Fixing Human Rights Law

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POSUI DEUM ADIUTOREM MEUM
In memory of my beloved parents

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Dr Michael Arnheim is a practising London barrister and sometime fellow of St John's College, Cambridge. He has written 24 published books to date, including *Anglo-American Law: A Comparison* (2019), *A Practical Guide to Your Human Rights and Civil Liberties* (2017), *Principles of the Common Law* (2004), *The Handbook of Human Rights Law* (2004) and *Common Law (Legal Cultures: 9)*, New York University Press (1994).

Preface

This booklet is a sequel to my previous publication for Civitas, *The Problem with Human Rights Law*, which appeared in 2015. Thanks to Dr David Green and Carol Bristow of Civitas, a very successful round-table conference was held, which was attended by several public figures, including some MPs.

The problem has now become infinitely worse and the need for a solution all the more urgent. This publication, my twenty-fourth published book to date, sets out my view of what is called for and how it can be achieved. It follows concepts previously expounded in my *Anglo-American Law: A Comparison* (2019), *A Practical Guide to Your Human Rights and Civil Liberties* (2017), *Principles of the Common Law* (2004), *The Handbook of Human Rights Law* (2004), *Common Law (Legal Cultures: 9)*, New York University Press (1994).

I am grateful to Dr Jim McConalogue, CEO of Civitas, for inviting me to write this booklet. My thanks also go to my friends Tom Malnati, James Peterson, and, for his encouragement, Jack Ward.

My *Wikipedia* biography may be found here:
https://en.wikipedia.org/wiki/Michael_Arnheim

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Abbreviations

DWA – Deportation with Assurances

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights, aka The Strasbourg Court

HRA – Human Rights Act 1998

IMA – Illegal Migration Act 2023

J (after a name) – High Court judge

LJ (after a name) – Lord Justice (Court of Appeal judge)

MR – Master of the Rolls

NABA – Nationality and Borders Act 2022

NHS – National Health Service

UKSC – UK Supreme Court

UNHCR – United Nations High Commissioner for Refugees

Yo-yo case – Case where one party wins at first instance, loses on appeal and then wins again on final appeal.

1.

The Problem

What is Human Rights Law?

It is important to realise that human rights law is about *everybody's* human rights – the human rights of the mass of law-abiding citizens – and not just the rights of the small minority of special interest groups championed by the self-styled 'human rights' lobby.

What is the problem with Human Rights law?

In a nutshell, the problem is that, in practice, human rights law does not actually protect the mass of law-abiding citizens, who should be its beneficiaries, but instead benefits a motley assortment of special interest groups, including illegal migrants, bogus asylum seekers, terrorist suspects, disruptive protestors, strikers, and the beneficiaries of 'mission creep' and 'politically correct' and simply wrong and unjust court decisions. Here is a brief summary of the most serious problems with human rights law:

- **Illegal migration:** The influx of huge numbers of illegal migrants has a negative impact on the human rights of the mass of law-abiding citizens in several respects:
  - Housing;
  - Overcrowding;
  - Pressure on healthcare;

  - Expense;
  - Public order;
  - Pressure on education system; and
  - Pressure on food supply.
- **Bogus asylum seekers:** Up to now, the majority of illegal migrants have tended to apply for asylum. Most of these claims are bogus, as explained below. Besides clogging up the courts with endless appeals – at taxpayer expense – these false claims actually impede the claims of genuine asylum seekers.
- **Terrorist suspects:** 'The Home Office is chaotically incompetent to remove people who should not be here, starting with suspected terrorists' (Lord Carlile, former terrorism watchdog – *Daily Mail*, 11 April 2023).
- **Disruptive protests:** The law has been tightened up, but it remains to be seen how effective that will be. The main problem is that the courts tend to view disruptive protests from the point of view of the protestors' rights rather than from the point of view of the general public, whose rights may be severely impacted by these activities.
- **Strikes:** Contrary to some strike advocates, there is no fundamental right to strike. But strikes deny thousands of people their rights to healthcare, travel and simply the right to go about their business without let or hindrance. And strikes also seriously impact the national economy.
- **The Rule of Law:** The 'human rights' lobby claim to be advocates of 'the Rule of law', but this usually amounts in practice to the rule of lawyers or judges. Much of English law is now in such a state of disarray as to deny ordinary people the fundamental right of a fair trial or of equality before the law.

1.1. 'The System Is Broken' – Immigration, Asylum & Terrorism

'The system is broken' was the stark admission made to Parliament by the newly appointed Home Secretary, Suella Braverman, on 31 October 2022. The admission may have been unexpected, but the chaotic state of the whole immigration and asylum system was nothing new. Every aspect of the system – if indeed it deserves to be called a system at all – reeks of injustice, inefficiency, undue expense, danger and delay.

'Stop the Boats'

No fewer than 45,756 people are known to have entered the UK illegally in 2022 by crossing the English Channel in small boats. On 7 March 2023, standing behind a lectern emblazoned with the slogan 'STOP THE BOATS', Prime Minister Rishi Sunak announced the introduction of new legislation titled the Illegal Migration Bill, which has since become the Illegal Migration Act 2023: 'My policy is very simple, it is this country – and your government – who should decide who comes here, not criminal gangs.'

Is this legislation really the solution to the human rights problem? From the get-go it has attracted the unwelcome attention of the self-styled human rights lobby with its usual focus on the rights of the special interest groups. But the Government's focus is also arguably too narrow.

There is far too much emphasis on the 'small boats'. 45,756 may seem like a lot of illegal migrants for one year. And it represents a four- or even a five-fold increase over the past few years. But, more importantly, it is just the tip of the iceberg. The *total* number of illegal migrants in the UK today was conservatively estimated at between 800,000 and 1.2 million in 2017 and has undoubtedly increased since

then. Any policy intended to tackle the migration problem needs to deal with the whole problem and not just the small boats.

Prime Minister Rishi Sunak has remarked, '… All I can say is that we have tried it every other way… and it has not worked.' Really? It is an admission of previous failure coupled with trust in this new legislation as the last resort. But have all other options really been attempted? And why should this legislation succeed where previous attempts failed? In a word, supposedly because it is more *robust*, or *tougher*. But is it actually tough enough?

Let us examine some main features of the new legislation to test its chance of success. There are three fallacies. The Prime Minister said on 7 March 2023:

> 'The reason that criminal gangs continue to bring small boats over here is because they know that our system can be exploited… that once here… illegal migrants can make a multitude of asylum, modern slavery and spurious human rights claims to frustrate their removal.'

There are at least three serious fallacies in this statement alone:

1. The physical problem: The Prime Minister recognises that, 'once here', illegal migrants can start making all sorts of legal claims. So, the key should be to stop them *setting foot* on British soil in the first place. But his policy does not really do enough to achieve this.

2. Criminal gangs: Putting all the blame on human traffickers or smugglers turns the illegal migrants themselves into victims. Yet, many or even most of them are actually *economic migrants*, who have shelled out thousands of pounds to be transported to the UK.

3. 'Our system can be exploited': Too true. But the new legislation does not actually prevent this.

Rishi Sunak's are fighting words indeed, but they raise as many questions as they answer. In broad terms, is the problem primarily physical, political, economic or legal? How did it come about? Who is to blame? And what is the solution?

Asylum-seeker rights and the right to apply

Rishi Sunak also suggests:

> 'The current situation is neither moral nor sustainable. It cannot go on. It's completely unfair on the British people… who have opened their homes to genuine refugees… but are now having to spend nearly £6 million a day to put up illegal migrants in hotels.'

It may seem fitting that if you claim asylum when entering into Britain uninvited you will be housed in a barge. Spending *£6 million a day* of taxpayer money to house illegal migrants is indeed shocking. Some of the hotels have been block-booked for 18 months ahead and there are no plans to move those already in hotels to alternative accommodation. All these hotels are now closed to holiday-makers and their facilities are not available to local people either. The 'solution' for new arrivals, announced by the Government on 28 March 2023, is to house them in RAF barracks and giant barges, which are intended to be 'a deterrent, not a magnet' for migrants thinking about crossing the Channel in small boats.

This 'solution' is only going to exacerbate the problem. The Government should be looking to reduce the amount of accommodation, not increase it, with the ideal being a situation where *no illegal migrants at all* are housed at government (i.e., taxpayer) expense – because the aim

should be to try to stop them even setting foot on British soil in the first place.

There is much talk about the 'right', or even the 'fundamental right', to apply for asylum. There is no such right except for genuine refugees. Every state has the right to determine whether an asylum seeker is genuine. But every state can also determine the conditions for applying for asylum in the first place. There is no right to visit any foreign country of your choice and apply for asylum. Every country is entitled to make its own rules for asylum, including refusing to entertain any application made by an asylum seeker who has already passed through another 'safe' country – which is the case with the overwhelming majority of those seeking asylum in the UK. None of the countries of origin of asylum seekers are contiguous with the UK or at all close to the UK. Asylum seekers almost invariably have to pass through at least one 'safe' country before reaching the UK. The UK has half-heartedly tried to enforce a 'first safe country' rule, refusing to consider applications from any such asylum seekers – accompanied by the repeated criticism of the 'human rights' lobby.

Even the EU recognises the 'first safe country' rule. The Dublin Regulation (No. 604/2013) requires that asylum seekers have their asylum claim registered in the first EU country that they reach – and that the decision of that EU member state is the final decision for all EU member states. This is intended to prevent 'asylum shopping'. Some asylum seekers are known to refuse to be fingerprinted or registered in countries viewed by them as not 'asylum-friendly' and hold out to apply to countries that are more welcoming to asylum seekers, like Germany, Sweden – or Britain. Some asylum seekers have even been known to burn their fingers so as to obliterate their fingerprints, and others falsify their

country of origin, claiming, for example, to be fleeing from persecution in Somalia when they are in fact from Tanzania.

Most UK visas, whether for tourism, work or study, need to be obtained before arrival in the UK, either online or from a British embassy or consulate. This is all the more reason for requiring asylum seekers to do the same. No country has to allow aliens simply to arrive on their shores. And the crucial point is that people applying for asylum from outside the UK have no right to apply to the UK courts.

So the top priority for UK Government policy should be to prevent asylum seekers from setting foot on British soil in the first place.

The Franco-British relationship

Rishi Sunak has argued that:

> '...I've already secured the largest ever small boats deal with France. And patrols on French beaches are already up 40 per cent. I also promised progress on enforcement and we've increased raids on illegal working by 50 per cent.'

Once an illegal migrant sets foot on British soil this triggers a whole series of demographic, economic and legal problems. The aim of UK Government policy should be to keep illegal migrants from reaching the UK in the first place.

In his speech on 7 March 2023, the Prime Minister announced three policy decisions intended to combat small boat arrivals: a deal with France, French patrols and cracking down on illegal working. France is to be given £500 million over three years – after millions already thrown at them for this same problem.

In 2015, a mile-long fence costing £7 million was erected at Coquelles to stop people entering the French side of the Channel Tunnel. This precaution came to nothing when ingenious asylum-seekers gained access by guessing the

security code – from the dirtiest or most worn numbers on the keypad (apparently zero, two and four).

Whatever deal may be struck with France, it has to be recognised that the more help the French give the UK to keep illegal migrants from making the crossing, the more likely those illegal migrants are to remain in France – where illegal migrants are no more welcome than they are in Britain. So, why trust the French to do Britain's dirty work?

There is no mention by the Prime Minister of 'push-back' tactics (see below). In 2019 navy patrols ended after six weeks, at a cost of £780,000, without a single boat being intercepted. Critics were quick to condemn this attempt as an 'abuse' of the Royal Navy or even as 'illegal'. The glory days of chasing the Spanish Armada are long gone, but there is nothing intrinsically wrong with wanting to prevent the incursion of people with no right to be here.

What happened to the policy announced in 2021 of spending £385 million on private border security contracts – including £200 million for 'replacement cutters' (i.e., patrol boats), £65 million over five years for private security guards, plus sniffer dogs and drones?

It is time to consider how we could patrol English beaches with British armed forces and volunteers through a modern version of the wartime Home Guard.

Border chaos

In 2013 several new agencies were created to take over immigration control and the issuing of visas from the malfunctioning UK Border Agency (UKBA). In November 2011 the Home Affairs Select Committee reported that 124,000 deportation cases had been shelved by the UKBA in a 'controlled archive' made up of a list of lost applicants.[1] Several high officials in the UKBA were suspended

following allegations that staff had been told to relax some identity checks. On 8 November 2011 Brodie Clark, the head of Border Force, which was then part of the UKBA, formally resigned – claiming that he had been constructively dismissed by the then Home Secretary, Theresa May. The dispute was settled out of court, with a settlement payment of £225,000 being made to Mr Clark without an admission of liability or wrongdoing from either side.[2]

Border control is now facing a new and even more serious crisis. At the end of 2022 UK Border Force staff went on a week-long strike (with the exception of 27 December) at six UK airports, including Heathrow and Gatwick, and further strike action was taken in late April 2023. 'Taking back control of our borders', an oft-repeated Government mantra, rings hollow in the face of this sort of chaos. The recent relapse of the country into what used to be termed 'the British disease' with its 'I'm all right Jack' mentality is serious enough on its own but becomes really critical when compounded with the problem of border control. (The problem of strikes is discussed in Chapter 1.3.)

Isle of Sark?

Keeping illegal migrants from setting foot on British soil in the first place should be a government policy priority. One way of achieving this is by requiring *all* applications for entry into the UK to be made from *outside* the country. The Nationality and Borders Act 2022 (NABA) lists a number of places where an application can be made for asylum – all of them in the UK itself. This is practically an invitation to illegal migrants.

In his speech of 7 March 2023, cited above, Prime Minister Rishi Sunak made it clear that under the new legislation, 'if you come here illegally you can't claim asylum'. Critics

immediately pounced on this as inhumane, on the ground that asylum-seekers fleeing persecution would generally have no option but to enter the UK illegally. This objection lacks credibility, because the great majority of small boat arrivals are *not* genuine asylum-seekers. And genuine asylum seekers should be afforded other avenues to apply without needing to risk a costly and dangerous Channel crossing or entering the UK at all.

Most illegal migrants to the UK apply for asylum, meaning that they wish to become recognised as refugees. The Refugee Convention of 1951, to which the UK is a signatory, defines a refugee as someone who has had to leave their home country 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.' Most illegal migrants coming to the UK in small boats are unlikely to be genuine asylum seekers. For one thing, just under a third of them are from Albania, a safe European country.[3] Secondly, most small-boat arrivals are unaccompanied young males between the ages of 18 and 40.[4] Men fleeing for their lives from persecution, torture or death would not normally leave their womenfolk and children behind. The all-too-familiar pictures of genuine refugees show families huddled together desperately clutching their few worldly possessions. Which gives us yet a third reason for doubting the refugee claims of most small-boat arrivals, who are known to pay large sums of money to people-smugglers to transport them. Far from being able to shell out thousands to enter Britain, genuine refugees are mostly destitute, as they have generally had to leave their homes in a hurry, giving up most of their possessions in the process.

Nowadays, applications of every kind can be made online – including UK visa applications. Why not also

applications for asylum? An initial online application can then be followed up by an interview at a UK embassy or consulate, and the UK has diplomatic representation in practically every country in the world. Asylum-seekers who are genuinely facing persecution in their home country may well be afraid to visit a UK consulate, but they should nevertheless be able to lodge an initial application online, which would enable the genuineness of their application to be examined without giving the applicant the opportunity of setting in motion any legal claims in the UK. To facilitate this, the UK could offer an encrypted online service. And, instead of having to visit a UK embassy or consulate inside their home country, they could be offered an interview in a 'safe' third country.

For in-person applications, the UK Government could do a deal with a safe third country like the Isle of Sark in the Channel Islands, a royal fief and part of the Bailiwick of Guernsey. Though it is a Crown Dependency, it is under the Crown not as King of the United Kingdom but as a relic of the Duchy of Normandy. By the Treaty of Le Goulet of 1200 (ratified by the Treaty of Paris of 1259) King John of England ceded the mainland of Normandy to Philip II of France, retaining insular Normandy, i.e., the Channel Islands, for himself and his heirs in perpetuity. Though under the British Crown, Sark does not form part of the United Kingdom or of any British Overseas Territory. The Crown is represented by the Seigneur or Dame of Sark.

Offshore processing has proved successful in Australia. Since July 2013, under a policy called 'Operation Sovereign Borders', asylum-seekers arriving in Australia by boat have been sent for processing to Nauru and (Manus Island in) Papua New Guinea, two nearby independent states. Nobody who arrives by this route – even if granted refugee status –

is ever allowed to settle in Australia. In 2012-13 no fewer than 25,173 people arrived in Australia by boat. In 2014 the number dropped to 157 and in 2015 the number was zero. The number of maritime asylum seekers has remained low ever since. The policy is assisted by 'turnbacks', i.e., the Australian navy escorting small boats out of its territorial waters, and 'takebacks', i.e., arrangements with other countries, including Sri Lanka and Vietnam, to accept the return of their nationals.

Offshore processing alone, without 'turnbacks' and 'takebacks', is probably not enough to account for the sharp decline in maritime arrivals of illegal migrants to Australia. So, for the UK, the Rwanda policy on its own is probably unlikely to have the desired deterrent effect – and so far it has certainly failed in that respect, not least because, up to the date of this writing, the UK Government has allowed the domestic courts and Strasbourg to prevent anyone from being deported to Rwanda. So far the UK Government has been too inclined to pander to its 'liberal' critics, stressing that, by contrast with the Australian scheme, the UK's Rwanda policy is 'a migration and economic partnership', adding:

> 'People will have all their needs looked after while their asylum claims are being considered in Rwanda…Those relocated will be given a generous support package, including up to five years of training, accommodation and healthcare.'[5]

This reads more like a travel agent's brochure than a policy intended to deter illegality.

If the UK Government really wants to deter illegal migration it needs to adopt a much tougher stance. Passing new legislation is not enough: the new policy needs to be vigorously enforced. But, after touting a vigorous 'pushback' policy, it was suddenly abandoned in April 2022, just a few

days before a judicial review challenge to it was due to be heard in the High Court. Judicial review is a particularly uncertain area of the law – and it is important to stress that any court decision can be revoked by Parliament (see Chapter 4).

On 25 April 2022 a Government spokesman was quoted as giving this unsatisfactory response: 'There are extremely limited circumstances when you can safely turn boats back in the Channel.'[6] The English Channel is indeed an exceptionally treacherous stretch of water, but nobody invited these asylum seekers to risk life and limb crossing it. And knowing that they are likely to be intercepted or turned back will actually save lives because that will act as a deterrent, which is absent in the existing system or even in the new legislation.

Do the problems stem from previous legislation?

Rishi Sunak has argued: 'This Bill provides the legal framework needed… in a way that no other legislation has done before'. What was wrong with the previous immigration and asylum legislation – of which there was no shortage, including the Nationality and Borders Act 2022 (NABA), which received the royal assent as recently as 28 April 2022? While carefully eschewing any direct criticism, Rishi Sunak effectively pins at least some blame on previous legislation. The scope of NABA is wider than that of the Illegal Migration Act (IMA), but it covers a good deal of the same ground, notably unlawful entry into the UK, accommodation for asylum seekers, 'modern slavery' applications and removal of asylum seekers to a safe country. Though condemned by critics as unduly harsh or even 'inhumane', NABA is tame by comparison with the IMA. When the law in a particular area is changed, the normal practice is simply to amend the

existing law, or in an extreme case to repeal the previous legislation and start again. But in this case NABA is neither amended nor repealed by the new law, and it is not clear how the two laws will coexist and interact in practice.

Deportation With Assurances (DWA)

Rishi Sunak has argued that:

> 'Those illegally crossing the Channel are not directly fleeing a war-torn country… or persecution… or an imminent threat to life. That is why today we are introducing legislation to make clear that if you come here illegally you can't claim asylum…'

Bogus asylum seekers would appear to be ideally suited to deportation back to their countries of origin. To placate critics, successive UK governments between 2005 and 2013 went to enormous lengths to obtain assurances from a number of countries that nationals of theirs deported back to them would not be subjected to torture or ill-treatment. The countries concerned were Jordan, Libya (later cancelled), Algeria, Morocco, and Lebanon. A total of only 12 people were deported under this policy of 'Deportation with Assurances' (DWA) up to 2013. The policy was under constant attack, and the Government suffered a number of setbacks in the UK courts, notably in the Special Immigration Appeals Commission (SIAC). In 2017 a report on DWA was commissioned by the Home Secretary from David Anderson QC (as he then was), the then Independent Reviewer of Terrorism Legislation, together with Professor Clive Walker QC.

The report concluded that:

> 'DWA remains potentially capable of playing a significant role in counter terrorism, especially in prominent and otherwise

> intractable cases which are worth the cost and effort. But as the UK experience amply demonstrates, it can be delivered effectively and legitimately only if laborious care is taken.'

Though the government of the day expressed the intention of continuing the practice of DWA, this less than enthusiastic endorsement of the policy effectively put the kybosh on it. DWA was, in practice, applied only to terrorist suspects, but there is really no good reason why it should not be applied to failed asylum seekers as well. And for a deportee to be returned to their country of origin, where they would probably have some friends and family, is likely to be less traumatic than to be dropped into some completely alien third country (like Rwanda) whose language they did not speak and with which they had no connection.

The modern slavery trap

The latest dubious practice for asylum seekers is to use the Modern Slavery Act 2015 to claim that they have been kidnapped and sold into slavery by people traffickers.[7] It is a neat way of posing as a victim and passing the blame on to someone else. The claim rings rather hollow in the case of many supposed 'potential victims', 25 per cent of whom in 2022 were British citizens and 31 per cent Albanians[8] – Albania being a safe European country from which asylum seekers are known to pay thousands to enter Britain illegally. Who then are the 'human traffickers'? There are no doubt some genuine victims of 'modern slavery', but the problem has clearly been exaggerated out of all proportion. However, even former Prime Minister Theresa May, the proud architect of the Modern Slavery Act 2015, has fallen into the 'modern slavery trap', claiming in March 2023 that the Illegal Migration Bill would:

> 'drive a coach and horses through the Modern Slavery Act, denying support to those who have been exploited and enslaved, and in doing so making it much harder to catch and stop the traffickers and slave drivers.'[9]

Terrorist suspects at large

'If we continue to lose control of our borders, we lose control of our society.'

So wrote Sir Andrew (now Lord) Green, the founder of Migration Watch UK, in the *Daily Mail* on 30 December 2009. If anything, the situation has become even more serious since then. And no aspect of the problem is more critical than national security. On 11 April 2023 the *Daily Mail* revealed that:

> '19 men with terrorism links arrived in the UK by small boat across last year and are living freely in this country. Some of the men – who included five with links to Islamic State and its offshoots – are understood to have lodged asylum claims and are housed in hotels at the taxpayers' expense… Seven of the 19 terror suspects were already under 'active investigation' in other countries when they arrived here, it is understood.'

Prosecution of the 19 terrorist suspects,

> '…is currently thought to be impossible. If the cases against them are based on surveillance material – or other information from intelligence-gathering it cannot be used in British courtrooms, for fear of exposing surveillance capabilities or endangering covert sources.'

These 19 men are just the tip of the iceberg. Also, on 11 April 2023 the *Daily Mail* quoted Lord Carlile, the former terrorism watchdog: 'The Home Office is chaotically incompetent to remove people who should not be here, starting with suspected terrorists.'

Misreading the law

Rishi Sunak has held,

> 'We will detain those who come here illegally and then remove them in weeks, either to their own country if it is safe to do so, or to a safe third country like Rwanda'.

One of the most trenchant critiques of the unwarranted expansion of human rights law, or 'mission creep', was expressed by retired Supreme Court Justice Lord Sumption:

> '[M]ost of the rights which the Strasbourg Court has added to our law are quite unsuitable for inclusion in any human rights instrument. They are contentious and far from fundamental… The result is to devalue the whole notion of universal human rights.'[10]

Lord Sumption aptly labels this extension of rights by the Strasbourg court as 'a form of non-consensual legislation' and 'mission creep'.

It is important to note that the Strasbourg Court, or, more formally, the European Court of Human Rights (ECtHR), which supervises the ECHR, has nothing to do with the European Union but falls under a completely different organisation known as the Council of Europe, a loose umbrella body of 47 states. The UK's continuing membership of the Council of Europe and its relationship with the Strasbourg Court is not affected by Brexit.

Section 2(1)(a) of the Human Rights Act requires the UK courts to 'take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.' In the words of the former Lord Chancellor and architect of the Human Rights Act, Lord Irvine of Lairg:

> ''Take account of' is not the same as 'follow', 'give effect to' or 'be bound by'. Parliament, if it had wished, could have used any of these formulations. It did not. The meaning of

> the provision is clear. The judges are not bound to follow the Strasbourg court: they must decide the case for themselves.'[11]

Yet, as Lord Irvine pointed out, the domestic courts of the UK have generally proceeded 'on the false premise that they are bound (or as good as bound) to follow any clear decision of the ECtHR which is relevant to a case before them.' As 'the starkest example' of this wrong approach Lord Irvine singled out the House of Lords decision in *AF v Secretary of State for the Home Department*,[12] a case about control orders issued under the Prevention of Terrorism Act 2005. The House of Lords unanimously allowed the appeal by the suspected terrorists on the premise that it was obliged to do so.

Lord Rodger of Earlsferry concluded, somewhat flippantly:

> 'Even though we are dealing with rights under a United Kingdom statute, in reality we have no choice: Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed.'

Besides amending the Latin to read *Argentorato locuto, iudicium finitum est*, I would agree with Lord Irvine's sharp reprimand, 'I beg to differ. Section 2 of the HRA means that the domestic Court always has a choice.'[13]

This opens up the even more fundamental question of the right of judges generally to make law. Lord Sumption puts his very sensible position quite squarely: 'Judges exist to apply the law. It is the business of citizens and their representatives to decide what the law ought to be.'[14]

This takes us back to one of the many pernicious decisions of the ECtHR, which has been slavishly followed by the UK courts: *Chahal v. UK*,[15] which decided that it was a violation of ECHR Article 3 to deport a foreign national if there was

a real risk that he would be subjected to treatment contrary to ECHR Article 3 at the hands of the receiving state. Is this really what Article 3 says? Not at all. Article 3 reads as follows: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' But a correct reading of this makes it clear that this is addressed to each member state (including the UK) only in regard to its treatment of persons under its jurisdiction and has no relevance to the treatment of deportees by their home countries. This is explained more fully below.

However, in the extract from his policy speech of 7 March 2023, quoted above, Rishi Sunak has himself fallen into this 'torture' trap – making deportation to a person's home country conditional on its being 'safe to do so'. And his new legislation likewise allows deportation to a person's country of origin to be challenged if there is a 'serious risk of irreversible harm' – a favourite claim used by asylum seekers to stop, or at least suspend, deportation to their country of origin.

Professor Richard Ekins of Policy Exchange, who is strongly supportive of the new legislation, makes the same mistake:

> 'The test of serious risk of irreversible harm is too vague and too broad. The test should instead simply be whether someone is being removed to a country where he faces persecution.'[16]

This misses the whole point. The 'facing persecution' test is actually even vaguer and broader than the test of 'serious risk of irreversible harm'. But the point is that neither test is required. The 'risk of torture, persecution or irreversible harm' argument so routinely invoked by asylum seekers is purportedly based on ECHR Article 3, which, as mentioned

above, reads as follows: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

But, subjected to torture or harm by whom? The whole of the ECHR is addressed to the 'High Contracting Parties' – i.e., the states which signed the Convention, in most of which illegal migrants are no more welcome than they are in Britain. So, what Article 3 is saying is that the signatory states themselves must not subject anyone to torture, etc. Therefore, the UK, as a signatory state, must not torture anybody. But where does it say that the UK must also be responsible for the treatment received by someone in another country after being deported from the UK? Nowhere. This is 'mission creep', a huge unwarranted extension of Article 3 by the Strasbourg court and slavishly followed by the UK courts – and, as indicated above, even by the current British Government.

In fact, a close reading of the ECHR makes it clear that the UK as a signatory state is not responsible for what happens to a deportee in their home country. ECHR Article 1, titled 'Obligation to respect human rights', which sets out the legal framework of the Convention as a whole, reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.' 'The High Contracting Parties' means the signatories to the ECHR, including the UK. And Section 1 of the Convention contains the substantive rights as incorporated into the UK's Human Rights Act. So, in regard to the UK, what ECHR Article 1 says is just this: 'The UK must secure to everyone *within its jurisdiction* the substantive rights and freedoms as incorporated into the UK's Human Rights Act 1998' (emphasis added). Does the UK have any jurisdiction over Iraq, Iran, Algeria or Sudan, or any other of the asylum seekers' home countries? Clearly not. So, the UK

is not responsible for the treatment that a deportee receives on return to their own country. This interpretation of the ECHR is accepted even by the Strasbourg Court itself in *Al-Skeini v. UK*, Application No. 55721/07 (2011).

This is of course predicated on the right of the UK as a sovereign state to decide who is allowed within its borders, as stated in section 6A of the Immigration Act 1971 (as amended):

> 'A person who is not a British citizen is liable to deportation from the United Kingdom if (a) the Secretary of State deems his deportation to be conducive to the public good.'

It is important to note that, besides the articles of the ECHR incorporated into the Human Rights Act 1998, no other international conventions or treaties are part of UK law. Section 19 of the Human Rights Act is relevant in this regard, as it gives the Government a choice whether to declare a particular Bill going through Parliament compatible or incompatible with the ECHR. The latter alternative is for the minister responsible for a Bill in Parliament to:

> '…make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.'[17]

This does not affect the validity of the Bill. And the same applies if a court declares an Act of Parliament or subordinate legislation incompatible with the Convention right. Section 4(6) specifically provides that:

> 'a declaration of incompatibility – (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.'

This neatly preserves the Sovereignty of Parliament.

However, as explained by the former Lord Chancellor, Lord Irvine of Lairg, no other international convention or treaty can be invoked or applied by the UK courts:

> 'Treaty obligations only bind the State as an actor in public international law. They are not directly incorporated in, or enforceable under, our domestic legal system. Absent the HRA, no claim could be brought in our Courts because an individual alleges that his Convention rights have been breached. Treaty obligations bind the UK only because the UK qua State has consented to it. If the UK does not comply with its obligations then the consequences which may follow are a matter of international relations, and inter-State diplomacy.'[18]

Some light relief: claiming rights in your own country

A little light relief is always welcome, especially in a serious subject like human rights. But amidst all the tired old 'liberal' arguments I have recently come across one that is brand new – and (unintentionally) humorous to boot.

This nugget was hiding in plain sight on a news website under the heading: 'Is the Government's new Illegal Migration Bill legal?' Nothing surprising about that. But then comes this bombshell:

> 'According to legal commentator Joshua Rozenberg this [*the Illegal Migration Bill*] could be a breach of Article 34 of the ECHR, which allows individuals to bring a case against a government at court in Strasbourg if they haven't received proper redress in that country. Mr Rozenberg wrote in a Substack article: "Article 34 is a treaty obligation and parliament cannot relieve the government of its duties to comply with international agreements."'[19]

Really? This would appear to have been intended to be taken seriously. So, let us analyse it bit by bit:

(a) Allegation: 'Article 34 is a treaty obligation.' True, it forms part of the ECHR, though it is not one of the substantive rights articles incorporated into the UK's Human Rights Act 1998 (HRA).

(b) Allegation: 'So the UK Government is bound by Art 34.' Correct.

(c) Allegation: 'Individuals can bring a case in the Strasbourg court against the government of a country if they haven't received proper redress in that country.' No. You can invoke Article 34 by going directly to Strasbourg, but only if you have exhausted all domestic remedies. In other words, before taking your case to Strasbourg you must have gone through the whole gamut of available appeals in the domestic courts (in this instance, the UK courts) without success. But you can do that only if you are already living in the UK and your case has gone from first instance to appeal to final appeal in the UK domestic courts without success. It does not apply to someone who has no right to enter the UK in the first place and is trying to obtain that right from the Strasbourg court. Moreover, the only rights you can seek to obtain from Strasbourg are rights contained in the substantive articles of the ECHR, and the right to enter a foreign country even as a tourist, let alone as a resident, is not one of those rights.

(d) Here's what Article 34 actually says:

> 'Individual applications: The Court may receive applications from any person…claiming to be the victim of a violation by one of the High Contracting Parties [i.e. one of the signatory states to the ECHR] of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way that effective exercise of this right.'

So, the only rights that you can claim in Strasbourg under Article 34 are the substantive rights of the ECHR, such as freedom of expression or freedom of religion. You cannot ask Strasbourg to give you the right to enter or live in a foreign country. There is no such right in the ECHR.

(e) Above all, Article 34 is available only against your own country. You can't just pick a country at random that happens to be a signatory to the ECHR (there are 47 of them) and launch a case against it in Strasbourg because it would not let you in. Every Article 34 case of which I am aware was brought against a country by a national of that same country. This is clear from the list of the most recent Article 34 cases:

- Chief Rabbinate of Izmir v. Turkey, No. 1574/12 – 21/03/2023 (applicant was from Izmir in Turkey).
- Croatian Radio-Television v. Croatia, No. 52132/19 – 02/03/2023.
- Sorbalo v. Moldova, No. 1210/10 – 31/01/2023 (concerning the dismissal and reinstatement of a Moldovan judge).
- Khural and Zeynalov v. Azerbaijan (No. 2), No. 383/12 – 19/01/2023 (concerning the editor-in-chief of an Azerbaijani newspaper).
- Hoppen and Trade Union of AB Amber Grid employees v. Lithuania, No. 976/20 – 17/01/2023 (the first applicant resided in Kaunas and the second applicant was from Vilnius, both in Lithuania).
- Gaggl v. Austria, No. 63950/19 – 08/11/22 (concerning an Austrian husband and wife).

Misreading refugee law and conventions

'A clear breach of the Refugee Convention' is a repeated criticism of the government's illegal migration reforms. Not

quite so entertaining and far more boring are the trite attacks on the new law by the 'refugee lobby', who are quick to allege that the law is in breach of the UK's international obligations such as the ECHR and the UN Refugee Convention. These allegations can often be simply false.

Even the UNHCR itself, the UN's Refugee Agency, has managed to misread their own Refugee Convention. They allege that the new law will be 'a clear breach of the Refugee Convention' as its effect will be 'to deny a fair hearing and to deny protection to many genuine refugees in need of safety and asylum.'

The relevant provision of the Refugee Convention is Article 31, which reads as follows:

> 'Article 31. – Refugees unlawfully in the country of refuge
>
> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, *coming directly from a territory where their life or freedom was threatened* in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.' (Emphasis added)

The key words are 'coming directly from a territory where their life or freedom was threatened.' What that means is that the following categories of asylum seekers are *not* covered by this Article:

- Those whose life or freedom was not under threat in their home country;
- Those who have not come directly from a country where their life or freedom was under threat;
- And even those who have come directly but have not applied 'without delay' with a good reason for their illegal entry or presence.

Those arriving in the UK in small boats have obviously *not* come *directly* from a country where their life or freedom was under threat. Most of them have come to the UK via France, a 'safe' country. It is virtually impossible to reach the UK *directly* in a small boat from Syria, Iran or Eritrea.

So, the allegation that the new law constitutes a breach of the Refugee Convention can often be simply false.

Rights vs Rights

It cannot be stressed enough that every human rights case involves rights on both sides: Rights vs Rights. The rights balancing those of a human rights claimant are not confined to those of the opposing party in the lawsuit in question but must always also include the human rights of the mass of law-abiding members of society. This important aspect of human rights is not always recognised by the courts.

A persistent problem with illegal migration is the number of clandestine entrants concealed in goods trucks, with or without the knowledge of the drivers. The Immigration and Asylum Act 1999 tackled this serious (and ongoing) problem by introducing a code of practice for all road hauliers or carriers, with tough penalties for breaches. A challenge to the lawfulness of the scheme was upheld by a High Court judge, who declared that the legislation was incompatible with the carriers' right to a fair trial under ECHR Article 6. This decision was upheld by a majority (two to one) in the Court of Appeal.

One of the majority, Simon Brown LJ, concluded: 'I have come to regard this scheme as, quite simply, unfair to carriers.' He admitted unapologetically that this amounted to judicial activism: 'Constitutional dangers exist no less in too little judicial activism as in too much' (para 54).

Yet, in another case, this same judge cited this dictum from the Strasbourg court's judgment in *Sporrong & Lönnroth v Sweden* (1982) 5 EHRR 35:

> 'The Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention.'

Laws LJ cited this in his sharply dissenting judgment, together with holding that striking this balance was a matter for Parliament, to which deference had to be paid.

The Court of Appeal's majority decision scuppered the Blair Administration's robust statutory scheme for curbing the smuggling of illegal migrants in trucks. Though it was a prime candidate for revocation by Parliament, nothing was done.

This case is one example out of many of the failure to apply either of the two basic principles necessary for success in any human rights case: the principle of Rights vs Rights coupled with that most fundamental of all British constitutional principles, the Sovereignty of Parliament.

1.2. The way ahead with illegal migration

With the Illegal Migration Bill finally passed after some bruising contests between the two Houses of Parliament – and a serious setback in Court – it is possible to look ahead to what the future is likely to hold.

End of the road for the Rwanda policy?

> '[R]wanda is a "safe third country" for Article 3 purposes, [and] it follows that the various policies that enable the Home Secretary to send migrants there are not unlawful…'.

This is the conclusion of Lord Chief Justice Burnett in the Court of Appeal, agreeing with the two-judge Divisional Court (the High Court) in *R (AA) v Secretary of State for the Home Department* [2023] EWCA Civ 745. The case involved 10 single men who, having arrived in the UK irregularly by small boats, claimed asylum and were then ordered by the Home Secretary to be removed to Rwanda. But the Lord Chief Justice was in a minority in the Court of Appeal, the two-judge majority holding that the Government's policy of deportation to Rwanda is unlawful.

Who was right, the two Court of Appeal judges who found against the Government, or the three senior judges (including the Lord Chief Justice) who upheld the Government's policy? In upholding a democratically endorsed Government policy and in not being in breach of ECHR Article 3 or the Refugee Convention, I believe that the Lord Chief Justice and the Divisional Court (the High Court) and the Lord Chief Justice were right. A member of the Divisional Court, Swift J, the Head of the Administrative Court, also made the trenchant point that the risks posed to refugees are 'in the realms of speculation' [*R (AA) v Secretary of State for Home Department* [2022] EWHC 3230 (Admin)]. The Government has lamely indicated they will appeal the highly controversial and far-from-unanimous Court of Appeal decision to the UK Supreme Court. Why? With both a democratic mandate and human rights law on their side, the obvious solution is not to appeal to yet another group of unelected and unaccountable judges but simply to *revoke* the Court of Appeal decision.

Revocation: 'Any judicial decision can be revoked by Parliament through a statute' (Lord Neuberger, 2017, as quoted on pages 41 and 42). This nuclear weapon in

Parliament's arsenal is surprisingly unknown to many politicians and lawyers. Yet it is not an exceptional power but an integral part of parliamentary sovereignty, the bedrock principle of the British constitution. It also does not depend on the judicial decision in question being 'wrong' in any sense. And it is applicable to a decision of *any* law court, including the UK Supreme Court. It also does not depend on the judicial decision in question being only a majority decision (as distinct from one where the court in question is unanimous). In fact, in the two best-known cases, the judicial decision that was revoked was almost certainly legally correct. And both revoked judicial decisions were judgments of the House of Lords, then the highest court in the land. These cases were *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87 (revoked by the Trade Union Act 1913), and *Burmah Oil v Lord Advocate* [1965] AC 75 (revoked by the War Damage Act 1965). As even this latter case is now more than half-a-century old, it may well be asked whether the power of revocation is still available. As Lord Neuberger indicated (see above), the answer is that this important power is still very much alive and well.

An interesting recent application of it occurred in relation to a more recent House of Lords decision, *YL v Birmingham City Council* [2007] UKHL 27, in which a three to two majority decision of the House of Lords (as a court) was revoked by Parliament. An elderly resident placed by Birmingham City Council in a privately owned care home was given only 28 days' notice to leave. A majority in the House of Lords dismissed the human rights claim of the elderly lady concerned, holding that a private care home providing care and accommodation under contract with a local authority was not exercising 'functions of a public nature' within section 6(3)(b) of the HRA. The court decision was revoked

by Parliament by section 145 of the Health and Social Care Act 2008, which provides that private care homes in such circumstances are indeed exercising 'functions of a public nature', thus protecting the human rights of residents of such care homes like YL. If ever there was a judicial decision crying out for revocation, it is the two to one majority Court of Appeal ruling on Rwanda discussed above.

ECHR Article 3: Much of the criticism of the Illegal Migration Bill in the House of Lords was based on the assumption that the UK is obliged by that article to ensure that no deportee is 'subjected to torture or to inhuman or degrading treatment or punishment' when removed to their country of origin or any third country. This is a misinterpretation of the article. ECHR Article 1, which governs all the substantive articles, provides that the signatory states of the ECHR, including the UK, 'must secure to everyone *within its jurisdiction* the substantive rights and freedoms' in the remaining articles of the ECHR. The UK must not allow anyone to be tortured in the UK or in any territory controlled by the UK, but not in any foreign country. See *Al-Skeini v UK* [Application No. 55721/07 (2011)] (see the discussion on page 21).

Refugee Convention Article 31: This begs the question: what right does the UK have to deport or remove anyone to a third country in the first place? The Refugee Convention itself, so often used to argue against the deportation of illegal migrants, actually makes it clear in Article 31 that it only protects against 'penalties' for those illegal migrants who are:

> 'coming directly from a territory where their life or freedom was threatened…present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

Those arriving in the UK in small boats clearly do not fulfil these conditions. So, the allegation that the new law constitutes a breach of the Refugee Convention is essentially false (see the discussion on page 25).

Refugee Convention Article 33: This article provides that:

> 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

Between 2005 and 2013, successive UK governments went to inordinate lengths to secure assurances from a number of countries that nationals of theirs deported back to them would not be subjected to torture or ill-treatment. This policy, known as 'Deportation with Assurances' (DWA), was under constant attack and the government suffered a number of setbacks in the UK domestic courts – perfect targets for *revocation*, which were never revoked. Instead, the policy was effectively abandoned, though it is an excellent solution to the problem of Article 33 and also goes well beyond the UK's obligation under ECHR Article 1 (discussed on page 20). In the recent litigation on Rwanda, Swift J, the head of the Administrative Court, made the trenchant point that the risks of removal to Rwanda to illegal migrants arriving in small boats are 'in the realms of speculation'. [*R (AA) v Secretary of State for Home Department* [2022] EWHC 3230 (Admin)].

It is also worth adding that Article 33 protection does not extend to terrorist suspects. Yet. as Lord Carlile, the former terrorism watchdog observed: 'The Home Office is chaotically incompetent to remove people who should not be here, starting with suspected terrorists.'[20]

ECHR Article 34: This is a new candidate for attacks on Government migration policy, the allegation being that it 'allows individuals to bring a case against a government at court in Strasbourg if they haven't received proper redress in that country.' Article 34 is not at all applicable to illegal migrants but is purely for a redress of grievances by citizens and other inhabitants of the country concerned (see the discussion on page 24).

Nearly £6 million a day: At the time of this writing the UK Government is evidently spending nearly £6 million of taxpayer money to house illegal migrants and is planning to expand accommodation facilities for illegal migrants to barracks and barges. This is exactly the opposite of what the Government should be doing. It should be looking to provide less, not more, accommodation for illegal migrants – by allowing as few illegals as possible to set foot on UK soil. This will not only reduce the enormous accommodation bill and the tensions that the presence of illegal migrants inevitably causes, but will also stop the endless litigation that is associated with illegal migration. For an illegal migrant who has not even set foot on UK soil has no rights under UK law (see the discussion on pages 5-7). And those who do manage to enter the UK and take advantage of the UK legal system can be countered by Parliament's use of *revocation*.

1.3. Disruptive protests

The Public Order Act 2023, which received the Royal Assent on 2 May 2023, toughened up the law against 'disruptive' protests, creating some new offences, including 'locking on', interfering with key national infrastructure, and obstructing transport. It also gives the police greater stop and search powers to prevent disruptive protests, including certain circumstances in which this power may be exercised

'without suspicion' but provided 'a police officer of or above the rank of inspector reasonably believes' that certain offences 'may be committed' in that officer's area, including 'locking on', wilful obstruction of the highway, 'tunnelling', obstruction of major transport works, and interference with key national infrastructure.[21]

The offences of locking on and 'being equipped for locking on' were in force by the time of the Coronation on 6 May 2023, and the police arrested six protestors in Central London for being in possession of 'items which at the time they had reasonable grounds to believe could be used as lock on devices'. The protestors claimed that these items were just straps to hold their placards in place, and, as the police could not prove otherwise, the six were released without charge.[22]

At the time of this writing it is too early to tell how effective the new Public Order Act is likely to be, but pre-emptive 'without suspicion' arrests, which are specifically allowed by the Act, are a useful security measure that could possibly nip in the bud a serious threat to public safety. The fact that such arrests may turn out to have been mistaken, as in the Coronation cases, should not put a damper on their use as a preventative.

A major 'yo-yo case'

It is to be hoped that the new law will prevent a repetition of the major 'yo-yo case' of *DPP v Ziegler & others* [2021] UK Supreme Court 23, a 'yo-yo case' being one where a party wins at first instance, then loses, and finally wins again. The case involved a protest by four people against the Defence and Security International arms fair held at the Excel Centre in East London in 2017. At about nine a.m. they 'locked on' to boxes placed in the middle of the road heading towards

the ExCeL Centre and lay down. After failing to persuade them to move away from the road, the police, who attended almost immediately, arrested them, but it took the police about 90 minutes to disassemble the protestors and clear the road.

The protestors were charged under section 137 of the Highways Act 1980 , which provides: 'If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence.' They were found not guilty by a District Judge sitting at Stratford Magistrates' Court. This decision was reversed by a two-judge Divisional Court of the High Court: [2019] EWHC 71 (Admin). However, the District Judge's decision was restored by a three to two majority in the UK Supreme Court.

The High Court was scathing in its criticism of the District Judge's decision, mainly on the ground that the District judge had failed to balance the protestors' rights to freedom of expression (Art 10 ECHR) and freedom of peaceful assembly (Art 11 ECHR) against the public's right of access to the highway. The High Court also noted that the District Judge had come:

> '…perilously close to expressing approval of the viewpoint of the Respondents (i.e. the protestors), something which (…) is not appropriate for a neutral court to do in a democratic society' (para 116).

Surprisingly, Lords Hamblen and Stephens of the majority on the UK Supreme Court considered that the subject matter of the protest 'was an appropriate factor to be taken into account' (para 82).

This case is worrying, for several reasons:

- Why did this fairly straightforward human rights matter turn into a yo-yo case – or even a double yo-yo case,

which not only went all the way up to the UK Supreme Court but encountered a further split vote there? The reason, as so often in such cases, is the uncertainty of the law.

- More particularly, it is because the rights of the general public were not sufficiently taken into account by the District Judge at first instance, nor by the majority on the UK Supreme Court.
- Rights vs Rights: It should never be lost sight of that every case involves rights on *both* sides.
- In any human rights case, the rights of the person claiming a Convention right must be balanced against the rights of the mass of law-abiding citizens.
- This is particularly the case with articles, like Articles 10 and 11, which have a second paragraph qualifying the rights granted in the first paragraph. The second paragraph in both those articles makes the rights in question subject to certain restrictions (in the case of Article 11):

  > '…as are prescribed by law and are *necessary in a democratic society*, in the interests of national security or public safety, for the prevention of disorder or crime, *for the protection of health or morals or for the protection of the rights and freedoms of others'* (emphasis added).

- Trying to force one's views on others by preventing them from going about their daily business without let or hindrance is not only undemocratic, it is anti-democratic. There are many ways of bringing one's views to the attention of others without disruptive protests. Among other things, one can stand for election, lobby Parliament, advertise, or hold peaceful demonstrations that do not impact on other people's rights.

- And I agree with the High Court that the subject matter of a protest should not enter into the considerations of a court.
- So uncertain is the law in so many areas that not even the seemingly rigorous provisions of the Public Order Act 2023 will be able to prevent a repetition of similar judicial fissures in the future. The only solution is for Parliament to revoke particularly unacceptable court decisions.

1.4. 'I'm All Right Jack'

The 1959 film *I'm All Right Jack* about an industrial strike is now more topical than ever – except that, unlike the situation portrayed in the movie, the present avalanche of strikes is very largely among employees in public or semi-public concerns, including transport, healthcare, education, government, environment, and postal services. Labelled the English disease, or the British disease in the 1960s, it is now an epidemic. Members of the public are often afraid to voice their opposition to all these strikes, even though many of them have been seriously inconvenienced by them. The strikes are taking a toll on the economy and, if strikers' demands for hefty wage increases are conceded, inflation will burgeon.

Contrary to common belief, there is no 'right to strike' in the UK. In fact, under the common law, striking is a breach of contract – entitling the employer to sack the strikers. It was only in 1984, in the Thatcher administration, that a system of secret strike ballots was introduced, by which strikes were legalised. Under the Trade Union Act 2016, passed under David Cameron's Conservative administration, 50 per cent of union members need to vote for a strike ballot to be valid. And in 'important' public services there is, in addition, a

requirement of a 40 per cent threshold of support among all employees eligible to vote. So, if, for example, there are 100 employees eligible to vote, at least 50 of them have to vote and 40 of those have to vote in favour, for a strike to be legal. If, say, 50 voted and 37 voted in favour of striking, a strike would be illegal. The reason for the introduction of the strike ballot in the first place and the tightened up new rules is to prevent trade union leaders from putting undue pressure on their membership to strike. However, even with these new rules in place, there has been a proliferation of legal strikes.

To help solve the problem, in July 2022 new regulations came into force, allowing employers to use agency workers to take over the work normally performed by strikers. However, this measure has not really helped, because many agencies are reluctant to offend trade unions by supplying 'scabs', and potential 'scabs' or 'blacklegs' are hard to find anyway.

So, now the Government's latest gambit is to propose a Strikes (Minimum Service Levels) Bill 2023, to force unionised employees in key public services – including healthcare, education, fire and rescue and border security – to provide a minimum level of service during strikes. But 'minimum service level' is not defined in the Bill, and employers are to decide which employees to place in this unenviable position.

This provision is no more likely to succeed than the agency regulations. The Government seems to be trying to steer a middle course between the trade unions and the right wing of the Conservative Party, but will probably fall between two stools, succeed in offending both and achieve nothing.

It is high time the Government bit the bullet. Instead of trying desperately to appease the demanding strikers, it

should tackle the problem head-on. Before doing that, it should try to win popular support against the strikers by pointing out just how unjustified and how damaging some of the strikes are. Railway strikes, which have been the most persistent, are also among the least justifiable. In 2022 the average train driver salary was £59,000, plus extra for overtime. The average pay for RMT railway members was around £33,000, with station assistants, customer service 'hosts' and cleaners earning less than this average amount.[23]

Hippocratic or hypocritical oath?

Graduates from UK medical schools generally still take a modern version of the ancient Greek Hippocratic oath. In the oath administered by the University of Exeter a medical graduate pledges 'that I will do my best to serve humanity – caring for the sick, promoting good health and alleviating pain and suffering.' The oath is all about service and care. There is no mention at all of remuneration. Another pledge contained in the oath: 'I shall never intentionally cause harm to my patients, and will have the utmost respect for human life.' How is one complying with this oath by walking out on strike?

'Free at the point of use'

A key principle of the NHS since it was first set up in 1948 is that it is 'free at the point of use'. This is not quite true, as it is paid for by the taxpayer. But what it means is that NHS services are a human right for all. Strikes by NHS medical staff should be considered a breach of this human right.

Taft-Hartley Act

Members of the armed forces and police are not allowed to strike. Why not extend this ban to employees in other public services like the NHS and transport? The invariable retort

is: what then about collective bargaining? The answer is that collective bargaining does not have to depend on the treatment of strikes, and the responsibility of public service should include acceptance of a ban on striking.

The US Taft-Hartley Act of 1947, among other things, prohibits federal employees from striking. Federal employees have to take a solemn oath not to participate in any strike against the Government. When about 13,000 air traffic controllers went on strike in 1981, President Ronald Reagan reminded them of their sworn pledge, declared the strike a 'peril to national safety', and gave the strikers 48 hours to return to work or be fired. About 1,300 returned to work, and the remaining 11,345 were not only dismissed but also banned from federal service for life. (The ban was lifted by President Bill Clinton 12 years later.)

This decisive action not only stopped strikes by federal employees but also resonated throughout the private sector, so that the number of strikes plummeted over the years to 17 in 1999 and 11 in 2010.[24]

Rights vs Rights

It would not be easy to pass legislation like the Taft-Hartley Act in Britain, but, as the wave of strikes continues to threaten engulfing the UK economy, and as the palliative measures adopted by the Government are seen to fail, a decisive remedy is called for. As so often, the reciprocal nature of human rights, which has been lost sight of, needs to be stressed. Strikes in public services such as the NHS and transport have a negative impact on the human rights of the mass of law-abiding members of the public, who have the right to go about their daily business without let or hindrance, and, as far as the NHS is concerned, have the right to a 'free' service at the point of use.

2.

A much-neglected solution

The UK courts quite often thwart Government policy on migration, asylum, national security and human rights generally. The Government response is usually either a climb-down, or a cringing statement expressing 'regret' at the court decision, with or without the intention to appeal. As a result, a group of unelected, unaccountable and virtually irremovable judges have become the arbiters not only of government policy but also of legislation passed by Parliament. I do not blame the judges for this, as they have quite frequently filled a vacuum in the law that should have been filled by the legislature, Parliament, which has quite simply been asleep at the wheel for the better part of two centuries.

There are therefore two major problems crying out for urgent attention. First, there is the huge underlying problem of the lack of law that is accessible, intelligible, clear and predictable – Lord Bingham's useful definition of the Rule of Law (as discussed below). This is a mammoth task, which is the responsibility *not* of the judiciary but of the supreme law-making body, Parliament. This means in practice that it is the responsibility of the Government, which is normally formed by the majority party in the House of Commons and generally therefore has a strong hold over Parliament. To characterise this with the much-overused label of the elephant in the room is apt, not only because it is mammoth

(no pun intended) but also because it is hidden in plain sight. It is simply ignored by most judges, lawyers and politicians, and no effort has been made to tackle it.

Secondly, there is the major problem that has arisen out of the humongous underlying problem. Because of some serious gaps in the law and because a large part of the law is affected (in Lord Neuberger's words) by 'a notable degree of disarray and a marked lack of reliable principle', judge-made law has grown, resulting in some pointed disagreements between the different courts and also between judges in the same court, leading to a proliferation of appeals, 'yo-yo cases',[25] injustice, unduly expensive litigation, and yet further legal uncertainty and unpredictability.

Until the colossal underlying problem is solved – which has not yet even been recognised by the Government or Parliament – all that can be hoped for is a quick fix of the resultant secondary problem, judge-made law – by Parliament's using its power to 'revoke', or cancel by legislation, any unacceptable, objectionable or unjustifiable judicial decisions.

What does this have to do with human rights? Everything. Uncertain and unpredictable law results in a breach of the right to a fair trial under Article 6 of the ECHR and of the fundamental human right of equality before the law; and it also impacts on the particular human rights in question in each particular case.

Parliament's power of revocation

'….[A]ny judicial decision can be revoked by Parliament through a statute' – Lord Neuberger (2017).

Revocation is the obvious solution to the numerous court decisions thwarting government policy. So why is it so seldom used?

In a speech given as Attorney General in 2021, Suella Braverman lamented the 'huge increase in political litigation', adding that 'there would be perfectly legitimate instances where the government thinks it worthwhile and important to invite parliament to legislate to overturn individual court decisions.' She supported Dominic Raab's sensible plan (as Justice Secretary) to introduce into Parliament an annual 'Interpretation Bill' revoking a number of objectionable court decisions of the past year – which, unfortunately, was shelved before even having a first reading.

Needless to say, such a Bill would have the self-styled 'liberal' or 'human rights' lobby jumping up and down in fury. But it cannot be too strongly emphasised that Parliament does have the right to revoke *any* court decision, even of the UK Supreme Court, and does not have to give any reason for doing so. The two best-known examples of parliamentary revocation were both decisions of the House of Lords (then the highest court in the land), one being unanimous and the other a majority decision (see below). The court decisions targeted for revocation today arise at a time when the law is uncertain and the judges often at serious loggerheads with one another. Here is the full quotation by Lord Neuberger cited above, from his 2017 Neill Lecture to the Oxford Law Faculty:

> '[I]n a speech concerned with the role of judges under a constitutional system based on Parliamentary sovereignty, it is perhaps appropriate to end with a reminder that any judicial decision can be revoked by Parliament through a statute.'

The two best-known examples of this power of revocation are the Trade Union Act 1913 and the War Damage Act 1965, both of which were passed to overturn a decision by the

House of Lords (then the highest court in the land).

The Trade Union Act 1913 reversed the House of Lords decision in *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87, which had ruled that it was unlawful for trade unions to use members' subscription money for political purposes, notably to fund the Labour Party. This decision was revoked by the government-sponsored Trade Union Act 1913, which allowed trade union political levies – thus giving the Labour Party a much-needed shot in the arm and sounding the death-knell of Asquith's governing Liberal Party. It would have been much more politically astute for the Liberals to leave undisturbed a judicial decision that not only benefited them politically but was also undoubtedly legally correct.

The War Damage Act 1965 was passed to revoke the House of Lords judicial decision in *Burmah Oil v Lord Advocate* [1965] AC 75. During World War II the British Government ordered Burmah Oil to adopt a scorched earth policy to prevent their oil fields from falling into the hands of the invading Japanese. After duly complying with this order, the oil company sought compensation from the UK Government. By a three to two majority impeccable legal decision, the House of Lords held that the UK Government should compensate Burmah Oil for its loss. To save having to pay out, the Government sponsored the War Damage Act 1965, blotting out the House of Lords decision.

Besides revoking the House of Lords judicial decision, the War Damage Act was a retroactive, retrospective or *ex post facto law*, i.e., backdated – another integral aspect of parliamentary sovereignty. Probably the best-known example of a retroactive law is the War Crimes Act 1991, which allowed the prosecution of crimes committed in World War II (1939-45). In fact, until 1793 practically all Acts

of Parliament were retroactive, as they took effect from the first day of the session in which they were passed.

In both the *Osborne* and *Burmah Oil* cases, the court decisions were almost certainly correct, but that did not prevent them from being revoked by Parliament. The present situation is quite different. Government policy, especially in the area of human rights, is being thwarted by court decisions that are *not* legally correct (see the section in Chapter 1, 'Misreading the law'). So why is the Government so afraid to pass legislation through Parliament to revoke them? In 2021, a Government proposal was briefly floated to pass an annual 'Interpretation Bill' to revoke unacceptable court decisions handed down in the past year. The then Justice Secretary Dominic Raab, one of the architects of the new legislation, gave an example of what was intended. Pledging to prioritise free speech over privacy, he remarked:

> 'I think the drift towards continental-style privacy laws, innovated in the courtroom, not by elected lawmakers in the House of Commons, is something that we can and should correct.'[26]

But, just as suddenly as it was floated, it was dropped without trace. Why? Was the Government afraid that it might not have enough support in Parliament to pass the 'Interpretation Bill'? Unfortunately, even some senior Conservatives echo the tired old 'liberal' slogans. Here, for example, is David Gauke, a former Conservative lord chancellor and justice secretary:

> 'If the government is contemplating getting parliament to retrospectively change the law as it has been interpreted by judges, then that would be an extremely worrying step and a departure from the rule of law and the traditions of this country.'[27]

Judge-made law appears to be equated here with the Rule of Law, which is in fact its polar opposite (see below). And, as for tradition, nothing is more in keeping with tradition than the exercise of parliamentary sovereignty in revoking – retroactively if desired – judicial decisions.

Where does this power of parliamentary revocation come from? It is simply an integral part of the principle of the sovereignty of Parliament giving Parliament legislative supremacy. And where does that doctrine come from? In the absence of a written constitution, it has come about by dint of history and practice.[28]

The Sovereignty of Parliament

> 'The English Parliament can do anything except turn a man into a woman or a woman into a man.' – de Lolme (1771).
>
> 'An Act of Parliament can do no wrong, though it may do several things that look pretty odd.' – Chief Justice Holt (1701).

'The Sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions.' (A.V. Dicey, 1885). This is the classic statement of the principle. Dicey did not make this up. In 1689, two centuries earlier, the Earl of Shaftesbury had said virtually the same thing: 'The Parliament of England is that supreme and absolute power which gives life and motion to the English government.'

In his authoritative *Commentaries on the Laws of England*, first published in 1765, Sir William Blackstone waxed lyrical on the subject:

> '[Parliament] hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or

> temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms....It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo…'

A more succinct and jocular version of this was penned by Blackstone's contemporary Jean-Louis de Lolme: 'The English Parliament can do anything except turn a man into a woman or a woman into a man.'[29] Since the passing of the Gender Recognition Act 2004, even this exception has fallen away.

Like so many British institutions, the principle of the Sovereignty of Parliament came about as a result of history and practice rather than by dint of some theoretical rule.[30] In common with other European monarchies, sovereignty in England was originally vested in the Crown, which combined executive, legislative and judicial functions. But, as a result of the drain on resources occasioned by the Hundred Years' War, followed by the protracted Wars of the Roses, the Crown became increasingly dependent on Parliament for supplies, giving Parliament a reciprocal growing power to demand redress of grievances.

Until the mid-fifteenth century Parliament's role was reflected in the enacting formula: 'Be it enacted by the King's most Excellent Majesty, by and with the advice and consent' of both houses of Parliament. From this period onward, the phrase 'and by the authority of the same' (viz. of Parliament) was tacked on to the enacting formula to indicate that Parliament was now not only consenting to the legislation in question but was actually instrumental in authorising it.

Henry VIII's reliance on Parliament to pass his far-

reaching Reformation legislation strengthened it against his successors, until it erupted into civil war between King and Parliament a century later, leading to the abolition of the monarchy and the execution of Charles I. Though the monarchy was restored, it was on terms laid down by Parliament, as became clear after the so-called 'Glorious Revolution' of 1688-89, by which the Sovereignty of Parliament was finally established.

Some red herrings

Crown in Parliament: The Sovereignty of Parliament, or, more formally, the sovereignty or supremacy of the Crown in Parliament, is still generally recognised as 'the bedrock of the British constitution'.[31] Why 'Crown in Parliament'? Simply because parliamentary sovereignty is exercised through the enactment of statutes, which, in addition to being passed by (with a few exceptions) both Houses of Parliament, need the formality of *royal assent*. (Though the monarch has the theoretical right to veto legislation, the last time this was done was by Queen Anne in 1708.)

A non-exception: No Parliament can bind a future Parliament. This is commonly flagged up by academic commentators as an 'exception' to parliamentary sovereignty. It is no such thing. It is in fact an integral part of parliamentary sovereignty. Because, if the Parliament of 2023 could set VAT at, say, 22 per cent and stipulate that this was to be 'forever', the Parliament of 2025 would not be able to change it to any other level – and that would deny the Parliament of 2025 the legislative supremacy that every Parliament enjoys. Parliamentary sovereignty means simply that every Parliament has complete freedom to make and unmake *any* laws it likes.

Red herring turning into a piranha: There have been a number of attempts to challenge the doctrine of the Sovereignty of Parliament, but none of them will stand up to scrutiny. In *Jackson v Attorney General* [2005] UKHL 56, two radical judges challenged the principle of the Sovereignty of Parliament.

Here is Lord Hope:

> 'Parliamentary sovereignty is no longer, if it ever was, absolute…It is no longer right to say that its freedom to legislate admits of no qualification whatsoever… The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.'

This is a disquieting example of judicial activism, or even judicial supremacism. Viewing judges as having 'ultimate' power is not only a usurpation of Parliament's legislative supremacy but is also an example of the mistaken identification of the Rule of Law with the rule of judges.

Similarly, Lord Steyn:

> 'In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether there is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.'

This idea, floated by a few 'liberal' lawyers and judges, had already been conclusively scotched by centuries of history. Lord Reid put it like this in 1969:

> 'It is often said that it would be unconstitutional for the UK Parliament to do certain things, meaning that moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. *But that does not mean that it is beyond the power*

of Parliament to do such things. If Parliament chose to do any of them, the courts would not hold the Act of Parliament invalid.'[32]

'Entrenched laws': The Steyn passage quoted above ties in with the same judge's pet idea that certain Acts of Parliament, including the Human Rights Act 1998, designated by him, 'constitutional statutes', were 'entrenched' and thereby acquired 'higher law status', the judicial approach to which had to be less strict than to 'ordinary' statutes. He was stung to the quick by a senior barrister, who in a letter to *The Times* claimed, perfectly correctly, that the status of the Human Rights Act was no higher than that enjoyed by the Dangerous Dogs Act 1991. Lord Steyn parried this with the irrelevant remark that the Dangerous Dogs Act had been 'widely condemned as an appallingly badly drafted piece of legislation.' The barrister concerned had presumably deliberately picked a trivial and much-criticised law to ram home the important truth that under English law all statutes are of equal status.[33] As for Lord Steyn's suggestion that judges should interpret the Human Rights Act less strictly than 'ordinary' statutes, if that was intended to suggest that human rights claimants should be given preferential treatment over those opposing their claims, that is another serious fallacy, namely the failure to recognise that there are always conflicting rights on both sides of any dispute (see the section in Chapter 1.1, 'Rights vs Rights').

Separation of powers: Though Parliament (made up of the House of Commons and the House of Lords) is essentially a legislature or law-making body, it is, in Dicey's words, 'an absolutely sovereign legislature' with priority over the two other branches of government, namely the executive government (made up of the Prime Minister, Cabinet and other Ministers) and the judiciary, made up of the courts and

judges of various degrees. What then of the doctrine of the 'separation of powers'? The short answer is that it exists in the UK Constitution only to a limited extent. However, even some very senior judges have expressed a demonstrably erroneous view of it.

Lord Diplock asserted that:

> '…it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interprets them'.[34]

There can be no quarrel with this delineation of the dividing line between the functions of Parliament and the judiciary, but characterising the British constitution as 'firmly based on the separation of powers' is completely unfounded.

A far more fallacious view was propounded by Nolan LJ (later Lord Nolan) in *M v Home Office* [1992] QB 270:

> 'The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.'

This purported definition is particularly worrying in a senior judge in failing to recognise that dictating to the executive 'what its lawful province is' is *legislation*, a power reserved to Parliament, not the judiciary.

A proper description of the British version of the separation of powers was expressed by Lord Mustill in *R (Fire Brigades Union) v Home Secretary* [1995] 2 AC 513:

> 'It is a feature of the peculiarly UK concept of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws

> it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see that they are obeyed.'

Checks and balances: Going hand in hand with the separation of powers are 'checks and balances'. Parliament has the ultimate check on the judiciary through the power to revoke any judicial decision (see above). And the judiciary use (and in fact overuse) judicial review as a check on the executive (see below). But what power does the executive have to check the judiciary? Until 2006 the judges were appointed by the executive (nominally by the Crown), but are now made by a 15-member body called the Judicial Appointments Commission, six of whom are judges, two lawyers and one a lay magistrate or tribunal member, with six (including the Chair) lay members. Twelve of the 15 members are appointed 'through open competition', but it is by no means clear how this 'open competition' works or who runs it. This far from transparent system gives UK judges even less democratic credentials than before. In the US, by contrast, state judges are mostly directly elected, and federal judges are appointed by the democratically elected President, subject to confirmation by the democratically elected senate.

'Elective dictatorship': The term 'elective dictatorship', coined by (the former and future Lord Chancellor) Lord Hailsham in 1978, refers to the fact that Parliament tends to be dominated by the executive government. This situation arose, like so many features of the British constitution, as a result of history and practice. In theory the King can appoint anyone he likes as Prime Minister. But that person will not be able to form a workable government unless they can

command a majority in the House of Commons to enable them to pass their Budget and put their programme on the statute book.

The lesson took a long time to sink in. In 1834, when William IV, thoroughly sick of the Whig government, invited the Tories, first under the Duke of Wellington and then under Sir Robert Peel, to form a government, it did not work out, because the Tories did not have a majority in the House of Commons. On six occasions Peel tendered his resignation to the King only to have it thrown back in his face every time. Not privy to these backstairs goings-on, *The Times* commented that Peel possessed every virtue of a statesman except the virtue of resignation. Eventually, after four months of this, the King accepted Peel's resignation and appointed the Whig leader, Lord Melbourne, as Prime Minister. It took some time, likewise, for Queen Victoria to understand the need to appoint as Prime Minister the leader of the majority party in the House of Commons, which is now a firm constitutional convention.

Parliament (or at least the House of Commons) is the only one of the three branches of government that is elected. As the Executive emerges from Parliament, drawn from the majority party in the House of Commons, it is indirectly accountable to the electorate. But the judiciary has no democratic credentials whatsoever, being unelected, selected in a non-transparent process (see above), totally unaccountable to the electorate, and (in the High Court and above) virtually irremovable. The fact that, in practice, Parliament tends to be steered by the executive does not affect the democratic nature of Parliament. The Sovereignty of Parliament has been aptly characterised by Lord Wilson of the UK Supreme Court as a 'precious constitutional principle, emblematic of our democracy.'[35]

Lord Hailsham used the term 'elective dictatorship' to lambast the Labour governments of Harold Wilson and James Callaghan, which, despite a tentative hold on the Commons, managed to pass a large amount of legislation. Wilson had a slender majority of three in his second administration, and Callaghan was forced to enter a 'pact' with the Liberals to stay in power, the so-called 'Lib-Lab Pact'. However, once the pact ended and Callaghan's government was in a minority, he lost a vote of confidence in the Commons and had to call a general election, which he lost to Margaret Thatcher's Conservatives, consigning Labour to 18 years in opposition.

Critics of 'elective dictatorship' claim that the British system has a 'democratic deficit'. The first-past-the-post electoral system, on which it is based, is certainly open to criticism, though it is a moot point whether it is less democratic in practice than the weak and short-lived coalition governments generally produced by its alternative, proportional representation.

Revoking court decisions and reasserting the Sovereignty of parliament

The power of Parliament to revoke any court decision for any reason is firmly based on the Sovereignty of Parliament, the bedrock principle of the UK Constitution. It is particularly relevant in the field of human rights as a solution to the serious inroads made by the courts not only on Government policy but also – in the name of 'the Rule of Law' and 'judicial independence' (see below) – on the Sovereignty of Parliament. It is high time that the nuclear power of revocation was used routinely as a corrective to human rights 'mission creep', 'political correctness' and just plain wrong interpretations of human rights law, which, as

explained above, are essentially the result of Parliament's failure to recognise its duty to legislate a coherent set of laws, as, for example, is done by every one of the 50 states of the United States, all but one of which are common law jurisdictions tracing their origins from English law.[36]

With a large part of the law displaying 'a notable degree of disarray and a marked lack of reliable principle' (Lord Neuberger), with human rights law generally suffering from 'mission creep', and with Parliament ignoring these crucial problems, there is an escalation of judge-made law. How does that relate to 'the Rule of Law'?

The Rule of Law

> 'The discretion of judges is the law of tyrants.' – Lord Camden (1766).

Self-styled 'liberal' politicians and lawyers are quick to attack Conservative policies in the name of 'the Rule of Law'. But what they are really defending is not *the Rule of Law* but its polar opposite, *the rule of lawyers* – and judges. The Rule of Law was originally conceived of as a counterblast against and substitute for the arbitrary rule of human sovereigns. The American Founding Fathers fondly believed that the carefully crafted US Constitution would 'rule', thus protecting the liberty of individual citizens against the encroachments of government.

This was expressed in the slogan: 'A government not of men but of laws.' An early wag retorted: 'A government not of laws but of lawyers.' He was right. US Chief Justice John Marshall's 'twistifications' and his decision in *Marbury v. Madison* (1803) turned the US Constitution (in the words of Thomas Jefferson) into 'a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form

they please.' How prophetic that turned out to be in regard to the US Supreme Court (though the law of the individual 50 states that make up the US is largely free from judge-made law).

In England, Lord Chancellor Camden made a similar point:

> 'The discretion of judges is the law of tyrants. It is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion – in the best it is oftentimes caprice: in the worst it is every vice, folly and passion to which human nature is liable.'[37]

Back then English law was largely free of judge-made law. The situation is very different today, when the decisions of the English High Court, Court of Appeal and the UK Supreme Court are seriously tainted by judge-made law – amounting to a denial of the Rule of Law.

In 2003 Australian High Court Justice Dyson Heydon stated succinctly that 'judicial activism' (including judge-made law) 'tends to the destruction of the rule of law.' In his book on *The Rule of Law* (2010) former Chief Justice of England Lord Bingham summarised the Rule of Law as: 'The law must be accessible and so far as possible intelligible, clear and predictable.'

English law fails dismally on all these counts. In a 2017 speech, Supreme Court President Lord Neuberger admitted that: 'Analysis of tort cases appears to demonstrate a notable degree of disarray and lack of reliable principle.' Tort is by far the biggest category of civil cases, including not only negligence and all road traffic cases, intentional torts such as trespass to the person (assault as tried in a civil court), the whole huge area of vicarious liability (where an employer or other authority is held liable for the actions of employees

or agents), and defamation. As if this were not enough, my *Anglo-American Law: A Comparison* (2019), reveals that the same serious problems of disarray and lack of reliable principle also affect other branches of the civil law. (Criminal law is more coherent – because it is largely statutory and at least partially codified.)

Disarray and lack of reliable principle mean that the law lacks clarity, intelligibility and predictability – the key ingredients of the Rule of Law. 'Disarray' means disorder, so it is just a nice way of saying that the law is in a mess. And in the absence of principle, lawsuits are decided by judicial 'policy' (sometimes referred to as 'public policy', but not to be confused with government policy), a euphemism for judges deciding cases on the basis of their own predilections. Law lacking in principle is judge-made law, the very antithesis of the Rule of Law.

What has all this to do with Human Rights? It means essentially that when you go to court in a civil lawsuit you are rolling the dice, because the law is so uncertain. And that means that you are denied the fundamental right of a fair trial enshrined in Article 6 of the European Convention on Human Rights (ECHR). And the fundamental human rights contained in the remaining Articles of the ECHR are no more definite.

Lord Bingham's definition of the Rule of Law places predictability up there with clarity and intelligibility. This follows the 'prediction theory' of the famous American Supreme Court Justice Oliver Wendell Holmes Jr. A law is unpredictable if there is no single agreed interpretation of it, resulting in injustice, and again a denial of rights under Article 6 ECHR.

English law also fails on 'accessibility', which is placed in

prime position in Bingham's definition of the Rule of Law. Lord Bingham explained:

> 'If everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.'

As a practising barrister, I have often had to advise clients myself that, though in my opinion their case was meritorious, there was no guarantee that they would win. And, because of the punitive 'English rule', under which the loser pays the winner's costs, it may be more prudent to hold off rather than to risk litigation that may cost you your life savings. Also, because of the uncertainty of the law, there are a good number of cases where one party wins at first instance and again on appeal, only to lose on final appeal – making it liable for the other side's legal costs (as well as its own); all the way up and all the way down. And then there are surprisingly frequent yo-yo cases, in which one party wins at first instance, loses on appeal and then wins again on final appeal. Because of the uncertainty of the law there are more and more appeals, brought on the assumption: 'Well, we've lost here but there's a good chance we'll succeed on the next throw of the dice.'

Disagreements between judges, though couched in polite terms, are often quite extreme. But feelings sometimes run so high that the kid gloves come off, revealing an iron fist underneath. Here are a few examples of both types of radical disagreement:

- **'The Court of Appeal misunderstood the law':** In a case on vicarious liability (see below) 9,263 employees sue Morrisons supermarket and win in the High Court

and in the Court of Appeal but lose on final appeal to the UK Supreme Court. Not only did the UK Supreme Court reverse the decisions of the lower courts but it also took the opportunity to berate the decision of the four judges involved (three in the Court of Appeal and one in the High Court): 'The judge and the Court of Appeal misunderstood the principles of vicarious liability'. An internal auditor of Morrison's engaged in a vendetta against the company had deliberately uploaded the payroll data of 99,000 employees to a public website. The 9,263 claimant employees sued Morrisons on the basis of *vicarious liability*, claiming that the company as employer was legally liable for the auditor's wrongdoing (in addition to the auditor himself, who was jailed for his pains).[38]

- **'The majority rewrote the law':** A journalist sought disclosure of letters written to the Government by the then Prince of Wales (now King Charles III). By a majority of three to two the UK Supreme Court upheld the decision of the Court of Appeal, which had itself affirmed the decision of the Upper Tribunal to allow disclosure. In a strong dissenting opinion, Lord Wilson pointed out that in reaching its decision the majority, following the Court of Appeal,

  > 'did not in my view interpret section 53 of the Freedom of Information Act. It rewrote it. It invoked precious constitutional principles, but among the most precious is that of parliamentary sovereignty, emblematic of our democracy'.

  Lord Hughes similarly:

  > 'The rule of law is of the first importance. But it is an integral part of the rule of law that courts give effect to Parliamentary intentions. The rule of law is not the

> same as a rule that courts must always prevail, no matter what the statute says.'[39]

In fact, the UK Supreme Court decision allowing disclosure had already been consigned to the shredder by a 2011 amendment to section 37 of the Freedom of Information Act 2000 by granting an absolute exemption from disclosure to communications with the Sovereign, the heir to the throne and the next in line. This is essentially a 'revocation' of the UK Supreme Court majority decision under the fundamental constitutional principle of the Supremacy of Parliament.

- **'Procedural' vs 'substantive' fairness muddle:** A former foreign student's application for leave to remain in the UK was refused because his employment sponsor's licence had been revoked. The courts got themselves in a real muddle over whether the Home Secretary should have informed the applicant about this revocation, and, if so, whether the applicant should have been given adequate time (he was requesting 60 days) to find a new sponsor. It all hinged on whether the Home Secretary's duty to inform the applicant was a matter of 'procedural fairness' or 'substantive fairness', neither term having any statutory definition or existence.[40] This case is just one of many illustrating the complexity of the Points-Based System (PBS) for immigration.
- ***Nemo judex in causa sua.*** This ancient Latin maxim is a fundamental principle of natural justice, meaning, 'Nobody should be a judge in his own cause.' In 1998 the retired Chilean dictator Augusto Pinochet was arrested while on a visit to Britain and brought to court to face an extradition claim by a Spanish judge on charges of serious human rights violations. The

extradition case went all the way up to the House of Lords (then the highest court in the UK), which found against Pinochet, by three votes to two. The majority included Lord Hoffmann, who turned out to have links to Amnesty International, represented at the hearing as an intervener against Pinochet – which ought to have disqualified Lord Hoffmann from sitting. In an unprecedented move, the decision was set aside and there was a rehearing by a different panel of law lords. Lord Hope held:

> 'In view of his links with Amnesty International as the chairman and director of Amnesty International Charity Ltd he could not be seen to be impartial. There has been no suggestion that he was actually biased.'

Lord Hutton said of the connection to Amnesty International:

> 'which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand.'

Lord Browne-Wilkinson remarked: 'In my judgment, this case falls within the category of cases… where the judge is disqualified because he is a judge in his own cause', amounting to 'automatic disqualification.' 'By seeking to intervene in this appeal and being allowed so to intervene, in practice Amnesty International became a party to the appeal.'[41]

One can only wonder why Lord Hoffmann did not realise that the demands of natural justice required him to recuse himself from sitting in this case.

- **Privacy – 'Signal shortcoming in our law':** When the well-known television actor Gorden Kaye suffered brain damage after being struck on the head by a piece of wood crashing through his car windscreen, he was visited in hospital by a journalist and a photographer from the *Sunday Sport* newspaper, posing as hospital orderlies. They proceeded to interview him and take pictures of him with his head swathed in bandages, ostensibly with Gorden Kaye's consent. It emerged that he was in no fit state to give informed consent, and he then obtained an injunction from the High Court to stop publication of the interview and photographs. This injunction was reversed on appeal to the Court of Appeal (except for a prohibition on the newspaper's claiming that Gorden Kaye had given his consent to the interview and photography). In an impeccable judgment, Glidewell LJ held that:

  > 'It is well known that in English law there is no right to privacy, and accordingly there is no action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.'

  Leggatt LJ added a similar earnest entreaty for Parliament to act:

  > 'The right to privacy has so long been disregarded here that it can be recognised now only by the legislature… It is to be hoped that the making good of this signal shortcoming in our law will not be long delayed.'

  And what response did Parliament give to these urgent entreaties? None at all.[42]

- **Privacy – 'Mission Creep':** After having no protection for privacy at all, English law has in some respects now taken a major leap to the other extreme – as a result of judge-made law. It is now possible to obtain a secret 'super-injunction' to prevent publication of embarrassing information. Owing to their secrecy, the Neuberger Committee set up to look into the law and practice surrounding 'super-injunctions', reported in 2011 that 'at present, there are records of only a limited number of cases; specific records are not at present kept in respect of such matters.' However, those 'super-injunctions' that have come to light have mostly been taken out by wealthy 'celebrities' to gag the press and other interested parties and have therefore been criticised as contrary to the right of free speech enshrined in Article 10 of the ECHR. On the other hand, privacy has been denied in some circumstances where it would be only fair and just to allow it – as in the case of King Charles III's letters to the Government as Prince of Wales, discussed above.

  Yet, there has been some 'mission creep' in respect of Article 8 of the ECHR, which does not actually protect privacy but only a person's 'right to respect for his private and family life, his home and his correspondence.' An example of this is the case of *Peck v UK* [2003] EHRR 287 (App. No. 00044647/98), where a man's image was captured on CCTV in a public place carrying a kitchen knife and evidently attempting suicide. The local authority operating the CCTV notified the police, who saved the man's life. Part of the footage (but not the part showing the alleged suicide attempt itself) was subsequently broadcast on television and in the press to

demonstrate the efficacy of CCTV. After failing to obtain redress through the English courts, the man took the matter to Strasbourg, which upheld his complaint under Article 8 of the ECHR on the ground that the disclosure of the footage 'constituted a serious interference with the applicant's rights to respect for his private life.'

The UK courts are responsible for 'mission creep' in regard to the law of confidence or confidentiality. In *Coco v A N Clark* [1968] FSR 415, the three elements required for a breach of confidence claim were identified as follows:

> 'First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.'

This has been greatly widened to cover claims of privacy, as explained by David Eady J.:

> 'The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence.'[43]

Here are a few recent cases illustrating the inconsistencies between the courts and also between judges in the same court, resulting in uncertainty, unpredictability and injustice:

- 162 young women (and a few men) sexually assaulted by a doctor hired by Barclays Bank sue the bank. They win in the High Court and Court of Appeal, but lose in the UK Supreme Court.[44]

- A woman raped by hotel employee in Sri-Lanka on a package holiday booked through Kuoni Travel. She sues Kuoni and loses in the High Court and the Court of Appeal, but wins in the UK Supreme Court – though only after a ruling by the European Court of Justice.[45]
- Frail woman of 76 injured when accidentally knocked down in the police chase of a suspected drug dealer. She sues the police and loses in the High Court and in the Court of Appeal, but wins in the UK Supreme Court.[46]

'An unruly horse'

In the absence of reliable principle, certainty and consistency, the courts rely on 'policy' or 'public policy', which, it is important to realise, is not government policy but judge-made law (based on each judge's subjective view of what is in the public interest). But how can an unelected judge be expected to gauge what is in the public interest? And, more particularly, what right do judges have to presume to do so? Is that not a function of the legislature? Sir George Jessel, Master of the Rolls, commented: 'It is impossible to say what the opinion of a man or a judge might be as to what public policy is.'[47]

A long line of judges have issued stern warnings against the judicial use of arguments from public policy. Famously, Burrough J in 1824:

> 'I, for one, protest… against arguing too strongly upon public policy; – it is a very unruly horse, and when once you get astride it you never know where it will carry you.'

And: 'The argument of public policy leads you from sound law, and is never argued but when all other points fail.'[48] Slightly more recently: 'Public policy is a high horse to mount, and is difficult to ride when you have mounted it.'[49]

In short, policy or public policy, when used in reference to a judicial decision, means no more and no less than the personal opinion of the judge concerned, or judge-made law – which amounts to an infringement of parliamentary sovereignty or legislative supremacy.

Why not make a clean break, replace the Human Rights Act 1998 with a home-grown British Bill of Rights and Duties, and pull out of the Council of Europe and the ECHR? This has long been mooted in certain circles. But, even if an alternative to the HRA could be enacted, the possibility of 'mission creep' on the part of the courts would rear its head again.

Quick fix

The best way of solving this mammoth underlying problem is by means of codification, meaning the compilation by Parliament of a clear, coherent and unified statutory set of laws based on the already existing statutes together with the established principles of the common law. Lip-service has long been paid to the need for codification, and the Law Commissions Act 1965 specifically stipulates that:

> 'It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including *in particular the codification of such law*…' [50]

It is now over half a century since the two Law Commissions (one for England and Wales and the other for Scotland) were established, yet there is still no codification of the law, only some tinkering around the edges. Codification has to be implemented by Parliament, and it is obviously never going to happen unless Parliament adopts a much more proactive role than it has done up to now.

Even if codification were seriously pursued, it would take years to complete. So, a more immediate quick fix is needed to shore up parliamentary sovereignty and establish the Rule of Law, as against the rule of lawyers and judges. The most direct way of achieving this is by means of Parliament's power of revoking court decisions by statute.

3.

‘Nonsense upon Stilts’

> ‘Natural rights are simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts’ – Jeremy Bentham.

Do you have the right to spit in public? It’s a filthy and unhygienic habit, but, unless it is specifically forbidden by law (as it has been in different places from time to time), you do have that right, and spittoons were once provided as a matter of course by innkeepers and publicans. Before the advent of human rights laws and conventions, which are now burgeoning, the whole of English law operated on the same basis: unless a particular practice or activity was expressly prohibited by law it was permitted, which meant that you had the right to engage in it. For example, until 1920, when possession of cocaine was first criminalised, there was nothing to stop you from buying and using it. In a word, when it came to rights, English law was traditionally *negative*, or what would now be termed ‘libertarian’.

By contrast, the European Convention of Human Rights (ECHR), to which the UK became a signatory in 1951, took a positive view of human rights, but its impact on UK law really occurred only half a century later, after the incorporation of (the main articles of) the ECHR into UK law by the Human Rights Act 1998 (HRA).

This sharply polarised UK opinion on human rights, with left-leaning politicians and lawyers being very supportive of the ECHR, and conservative and right-leaning politicians and lawyers evincing a more jaundiced view of it, and even more so, of its supervisory court, the European Court of Human Rights (ECtHR) based in Strasbourg. It is important to note that this body has nothing to do with the European Union but falls under a completely different organisation known as the Council of Europe, a loose umbrella body of 47 states. The UK's continuing membership of the Council of Europe and its relationship with the Strasbourg Court is not affected by Brexit.

One of the most trenchant critiques of the Strasbourg court's approach to the ECHR was penned by Lord Sumption, a retired justice of the UK Supreme Court:

> 'The Convention was originally conceived as a partial statement of rights universally regarded as fundamental: no torture, no arbitrary killing or imprisonment, freedom of thought and expression, due process of law and so on. It was not originally designed as a dynamic treaty. It was the Strasbourg court which transformed it into a dynamic treaty in the course of the first two decades of its existence. Its doctrine has been that the Convention is what it calls a 'living instrument'. The court develops it by a process of extrapolation or analogy, so as to reflect its own view of what additional rights a modern democracy ought to have. Now of course the court would not need to do this if the additional rights were already there in the treaty. It only needs to resort to the living instrument doctrine in order to declare rights which are not there.'[51]

Lord Sumption concludes with these words already quoted in Chapter 1, above:

> '[M]ost of the rights which the Strasbourg Court has added to our law are quite unsuitable for inclusion in any human

> rights instrument. They are contentious and far from fundamental… The result is to devalue the whole notion of universal human rights.'

Lord Sumption aptly labels these extensions of rights by the Strasbourg court as 'a form of non-consensual legislation', or 'mission creep'.

It is too easy to blame outside influences for this unwarranted and undesirable extension of human rights law. Blame could previously be laid at the door of the European Union (EU) with its powerful Commission and Court of Justice (CJEU). But Brexit has all but eliminated that influence. So now the blame tends to fall on the ECHR and the Strasbourg court that ultimately controls it. However, as was shown in Chapter 1, there is no compulsion on the domestic courts to follow the Strasbourg lead, so the responsibility ultimately rests on them and not on Strasbourg.

This opens up the even more fundamental question of the right of judges generally to make law. As quoted in Chapter 1, Lord Sumption puts his very sensible position quite squarely: 'Judges exist to apply the law. It is the business of citizens and their representatives to decide what the law ought to be.'[52]

It is sometimes asserted that judges in England have been making law for 700 years. This is not the case at all, as I show in my *Anglo-American Law: A Comparison*. In fact, until *Donoghue v Stevenson* in 1932, judge-made law was the exception rather than the rule.

'If one step, why not fifty?'

The landmark case of *Donoghue v. Stevenson* [1932] AC 562, decided by the House of Lords (as a court), marks the beginning of the end of an approach to the common law

based on time-honoured principles. Mrs Donoghue claimed to have contracted gastroenteritis from drinking some ginger beer contaminated by a semi-decomposed snail. There was just one small problem: Mrs Donoghue had not bought the ginger beer herself, so could not sue in contract. Lord Atkin came to Mrs Donoghue's rescue with his so-called 'neighbour principle', which brought the case into the realm of the tort of negligence.

It is worth noting that the two Scottish wing-men, Lords Thankerton and Macmillan, who voted with Lord Atkin in allowing Mrs Donoghue's appeal, did not actually do so on the basis of Lord Atkin's 'neighbor principle', which neither of them even mentioned. Another relevant point is the fact that the House of Lords heard the case *on assumed facts*. It was referred back to the Scottish court for a determination of the actual facts, but that hearing never took place. So, to this day we still do not know whether there was a snail in that bottle or not!

Lord Atkin's 'neighbour principle' amounted to a complete departure from the existing principles of law, as Lords Buckmaster and Tomlin were quick to point out in their trenchant dissenting opinions. Lord Buckmaster summed up the proper approach to principle:

> 'The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.'

Lord Buckmaster foresaw that Lord Atkin's frolic would not be the last: 'If one, why not fifty?' Lord Tomlin's rejection of the majority decision was even more pointed: '[T]here is,

in my opinion, no material from which it is legitimate for your Lordships' House to deduce such a principle [as the 'neighbour principle'].'

As Lord Buckmaster predicted, this kind of judicial activism, or judicial supremacism, has prevailed over the older principle-based approach to the common law. After lurching from one unworkable basis to another, the House of Lords finally settled on a threefold test for a duty of care in negligence: proximity, foreseeability and whether it is fair, just & reasonable to impose a duty of care[53] – hardly an objective test.

And now even the key ingredient of *causation* has been dropped as a requirement for a finding of negligence! Lord Neuberger reported this development with no great enthusiasm:

> 'There is no getting away from the fact that one of the most fundamental principles of tort law, causation, is now no longer an absolute principle at all, but must yield to policy'.

This radical departure from principle was based on a three to two decision by the House of Lords in *Chester v Afshar* [2004] UKHL 41 – the two dissenters, Lords Bingham and Hoffmann, being probably the most distinguished members of the court. Lord Bingham characterised the majority decision as 'a substantial and unjustified departure from sound and established principle.' Policy decisions like the majority decision in Chester are a formula for injustice and a breach of the fundamental right of equal treatment before the law.

Until *Donoghue v Stevenson* in 1932, judge-made law was rare. The courts generally based their decisions on well-established principles known as 'maxims'. And since 1932 by no means all judges have been prepared to flout

parliamentary sovereignty by making law themselves. Lords Buckmaster and Tomlin in the snail-in-the-bottle case itself were followed, among others, by Viscount Simonds (Lord Denning's nemesis), as well as by Lord Scarman (in *McLoughlin v O'Brian* [1983] 1 AC 410) and of course Lord Irvine of Lairg. The earnest entreaties to Parliament by the Court of Appeal in Gorden Kaye's case (discussed above) fell on deaf ears, as has Lord Neuberger's recent appeal to Parliament in a 2017 BBC interview, recognising that when Parliament fails in its duty to lay down the law, the judges will be forced to fill the void:

> 'If [the Government] doesn't express clearly what the judges should do about decisions of the European Court of Justice after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do their best. But to blame the judges for making the law when Parliament has failed to do so would be unfair,' he added.

He said all judges 'would hope and expect Parliament to spell out how the judges would approach that sort of issue after Brexit, and to spell it out in a statute.'[54]

'The constitutional imperative of judicial self-restraint'

The most serious departures from principle in favour of judicial policy decisions occur in Judicial Review, which started out as a way for the Crown to get the High Court to review decisions of lower courts. To this day every judicial review case is still listed with the Crown as the (now nominal) claimant. But, far from acting on behalf of the Crown, i.e., the Government, as was originally intended, the powerful guns of Judicial Review have been reversed to attack the government policy and even make inroads on parliamentary supremacy. This whole area of the law is

governed by judicial policy, and many of the cases heard involve political and human rights issues – not least, immigration and asylum claims.

It was to this major development that UK Supreme Court Justice Lord Sumption was referring when he raised the alarm in 2019 over 'our persistent habit of looking for a legal solution to what are really political problems', which democracy demands should be dealt with by the elected political organs of government.

Lord Sumption's concerns about judicial review tie in with the strictures on 'merits reviews' repeatedly expressed by former Lord Chancellor Lord Irvine of Lairg, who advanced a cogent argument in support of the view that the courts should restrict themselves to reviewing the *lawfulness* of an executive decision but should not review its *merits*. His carefully constructed argument is that a 'merits review' violates 'the constitutional imperative of judicial self-restraint'. He identifies three bases of this imperative:

(a) 'A constitutional imperative', meaning that judges should not make law, because that would be a usurpation of parliamentary sovereignty.
(b) 'Lack of judicial expertise', meaning that judges are not qualified to judge the merits of executive decisions, which would normally be taken only with expert advice.
(c) 'The democratic imperative', meaning that elected public and local authorities, and, indirectly, central government as well, derive their authority from their electoral mandate.[55]

It is worth noting that this article was written before becoming Lord Chancellor, while Lord Irvine was a distinguished practising QC who had served as a deputy High Court judge.

As Lord Chancellor and beyond, he remained a champion of parliamentary democracy, in which he was joined by the outspoken academic, Prof. J.A.G. Griffith, whose book *The Politics of the Judiciary* went into five editions between 1977 and 2010. Referring to public law cases in general, Griffith gave this further argument against 'merits reviews' by the courts: 'The idea that judges can be politically neutral in such cases has never been true.'[56]

Ouster clauses

There are few more controversial issues than 'ouster clauses', i.e., provisions in a statute excluding judicial review. The Judicial Review and Courts Act 2022 contains a clause excluding judicial review of the Upper Tribunal's permission-to-appeal decisions. This very limited restriction on judicial review has been upheld by the High Court, but the more extensive ouster clauses contained in the Illegal Migration Act aroused fierce opposition from the outset. The Bar Council's 'Briefing for Peers', for its Second Reading as a Bill before the House of Lords in May 2023, characterised these ouster clauses as infringing 'the constitutional principles of the rule of law and the separation of powers.'

This is not a sustainable objection to the ouster clauses in question. As pointed out above, two of the key requirements of the Rule of Law are clarity and predictability. Judicial review, which is wholly based on policy rather than principle, inevitably results in a lack of clarity and predictability and cannot be equated with the Rule of Law but with its opposite, the rule of lawyers and judges. So, curbing judicial review actually promotes the Rule of Law. As for separation of powers, as demonstrated above, it exists in the British constitution to only a very limited extent. The overriding principle of the British Constitution is the

Sovereignty of Parliament, which means quite simply that what Parliament says (by statute) goes. Even if Parliament actually passed legislation abolishing judicial review, any judge who refused to obey that law would deservedly earn Lord Irvine's rebuke (as shadow Lord Chancellor in 1994) and that would amount to judicial activism and a threatened usurpation of the role of Parliament.[57]

Lord Reid famously expounded the basic principle, as cited earlier:

> 'It is often said that it would be unconstitutional for the UK Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts would not hold the Act of Parliament invalid.'[58]

The Judicial Review of a non-existent decision

What then of the case of *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, which is taken by the courts to mean that an ouster clause in a statute is ineffective if it purports to exclude the judicial review of a particular decision which is found by the court to be wrong. The supposed logic here is that if a decision is wrong, it is *ultra vires*, void or a nullity and therefore non-existent. So, as there is no decision there at all, the ouster clause falls away. This argument is clearly fallacious. It makes no sense to say that a wrong decision is non-existent and then to proceed to review it anyway.

Anisminic Ltd was a British mining company whose property had been sequestrated and nationalised by the Egyptian Government. Anisminic applied for compensation

from the Foreign Compensation Commission, a British government-appointed public body. When their application was rejected by the Commission, they asked the Court to intervene and conduct a judicial review of the Commission's decision. Anisminic won in the High Court, lost in the Court of Appeal and won finally (by a three to two majority) in the House of Lords (as a court) – a classic 'yo-yo case'.

The reason Anisminic lost in the Court of Appeal was because that court followed the clear wording of the statute establishing the Foreign Compensation Commission, namely the Foreign Compensation Act 1950, section 4(4) of which provided: 'The determination by the Commission of any application made to them under this Act shall not be called into question in any court of law.' Four judges (the High Court judge and three law lords) found in favour of Anisminic on the basis that judicial review could not be excluded, while five judges (all three Court of Appeal judges and two dissenting law lords) found against Anisminic on the basis of the clear provision in the statute. Here is how Lord Morris of Borth-y-Gest concluded his dissenting judgment:

> 'In agreement with [the three Court of Appeal judges] I consider that the commission acted entirely within their designated area of jurisdiction. I do not think that their decision or determination is to be jettisoned as being a nullity.'

Likewise, Lord Pearson:

> 'I would say therefore that the commission… did not ask themselves any wrong question or exceed their jurisdiction in any way… [Their] decision was plainly within their jurisdiction, and therefore by virtue of section 4(4) of the Foreign Compensation Act 1950, it cannot be called into question in any court.'

Not only, therefore, did the three law lords forming the majority in the House of Lords base their decision on an illogical argument, and not only were they – plus the first instance judge – outnumbered by a unanimous Court of Appeal (including Diplock LJ, a future distinguished law lord) plus two dissenting law lords, but, more importantly, their decision flew in the face of a clearly worded statute and therefore amounted to an unabashed denial of Parliament's legislative supremacy. This fallacious decision is crying out for revocation by Parliament, and unless this is done it will be used by the courts to thwart the ouster clauses in the Illegal Migration Act and any other legislative attempts to curb judicial review.

As mentioned in Chapter 2, the elephant in the room is the long-term failure of Parliament to legislate a clear, coherent and comprehensive set of laws to enable the Rule of Law to be established in the UK and thereby to discourage judge-made law, which is not only an infringement of Parliament's role but, as we have seen, also tends to lack clarity and predictability and is blighted in some major areas by disarray and a lack of reliable principle.

Natural Law and Natural Rights

The concept of natural rights goes back a long way. The Roman writer, philosopher and statesman Cicero wrote:

> 'True law is right reason in agreement with nature. It is of universal application, unchanging and everlasting. It summons to duty by its commands and averts from wrongdoing by its prohibitions. It has dominion over good men, but exerts no influence over bad men. No other law can be substituted for it, no part of it can be taken away, nor can it be abrogated altogether. Neither the people nor the senate can absolve from it. It is not one thing in Rome and

> another thing in Athens; one thing today and another thing tomorrow; but it is eternal and immutable for all nations and for all time.'[59]

From this concept of natural law came the idea of natural rights, which were likewise seen as immutable, universal and eternal. Both natural law and natural rights were believed to be of divine origin.

There are two big question marks over this natural law/natural rights model. First, what is its content? Despite widespread agreement on the need for such a model and even on its existence, there is no agreement on what it actually embodies. For example, contrary to modern believers in natural law, for whom slavery is anathema, Cicero regarded slavery as part of the natural order of things, though he himself is believed to have treated his slaves well. The second big question that the model raises is: Who is to decide on its content, or, if that is agreed, on its interpretation? This remains the biggest question hanging over the ECHR and all the other rights conventions in the world today.

The chief danger here is the absence of objectivity, which, unfortunately, cannot be guaranteed by entrusting the decision to judges sworn to be impartial. Examples can be multiplied, but suffice it to cite the judgment of that supposed legal luminary, Sir Edward Coke (1552-1634), in *Dr Bonham's Case* (1610). Thomas Bonham, a medical graduate of Cambridge University, was fined and imprisoned by the College of Physicians for practising medicine in London without a licence issued by the College, which had a statutory right to licence anyone wishing to practice as a physician in London. Coke delivered the majority opinion of the Court of Common Pleas in favour of Dr Bonham, employing an argument based on natural law:

> 'And it appears in our books that in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void, for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an Act to be void.'

With this, Coke effectively tore up the two Acts of Parliament giving the College of Physicians the right to licence physicians in London. Were these statutes in any way 'against right and reason, or repugnant, or impossible to be performed'? Not at all. So, on what basis could Coke declare them null and void? Purely because the College of Physicians had the temerity to ban from practice a graduate of Cambridge, Coke's own university; and in his judgment he made no bones about the superiority of Cambridge (and Oxford) to the College of Physicians. In short, Coke's judgment is based purely on bias. What is worse, he attributes to the common law the power to set aside Acts of Parliament – a power that it did not actually have. And worse still, he arrogates to himself (with the aid of some bogus case-law) the power to determine what the common law says.

Dr Bonham's Case was superseded in 1689 by the principle of the sovereignty of Parliament, which would have made short work of Dr Bonham's case, as he was up against two Acts of Parliament giving the College of Physicians the right to supervise the practice of medicine in London.

Why, then, is there still so much interest in that case? Coke was the ultimate judicial activist, or indeed judicial supremacist. Today, very few judges would admit to being activists, much less supremacists. But, as we have seen, Parliament's failure – even in the face of earnest entreaties – to perform its proper function as supreme legislator has created a vacuum into which judges are perforce drawn.

That, however, is not the 'Rule of Law' but the rule of lawyers and judges, contingent by its very nature upon the subjective attitudes and predispositions of the individual judges concerned, no matter how hard they may try to remain objective.

There is still an uneasy relationship between the pragmatic world of positivism and the idealised world of natural law and natural rights. This uneasy relationship is well reflected in the ECHR, by the juxtaposition of the rights of the individual with (in most but not all Articles) restrictions on those rights in the interests of democracy, national security, public safety and the rights and freedoms of others.

The natural rights aspect of the ECHR is shared by most other international conventions of rights, notably the Universal Declaration of Human Rights adopted by the United Nations in 1948, which owes a good deal to the French philosopher Jacques Maritain (1882-1973), who stressed that natural rights are rooted in natural law. Following Aristotle, Cicero and Thomas Aquinas, Maritain saw natural law as unchanging and eternal and based on divine reason, a fundamental precept of which is to do good and avoid evil.[60]

By contrast, the British empirical approach can be traced back to Thomas Hobbes (1588-1679), whose caricature of natural rights is encapsulated in his famous characterisation of the state of nature as a situation in which everyone has a right to do whatever they like, so that human life in the state of nature is 'solitary, poor, nasty, brutish and short' – the alternative to which is the surrender of their rights by individuals to an omnipotent sovereign.[61]

One can draw a straight line from this to the ideas of Jeremy Bentham (1748-1832), who famously ridiculed natural rights: 'Natural rights are simple nonsense: natural

and imprescriptible rights, rhetorical nonsense – nonsense upon stilts.' As a legal positivist, Bentham believed that all rights derive from the state, which made him a passionate campaigner for the codification of law, and he is even credited with coining the verb 'to codify'. In 1811 he wrote to US President James Madison, the author of the US Constitution, volunteering to draft a complete legal code for America, and, when rebuffed, wrote to every state governor with the same offer. Despite rejection, codification did subsequently take off in America, independently of Bentham, through the efforts of David Dudley Field II (1805-94) and his emulators. Meanwhile, Britain has remained resistant to codification, despite a commitment to it in the Law Commissions Act 1965.

The uneasy relationship between positivism and natural rights continues to plague UK human rights law, with no resolution in sight other than the case-by-case power of Parliament to revoke any court decision.

4.

Round-up

1. **Negative Impact:** Illegal migration has a huge impact on the human rights of the mass of law-abiding citizens in a number of respects.
2. **Bogus asylum seekers**: Most boat arrivals are not really fleeing persecution, most being unaccompanied males aged 18-39,[62] and 28 per cent from Albania.[63]
3. **Tip of the iceberg:** Illegal boat arrivals amounted to 45,756 in 2022[64] – a small percentage of the total number of 'unauthorised immigrants' living in Britain, now in excess of the estimated figure of between 800,000 and 1.2 million in 2017.[65]
4. **£500 million to France:** France is to be paid £500 million over three years to help keep illegal migrants from crossing the Channel. But why should France help to keep illegal migrants out of Britain – meaning that they will stay in France? Yet illegal migrants are no more welcome in France than in Britain.
5. **£6 million a day:** The Government is spending £6 million a day to house illegal migrants in hotels, with plans to use barracks or barges instead. Why?
6. **Top priority**: A top priority must be to stop these illegal migrants from setting foot on British soil in the first place.

7. **British patrols:** To achieve this, boats must be escorted back across the Channel and British beaches must be vigorously patrolled.
8. **Offshore applications:** No applications for asylum or visas of any kind should be entertained from people already on British soil. All such applications must be made offshore.
9. **Terrorist suspects**: There are also 19 known and many unknown terrorist suspects at large in the UK.
10. **'Torture trap':** A proper reading of ECHR Article 3 does not make the UK responsible for what happens to deportees back in their homeland or third country.
11. **'Modern slavery trap':** The incidence of 'modern slavery' has been exaggerated. The greatest number of claimed victims are UK residents, while illegal migrants have mostly not been kidnapped but pay thousands for transportation to UK.
12. **ECHR Article 34:** There is no right under this for failed asylum seekers to apply to UK courts.
13. **Refugee Convention:** Article 31 only protects:

    > '…refugees, who coming directly from a territory where their life or freedom was threatened …enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

14. **International treaties and conventions:** Other than ECHR articles incorporated into the HRA, these agreements accord nobody any right to apply to UK courts.
15. **Disruptive protests:** Rights to freedom of expression and freedom of peaceful assembly and association are protected by the ECHR, but they are subject to restrictions,

including protection of the rights and freedoms of the public. This principle of Rights vs Rights is not always accorded the attention it deserves.

16. **'I'm all right Jack':** The time for navigating around this persistent serious problem is over. It is time to ban strikes by employees in public services. The watchword again must be Rights vs Rights.
17. **Hippocratic or hypocritical oath**? The oath taken by graduates of medical schools is a pledge of service and dedication, with no mention of remuneration. As for railway employees, most are paid well above the average wage.
18. **Underlying problem:** Immigration, asylum and terrorism, disruptive protests and strikes all constitute serious legal problems, but they are only part of a huge underlying problem with human rights law generally.
19. **Rule of Law:** With a lack of clarity, predictability and accessibility in UK law, what exists in Britain is not the Rule of Law but its polar opposite, the rule of lawyers and judges, or judge-made law, which is an infringement of parliamentary legislative supremacy.
20. **'Yo-yo cases':** The disarray and lack of reliable principle in the huge area of Tort law, coupled with fundamental disagreements among judges in other areas as well, has led to a proliferation of appeals and 'yo-yo cases', in which one party wins at first instances, loses on appeal and then wins again on final appeal.
21. **Revocation:** Parliamentary sovereignty accords Parliament the right and the power to revoke, i.e., cancel, any court decision for any reason (or none).
22. **Sovereignty of Parliament:** Parliamentary sovereignty has been the bedrock principle of the Constitution since

1689. Some judges' attempts to limit it in some way will not stand up to scrutiny.

23. **Dangerous Dogs Act:** The suggestion that certain Acts of Parliament are 'constitutional statutes' enjoying 'entrenchment' and 'higher law status' has no foundation. No law has higher status than the Dangerous Dogs Act 1991.
24. **Codification:** The 'democratic imperative' demands judicial self-restraint and the codification of the law as called for by the Law Commissions Act 1965, but nothing has yet been achieved beyond some tinkering around the edges. Even if seriously pursued, codification would take years. In the meantime, reliance must be placed on revocation.

Notes

1. *BBC News*, 12 April 2012.
2. UK Border Agency Annual Report 2011-12, HC 344.
3. In 2022 Albanians 'accounted for 28% of arrivals in small boats, which is somewhat less than the one-third suggested by the prime minister.' [BBC News, 8 March 2023].
4. 'Overall, males represented approximately 90% of small boat arrivals in 2021 (excluding arrivals where information on sex was not yet available on the dataset). Three-quarters (75%) of all arrivals were adult males aged 18 to 39.' [Home Office Official Statistics: Irregular migration to the UK, y/e December 2021 (published 24 February 2022).
5. 'Australian offshore asylum system', Factcheck -Channel 4 news, 22 June 2022.
6. *Guardian*, 25 April 2022.
7. *See R v EK* [2018] EWCA Crim 261: While accepting that EK was a victim of trafficking, the Court of Appeal upheld her criminal conviction, adding that she had "reasonable opportunities to extricate herself". The court also expressed scepticism about the value of "human trafficking expert evidence". In *VCL & AN v UK* (2021 -- App. Nos. 77587/12 & 74603/12), the two applicants, aged 15 and 17, both pleaded guilty to drug offences and their appeals were dismissed by the Court of Appeal. Even the Strasbourg Court held that there is no general prohibition on prosecuting victims, or potential victims, of trafficking. But in these two cases Strasbourg held that there had been a "failure to investigate whether the applicants were the victims of trafficking" before being charged, and that the UK had been in breach of ECHR Article 4 (prohibition of forced labour) and Article 6 (right to a fair trial).
8. *Guardian*, 28 March 2023.
9. *Guardian*, 28 March 2023.

10. J. Sumption, *Trials of the State*, 2020, p. 40.
11. 'A British Interpretation of Convention rights', Lecture, 14 December 2011.
12. [2009] UKHL 28.
13. Lord Irvine, 'A British Interpretation of Convention Rights,' lecture at the Bingham Centre, 14 December 2011.
14. J. Sumption, *Trials of the State*, 2020, p. 42.
15. (1996) 23 EHRR 413.
16. *Daily Telegraph*, 9 March 2023.
17. [HRA s. 19(1)(b)].
18. Lord Irvine, 'A British Interpretation of Convention Rights,' lecture at the Bingham Centre, 14 December 2011.
19. *Sky News*, 8 March 2023.
20. *Daily Mail*, 11 April 2023 – see page 8.
21. Locking on involves protestors' attaching themselves to a building, railing, fence or some heavy object from which it is difficult to dislodge them.
22. news.met.police.uk – 8 May 2023.
23. *The Guardian*, 23 June 2022.
24. Joseph A. McCartin,'The Strike that Busted Unions', *New York Times*, 2 August 2011.
25. A 'yo-yo case' is one in which a particular party wins at first instance, loses on appeal and then wins again on final appeal.
26. *The Times*, 6 December 2021.
27. *The Times*, 6 December 2021.
28. See James McConalogue, *The 'rule of the recognised helm': How does EU membership impact upon UK parliamentary sovereignty?* (2018) PhD thesis The Open University.
29. *Constitution de l'Angleterre* (1771).
30. See: Jim McConalogue, Ibid, and *Rebalancing the British Constitution*, 2020.
31. Bingham in *R (Jackson) v Attorney General* [2005] UKHL 56.
32. Emphasis added. *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645.
33. See my *Handbook of Human Rights Law*, p. 67.
34. *Duport Steels v Sirs* [1980] 1 142.
35. *R (Evans) v Attorney General* [2015] UKSC 21.
36. See Michael Arnheim, *Anglo-American Law: A Comparison* (2019).
37. *Hindson v Kersey* (1766).
38. *Wm Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12.
39. *R (Evans) v. Attorney General* [2015] UKSC 21].
40. *R (Pathan) v Secretary of State for Home Dept* [2020] UKSC 41.

41. *In Re Pinochet* [1999] UKHL 1.
42. *Gorden Kaye v Drew Robertson & Sport Newspapers* [1990] EWCA Civ 21.
43. *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB). See also: *Douglas v Hello! Ltd* [2005] EWCA Civ 595; *Campbell v Mirror Group Newspapers* [2004] UKHL 22.
44. *Barclays Bank plc v Various Claimants* [2020] UKSC 13.
45. *X v Kuoni Travel Ltd*. [2019] UKSC 37.
46. *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4.
47. *Besant v. Wood* (1879) L.R. 12 C.D. 620.
48. *Richardson v. Mellish* (1824) 2 Bing 252.
49. A. L. Smith M.R., *Driefontein Consolidated Mines v. Janson* (1901) Times LR vol xvii, 605.
50. Emphasis added.
51. J. Sumption, *Trials of the State*, 2020, p. 40.
52. *Ibid*., p. 42.
53. *Caparo v Dickman* [1990] 2 AC 831.
54. Clive Coleman, 'UK judges need clarity after Brexit—Lord Neuberger', BBC News, 8 August 2017, https://bbc.in/2UriA7o
55. Lord Irvine, 'Judges and Decision-Makers: the Theory and Practice of Wednesbury Review' [1996] *Public Law* 59. At 60-61.
56. 'The Brave New World of Sir John Laws,' *Modern Law Review* 63 (2000) 159.
57. *The Guardian*, 5 March 2004.
58. *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645.
59. De Re Publica.
60. See: *La loi naturelle*, 1951.
61. Thomas Hobbes, *Leviathan.*
62. BBC News, 15 June 2022.
63. *The Guardian*, 5 March 2023.
64. *The Guardian*, 1 January 2023.
65. www.pewresearch.org/global/fact-sheet

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Fixing Human Rights Law by Dr. Michael Arnheim, a practising barrister, Sometime Fellow of St John's College, Cambridge and author of 23 published books to date, provides an overview of what has gone wrong with contemporary human rights legislation – while suggesting 'revocation' by parliament is the best way forward.

Focusing on the solution that any judicial decision on human rights law can be revoked by parliament through a statute, Arnheim considers this weapon in parliament's arsenal is surprisingly unknown to many, hardly an exceptional power, and yet an integral part of parliamentary sovereignty – the bedrock principle of the British constitution.

For Arnheim, human rights law is about everybody's human rights – the human rights of the mass of law-abiding citizens – and not just the rights of the small minority of special interest groups championed by the self-styled 'human rights' lobby.

Arnheim advocates preventing illegal migrants from setting foot on British soil, and proposes that asylum applications must be made offshore. He shows that neither the Human Rights Act nor the Refugee Convention prevents the deportation of illegal migrants.

It also examines public sector strikes, on which Dr. Arnheim argues that contrary to some strike advocates, there is no fundamental right to strike – and yet strikes deny thousands of people their rights to healthcare, travel and simply the right to go about their business without let or hindrance, while seriously impacting the national economy.

The author finds that with an ongoing lack of clarity, predictability and accessibility in UK law, what exists in Britain is not the 'Rule of Law' as is often claimed, but its polar opposite: the rule of lawyers and judges, or judge-made law, which remains an infringement of parliament's legislative supremacy.

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