisprudence in which the balance between private right and public interest could be struck without firm or rigid preconceptions?

39. Remember: such questions are not only issues about the interpretation of the Human Rights Act or the European Convention; they are issues touching our constitution. Such a shift in the courts' approach might, I suppose, bring us closer to the traditional public law test for the legality of administrative action called *Wednesbury*²² unreasonableness, and that is a long way from the modern Convention jurisprudence, here and in Strasbourg. We are unlikely to return to *Wednesbury*, and I do not say that we should. But it is worth reflecting that that case was surely born out of our vigorous tradition of a marked and distinct separation between the functions of courts of law and government, ultimately between the two political moralities.

40. So the judges should exercise an imperative of restraint when they are ineluctably drawn onto the territory of the morality of government. How it is to be done

²² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

presents, as I have suggested, a major challenge for the future. But in their own territory, the morality of law, the judges' jurisdiction is and should be exuberant. Some of the Convention rights operate clearly within this territory: Articles 2 (the right to life), 3 (no torture), 5 (no detention without law), 6 (the right of fair and proper trial) and 7 (no retrospective crime) all belong there. Article 5 calls up the well known words of Winston Churchill on preventive detention in 1943, at the height of the Second World War:

“The power of the executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers, is in the highest degree odious, and the foundation of all totalitarian government whether Nazi or Communist.”²³

41. On such territory, which is their own, the courts will continue vigorous – activist, if you like. And among the political rights, though they may be interfered with by government on public utilitarian grounds, there is to be found Article 10 – freedom of expression; and this is a right which is inherent in the autonomy of the individual, the very basis of the morality of law. Along with Article 9, freedom of thought and religion, it is integral to one of the law's core principles – the presumption of liberty; and to the mandatory characteristics of the good constitution to which I referred at the outset: difference and disputation, in short pluralism. As such it needs the special protection of the judges. And I think it is under threat. There has in recent years developed an insidious tendency to regard the fact that certain speech is offensive as a reason for banning it. I do not think that offensive speech should ever be prohibited by law for no reason other than its offensiveness.
42. I said I would consider particular features of the arrangements for the distribution of State power in the United Kingdom which are important for the balance of the political moralities. I have discussed only two: the want of a written constitution, and the strong tradition of separation between courts and government. But they have

²³ Cited in A W B Simpson, *In the Highest Degree Odious: Detention without trial in Wartime Britain* (Oxford, Clarendon Press, 1992), 391.

deep implications: an acceptance that when the judges are drawn onto the territory of the morality of government, as they are in human rights adjudication, and there strike the balance between the two moralities, they are not merely administering an Act of Parliament; they are shaping our constitution; a challenging need for restraint on the territory of the morality of government; vigour and activism on the territory of the morality of law.

43. In all this, the means and methods of the common law are to hand. It is a creative process. You sometimes hear it said, even today, that Parliament makes the law, and the judges do no more – or should do no more – than interpret it. But this was always a false picture, or at least a partial one, and therefore misleading. The judges made the common law; that was always a creative exercise. But it was not always so recognised. The fog was clearing, however, by the early 1970s. You will recall Lord Reid's aphorism of 1972:

“There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him some magic knowledge of the words Open Sesame... But we do not believe in fairy tales any more.”²⁴

44. Not fairy tales, certainly; but the reality has much more to tell us than any fairy tale. The task before us is to shape our constitution so that the morality of law and the morality of government each plays a substantive part; and they do so in harmony. It is a purpose which will be served by the genius of the common law, which makes new lamps from old, and speaks over time and with many voices.

POSTSCRIPT

45. But at the end there is a softer note to strike. How much should we expect of the good constitution? You will remember the famous dilemma in Plato's dialogue the *Euthyphro*: Are moral acts willed by God because they are good, or are they good

²⁴ Lord Reid, “The Judge as Lawmaker” (1972) *12 Journal of the Society of Public Teachers of Law* 22.

because they are willed by God? Immanuel Kant had a like question in mind, and posed an answer to it, when he said²⁵:

“We must not expect a good constitution because those who make it are moral men. Rather it is because of a good constitution that we may expect a society composed of moral men”.

46. I am not so sure. I think much depends on the temper of the people. They need to relish their democracy: without it law is just the puppet of whatever tyrant is the ruler. But they need to relish the law as well: without it, democracy is just the tyranny of the majority. Sir David Williams relished both. I hope he would have found some small value in what I have said.

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²⁵ Quoted by Lon Fuller, *The Morality of Law*, Yale University Press (revised edition 1969), p. 152.