Montesquieu grasped the difference better than anyone else when, as a prelude to the few pages that laid down the foundations of modern constitutional thinking (Chapter 6, Book XI of *The Spirit of Laws*),[8] he wrote: ''One nation there is also in the world that has for the direct end of its constitution political liberty. We shall presently examine the principles on which this liberty is founded; if they are sound, liberty will appear in its highest perfection.''[9] This nation was, of course, England. Free from the intrusive police power that was reigning supreme on the continent, its citizens enjoyed political liberty, that is, ''a tranquility of mind arising from the opinion each person has of its safety.''[10]

The position of England *vis-à-vis* public law has always been exceptional. This was true in the eighteenth century, and it is still true today. England never developed a public law like that of the States in continental Europe, where the word of the sovereign, the law of the State, was separated from ordinary law and immune from any review by the courts of law. English monarchs were never strong enough to make such a State prevail or, more precisely, when they were strong enough (after the Conquest), the idea of public law was not born yet, and when the idea was born (after the Reformation), they had lost the power to make it prevail. The British monarchy has been able to perpetuate itself only by forgoing absolutism (Chapter 3) and by accepting the rule of law (Chapter 4).

---

[8] Chapter 6 of Book XI is merely entitled ''The Constitution of England''; see Montesquieu, *The Spirit of Laws* [Translated by Th. Nugent, 1752, revised by J. V. Prichard], 1748, available at http://www.constitution.org/cm/sol.htm.

[9] *Id*., Book XI, chap. 5.

[10] *Id*., Book XI, chap. 6.

Chapter 3

The Defeat of Absolutism

The status of the monarchy. Unlike continental monarchies, the British monarchy never fell into absolutism, still less into despotism. Historical conditions never made it possible.

In the first place, English monarchs were never able to call themselves, as the French kings did, king ''by the grace of God''; the conquest of 1066 forbade it. It took a very long time for the hereditary succession to the throne to become settled law. The conqueror himself could not rely upon hereditary right; he relied rather on gift or devise. He argued that Edward had given him the kingdom.[1] The kings of England were crowned; but the coronations were not consecrations. No bishop ever said that coronation ruled out the king's deposition. The ceremony created a religious bond between the king and his people, but it did not transform him into a sacred person.

In the second place, English monarchs were never able to turn the precepts of Roman law to their own advantage. As early as the thirteenth century, under the reign of Edward I (1272-1307), the ecclesiastics, the scholars learned in Roman law in the Middle Ages, ceased to sit on the bench of royal courts. English law became more and more insular, and the judges as well as the lawyers increasingly ignorant of any other law but their own. The Roman law of the late Roman Empire, which filled continental lawyers' thoughts, remained foreign to them. English law has lost a great deal in cutting itself off from Roman law. It lacks principles: Property law, for instance, is a maze of intricate rules riddled with exceptions. It has no distinct idea of the *res publica* in which it does not believe and that it does not conceive of as being able to be anything more than a mere aggregation of private interests. But the loss was outweighed by a tremendous advantage.

[1] F. W. Maitland, *The Constitutional History of England*, Cambridge University Press, Reprint, 1955, p. 97.

English law never received the late Roman law maxims that on the continent made absolutism so successful. The king of England has never been *princeps legibus solutus* (free from complying with the laws). The rule has never succeeded in becoming firmly rooted. True, the monarch possesses a certain status *vis-à-vis* the law. For instance, early in the Middle Ages, it was commonly acknowledged that the king could not be sued by virtue of the rule that the King could do no wrong. But the king was not above the law. If he happened to cause damage, the remedy consisted in the right to petition him. In the thirteenth century, Henry de Bracton (who was a judge for twenty years under Henry III) affirmed the absolute empire of the law many times. According to his famous formula, he repeated over and over that England is ''not under the King but under God and the law.''[2] The law itself makes the king: *Ipse tamen rex non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem*. As far as one goes back in time, the common law tradition has put sovereignty under law; this medieval tradition has remained immutable because the common law escaped the influence of imperial Roman law.

The status of sovereignty. According to the great historian Maitland, there were in England, at the beginning of the seventeenth century, three claimants for sovereignty:

(1) the king all alone and in majesty, as the French Jean Bodin had presented him;

(2) the king in Parliament (*i.e.*, the medieval king surrounded by his counselors of the Curia Regis), deciding with the advice and consent of those who formed with him the Parliament, namely, the discrete estates of the realm (the spiritual and temporal Lords, and the representatives of the Commons); and

(3) the law that, according to medieval scholars, was in every way above the king.[3]

The struggle between the three contenders began in the early seventeenth century with an offensive of the first against the second that was arbitrated by the third and eventually decided of the Fate of the Prerogative (Section A). It came to a close at the end of the seventeenth century with the victory of the second over both the first and the third. Indeed, it was a glorious Revolution,[4]

---

[2] Henry de Bracton, *Bracton De legibus et consuetudinibus Angliæ* (George E. Woodbine ed.), Yale University Press 1915-1942, vol. II, p. 33.

[3] *Id*., pp. 297-298.

[4] The term ''glorious Revolution'' is to be found in E. Burke, *Reflections on the Revolution in France* (1790), Penguin Classics 1968, p. 86.

since a single act sufficed to make it understood that sovereignty had changed hands once and for all and was henceforth in the king in Parliament; the king could no longer govern except with the Lords and the Commons. The watershed opened the way towards a consolidation of the fundamental principle of English law, Parliamentary Sovereignty (Section B).

A. THE FATE OF THE PREROGATIVE

The offensive of absolutism. When Elizabeth I died in 1603, the crown of England fell to James I, son of Mary Stuart and king of Scotland. James I was Catholic, and he was very influenced by the ideas of Jean Bodin, whose works he had read closely. While he was king of Scotland, he wrote a book *The Trew Law of Free Monarchies*, which was a rebuttal to both the Calvinist antimonarchical views and the Catholic Church's claims regarding the supremacy of the Pope. He argued in this book that power comes from God and that disobedience to the king was as much a sacrilege as disobedience to God. Indeed, as he told Parliament in 1610, ''Kings are not only God's Lieutenants upon earth, and sit upon God's throne, but even by God himself they are called Gods.''[5]

During the first years of his reign, he tried to put these ideas into practice. He claimed to govern the country by virtue of his inherent powers—powers belonging to the king only—and these were usually gathered under the broad term of ''prerogative.'' But he failed. The English people did not accept the king's eccentric claims, which were in complete opposition to the already entrenched ideas of his contemporaries. The absolutist pretensions of the Stuart dynasty to govern only by prerogative ran up against well-established institutions:

(1) The ancient idea of rights as laid down in the *Magna Carta*,[6] a famous document the free men of England forced King John II to sign when he tried to send them to France to fight to regain his lost possessions. The *Magna Carta* established the fundamental law of the English Constitution that rights exist before the king, so law precedes power. To that extent, the king of England is indeed ''under law.''

---

[5] See G. Burness, ''The Divine Right of Kings Reconsidered,'' 107 *English Historical Review* 827 (1992) quoted by H. J. Berman, ''The Origins of Historical Jurisprudence: Coke, Selden, Hale,'' 103 *Yale L. J.* 1651, 1667 (1994).

[6] See C. Stephenson & F. G. Marcham, *Sources of English Constitutional History, A Selection of Documents from A.D. 600 to the Interregnum*, vol. I, New York, Harper & Row, 1972 [hereinafter *Stephenson & Marcham*, I], p. 115

(2) The representative institutions existing at that time, in particular, a Parliament, composed of the Lords Spiritual and Temporal and the Commons, representing all the estates of the people of the realm, associated with all major religious reforms under the Tudors. Both Henry VIII and Elizabeth I had taken great care in establishing the Anglican Church with the full support of Parliament. In giving to this political body the power to establish, together with the king, the religion of the State, the Tudors did much to instill into the English mind the idea of the sovereignty of Parliament—so much so that sovereignty at that time was associated with God.

(3) The tradition of the common law established by Henry II (1154-1189) and well developed in the sixteenth century. The common law courts were the king's courts. It was only through their intermediary that the king could dispense justice, in particular, that they could decide cases dealing with the property of his subjects or with punishment of violent crimes. But it was recognized that the king had a residual power to dispense justice whenever the common law courts were inadequate.

The notion of prerogative. At the time of James I, the prerogative, a generic term like *droits régaliens* in French, designated all the various powers exercised by the king. A well-known and well-established institution, it encompassed two kinds of powers: (1) inherent powers to defend the realm against foreign enemies, and (2) residual powers that the king could exercise for the common good. The prerogative was a bundle of sticks, so to speak, a bundle of rights recognized as inherent to the royal function, such as the right to defend the realm and ensure the public peace, to put into effect the missions implied by the right to wage war, to conduct diplomacy and foreign affairs, to dispense justice, and to make the laws necessary for the conservation of the kingdom. In the seventeenth century, the lawyers made distinctions among these powers depending on their ordinary or extraordinary character.

1. The Status of the Ordinary Prerogative

The judges' moment: Sir Edward Coke. The ordinary prerogative was the royal function that the king exercised in definite forms and not at his discretion. Since Henry II, the judges had held to two tenets: first, that the king had no legislative authority without Parliament and, second, that he could not judge except through the intermediary of his judges. Sir Edward Coke, one of the greatest defenders of the common law, had to remind King James I of both principles in two cases that called into question respectively his power to make law and to give justice.

a. The Question of Prohibitions (1607)

In 1605, Bancroft, Archbishop of Canterbury, complained to the king about the writs of prohibitions issued by common law courts against judicial decisions made by ecclesiastical judges. As he wanted the king to put an end to this practice, he argued that the king himself may decide any cases in his royal person. The judges are but the delegates of the king, he maintained; further, the king may take cases as he wishes from the determination of the judges, to determine himself. The matter was eventually referred to the Court of Common Pleas.

The opinion of Chief Justice Coke and his colleagues was to the effect that

> the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or between party and party, concerning his inheritance, chattels, and goods, etc., but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England [. . .]; that no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within his realm, but these were solely determined in the Courts of Justice [. . . .]
>
> Then the king said that he thought the law was founded upon reason, and that he and others had reason as well as the judges. To which it was answered by me that true it was that God had endowed his majesty with excellent science and great endowments of nature; but his majesty was not learned in the laws of his realm of England, and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of law—which law is an act which requires long study and experience, before that a man can attain to the cognizance of it—and that the law was the golden metwand and measure to try the causes of the subjects, and which protected his majesty in safety and peace. With which the king was greatly offended, and said that then he should be under the law—which was treason to affirm, as he said. To whom I said that Bracton said *quod rex non debet esse sub homine, sed sub Deo et lege*.[7]

b. The Case of Proclamations *(1611)*

In the early seventeenth century, James I wanted to prohibit by ''proclamation'' (an act very similar to the ''ordinance'' of continental Europe) the

[7] *Stephenson & Marcham*, I, *supra* note 6, at pp. 437-438.

building of new houses in London, in order to check the overgrowth of the capital, and the manufacture of starch from wheat, so as to preserve wheat as a food supply. The Commons complained of an abuse of proclamations. The opinion of Chief Justice Coke and four of his colleagues was to the effect that

> the king by his proclamation cannot create any offence which was not an offence before; for then he may alter the law of the land by his proclamation in a high point. For, if he may create an offence where none is, upon that ensues fine and imprisonment. Also the law of England is divided into three parts: common law, statute law, and custom. But the king's proclamation is none of them. . . . Also it was resolved that the king hath no prerogative but that which the law of the land allows him. But the king, for prevention of offences may by proclamation admonish his subjects that they keep the laws and do not offend them, upon punishment to be inflicted by the law.[8]

Consequences. Both cases are of fundamental importance insofar as they placed the king of England as far as possible from the king of France. The English monarch was to be neither lawgiver nor lawmaker. Sir Edward Coke gave a death blow to the idea of king as fountain of justice. The king is henceforth definitely *sub Deo et lege*. Both cases are also important as forerunners to a separation of functions (first judicial, then legislative functions are drifting away from the royal function) buttressed by a separation of organs (the royal organ is increasingly limited to the executive function, while the judicial organ and the legislative organ acquire their autonomy). The realm of England is not whole in one; one organ does not concentrate all the powers.

2. The Status of the Extraordinary Prerogative

Judicial deference and Parliament's moment. As resort to the ordinary prerogative proved to be of no avail, the king of England turned to the extraordinary or absolute prerogative that the king could exert in person at his own discretion and subject to no restrictions of a formal or legal kind. Medieval lawyers applied it to the power of dispensing with laws, of granting pardon, of granting peerage, and, more generally, the power to take all measures necessary in the time of emergency.[9] Charles I attempted to govern by invoking the extraordinary prerogative only. His pretension amounted to a claim of absolute power; for the king invoked sovereignty in its highest and strongest expression,

---

[8] *Id*., pp. 441-442.

[9] For a general study on the law of necessity, see F. Saint-Bonnet, *L'état d'exception*, Paris, PUF, Collection Léviathan, 2001.

the power to decide in exceptional circumstances.[10] The judges (who, at that time, were still very much ''his'' judges, as they were nominated and dismissed at his own discretion) did not dare to stop him. This may be illustrated by three cases in which the judges respectfully deferred to the king as the sole holder of sovereignty and, thus, the exclusive authority to determine the common good for the realm. Later, their inaction was reversed by Parliament.

a. Case of Impositions (Bate's Case) *(1606)*[11]

John Bate, a merchant trading with Venice and the Levant, refused to pay an extra poundage on imported currants, which James I had imposed in addition to the statutory poundage. Bate's counsel argued that the new poundage had been imposed unjustly against a statute that prohibited indirect taxation without the consent of Parliament. The decision of the Barons of the Exchequer was unanimous for the king. They decided that the king might impose what duties he pleased, if it was only for the purpose of regulating trade and not raising revenue, and that the court could not question the king's statement that the duty was in fact imposed for the regulation of trade.

b. Darnel's or the Five Knights' Case *(1627)*[12]

In 1626, letters under the privy seal were issued assessing certain individuals for contributions to a forced loan. Sir Thomas Darnel and four other knights refused to pay, and they were sent to the Fleet prison. Darnel obtained from the king's bench a writ of *habeas corpus* directed to the warden of the Fleet to show cause for his imprisonment. The reply made by the warden stated that the prisoner was detained in his custody ''by special command of his

---

[10] According to the famous definition of Carl Schmitt: ''Is sovereign he who decides on the exception.'' In a footnote, George Schwab underlines:

> In the context of Schmitt's work, a state of exception includes any kind of severe economic or political disturbance that requires the application of extraordinary measures. Whereas an exception presupposes a constitutional order that provides guidelines on how to confront crises in order to re-establish order and stability, a state of emergency need not have an existing order as a reference point because *necessitas non habet legem*.

Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1934) [Translated by George Schwab], MIT Press, 1985, at p. 5, note 1. Concretely speaking, the definition must be understood as implying the power of determining both when and what the situation of emergency requires.

[11] D. L. Keir & F. H. Lawson, *Cases in Constitutional Law*, 6th ed., Oxford, Clarendon Press, 1979, pp. 74-75.

[12] *Id*., pp. 75-76.

majesty'' (*per speciale mandatum domini regis*). Similar replies were made with respect to the other four knights.

Counsel for the prisoners argued in substance that the true meaning of a writ of *habeas corpus* was to show cause and, possibly, a valid cause for imprisonment. The court did not agree. It recognized that ''the main point in law [was] whether the substance or matter of the return be good or no,'' but said that ''if no cause of the commitment be expressed, it is to be presumed to be a matter of state, which we cannot take notice of.''

c. R. v. Hampden (The Case of Ship Money) *(1637)*[13]

In 1634, Charles I, being in need of a navy for the protection of English shipping, but unwilling to call a Parliament, issued writs commanding seaport towns to furnish ships fully manned and equipped and instructing the municipal authorities to raise money from the citizens for that purpose. A year later, writs were issued again, this time to inland counties too. John Hampden, a Buckinghamshire gentleman, having been assessed to pay the tax, refused to pay. His counsel argued that the king in time of emergency did have the right to raise taxes without the consent of his subjects but that he could do it only in time of actual and real, not simply alleged, emergency. On behalf of the Crown, it was argued that the king alone was in charge of deciding what the emergency required. The judges unanimously decided that

> when the good and safety of the kingdom in general is concerned and the whole kingdom is in danger, your majesty may, by writ under the great seal of England, command all the subjects of this your kingdom at their charge to provide and furnish such number of ships, with men, munitions, and victuals, and for such time as your majesty shall think fit, for the defense and safeguard of the kingdom from such danger and peril; and that by law your majesty may compel the doing thereof in case of refusal or refractoriness. And we are also of opinion that in such case your majesty is the sole judge both of the danger and when and how the same is to be prevented and avoided.

Action by Parliament. All three previous cases were later overruled by Parliament, which put an end to the claim of the Stuarts to govern by extraordinary prerogative only.

The power to tax without the consent of Parliament and the power to imprison without cause were declared unlawful in the *Petition of Rights* (June 7,

[13] *Id.*, p. 77.

1628).[14] The Petition reiterated a long-established principle in force since the *Magna Carta* and the Statute *De Tallagio non Concendendo* that the king's subjects should not be taxed but by consent in Parliament.

The struggle for supremacy between the king and Parliament continued and deepened when the king claimed the power to dispense with the laws, which amounted to a claim of the right to grant privileges and make unequal laws. The Stuarts, who remained faithful to the Catholic Church, did, however, support the Anglican Church, but they did not want to enforce the laws of exclusion applicable to those who were not Anglicans, in particular the Catholics, keeping them out of all official positions. Judges endeavored to draw a line between permissible and impermissible dispensations in *Thomas* v. *Sorrell* (1674), but in *Godden* v. *Hales* (1686),[15] a case that scandalized people, they held that the power to exempt a convict from a lawfully pronounced sentence was not severable from the prerogative of the king. The struggle ended in 1689 with the adoption of the Bill of Rights by Parliament, which solemnly affirmed that the king may not exempt his subjects from the laws and the execution of the laws, and thus implied that laws cannot be unequally applied and enforced.

B. PARLIAMENTARY SOVEREIGNTY

1. Historical Construction of the Principle

The Bill of Rights (1689).[16] Charles II died in 1685. His brother, the Duke of York, who succeeded him, undertook to bring Catholicism back to the country. He suspended the anti-Catholic laws, called back the Jesuits, and nominated Catholics in the parishes, the universities, the courts, and the army; and he enacted a declaration of indulgence—all measures taken directly against the will of a large majority of the people who were strongly opposed to this policy.

From a first marriage, James II had two daughters, both of them Protestants married to Protestant princes: Mary, married to William, Prince of Orange, stadholder (chief magistrate) of Holland, and Anne, married to the heir apparent of Denmark. In 1688, James's second wife, an Italian and a Catholic, gave birth to a son. The situation then changed completely, for it meant that the successor to James II was a Catholic child. Many Tories, nervous before a perceived papist

---

[14] *Stephenson & Marcham*, I, *supra* note 6, at pp. 450-454.

[15] C. Stephenson & F. G. Marcham, *Sources of English Constitutional History, A Selection of Documents from the Interregnum to the Present*, vol. II, New York, Harper & Row, 1972 [hereinafter *Stephenson & Marcham*, II], pp. 582-583.

[16] *Id*., pp. 599-605.

danger, allied with the Whigs to offer the throne of England to William of Orange, son-in-law of the king, in the hope that his accession would save Protestantism in the country. William, eager to use the revenue of England at a time when he was considering waging war against France, accepted. On November 5, 1688, he landed and found no resistance; on December 11, James, surprised and frightened, fled London and dropped the great seal of England into the Thames. On December 22, he left the country and took refuge at the court of his cousin, Louis XIV, king of France.

As James had dissolved the Parliament in the preceding summer, William called an assembly that was rapidly convened. The assembly met on December 26, 1688, and it advised the prince to summon a convention of the estates of the realm, which met in January 1689. Then, the Commons resolved that King James II, having subverted the Constitution of the kingdom, had abdicated, and that the throne had thereby become vacant. After some hesitation, the Lords agreed to this resolution, and it was resolved that William and Mary should be proclaimed king and queen. On February 13, the Houses waited on William and Mary and tendered them the crown, accompanied by a Declaration of Rights. The crown was accepted. The convention passed an act declaring itself to be the Parliament of England, and it adopted the Bill of Rights, which incorporated the Declaration of Rights. This succession of events marked the Glorious Revolution that established the sovereignty of Parliament.

Content. The exact title of the Bill of Rights is ''An act for declaring the rights and liberties of the subjects and settling the succession of the Crown.'' It begins by an enumeration of James II's misdeeds regarding the Protestant religion and the rights of the subjects, and declares all of them ''utterly and directly contrary to the known laws and statutes and freedom of this realm.'' The act then takes notice of James II's abdication and the vacancy of the throne, and turning to William and Mary, the Lords Spiritual and Temporal and Commons, being ''assembled in a full and free representative of this nation'' and recalling ''in the first place (as their ancestors in like case have usually done) . . . their ancient rights and liberties,'' decide to give the crown of England to William and Mary upon an oath from both to respect them.

> Having therefore an entire confidence that his . . . Highness, the prince of Orange . . . will still preserve them from the violation of their rights which they have here asserted, and from all other attempts upon their religion, rights and liberties, the said Lords Spiritual and Temporal and Commons assembled at Westminster do resolve that William and Mary, prince and princess of Orange, be and be declared king and queen of England.

The Bill of Rights marks a turning point in the constitutional history of England. It is indeed a true revolution insofar as it is actually the Lords Spiritual and Temporal and Commons assembled who elected the monarchy, chose their monarch and installed him on the throne upon their own conditions. The following excerpts are noteworthy insofar as they, on the one hand, discard the former royal pretensions to govern by prerogative and, on the other, assert the political liberties of a government henceforth truly constitutional, that is, subject to fixed and established rules.

> The Lords Spiritual and Temporal and Commons [. . .] declare
> —That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;
> —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;
> —That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious;
> —That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal [. . .]
> —That election of members of Parliament ought to be free;
> —That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;
> —That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted [. . .]
> And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently.

With the Glorious Revolution, the principle is definitively established in England that the king is under the law as it is administered by the courts of justice or enacted by Parliament and that there is no law of exception even when it is a matter of doing the public good, except with the consent by Parliament. The king is henceforth bound to govern with Parliament, in most domains of governmental activities.

The Act of Settlement (1700).[17] In 1700, Parliament, anxious to settle the religious question and the succession to the throne of England, resolved in the Act of Settlement that ''the [. . .] Crown and government shall [. . .] descend to and be enjoyed by such person or persons, being Protestants.'' The problem was to rule out forever the possibility that a Catholic might inherit the Crown. The Act explicitly provided that

> all and every person and persons that then were, or afterwards should be reconciled to, or should hold communion with the see or Church of Rome, or should profess the popish religion, or marry a papist, should be excluded, and are by that act made for ever incapable to inherit, possess, or enjoy the Crown and government of this Realm.

It also provided that after the death of the king's heir (Queen Anne succeeded to William in 1702), the Crown would descend to a granddaughter of James I, Princess Sophia, Electress and Duchess Dowager of Hanover, or her son. For the second time, Parliament disposed of the Crown. The Act of Settlement still deserves notice insofar as it established for the first time the principle of the independence of the judiciary: ''[J]udges commissions be made *quamdiu se bene gesserint* [*i.e.*, during good behavior''] and their salaries ascertained and established; but upon the address of both houses of Parliament it may be lawful to remove them.''

The prerogative's final fate. At the beginning of the eighteenth century, legal sovereignty was in the hands of Parliament. The Lords and the Commons demonstrated both with the Bill of Rights and the Act of Settlement that the king held his power from them and from them alone. However, some caution is called for when ascribing political meaning to these events. The king at that time was still a powerful actor. He had not lost all the powers exercised by prerogative, and some of them were far from trifling. In particular, the king had governmental power, the power to inspire and lead governmental action. Major decisions still depended on him, and he had exclusive power to nominate as his ministers persons whose loyalties were attached to his person. The policy then undertaken was still his policy, and the ministers were still his ministers. True, Parliament exercised legal sovereignty; however, political sovereignty was still in the hands of the monarch.

The decisive fact is that he lost this power progressively; it migrated, so to speak, to Parliament through a political process that lasted the entire eighteenth century, during the course of which governmental power fell into the hands of a small governmental team, legally nominated by the king, but, politically, chosen

[17] *Id.*, pp. 610-612.

by Parliament, to which it was responsible and by which it could be overthrown.[18] The development of responsible government together with the establishment of constitutional monarchy marked a second phase in the history of the prerogative. The principle was eventually established that the prerogative could be exercised only on the advice and consent of a cabinet of ministers responsible before Parliament. Parliament became the central institution of English public law. Its legal ascension, patiently achieved step by step from the Middle Ages, received a political endorsement.

2. Political and Social Conditions

The end result of a secular historical process. From the outset, the conqueror had to exercise his powers in a feudal environment, which was prone to subject him to limitations on his personal power. The king was able to rule only by paying respect to feudal traditions, chief among these that, in solemn circumstances, he had to govern surrounded by his vassals, who formed around him an institution very similar to the Curia Regis of the first Capetians. These meetings usually convened to decide important issues.

In the twelfth century, even before the granting of *Magna Carta*, it became established custom that, before deciding certain issues or making important decisions, the king had to put them on the agenda of a *concilium* (*i.e.*, a council made of the prelates and most important vassals of the Crown). Apparently, the king followed this course of action in order to fend off encroachments by the clergy on secular power. He sought to strengthen the authority attached to his acts by associating the most important Lords of his realm with their making. The practice soon became a principle of English law and, under Henry II, Glanville made it a theory. Besides the initial name of *concilium*, the assemblies surrounding the king were also subsequently called ''Assizes'' (such as the Assizes of Clarendon in 1164, during the course of which Henry II succeeded in obtaining a limitation of ecclesiastical courts' jurisdiction) or ''Parliament,'' a name that eventually stayed with them.

In the thirteenth century, the practice gained in depth and precision. There existed henceforth two *concilium* bodies. The *Magnum Councilium*, the parliament of prelates and barons, functioned as a court of law and as a legislative advisory body. The *Commune Councilium*, which was supposed to include those who held tenures directly from the Crown, as well as prelates and barons, and had to be convened whenever the Crown wants to raise any kind of financial contribution. This assembly does not seem to have functioned properly.

[18] See D. Baranger, *Parlementarisme des origines*, PUF, Coll. Léviathan, 1999.

Everything changed, however, in 1254 when the knights representing the shires were summoned to parliament and sat next to the prelates and barons; it was a turning point because the shire, as Esmein put it, formed ''an organic body and, to some extent, an independent collectivity which had long been used to elect representatives to fulfill various local functions.''[19] In 1261 and 1265, delegates from the privileged cities and boroughs were added to these knights. The practice was repeated and, in 1295, Edward I summoned a parliament that remained a model for all future parliaments. The whole nation was represented in the estates that formed the realm: first, the archbishops and bishops with the heads of their chapters, one proctor for the clergy of each cathedral and two for the clergy of each diocese; second, every sheriff was to cause two knights of each shire, two citizens of each city and two burgesses of each borough to be elected; and, finally, seven earls and forty-one barons were summoned by name. At the end of the thirteenth century, the representative assembly of the nation ceased to be a feudal court; it transformed itself into a true parliament, and the king began to reign in Parliament.

Formation of the body politic of ''King in Parliament.'' The decisive element is that the king regularly summoned parliaments made after the model of 1295. These made the precedents that contributed to establish the firm belief, then the customary rule, that the sovereign power in England was exercised by a body politic made up of the king surrounded by Parliament. The importance of these parliaments kept growing; originally summoned to give the king ''aid and assistance,'' they were also called to give their consent to the statutes; moreover, they made a clever use of two of their most important rights—the right to consent to taxation (reinforced with Edward I' Confirmation of the Charters which clearly embodied the issue of parliamentary control of taxation),[20] and the right of petition, which enabled them to put forward bills.

By the end of the Middle Ages, the principle is firmly established that the king may not govern in an absolute manner. On the one hand, he is under the law, as Bracton had put it with force in the thirteenth century;[21] on the other hand, he governs ''with'' and ''in'' Parliament, so that the Roman law maxim

---

[19] A. Esmein, *Eléments de droit constitutionnel français et comparé*, 1914, Réédition 2001 Éditions Panthéon Assas, p. 76. See also W. Stubbs, *The Constitutional History of England*, vol. II, Hein Reprint, 1987, pp. 214-36, no. 202-215.

[20] See *Stephenson & Marcham*, I, *supra* note 6, at pp. 164-165. The Confirmation embodies the first article of what used to be called the Statute *De Tallagio non Concedendo* but that seems rather to have been a petition drawn up by the parliamentary opposition during the crisis of 1297.

[21] See the introductory material to this chapter.

quod principi placuit legis habet vigorem (what pleases the prince has the force of law) finds no place in England, as opposed to France where, due to the tragedy of the Hundred Years War, it became common practice. As Fortescue explains in a book written in 1496, *De Laudibus Legum Angliae*, a work that was instrumental in establishing the superiority of English monarchical institutions:

> For the King of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political. If he were to rule over them with a power only royal, he would be able to change the laws of the realm, and also impose on them tallages and other burdens without consulting them; this is the sort of dominion which the civil laws indicate when they state ''What pleased the prince has the force of law.''[22]

The distinction between the royal government (*dominium regale*) and the royal and political government (*dominium politicum et regale*) is based on the manner power is exercised. The monarch of the royal government rules with laws at his pleasure, laws that he makes alone or in restricted council and that he imposes upon his subjects at his own will without their consent. By contrast, the monarch of the royal and political government cannot rule over his subjects with laws they did not consent to; he governs surrounded by representative institutions of the estates of his kingdom (nobility, clergy, and commons), and he cannot tax his people at will without their consent.

The ''English miracle'' and the excellence of the mixed government. At the end of the Middle Ages, the institution of Parliament is firmly established in England; the gap between England and the continent is about to widen. All continental monarchies at the time had similar representative institutions (representative assemblies of estates surrounded European monarchs everywhere). However, whereas on the continent, due to the Reformation, these institutions entered into a crisis that eventually ended in absolutism,[23] in England, the same institutions emerged from the crisis stronger and more fully consolidated. In complete opposition to what happened on the continent, the parliamentary institution in England came through the turmoil reinforced. The crisis triggered by the claim of the Stuarts to govern by prerogative even accentuated the institutionalization of Parliament as the central piece of the

---

[22] Sir John Fortescue, *On the Laws and Governance of England* (Shelley Lockwood Ed.), Cambridge University Press, 1997, p. 17.

[23] See H. G. Koenigsberger, ''Monarchies and Parliaments in Early Modern Europe: *Dominium Regale et Dominium Politicum et Regale,*'' 5 *Theory and Society* 191 (1978).

British government. The end result of all this is that, in the eighteenth century, England was regarded all over Europe as having accomplished a miracle. It had a moderate government that bore no comparison with the well-ordered Police-States of the continent; the English monarch had limited powers and governed his kingdom with due respect for the rights of his subjects. It did not take long before England was represented as having succeeded in realizing the impossible dream of ''mixed government,'' which the Ancients held to be the best possible government.

According to the Ancients, mixed government came closest to excellence because in mixing and blending the features of the three possible forms of government (democracy, aristocracy, and monarchy), it partook of the advantages of each. It has concern for the public good, the common good that is the end of democracy; it has the wisdom that pervades the aristocratic government led by the best of men; and it has the might of the monarchy. The problem was that experience had proved that this exemplary government could never be lasting or secure; sooner or later, it fell into one of the three forms of government it was made of, and it lost the advantages of the two others.

In a work that exercised an overwhelming influence on political theory at the end of the eighteenth century, Blackstone wrote: ''Happily for us of this island, the British constitution has long remained [. . .] a standing exception to the truth of this observation.'' In England, he explains, legislative power (the sovereign power par excellence since Bodin, and the most dangerous for liberty)

> is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratic assembly of persons selected for their piety, their birth, their wisdom, their valor, or their property; and thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.[24]

[24] W. Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769,* Chicago & London, University of Chicago Press, 1979, Vol. I, pp. 50-51, 4 volumes, available at http://www.constitution.org/tb/tb=0000.htm (edited by St. George Tucker).

The conditions of the miracle: The society in estates or orders. Blackstone proudly emphasized the perfect balance of power that existed in England, and he concluded: ''Here [. . .] is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government [*i.e.*, wisdom, care for the public good and strength] so well and so happily united.'' In other words, the Constitution of England was the guarantor of the common good for all.

What Blackstone did not say, which will be understood much later, is that the miracle was made possible only because the political constitution of the kingdom mirrored its social constitution—a legacy of the feudal times. Only the division of the society into estates, three social classes having specific political powers, and their representation as such in the government (the Lords temporal for the nobility, the Lords spiritual for the clergy, the Commons for the bourgeoisie) made the balance of powers workable. The ''mixed government'' was the best government in the monarchical age because it was the most effective to limit sovereignty; it was possible only because it drew the resources of its existence from the inequalities and hierarchies of the social fabric.

The origins of the miracle: the theory of the king's two bodies. The path taken by England to accomplish the miracle of its moderate (or constitutional) monarchy has remained mysterious for a long time. Historiography in the twentieth century brought decisive clarifications.

A distinction universally made in the Middle Ages attributed two bodies to the king, a physical body and a political body, the first being mortal, the second immortal. The institution of the king's two bodies ensured the continuity of the State. The remarkable exception represented by the English monarchy in European history is tied to the fact that it has been the only one in which the king's two bodies succeeded in being actually separate and distinct. They became two discrete entities because they took shape in two different realities. The physical body of the king and his political body correspond to the distinction between the king and the king in Parliament. At the Reformation, the manner in which Henry VIII addresses his Parliament, ''in the time of Parliament, [. . .] we as head and you as members are conjoined and knit together into one body politic,'' bears witness that the institution has already reached maturity.[25] The ''King in Parliament'' forms a unity; it is a ''body politic.''

[25] Letter and Papers of Henry VIII, vol. xvii, pp. iv, 107 quoted by A. F. Pollard, *The Evolution of Parliament*, London; New York, Longmans, Green, 1920, p. 231.

As the historian Kantorowicz explained, England alone developed a consistent political, or legal, theory of the ''King's two bodies'' from factors historically given to all European nations and therefore common to all. Some of them harbored in their constitutional thought very similar ideas; but they took completely different forms. France, Kantorowicz says, although well aware of the dual expression of the immortal dignity of the monarchy and the mortal feature of the individual monarch (''The King is dead, Long live the King!''), came out with an interpretation of absolute monarchy so extreme that all distinctions between personal and suprapersonal components of the king's dignity became blurred and eventually disappeared.[26] He adds that ''in Germany, where constitutional conditions were most unclear and complicated anyhow, it finally was the personified State which engulfed the romano-canonical concept of Dignity, and it was the abstract State with which a German prince had to accommodate himself.''[27]

The historian underlines that it is impossible to separate the notion of the king's two bodies from the early development and pervasive influence of Parliament in English political thought and institutions. Parliament was by representation a lively body politic of the realm, a very actual and real representative element (*corpus repraesentans*) in the kingdom. Therefore, in England, the term ''body politic of the kingdom'' had concrete meaning and palpable content, the effect of which was to make recourse to abstract concepts (such as ''State'') to convey the idea of the ''*res publica*'' useless, since it was present and represented in Parliament. In the sixteenth century, because of the turmoil caused by Reformation, England entered a brief period when it came close to adopting the same path that carried most European nations toward absolute power. This happened when, in the year 1539, the Act 31 Henry VIII., c. 8 formally empowered the Crown to legislate by means of proclamations. This enactment was an apex in the authority reached by the Crown. Had this path been pursued, it might have led England towards the same developments as in continental Europe. But it did not take hold in English law; it did not find therein any favorable ground to grow, and the Act was repealed only ten years after its adoption, in the reign of Edward VI. The Tudor century, exemplified by the long reign of Elizabeth I, was made up of authoritarian monarchs, but they always took great care to govern ''in Parliament,'' that is, surrounded and advised by the Lords and the Commons on every sensitive question of the time, particularly religious matters.

---

[26] See Chapter 1, Section A.2.

[27] E. H. Kantorowicz, *The King's Two Bodies*, *A Study in Medieval Theology*, Princeton University Press, 1981, p. 446.

3. The Theory of Albert V. Dicey

Parliamentary sovereignty comes out of age. At the end of the nineteenth century, a professor of law at Oxford, Albert V. Dicey, looking for an apt formula to capture the historical evolution of the eighteenth century that made Parliament in Westminster the heart of English political institutions proposed the expression ''Parliamentary Sovereignty.''[28] The term outlived its author and refers today to the very first principle of English public law.[29] According to Dicey's definition:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament [. . .] defined [as the King, the House of Lords, and the House of Commons; these three bodies acting together] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.[30]

Inherent sovereignty. As theorized by Dicey, parliamentary sovereignty is a merely legal concept. It neither derives from nor depends on underlying popular consent. Parliament in England is inherently sovereign, in its own right, not because it represents the sovereign (*i.e.*, the people). Parliament is the sovereign by itself; it is not the representative of the sovereign. It does not hold its sovereign powers from the people, but from itself, and this is precisely why, being inherently sovereign, Parliament cannot be in any legal sense a trustee for the electors. Courts are therefore powerless to relate statutes adopted by Parliament to the will of the electors and *a fortiori* to invalidate them for having betrayed an alleged duty to respect the will of the people.[31] If that duty exists, it is political, not legal.

Courts take cognizance of the will of the electors only insofar as it is laid down in a statute adopted by Parliament. To that extent, the following words by Dicey are still true: ''The judges know nothing about any will of the people

---

[28] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution,* with an introduction by E. C. S. Wade, 10th ed., London, The McMillan Press Ltd., 1959, p. 39, available at http://www.constitution.org/cmt/adv/law=con.htm.

[29] Today, some authors prefer the expression ''Parliamentary supremacy'' on the ground that ''it is less likely to be confused with the notion of national sovereignty; and to avoid supporting the jurisprudential doctrine of John Austin and his successors that in every legal system, there must be a sovereign,'' A. W. Bradley & K. D. Ewing, *Constitutional and Administrative Law*, 13th ed., Harlow, Pearson Education, 2003, p. 53.

[30] Dicey, *supra* note 28, at pp. 39-40.

[31] *Id*., p. 75.

except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors.''[32] For Dicey, the sole legal right under the English constitution is to elect members of Parliament. Electors have no legal means of initiating, of sanctioning, or of repealing an act of Parliament. No court will consider for a moment the argument that a law is invalid for being opposed to the opinion of the electorate; their opinion can be legally expressed through Parliament, and through Parliament alone.[33]

As a legal concept, the word ''sovereignty'' means nothing but the legislative power of Parliament, freed from any legal constraint. If there is no answer to the question why Parliament is sovereign (except this one, purely circular: Parliament is sovereign because it is sovereign), there is an answer to the question of how Parliament became and remains sovereign. Parliament became sovereign because courts said it was sovereign. As Denis Baranger put it, ''Parliament is legally sovereign only by judicial approval.''[34] Here lies one of the most difficult points for a continental lawyer to understand when studying the English Constitution, namely, that, failing a written constitution—and thus, failing a constituent power (*pouvoir constituant*)[35] —the courts themselves wrote the Constitution of England. The upshot is that parliamentary sovereignty is the consequence, not the cause, of the rule of law, or, as Dicey himself put it, ''our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good or bad, of judge-made law.''[36]

Legal sovereignty and political sovereignty. British scholars agree these days in assigning the sovereignty of Parliament a basis other than its own right to exercise sovereignty. The shift in the foundations of parliamentary sovereignty was made gradually, step by step, in line with the British legal tradition, which knows no revolution but evolution. Everything was settled on the evolution of the franchise. Before 1832, the right to vote in legislative elections was based upon ownership of property; it was bestowed on only 5 percent of the active population. The Representation of the People Act 1832 (''the Reform Act'') extended the franchise by means of property qualifications

---

[32] *Id*., p. 74.

[33] *Id*., p. 59.

[34] D. Baranger, ''Angleterre (Culture juridique),'' *DCJ*, p. 58.

[35] On this concept, see the introductory paragraphs of Chapter 8. In French constitutional theory, the ''constituent power'' is the author of the Constitution; it is the sovereign power par excellence.

[36] Dicey, *supra* note 28, at p. 196.

from the landed gentry and borough caucuses to the middle classes. This electoral reform triggered a series of consequences that reverberated throughout the whole century. The Commons became the predominant element in the government of the country. In 1910, however, the right to vote was still limited to 28 percent of the population. In 1918, significant changes occurred, with the decision to substitute residency for ownership as the legal basis of the right to vote and to give the vote to women. but only at the age of thirty. In 1928, thanks to the suffragettes' tenacity, the right to vote for women at the age of twenty-one paved the way for the generalization of the franchise.

The successive electoral reforms made representative democracy a bedrock principle of the constitutional government of England. They drastically changed the context of Parliamentary sovereignty and turned this legal doctrine into the vehicle that eventually led England to modern democracy. That evolution had been foreseen by Dicey. Nowadays, the legal sovereignty of Parliament is based on the fact that the composition of Parliament is decided by the electoral body in which, ultimately, political sovereignty resides. The legal sovereignty of Parliament is therefore subordinated to the political sovereignty of the nation, which finds its political expression in parliamentary government.

Parliamentary sovereignty and responsible government. The history of the conquest of sovereignty by Parliament throughout the seventeenth century demonstrates that the long struggle of Parliament against the Crown was aimed at obliging the king to take into account the wishes of his subjects in governing. Parliamentary sovereignty did not come of age in one day, like the French national sovereignty—a thunderbolt in the blue sky of an age-old public law. It grew slowly, patiently, in an evolutionary manner, which, according to Dicey, made it possible to reduce and eventually to eliminate ''the existence of such a divergence, or (in other words) of a difference between the permanent wishes of the sovereign, or rather of the King who then constituted a predominant part of the sovereign power, and the permanent wishes of the nation.''[37] The decisive step was taken in 1689, when Parliament placed monarchs of its own choosing on the throne of England. But the evolution kept on. Parliamentary sovereignty matured; it became more complete at the political level with the gradual coming into being of responsible government before Parliament.

The political responsibility of the king's ministers before Parliament, with the power of the latter to force the former to resign, put the final touch on the transformation of monarchical government into parliamentary government and turned the nature of the Cabinet upside down. The government became

[37] *Id*., p. 83.

accountable for its policy before Parliament instead of the king. Once Parliament held over the government the threat of being overthrown, the government had no option but to govern in accordance with the wishes of Parliament. The 1832 electoral reform that enlarged the franchise accelerated the evolution. Political sovereignty passed to the people, represented in the Commons, which eventually became the final authority.

Nowadays, the Cabinet, the prime minister, and the ministers are chosen by Parliament, and no longer by the king, even if, legally speaking, it is still the king (or the queen) who appoints them. The upshot, as Dicey said, is that ''the divergence between the wishes of the sovereign [. . .] and the wishes of the nation,''—a divergence that at the end of the seventeenth century could have real substance, since the ministers were the king's men—is nonexistent today, since the ministers are Parliament's men. From a political standpoint, the analysis by Walter Bagehot adds to, and confirms that by Dicey: the Cabinet illustrates ''the close union, the nearly complete fusion''[38] and no longer, as in the eighteenth century, the separation of the executive and legislative powers. The fusion of executive and legislative powers is the key to understanding the secret of British institutions, namely the efficiency of its government, so much admired abroad at the end of the nineteenth century. As a connecting link between the legislative and executive powers, the Cabinet is the linchpin of the English government. It is the political engine that puts the whole system into motion and makes it possible to portray the British system of government as efficacious and efficient as a modern government. And Bagehot may rightfully conclude that the inherent coherence of the parliamentary system is monist; it is ''framed on the principle of choosing a single sovereign authority, and making it good.''[39]

Parliamentary sovereignty and the parliamentary system complement one another and work for the common good by putting at the helm State's men who, because of their dependence on Parliament, are naturally inclined to tailor their policies according to the preferences of the nation. The divergence that could exist formerly between the wishes of the sovereign and the wishes of the nation blur and eventually completely disappear when the system of government is truly representative. According to Dicey, when the Parliament is truly and fully representative of the people, the wishes of its representative portion can hardly in the long run differ from the wishes of the English people, or at any rate of the

---

[38] W. Bagehot, *The English Constitution*, 1867, Oxford World's Classics, Reed. 2001, p. 11.

[39] *Id*., p. 160.

electors. He added: ''that which the majority of the House of Commons command, the majority of the English people usually desire.''[40]

Parliamentary sovereignty and public interest. The weak point in the theory of parliamentary sovereignty is that it does not explain how the sovereign statute to which it contributes, once adopted, is the one most fitted to the public interest. Indeed, concern for the public interest is not even part of the analysis. Dicey pays no attention at all to the question of whether the statute is good or bad; for his purposes, there is no need to ask whether the results of representative government (*i.e.*, the laws actually adopted and enacted) are good or bad. All that seems of interest to Dicey is what he regards as the key feature of true representative government, that is, its ability to produce a perfect match between the wishes of the sovereign and these of his subjects.[41]

The statute is a command, because it is the will of the sovereign. The will of the sovereign does not differ from that of the subjects or, rather, from the will of a majority of subjects. In his Commentaries, Blackstone had noted that the excellence of the British constitution was to be found in the composition of Parliament, ''this aggregate body, actuated by different springs, and attentive to different interests.''[42] The quality of its composition was a guarantee that its acts would always conform to the public interest. Parliamentary sovereignty favors government by opinion; the public interest in the end is what the public opinion, or at least a majority of it, wants. There is no concern, still less an obsession, with ensuring that the statute conforms to the public interest.

Parliamentary sovereignty and public good. From an historical standpoint, concern for the public good was originally contained in the royal prerogative, which eventually was absorbed by Parliament and which came under its control. In the time of the Stuarts, Sir Francis Bacon claimed that the Crown possessed under the name of the ''prerogative'' a reserve, so to speak, of wide and indefinite rights and powers, and that this proposition was superior to the ordinary law of the land.[43] In the same vein, Locke believed that

> Prerogative being nothing, but a Power in the hands of the Prince to provide for the publick good [*sic*], in such Cases, which depending upon unforeseen and uncertain Occurrences, certain and unalterable Laws could not safely direct, whatsoever shall be done manifestly for

[40] Dicey, *supra* note 28, at p. 83.
[41] *Id*., pp. 83-84.
[42] Blackstone, *supra* note 24, pp. 50-51.
[43] See Dicey, *supra* note 28, at p. 63.

> the good of the People, and the establishing the Government upon its true Foundations, is, and always will be just Prerogative.[44]

These views did not prevail. If one lesson may be drawn from the contrasted evolution between the decline of royal authority and the rise of parliamentary power in the eighteenth century, it is this: The executive must obtain authorization from Parliament to carry out the public good. The principle of the rule of law preempts any governmental initiative to that end, no matter how well-intentioned that initiative may be. As Dicey recognized himself, ''the rigidity of the law constantly hampers (and sometimes with great injury to the public) the action of the executive.''[45] From a secular and rigid case law built over the years, it is plainly clear that the government cannot evade the obligation to obtain from Parliament, under statutory form, the discretionary authority to provide for the public good—an authority that is denied the Crown by the law of the land. In addition, while Parliament never faced any obstacle or limit that might have prevented its shaping and regulation of the use of the prerogative, it never itself claimed to exercise the powers attached to it.

At a more general level, the prerogative was brought under the control of the common law, and thus Parliament (the latter having the power to modify the former at will), with the result that Parliament alone may vest the government with the necessary powers to carry out its ends. Nowadays, the prerogative is viewed as belonging to the common law, with the consequence that the idea of a public good in the continental sense may barely take shape in England. The realization of the public good—this common good that was formerly contained in the prerogative—is subject to parliamentary authorization and under the control of the common law, which is principally interested in the protection of individual interests.

Limitations on the sovereign power of Parliament. The houses of Parliament extracted from royal authority just the amount of power needed to make lasting the correspondence dear to Dicey between the wishes of the subject and the wishes of the sovereign, without paying any attention to what sovereignty may imply in terms of the public good, common utility and justice for all. Parliamentary sovereignty postulates the conformity of statutes to the public good because, on the one hand, it derives from and is implied by a truly representative government, and, on the other, the public good, if it exists, ''is in

---

[44] J. Locke, *Two Treatises of Government, Second Treatise*, Cambridge University Press, 1988, p. 373.

[45] Dicey, *supra* note 28, at p. 411.

nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law.''[46]

Should this conformity not materialize, or in other words, should Parliament ignore the necessity to legislate for the protection of individual rights only, Dicey considers that representative government is a self-contained system that embodies regulatory devices aimed in the long run at inducing the government to legislate in conformity with the public good. According to Dicey, the sovereign power of Parliament is bounded or controlled by two limitations. One is an external limitation; the other is internal.[47]

The *external limit* to the real power of a sovereign is to be found in resistance to oppression or civil disobedience. This limit exists everywhere, even under the most despotic rulers, such as a Russian czar. Pointing to Louis XIV, Dicey argues that, even though the French king at the height of his power might have repealed the Edict of Nantes, he would have found it impossible to establish the supremacy of Protestantism. He also points to the French National Assembly, a majority of which in 1871 would have accepted the restoration of the monarchy, but was not prepared to restore the white flag. The French army could have acquiesced in the return of the Bourbons, but it would not have tolerated the sight of such an antirevolutionary symbol: ''the chassepots would go off of themselves.''[48] What is true of the power of an absolute monarchy is also true of the authority of a constituent assembly. Dicey here agrees with Hume, who argued that governments have no other support but public opinion.[49]

The *internal limit* to the power of a sovereign arises from the nature of sovereign power itself. Even an absolute monarch such as Louis XIV exercises his powers in accordance with his character, which is itself molded by the circumstances, the moral feelings, and the social ethics of his time. The French king might have imposed Protestantism on his subjects; but to imagine Louis XIV wishing to carry out such a reform is to imagine him to have been a being quite unlike the ''Grand Monarque.''[50] From a different perspective, Dicey, in quoting an excerpt from Leslie Stephen's *Science of Ethics*, suggests hypothetically that a legislature decided that all blue-eyed babies should be murdered. Under such a law, the preservation of blue-eyed babies would be illegal; ''but

---

[46] Blackstone, *supra* note 24, at p. 135.
[47] Dicey, *supra* note 28, at pp. 76-81.
[48] *Id*., p. 79.
[49] *Id*., p. 77.
[50] *Id*., p. 80.

legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.''[51]

The upshot of these arguments is that parliamentary sovereignty is not to be feared. And it is even less to be feared under a representative government, which naturally works at reducing the distance that may exist between the wishes of the sovereign and the wishes of the nation. When Parliament is truly representative of the people, there cannot be a meaningful difference between internal and external limits to the exercise of sovereign power, or if there is one, it is bound to disappear.[52] The wishes of the parliamentary majority cannot in the long run diverge from the wishes of the English people or, at least, from the electors' wishes. Bills adopted by a majority in the House of Commons mirror the wishes of the majority of English people. Such is the effectuation of representative government, namely, to close any possible gap between the wishes of the sovereign and the wishes of the subjects. From the moment there is a coincidence between the two, Parliament cannot be dangerous for the liberties and, accordingly, it works constantly for the public interest.

Conclusion. Public law in England has been driven by very different forces than on the continent. Its principle of legitimacy is, in the first place, to put government under the law, not to ensure the happiness of the subjects by carrying out the public good. Of course, it is always hoped that government will act for the public good, but it is not postulated. The end of government is not to bring about happiness for all but to give to everyone the means to achieve his or her own happiness. There is no need for public law to do this. This is the reason why all countries sharing the legacy of the British heritage have no public law and no State, in the sense that these terms are understood on the European continent. However, in order to ensure that every one may achieve his or her happiness, it is absolutely crucial to put government under the rule of law.

---

[51] *Id*., p. 81.
[52] *Id*., p. 83.

Chapter 4

The Rule of Law

The spirit of the lawyer. The term ''rule of law'' was coined by Dicey in the same work in which he elaborated the theory of Parliamentary sovereignty.[1] It is not easy to translate into foreign languages such as French or German inasmuch as it does not refer to a clearly identified legal institution such as the ''hierarchy of norms'' in the French ''*État de droit*'' or the German ''*Rechtsstaat*.''[2] Rather, the rule of law is a trait of British civilization, what Tocqueville would call, a ''habit of the heart'' of the British people.

In his *Notes de voyage* (1836), on which Dicey heavily relied to explain his new terminology, Tocqueville noticed that a salient trait of the English people was ''their love of justice'' and ''the place taken by the courts of law in public opinion, next to the political wheels.'' The Frenchman who had experienced with his family the anguish of waiting in a cell during the Terror, expecting to be called at any moment before the Revolutionary Tribunal, added that ''no nation can be free'' without ''the same deep respect for the *law*, the same love for the *legality*, the same loathing for the use of *force*, [. . .] which so vividly call the attention of the foreigner in England.''[3] One year before, in 1835, he had noted the same trait as a distinctive feature of *Democracy in America*. He then called it ''the spirit of the lawyer'' (*l'esprit légiste*).[4] Those who share the same spirit and abide by the rule of law, he said, ''have drawn from their work the habits of

[1] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, with an introduction by E. C. S. Wade, 10th ed., London, The McMillan Press Ltd., 1959, Part II 'The Rule of Law,' pp. 181-414, especially Chapter IV: 'The Rule of Law: Its Nature and General Applications,'' pp. 183-205, available at http://www.constitution.org/cmt/avd/law_con.htm.

[2] See L. Heuschling, *État de droit, Rechtsstaat, Rule of Law*, Paris, Dalloz, Nouvelle bibliothèque des thèses, 2002.

[3] A. de Tocqueville, *Voyage en Suisse*, in *Œuvres*, vol. I, Gallimard, Bibliothèque de la Pléiade, 1991, p. 619 (emphasis in original).

[4] A. de Tocqueville, *Democracy in America*, [Translated by H. C. Mansfield & D. Winthrop], University of Chicago Press, 2000, I, II, 8, p. 251.

order, a certain taste for forms, a sort of instinctive love for the regular sequence of ideas, which naturally render them strongly opposed to the revolutionary spirit and unreflective passions of democracy.''[5]

Its institutionalization in the judiciary. From Tocqueville's reflections, it appears, in the first place, that the rule of law is possible only through the agency of courts of law. This trait of British legal culture that England bequeathed to all common law countries cannot take shape unless independent courts and tribunals act as intermediaries. The rule of law means supremacy of the law as a rule of social conduct. It also means supremacy of the courts to settle the disputes that pervade and trouble social life. Behind the rule of law stands the firm belief that the judiciary is superior to the administration in protecting and guaranteeing individual rights.

It follows from this that a major difference exists between common law and civil law traditions. Unlike European continental monarchies, the British legal tradition did not develop a strong State administration. To guarantee individual liberties, it always favored a judicial over an administrative system of law enforcement. The difference was already in place in the eighteenth century. In contradistinction to the continent, England was held to be a land of freedom because daily life was regulated by courts of law rather than by the administration of the Police-State. Montesquieu well understood that if political liberty was the very object of the constitution of England, this was because courts of law in England were the true law enforcers. Only judges could guarantee the political liberty of Englishmen, that is, the ''tranquility of mind arising from the opinion each person has of his safety.''[6] The system has not fundamentally changed. In England, the public good rests first and foremost with the judges whose mission is to protect individual rights.[7] In England, the public good consists in ensuring the rule of law.

---

[5] *Id*., at 252. Tocqueville dreamt of a similar temper for the French people and went as far as writing in his *Voyage en Suisse*, quoted above, *supra* note 3: ''The love of justice, the peaceful and legal introduction of the judge into the domain of politics, are perhaps the most standing characteristics of a free people.'' The principle of the rule of law theorized by Dicey had a deep impact on jurisprudence and political theory. It was used and expanded by Friedrich Hayek, particularly in his work *The Constitution of Liberty* (1960). In the same manner, the rule of law as the bedrock principle of political ethics and just social order was extensively used by John Rawls, in particular in *A Theory of Justice* Harvard University Press, 1971.

[6] Montesquieu, *The Spirit of Laws* [Translated by Th. Nugent, 1752, revised by J. V. Prichard], 1748, Book XI, chap. 6, available at http://www.constitution.org/cm/sol.htm.

[7] The rule of law is not the perfect mirror of the continental *Rechtsstaat*; its content is more substantive than formal. The rule of law is less interested in the hierarchy of norms than in the primacy of the individual over the State.

A. ORIGIN AND HISTORICAL EVOLUTION

Greek and Roman origins. Insofar as it implies a power under law, the rule of law has very ancient origins. The Ancients very early understood that possession by political authority of coercive powers that it may use for the best (to ensure public peace and justice for all) as well as for the worse (to establish an odious tyranny) raised fundamental problems for political and legal theory. The Greek philosophers were the first to resort to law to solve the dilemma and to explain that the most important way to limit the powers of government over the governed was to subject it to legal rules. As a guarantor of liberty, a government of laws is better than a government of men. Aristotle gave a first expression to this principle in the Politics, when he asserted that a free citizen is one who obeys laws, not men. The idea was taken up and developed by the Roman jurists, in particular Cicero, who insisted on the true duty of the magistrate, namely, that he represents the State and must respect the laws.[8]

The medieval turning point. The subordination of political power to legal rules took a very different course in the Middle Ages. When Aristotle saw freedom (and citizenship) in obedience to laws, not men, the laws in question were human laws; they were the laws of the city-state that free men freely adopted. These free men could say they were free, hence citizens, because they obeyed the law that they freely gave themselves. Under the influence of the Church, the medieval world also made the supremacy of law over power the measure of a fair government, but—and this is a crucial difference from the Ancients—the law in question is no longer a human work. The Church fathers reinvented the law; they redefined it as a collection of rules very close to, or at least, inspired by the word of God. After them, it was commonly held throughout the whole western Christian world that there was a universal law that ruled over the world, and that this law took precedence over the laws of kings and princes. In the Middle Ages, law was not equated with statute, as it is today in the civil law system; as a matter of fact, it was distinct from it. Where Greeks and Romans regarded legal rules and the city-state as correlative notions, the Christian scholars of the Middle Ages viewed them as discrete.[9]

In England, perhaps because of the Conquest, the medieval idea of a complete separation between the law and the State assumed an exceptional meaning. From the beginning, it became one of the most solid and entrenched ideas of English legal thought, and, beyond England, it has remained a basic

---

[8] Cicero, *De Officiis*, I, 34, 124, quoted by A. Passerin d'Entrèves, *The Notion of the State*, Oxford University Press, 1967, p. 82.

[9] *Id.*, p. 83.

tenet of the common law systems. In the thirteenth century, in his long treatise on the laws and customs of England (*De legibus et consuetudinibus Angliae*), Bracton forcefully asserts that rulers are under law: ''The king ought not to be under man, but under God and law, because law makes the king.''[10] ''The king must give justice'' was a key component of the royal function. However, the provision was always made that he must give justice according to law, the law of the land, which like God's word is ageless. The *Magna Carta* of 1215 bears witness to the importance of this principle in medieval thought: ''No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by law of the land.'' The idea of a law that is supreme, above the kings and limiting their powers, was and remains the bedrock principle of the English legal system. Later, in the fifteenth century, the same idea enabled Sir John Fortescue to assert that there could be no taxation without representation.

The conflict between sovereignty and the rule of law in the seventeenth century. With the Reformation, the idea of a universal law was on the wane. On the continent, the principle of sovereignty replaced it, and the continental monarchies went down the path of absolutism. True, the Stuarts tried to follow the same path, and they invoked the divine right of kings to dispense justice by virtue of their inherent knowledge of the law and, in particular, by the means of extraordinary courts such as the Court of Star Chamber, which was not bound by the common law. Their ambitions failed when they met the resistance of judges, resistance soon taken up by Parliament. During the long conflict that, in the beginning of the seventeenth century, pitted the king and Parliament against each other, Chief Justice Coke and the lawyers who rallied behind him continually proclaimed the absolute supremacy of the common law over the king and the executive. The abolition of the detested Court of the Star Chamber, in 1640, marked their victory. From this date, it was acknowledged that the common law was to be the common law of all public and private acts, unless Parliament decided otherwise.

The rule of law did indeed vanquish sovereignty, but its triumph obliged it to reinvent itself. From the moment its oracles (*i.e.*, the judges) faltered before the king and hesitated to resist against the extraordinary prerogative precisely in the name of the common law, they had no option but to recognize that

[10] H. de Bracton, *On the Laws and Customs of England*, vol. II [translated Samuel E. Thorne], Cambridge, MA, Belknap Press, 1968, p. 33.

Parliament could change the common law. To put it in different terms, they had to recognize that ''parliamentary legislation [could] qualify the pretensions of the common law.''[11] Since then, it is acknowledged that the rule of law always means the supremacy of the law, but the law in question is made of the statutes adopted by Parliament and the case law of the courts of England, insofar as the latter is not discarded by the former.

B. CONTENT

The definition of Albert V. Dicey. According to Dicey, the rule of law has in English law three consequences that may be summarized as follows:

> When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions.
>
> We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint[12] [. . .]
>
> We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals[13] [. . .]
>
> There remains yet a third and a different sense in which the 'rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of

[11] C. Holmes, ''The Legal Instruments of Power and the State in Early Modern England,'' in A. Padoa-Schioffa (Ed.), *Legislation and Justice*, European Science Foundation, Clarendon Press, 1997, p. 269 s., especially p. 286.

[12] Dicey, *supra* note 1, at p. 188.

[13] *Id*., p. 193.

> individuals results, or appears to result, from the general principles of the constitution.[14]

An analysis of the precise content of these three propositions (the principle of legality, the principle of equality before the law, and the principle of a judicial guarantee for individual rights) is called for.

Principle of legality. The rule of law means, in the first place, the absolute supremacy of ordinary law established in the ordinary legal manner before the ordinary courts. The ordinary law must be understood as the legal rules decided by the courts or adopted by Parliament as opposed to the influence of arbitrary power. The rule of law excludes the existence of arbitrariness, of prerogative, or even of wide discretionary power on the part of government. It means that a man in England may be punished, or deprived of life, liberty, or property, only for a clear breach of a law duly enacted. A man may be punished for a breach of law, but he can be punished for nothing else.

The rule of law under the form of the principle of legality was affirmed with particular force in *Entick* v. *Carrington* (1765). Two king's messengers were sued for having unlawfully broken and entered the plaintiff's house, a well-known journalist of the time, Entick, allegedly the author of seditious writings. When the messengers were sued by Entick for trespass to his house and goods, the defendants relied on a warrant issued by the Secretary of State ordering them to search for Entick and bring him with his books and papers before the Secretary for examination. The Secretary claimed that the power to issue such warrants was essential to government, ''the only means of quieting clamors and sedition.'' Lord Camden said:

> This power, so claimed by the Secretary of State, is not supported by one single citation from any law book extant. [. . .] If it is law, it will be found in our books. If it is not to be found there, it is not law. [. . .] What would the parliament say if the judges should take upon themselves to mould an unlawful power into a convenient authority by new restrictions? That would be, not judgment, but legislation. [. . .] It is then said, that it is necessary for the ends of government to lodge such a power with a State officer; and that it is better to prevent the publication before than to punish the offender afterwards. . . . [W]ith respect to the arguments of State necessity, or a distinction that has been aimed at between State offences and others, the common law does

[14] *Id.*, pp. 195-196.

> not understand that kind of reasoning, nor do our books take notice of any such distinctions.[15]

The court held that, in the absence of a statute or a judicial precedent upholding the legality of the warrant, the practice was illegal.

The major lesson to be drawn from *Entick* is that the rule of law is an essential guarantee for the protection of individual rights. *Entick* means that a person may not be deprived of life, liberty, or property except by virtue of a rule of law duly enacted by Parliament or established by ordinary courts. The principle however is not faultless; the rule of law protects against the abuses of the executive, not against those of Parliament. Concretely, if an act of Parliament had authorized the search and seizure of seditious libels, Entick would no longer have been protected. This was true in the eighteenth century; it is still true today. Parliamentary sovereignty prevails over the common law, and in theory an act of Parliament may take away with the strike of a pen all the guarantees patiently gathered over the centuries to protect human rights.

True, English judges may resort to interpretive methods that may work as shields against this danger. In particular, they never presume an implicit will on the part of Parliament for having voluntarily departed from the common law; the departure must always be clear and explicit. Nonetheless, the principle of realism may always trump the common law, and the courts must yield to the will of the sovereign. This is the reason why there was strong feeling in the past for the rule of law; it took the form of an incorporation and entrenchment of the European Convention of Human Rights into English law under original conditions that consolidated the rule of law without infringing on Parliamentary sovereignty. This decisive step was taken with the Human Rights Act (1998).[16]

Equality before the law. The rule of law, in the second place, means legal equality (*i.e.*, the universal subjection of all classes to one law administered by the ordinary courts). Dicey put great store in the fact that the idea of legal equality in England had been pushed to its utmost limits. ''With us,'' he insisted,

> every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound

---

[15] C. Stephenson & F. G. Marcham, *Sources of English Constitutional History, A Selection of Documents from the Interregnum to the Present*, vol. II, New York, Harper & Row, 1972, pp. 705-710.

[16] See A. W. Bradley & K. D. Ewing, *Constitutional and Administrative Law*, 13th ed., Pearson, 2003, pp. 96-97 and p. 416.

> with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.[17]

There are therefore, he emphasized strongly, no special courts or tribunals to take cognizance of cases involving public officials and apply to them a law derogatory from the common law as was the case in his view in France at the end of the nineteenth century with ''*droit administratif*.''

Today, the kind of equality that Dicey was concerned with is no longer the one that matters the most. In the first place, regarding the inequalities that French ''*droit administratif*'' made possible between private individuals and officials, Dicey himself recognized in his lifetime that the latter were not immune from the rigor of the law and that his charge was unfair. More importantly, the inequalities against which the rule of law is powerless and which could not be foreseen by Dicey because the generality of the law at his time was still a reality are the inequalities deriving from legislative discriminations. Today, Parliament may resort to all sorts of fanciful classifications in economic and fiscal matters against which the rule of law offers no protection when they are arbitrary.

The protection of the courts. The rule of law carries a third meaning that, according to Dicey, is more relevant to the spirit than to the letter of English law and may be described as a special attribute of English institutions. We may say, Dicey underlines, that the Constitution is imbued with the rule of law on the ground that the general principles of the Constitution (as for example the right to personal liberty, or the right of public meeting) are with us as the result of judicial decisions determining the rights of private persons—in particular, cases brought before the English courts. On the continent, by contrast, security (such as it is) for the rights of individuals results, or appears to result, from general principles solemnly affirmed in ambitious declarations of rights, but these are not necessarily effective.

More deeply, the rule of law highlights the idea that the rights of Englishmen are the result of a slow and sedimentary law-making process, not the result of thundering declaration of rights not judicially enforceable. Dicey

---

[17] Dicey, *supra* note 1, at pp. 193-194.

proudly insisted that Englishmen never felt a need to set down in writing their rights and freedoms in hollow and empty declarations of rights as was done on the continent, because Parliament and the courts effectively protected them. This does not mean, he said, that the Constitution of England does not contain the same rights as the continental declarations; it does contain them, but as inferences that may be drawn from numerous courts cases and parliamentary statutes. Under such circumstances, the articulation between the rule of law and the individual rights is very different than on the continent. Whereas the constitutions on the continent are the product of human will and energy, made by a legislative power and grounded on the constitution-making power, the Constitution of England is a judge-made Constitution. In England, the right to individual liberty is part of the Constitution, because it is secured by the decisions of the court as these are extended or confirmed by the *Habeas Corpus* Acts. In other words, whereas rights and liberties on the continent are deductions drawn from the principles of the Constitution, the so-called principles of the Constitution in England are inductions or generalizations based on particular decisions pronounced by the courts as to the rights of given individuals.

The most important consequence of all this is that rights and liberties in England are ensured not by the guarantees that may be found in sweeping declarations of rights, but by the remedies that the common law provides to those whose rights have been illegally infringed, whether they are ordinary citizens or public officers. In other words, if rights and liberties are to be ''taken seriously'' (as a famous American philosopher has put it),[18] attention must be paid in the first place to the remedies available in case of their infringement. According to the maxim of English law, remedies precede rights; that is, there is no true right without a remedy attached to it to make it enforceable by a judge. Such is the reasoning by which public law has been actually introduced into English law, at least under a procedural form. A flaw of the common law was that it did not adequately empower the citizens against the administration and public authorities. To remedy the situation, the British did not imitate the Americans after the war, when Congress in 1946 adopted a large statute on administrative procedure that gives due process rights to citizens—in particular the right to be heard during the rule-making process. Instead, they undertook a reformation of the judicial remedies against public authorities and carved out a special role for the remedy of judicial review.

Rule of law and common law. Insofar as the common law is the foundation of the rights and liberties of Englishmen, the rule of law tends to regard it as the

[18] R. Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977.

best and most efficient means against arbitrariness and abuse of power. One of Dicey's governing ideas is that the common law gives the citizen better protection than a written constitution. From an historical standpoint, it is indisputable that the common law was a solid bulwark against arbitrariness and tyranny. However, today, the common law is no longer regarded with the same eyes, and Englishmen themselves are doubtful about the absolute efficacy of the common law as the better shield for their rights and freedoms. The reason for this doubt comes from the fact that the common law is subject to whatever changes Parliament, which happened to be no longer tempered by the mixed government and the balance of powers, may see fit to introduce. The truth of the matter is that their rights and freedoms may be curtailed, modified, and even suppressed by a sovereign act of the House of Commons. The dramatic events of Northern Ireland gave rise to derogations from the common law against which the principle of the rule of law was of very limited use, to say the least. On the other hand, the common law as such does not protect economic and social rights.

In the beginning of the 1990s, public opinion in Great Britain was largely in favor of a Bill of Rights that would have inscribed the rights so that Parliament could no longer have legislated against them. Failing a clear will to bring such dramatic changes to the principle of parliamentary sovereignty, the Blair government took the middle road, with the Human Rights Act (1998). The most important characteristic of the act is to compel judges, so far as it is possible to do so, to read and give effect to primary legislation and subordinate legislation in a way that is compatible with the European Convention on Human Rights. If it turns out that this is impossible, the judge may make a declaration of incompatibility, which is forwarded to the minister who may by order make such amendments to the legislation as he considers necessary to remove the incompatibility. The crucial point is that courts still have no power to invalidate the legislation; Parliament remains sovereign. The Human Rights Act has already enabled English courts to rejuvenate the principle of the rule of law by resorting to a European text to which English lawyers made a decisive contribution.

C. SCOPE

1. Traditional Principles

Rule of law and public law. By tradition, the rule of law and public law do not fit together; their respective ends are very different. Rule of law and public law do not obey the same logic. The rule of law is aimed at protecting private,

individual rights, not public, collective rights; it works for the benefit of the individual, not the community. The public thing, or the public good, is not within its compass, except insofar as the public good is regarded as a maximization of individual interests. In the common law tradition, ensuring the public good consists of ensuring the rule of law, and ensuring the rule of law consists of bringing individual interests to the highest point of satisfaction: no more, no less. English law is deeply individualistic. The traditional definition of the public good as found, for instance, in Blackstone's works bears witness to this tradition: ''[T]he public good is in nothing more essentially interested, than in the protection of every individual's private rights.''[19]

Common law and public law. That being said, there has always existed in the common law tradition some measure of concern for the public interest and public law values.[20] In a law as old as the common law, one can find everything, and it is true that at some point in its long history, in the Middle Ages, when there was barely a distinction between public law and private law, the common law made some room for the common good and showed some concern for the public good. However, those interested in this period of its history, to the point of digging into the ''public law'' institutions or concepts of the common law to find answers to the problems raised by the industrialization of the modern age, were the Americans, not the English. In the beginning of the nineteenth century, a few state judges in the United States were particularly inventive, going so far as to identify a distinction between public and private law within the common law itself.[21] At the federal level, the Supreme Court discovered the legal category of ''public rights'' and, later, that of ''public utilities,'' together with its companion doctrines, such as the ''business affected with a public interest'' or the ''prime necessity.''[22] In the same vein, the Supreme Court voided the state's grant in fee to a railroad of a large section of land submerged beneath Lake Michigan in the Chicago harbor. The Court held that the people of the state, not the state itself, were the land's beneficial owners and that the state held the submerged land ''in trust for the people of the state.''[23]

---

[19] W. Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769,* vol. I, Chicago & London, University of Chicago Press, 1979, p. 135.

[20] See D. Oliver, ''The Underlying Values of Public and Private Law,'' in M. Taggart (Ed.), *The Province of Administrative Law*, Oxford, Hart, 1997, p. 217.

[21] See, in particular, an opinion by the Supreme Court of Massachusetts (Shaw, J.), *Commonwealth* v. *Alger*, 61 Mass. 53, 93 (1851).

[22] See, in particular, *Munn* v. *Illinois*, 94 US 113 (1877).

[23] *Illinois Central Railroad* v. *Illinois*, 146 US 387, 452-453 (1892). See also D. R. Coquillette, ''Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment,'' 64 *Cornell L. Rev.* 761 (1979).

This American development may be explained by the fact that, although a country of common law that each state incorporated into its own law, the United States has always lived under a republican form of government, with the result that Americans have tended to be more concerned with the public interest than the English and that state judges (who usually are elected) have been, implicitly, driven by popular demand to explore the public components of the common law. State judges throughout the nineteenth century tried to resurrect old common law institutions, going back if necessary to the Middle Ages, and breathing new life into them so that the public interest could trump private egoisms.[24] However, at the end of the nineteenth century, the Supreme Court converted to conservative ideologies, nipping these initiatives in the bud and twisting them to make sure that they would give priority to the satisfaction of private interests.[25]

2. Recent Developments

Traditional reserve on the part of English judges. English judges were much more reserved than their American counterparts. They never followed the same ''publicist'' path as American state judges. The idea that public interests under the notion of public good or public interest may put limitations on the exercise of private freedoms and rights remained foreign to them, save, of course, when these limitations are decided by an act of Parliament, parliamentary sovereignty trumping the common law. Excepting those cases where Parliament commands otherwise, the control exercised by English judges over the uses of power, whether public or private, has generally been minimal.

Common law and private power. In the nineteenth century, English judges eschewed the idea that common law could work for the public interest; they construed and interpreted it as the strongest bulwark for private interests against public interest. The private law leaning of the common law in the nineteenth century is well illustrated by a water dispute between Edward Pickles and the

---

[24] See W. J. Novak, ''Common Regulation: Legal Origins of State Power,'' 45 *Hastings L. J.* 1061 (1994).

[25] The most famous example in the turnaround of meaning in the public law values of the common law is to be found in the destiny of *Munn* v. *Illinois* quoted *supra* note 22 (1877). In that case, the Court held that the legislature had the power to regulate the rates of companies running public utilities such as ferries, railroads, tolls, canals and, as in the case at hand, grain warehouses. Soon after being decided, Munn became in the hands of an increasingly conservative Court an obstacle to the regulation of activities regarded by the Court as ''strictly private''; see H. N. Scheiber, ''Law and Political Institutions,'' *Encyclopedia of American Economic History: Studies of Principal Movements and Ideas*, (Glenn Porter (Ed.)), 3 vols., New York, Charles Scribner's Sons, 1980, vol. II, p. 487, in particular, pp. 501-502.

Mayor of Bradford in Victorian England.[26] Edward Pickles owned land adjoining a spring that the Corporation of Bradford had used for nearly forty years to supply water to the town of Bradford seven miles away. In the early 1890s, Pickles started to drain the water in an attempt apparently to force the corporation to pay a premium for his land, and he eventually fatally threatened the water supply as the corporation steadfastly refused to buy his land or his water. The House of Lords refused to qualify his absolutism with an exception for malice; it held that the common law empowered Pickles to act as he pleased and for whatever motives he chose, as long as his action did not cause a tort resulting from a legal injury,[27] and the corporation lost its case. Not so long ago, the common law protected private interests so thoroughly without the slightest consideration for the public good, that H. C. Gutteridge, commenting upon the Pickles case, could write: ''[O]ur law has not hesitated to place the seal of its approval upon a theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism.''[28] As long as no tort resulting from a legal injury was done, no limitations could be imposed on the exercise of private power. Today, the legendary selfish content of English has been mitigated to the point that it is possible to refer to public law values belonging to both the common law and public law.[29] This evolution, however, was mostly the consequence of legislative action.

Common law and public power. The English judge exercises judicial review over public power only when it is exercised by an executive or administrative authority, the public power exercised by Parliament being by definition nonreviewable, by virtue of the doctrine of parliamentary sovereignty. Public authorities as a rule may infringe on private rights only for objective motives, legally established, and they must always act for the public good. English judges verify this condition every time they review the legality of administrative or executive action. English legal scholars regard hard-look judicial review exercised over the motives for decisions made by public authorities to be at the heart of the difference between private and public law.

The difference was underlined with great force by Wade:

> The powers of public authorities are [. . .] essentially different from those of private persons. A man making his will may, subject to any

[26] See M. Taggart, *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply*, Oxford University Press, 2002.

[27] *The Mayor of Bradford* v. *Pickles*, [1895] AC 587, 601.

[28] H. C. Gutteridge, ''Abuse of Rights,'' 5 *Cambridge L. J.* 1, 22 (1933).

[29] See D. Oliver, *Common Values and the Public-Private Divide*, London, Butterworths, 1999.

> rights of his dependant, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. So a city council acted unlawfully when it refused unreasonably to let a local rugby football club use the city's sports ground. Nor may a local authority arbitrarily release debtors, and if it evicts tenants, even though in accordance with a contract, it must act reasonably and 'within the limits of fair dealing.' The whole concept of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.[30]

The ultra vires *doctrine.* Although English judges have always reviewed the legality of the motives behind decisions made by public authorities, their review was usually mild. The fundamental principle is that public authorities may not overstep the limits on their actions imposed by Parliament; that is, they may not act *ultra vires*. Lord Greene, in the landmark case *Associated Provincial Pictures Houses Ltd.* v. *Wednesbury Corporation* (1948), limited the doctrine *ultra vires* to a mere review of the reasonableness of the decision. In his view, it meant that ''it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to it.''[31] A slightly different reformulation of the reasonableness test was given in the *GCHQ* case by Lord Diplock, who preferred to use the term ''irrational,'' which he described as applying to ''a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.''[32] With such criteria for review, the chances that a citizen could win a case against a public authority were very slim. As a rule, public authorities were bound to be regarded as always in the right, and the citizen as always wrong. Until very recently, English judges were powerless to effectively review abuses of discretion by public authorities; the new despotism (*i.e.*, the bureaucracy), according to the famous

---

[30] H. W. R. Wade & C. F. Forsyth, *Administrative Law*, 9th ed., Oxford University Press, 2004, p. 355.

[31] *Associated Provincial Pictures Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 KB 225, 230.

[32] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374.

title of a classical work, ran into no obstacle but an appearance of review. The rights of citizens were on the verge of being jeopardized. Several MPs and some enlightened judges sounded the alarm. The situation did not really change until Parliament decided to step in and to put into motion some of the reforms initially envisioned by a few visionary judges, such as Lord Diplock.

Legislative action. In the second half of the twentieth century, the British Parliament undertook two major reforms, different in substance, which dramatically changed the traditional British position *vis-à-vis* public law.

The first change, introduced in the 1970s, consisted of a sweeping reform of judicial remedies against public bodies and a comprehensive set of rules for making claims for judicial review. Prior to 1977, the procedures governing the prerogative remedies and the ordinary remedies (of declaration or injunction) were entirely separate. The purpose of the 1977 reforms was to introduce a procedure whereby the prerogative remedies and declarations and injunctions (and, in appropriate circumstances, damages) could be claimed in one claim. Shortly afterwards, in order to keep the public authorities from being swamped by abusive suits, the House of Lords in *O'Reilly* v. *Mackman* found that ''now that judicial review is available to give every kind of remedy, [. . .] it should be the normal recourse in all cases of public law where a private person is challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty.''[33] Following this decision, the distinction between public law and private law has become fundamental.

The second change derives from the adoption of the Human Rights Act in 1988, which made the European Convention of Human Rights enforceable against all public authorities. It is difficult to imagine how the judge could effectively enforce this instrument if he still adhered to the former test of the measure's reasonableness as set out by *Wednesbury*.

The new English ''public law.'' These reforms have brought about dramatic changes in the traditional positions of the English legal system *vis-à-vis* public law and the public interest. English judges today review the existence of the public interest more often than they used to. At the invitation of Parliament, they have developed their role in public law, especially in the domain of the relations between public authorities and the citizen. Although the foundations of English administrative law are procedural in nature, its substantive content in the years ahead should deepen and get stronger because the courts, leaving aside the dry and limited *Wednesbury* test, are more and more inclined to verify the manner in which the public interest is concretely applied in the cases coming before

[33] *O'Reilly* v. *Mackman* [1983] 2 AC 237, 256.

them.[34] The crucial point is that the judge no longer envisions his function as being exclusively limited to the protection of private interests and only partially in the protection of the public interest. English judges today measure and evaluate the public interest in the decisions of the public authorities more often and with more bite than they used to do under their traditional role of guardians of private interests.[35] The extension of the power of judicial review over formerly purely discretionary acts brought under judicial scrutiny the so-called prerogative powers of the Crown, in particular in the field of national security,[36] as well as the powers exercised by nongovernmental (or ''private'') bodies (especially regulatory bodies) such as a panel on takeovers and mergers operating in the city of London and regulating a very important part of the financial market.[37] In the same vein, English courts have developed new doctrines, such as ''natural justice,'' which compel decisionmakers, regardless of their administrative or judicial functions, to respect the right to be heard.[38] The power of judicial review today goes so far and so deep that some judges think that ''[t]rying to keep the *Wednesbury* principle and proportionality in separate compartments seems [. . .] to be unnecessary and confusing.''[39] They argue that the proportionality principle, although set aside a few years ago,[40] has become part of English law, if only because of the European Convention on Human Rights and that it is likely to replace the *Wednesbury* test. The review exercised by English judges over internment measures decided by the

---

[34] P. Craig, ''Public Law and Control Over Private Power,'' in M. Taggart (Ed.), *The Province of Administrative Law*, Oxford, Hart, 1997, p. 196.

[35] For instance, in a case concerning a ban of hunting deer with hounds, the court held that, since the land had been acquired under a statute authorizing acquisition of land for ''the benefit, improvement or development of their area,'' the county council was permitted to pursue objects that would ''conduce to the better management of the estate'' only. Since the ban was fueled by the ''ethical perceptions of the Councillors about the rights and wrongs of hunting,'' the purposes it sought were outside that of the governing statute. The ban, which probably would have been sustained under the *Wednesbury* test, could be decided for objective motives, compatible with the public interest, see R. v. *Somerset County Council, ex parte Fewings*, [1995] 1 All ER 513, 524.

[36] *Council for Civil Services Union* v. *Minister for the Civil Service* [1985] AC 374.

[37] R. v. *Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815.

[38] *Ridge* v. *Baldwin* [1964] AC 40.

[39] R. (*Alconbury Development Ltd*) v. *Secretary of State for the Environment, Transports and the Regions* [2001] UKHL 23 (Lord Slynn of Hadley, § 51), 2 WLR 1389, p. 1406.

[40] R. v. *Home Secretary, ex parte Brind* [1991] 1 AC 696.

governmental authorities for an indefinite period of time against persons suspected of terrorist activities support these views.[41]

Hesitations and uncertainties. The new developments in English public law are a cause of division among legal scholars. Resistance against the introduction of a distinction between public law and private law is still very strong.[42] Behind the scholarly debate, the fear is that the more public law grows, the more private law, and hence private power, dwindles. The debate is both political and legal at the same time.[43] It revolves around the dilemma of deciding whether the judge must stick to *Wednesbury* or free himself from its constraint and move toward a broader power of judicial review that would lay a stronger hand on the exercise of public power. Some believe that, in being more intrusive in the exercise of discretionary powers, the judges go beyond what the doctrine of parliamentary sovereignty authorizes. Others think that the first duty of the judge in the English legal system is to protect individual rights and that this is, indeed, the greatest legacy of the common law. The question is not resolved whether English public law (which in any case does exist today in the British legal system, if only under the procedural forms of public law remedies) will grow inside or outside the common law. If the first possibility carries the day, tradition will prevail, and England will have no public law, at least in a formal sense. If the second prevails, England could develop a true concept of public law.

It is still always possible to say that the distinction between public law and private law is overridden by the fact that the spirit of the common law has always been to forbid abuses of power, whether public or private.[44] Even assuming that this is correct in the light of legal history, public law does not end with the distaste for abuse of power. A ban on the abuse of power is a leading principle among public law's basic tenets; but the end and the object of public law are broader. Public law is the law of the *res publica*, the law of the public good. Its vocation is alternately to protect public authorities in their legitimate vindication of the public interest against private interests or to forbid them to go

---

[41] *A (FC) and Others (FC) Appellants* v. *Secretary of State for the Home Department* [2004] UKHL 56.

[42] See M. Taggart, '''The Peculiarities of the English': Resisting the Public / Private Law Distinction,'' in P. Craig & R. Rawlings (Eds.), *Law and Administration in Europe: Essays in Honour of Carol Harlow*, Oxford University Press, 2003, p. 107.

[43] See P. Cane, *An Introduction to Administrative Law*, 3rd ed., Clarendon Law Series, Oxford, 1996, p. 362.

[44] See the declarations and statements made by Sir Stephen and Sir John Laws in D. Oliver, *Common Values and the Public-Private Divide*, Butterworths, 1999, pp. 249-250

further than they are authorized and exact sacrifices from citizens that go beyond what the legitimate public interest may require. There is no public law without some conceptualization of the public interest; it is not to be ruled out that judges may find this concept in the common law itself. Until this step is taken, there will be no public law in England. Some recent cases, particularly dealing with terrorism, suggest that English judges may be heading in this direction, while remaining adamantly vigilant on the protection of private interests and, in particular, personal freedom.[45]

---

[45] See the opinion by Lord Hoffman, *A (FC) and Others (FC) Appellants* v. *Secretary of State for the Home Department* [2004] UKHL 56, §§ 91-97.

BOOK II
THE REPUBLICAN AGE

New economic and social conditions. The republican age began at the end of the eighteenth century, with the American and French Revolutions. Nowadays, it is possible to say that it has completely replaced the monarchical age. True, some States still exist that are formally monarchies (Belgium, Spain, the Netherlands, and the United Kingdom). However, all these States present social and political characteristics that turned them into ''disguised republics,'' as England already was at the end of the nineteenth century, according to a jest by Walter Bagehot.[1]

At the social level, modern societies no longer have much in common with the societies of the monarchical age that were divided into ''orders'' or ''estates,'' within which social position was hereditary, and thus not freely chosen, and founded on relations of allegiance and faith, and thus personal and based on feelings. The societies of the republican age are made of men free and equal in rights; the equality of conditions being their basic tenet, social relations in them are voluntary, objective, based on interests.

At the political level, equality of conditions ousted the monarchical principle and replaced it with the republican principle, which defined itself by the sovereignty of the people. The *res publica* is no longer the thing of a monarch, it is the thing of a people; it no longer belongs to one, it belongs to everyone.

Transformations of public law. The coming into being of the republican principle transformed public law insofar as it completely changed its significance or, even, its meaning. In the monarchical age, public law was not liked, but feared and even loathed, particularly when it was used to tax people. On the eve of the revolutions of the eighteenth century, experience had taught mankind, rightly or wrongly, that public law had worked only for the benefit of the

[1] W. Bagehot, *The English Constitution*, 2nd ed., 1873, p. 214, note 12. The formula *''disguised republic''* is not to be found in the first edition of 1867.

monarchs who resorted to it to strengthen their power of coercion over their subjects. Everything, it was believed, would be different when the *res publica* should become the thing of everyone, because it was impossible that the people would work against themselves and for their own misery.

The men who in America, as in France, lived through and worked for the passage from the age of monarchies to the age of republics were initially convinced that a new era had started, with the coming into being of the sovereign people, and that henceforth public law could serve only the happiness of the people. ''Happiness is a new idea in Europe,'' said Saint-Just in 1793 while article 1 of the Constitution of Year I proudly asserted: ''The aim of the society is the common happiness.'' Actually, there was nothing new in this affirmation; it had been known for a long time; the whole eighteenth century had been immersed in the philosophy of happiness. The true novelty was that the awaited happiness would no longer be the happiness dreamed up by a despot for his people, but happiness freely conceived by the people, for the people.

On both sides of the Atlantic, the republican principle of the sovereignty of the people raised the same enthusiasm. The times that followed the Declaration of Independence in the United States and the Declaration of the Rights of Man and the Citizen in France produced a spectacle of fervor so exceptional in the history of Western civilization that people can today barely imagine it.[2] The revolutionaries in both the United States and in France embraced the republican principle as the beginning of a new era. Everything was about to begin, to be born again, as before the era of tyrannies. People thought it was a return of the Republic of Ancient Rome, busy on behalf of the collective happiness of the people, and they were convinced that the public good would henceforth always triumph over private interests. Governments would no longer be the exercise of domination of man over man but the exercise of a collective power that would work only for the defense of liberty and the promotion of the public good.

In the United States as well as in France, the great expectations of the Revolution collapsed onto themselves. The Americans and the French discovered that transfer of sovereignty from one person to the multitude neither makes it disappear nor makes the problem it raises easier to solve. Worse, the transfer raises a problem that was unknown under the monarchy.

---

[2] For the United States, see G. S. Wood, *The Creation of the American Republic (1776-1787)*, 1969, reprint New York, W.W. Norton & Co., 1987, and G. S. Wood, ''The Origins of Vested Rights in the Early Republic,'' 85 *Virginia L. Rev.* 1421 (1999). For France, see J. Michelet, *Histoire de la Révolution française* in *Œuvres complètes*, vols. XVII—XXIII, Flammarion, 1897-1898.

Survival of sovereignty. A creation of the monarchical age, sovereignty curiously outlived that period. Such continuity calls for explanation, for it is not self-evident.

The first republicans, that is, chronologically, the Americans, were convinced that sovereignty would die with monarchy. They thought that, in the republican age, it was bound to disappear and would soon be replaced by law. In the pamphlet *Common Sense*, published in February 1776, which inflamed the revolt against England in the colonies, Thomas Paine wrote:

> But where says some is the King of America? I'll tell you Friend, he reigns above, and does not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING.[3]

Paine who would in 1793 be made a ''French citizen'' by the National Assembly, got it wrong; law has not replaced the king, neither in America nor elsewhere. In the United States, what has replaced the king of England (George III) is not law, but the people (''*We The People*''[4]). Still the aversion Americans cherished to this monarchical concept left a definite mark;[5] none of the founding texts of American public law, whether the Declaration of Independence of 1776 or the federal Constitution of 1787, contains the term ''sovereignty.''

In Europe, sovereignty followed the same path. Sovereigns have disappeared, or if they have not disappeared, they turned into constitutional icons; sovereignty remained. True, the republican age forbids sovereignty to lodge itself in a physical body and to be dressed in human clothes. Sovereignty can therefore be only a ''principle'' nowadays, as article 3 of the Declaration of the Rights of Man and the Citizen put it.[6] But it is lodged in the universality of the citizens (the nation, in France; the people, in the United States), and it remains. Sovereignty remains in the republican age the founding principle of public law—of modern public law, of course. What is it that explains this survival?

---

[3] T. Paine, *Common Sense* in *Collected Writings*, New York, Literary Classics of the United States, Coll. The Library of America, 1995, p. 34.

[4] These words are the very first of, and open the U. S. Constitution of 1787.

[5] See J. N. Rakove, ''Making a Hash of Sovereignty, Part I,'' 2 *Green Bag* 35 (1998); ''Making a Hash of Sovereignty, Part II,'' 3 *Green Bag* 51 (1999).

[6] Article 3 of the Declaration of the Rights of Man and the Citizen: ''The principle of all sovereignty remains in essence in the Nation.''

The explanation lies in this one fact: sovereignty has been historically and still remains the condition of modern liberty. It has freed men from the myriad powers that bore on them in the Middle Ages, the powers of the lords, the power of the monasteries, of the priests, of the guilds—to reduce all of them to one single power, the power of the State, which later was conquered by the people in democratic revolutions. Despite all the efforts made from a theoretical standpoint to negate it, or to make it disappear,[7] sovereignty has remained because it fulfills a function that is key to modern liberty. Sovereignty requires distinguishing between the public power, the only legitimate power, and the numerous private powers that run through the social fabric and that must by necessity be subject to law if liberty is to be preserved. It must, indeed, be remembered, before discarding sovereignty as a useless concept, that all the space that is not filled by statutory law is bound to be filled by private power. The famous aphorism by Montesquieu, ''Every man invested with power is apt to abuse it, and to carry his authority as far as it will go,''[8] may be applied to the holder of any power, whatever its nature, whether public or private; whatever its kind, religious or feudal as before, economic or financial as today. To that extent, the distinction between the State and civil society has been a huge step toward liberty.[9]

The new problem of representation. In the monarchical age, sovereignty was not represented. It did not need to be; sovereignty was an attribute of the sovereign, and the sovereign was the monarch. It was, indeed, society that was represented before the sovereign; and it was represented in its ''estates,'' that is, the three orders that, in France as in England, although under different names, derived from feudal society (the estate of the warriors, which formed the nobility, or the temporal Lords; the estate of the priests, which made the clergy, or the spiritual Lords; and the peasantry, which became the Tiers-État in France and the Commons in England). Only England succeeded in making use of this representation before the king to set up a theory of the king's Two Bodies, which enabled the representatives of society to form together with the king a body politic, distinct from the physical body of the king, and to govern with him. However, this evolution does not change the legal fact that the English Parliament does not represent the sovereign; Parliament *is* the sovereign.[10] This

[7] On the efforts of the conservative liberals in the nineteenth century, see J. Ellul, *Histoire des institutions: le XIXe siècle* (1962), PUF, Coll. Quadrige, 1999, p. 360.

[8] Montesquieu, *The Spirit of Laws*, [Translated by Th. Nugent, 1752, revised by J. V. Pritchard], 1748, Book XI, chap. 4, available at http://www.constitution.org/cm/sol.htm.

[9] See the Introduction, Section C.

[10] This odd legacy from the monarchical age obliges the classical British scholars such as Dicey to draw a line between legal sovereignty, which is within the hands of ''King in

is why, from a strictly legal standpoint, England still belongs to the monarchical age, despite the fact that, from a political standpoint, it is possible to say today that the sovereignty of Parliament rests on very different foundations. Today, a better explanation is that the legal sovereignty exercised by Parliament is viewed as deriving its legitimacy from the fact that Parliament's composition is determined by the electorate in whom ultimate political sovereignty resides.[11]

The coming of the republican age drastically changed the tradition of the monarchical age in which sovereignty was personified by a man or a body politic.[12] When sovereignty lies in an immense body made of millions of individuals, sovereignty takes a very novel shape. It is possible that this large body may exercise sovereignty itself, as was true in the past of citizens in the city-state who conducted their common affairs assembled in the agora, and this is true today in some western European States (Switzerland, France); it is also true in many states in the western United States where citizens are called to decide on public issues by way of referenda. In the contemporary world, however, these practices of direct democracy are rare, mostly exceptional; they exist usually for deciding constitutional matters, or occasionally for deciding statutory issues, but always in special circumstances. It is out of the question that they would be exercised on a daily basis. Therefore, the sovereign, in everyday public life, does not act by itself, but by delegation. It is represented. But how should it be represented? Here lies the very first great difficulty of modern public law. If the sovereign today is the whole society, it cannot be represented in the same way society in the monarchical age was for this decisive reason: The orders, or estates, no longer exist. From this disappearance, a second difficulty arises in modern public law: what remedy is there now against abuse of power?

Parliament,'' and political sovereignty, which lies in the hands of the electorate. Parliamentary sovereignty is ''an undoubted legal fact'' (see the explanations by A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, with an introduction by E. C. S. Wade, 10th ed., London, The McMillan Press Ltd., 1959, p. 68, available at http://www.constitution.org/cmt/avd/law-con.htm).

[11] See the lecture given at New York University School of Law by Lord Irvine of Laird (Lord Chancellor in the Blair government 1997-2003), ''Sovereignty in Comparative Perspective: Constitutionalism in Britain and in America,'' 76 *N.Y.U.L.Rev.*1, 12-13 (2001).

[12] No text better explains this complete change than article 3 of the Declaration of the Rights of Man and the Citizen that, after enunciating the axiom of the republican age, ''the principle of all sovereignty remains in essence in the Nation,'' adds ''no public body'' (innuendo, ''no body politic'' as the Parliament in England), ''no individual'' (meaning, no monarch) ''can exercise authority that does not expressly derive from the Nation.''