

## HUMAN RIGHTS AND THE RULE OF LAW IN RENAISSANCE ENGLAND

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¶ 1 The topic of human rights may seem far removed from the territory of the early-modern legal historian. Everyone knows that the United Kingdom did not formally subscribe to human rights until 2001, and the general reaction to the title of this paper has been one of incredulity. Surely there were no human rights in the time of Henry VIII or Bloody Mary? Could anyone in their right mind reconcile the “Henrician despotism” with the rule of law? Your topic, Professor Baker, should not occupy us for many minutes. Well, it depends on whether we regard such concepts as descriptive or normative. It is perfectly possible to find early-modern assertions of many, perhaps most, of the standards or aspirations which have been relabelled in our own time using the terminology of universal human rights. And it is equally possible to find instances in our own time of government activity falling short of those standards, especially when a country is felt to be in danger from hidden enemies. A few years ago I did not think I would live to see common-law countries sanctioning indefinite imprisonment without charge or *habeas corpus*, or their governments killing civilians extrajudicially in non-combat situations. Although such things have returned, and are probably here to stay for some time, the fact that they are controversial nevertheless shows that the old philosophy of the rule of law is not moribund; indeed, it still applies in most everyday situations and is regarded as the ideal. Legal and moral norms are not disproved by showing that in practice they are sometimes ignored or laid aside. It is, therefore, worth exploring the hypothesis that these “human” rights are not such a new departure as is fashionably supposed, but rather an attempt to restate and refine assumptions which have long been present in the common law.

¶ 2 Needless to say, human rights were not known by that name in Renaissance England, nor even in Victorian England. English law was not primarily a law of rights, except in the property sense, though we do begin to hear in Tudor times of the general “rights” of subjects—and it may be noted that some of the earliest references are found, not in subversive literature, but in the legislation of our despotic Henry. For instance, when English law was extended to Wales in 1536, the statute provided that everyone born in Wales should “enjoy and inherit all and singular freedoms, liberties, rights, privileges and laws within this his realm, and other the king’s dominions, as other the king’s subjects, naturally born within the same, enjoy and inherit.”<sup>1</sup> In the seventeenth century the language

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<sup>1</sup> 27 Hen. 8, c. 26 (1536) (Eng.).

of rights became more familiar to lawyers,<sup>2</sup> and was especially favoured by lawyer-parliamentarians resisting the encroachments of prerogative rule under the early Stuarts.<sup>3</sup> The more familiar words “liberties” and “privileges” were fine-sounding enough but had a permissive ring to them, whereas “rights” had a more assertive flavour: liberties were merely allowed, whereas rights were asserted and vindicated. As the threats of absolutism grew stronger under James I and Charles I, the House of Commons began collectively to assert the “rights” of the people,<sup>4</sup> and the terminology of political rights entered the pages of constitutional history in the Petition of Right 1628 and the Declaration of Rights 1689.

¶ 3 It is significant, however, that these ancient rights of which parliamentarians spoke were not universal “human” rights or rights derived from some abstract regime superior to municipal law. They were the rights and liberties of Englishmen, inherited by birth like other forms of franchise or property, guaranteed over the centuries by charters of liberties and statutes of due process,<sup>5</sup> and believed to be superior to such rights as might belong to the peoples of benighted nations. There was little practical reason to reflect upon the universal rights of man in an island which believed its own rights superior to those of mankind in general.<sup>6</sup> Indeed, the “rights of mankind”—as they were usually known until the mid-twentieth century—do not seem to be encountered as such in English common-law sources until the reign of George II, when they surface (somewhat surprisingly) in Lord Hardwicke’s Court of Chancery.<sup>7</sup> They reach the common-law courts in the following reign, when they are said to include freedom from having one’s private papers searched by public authorities;<sup>8</sup> freedom from slavery;<sup>9</sup> and, more controversially, freedom from copyright—a right which, though itself derivable from a natural right to the fruits of one’s labours, inevitably collided with another right of mankind not to be restricted by

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<sup>2</sup> See for example the reference to the “full rights of English-men” in *Le Case del Union d’Escose ove Angletterre*, 1 Moo. 790, 793 (K.B. 1606), *per* Sir Edwin Sandys (amended).

<sup>3</sup> See for example Nicholas Fuller’s remark in 1610 that “the laws of England do as tenderly preserve the right and liberty of the subjects in their lawful and free trades, mysteries, and manual occupations as in their lands and goods.” PROCEEDINGS IN PARLIAMENT, 1610 ii. 152 (E. R. Foster ed., 1966). There are numerous references to rights and liberties in the great debates on the liberty of the subject in the 1628 Parliament.

<sup>4</sup> *Petition of grievances (1610)*, in PROCEEDINGS IN PARLIAMENT, *supra* note 3, at 258-259 (“the indubitable right of the people of this kingdom not to be made subject to any punishment that shall extend to their lives, lands, bodies, or goods, other than such as are ordained by the common law of this land, or the statutes made by their common consent in parliament.”); *Sitting of 28 March 1628*, PROCEEDINGS AND DEBATES ii. 122-123 (“Let it be ordered that it is the ancient and undoubted right of the subjects of England not to be confined to a particular place but by act of parliament.”).

<sup>5</sup> The line of statutes, beginning with c. 29 of Magna Carta, and including the compendious guarantee of 1354.

<sup>6</sup> Those with grievances might see things more broadly. An anonymous Puritan manuscript tract from the time of Charles I identified “nine fundamental rights and liberties” of the Jewish people, including religious and personal freedoms which the author claimed also for Englishmen. J. W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 65 (1955).

<sup>7</sup> *E.g.*, *Roach v. Garvan*, 27 Eng. Rep. 954 (1748), *per* Lord Hardwicke L.C. (sentence of foreign courts conclusive, “otherwise the rights of mankind would be very precarious and uncertain.”); *Earl of Chesterfield v. Janssen*, 1 Atk. 301, 339 (1750) (amended) (“just rights of mankind”).

<sup>8</sup> *Money v. Leach*, 97 Eng. Rep. 1075, 1086 (K.B. 1765), *per* Dunning (amended).

<sup>9</sup> *Somerset v. Stewart*, Lofft 1, 3 (1772), *per* Hargrave (amended).

monopoly.<sup>10</sup> After 1789, thanks to the French revolution and Tom Paine,<sup>11</sup> the “rights of man” became distinctly more sinister and disturbing to the establishment. Indeed, in 1790 Lord Kenyon, C.J. treated an assertion of the rights of man as tantamount to a secession from allegiance to the king’s government.<sup>12</sup> Yet the older sense lived on—introducing a subtle difference between the revolutionary Rights of Man and the more palatable “rights of mankind”—and even the reactionary Lord Eldon, L.C. felt able to refer to the latter with benevolent toleration.<sup>13</sup>

¶ 4 In taking a further step back to the Renaissance period, then, there is obviously no point in looking for any explicit acknowledgment of rights—human or otherwise—for we should only find ourselves trapped in particular corners of property law. What we should look for instead are the underlying, perhaps unidentified, assumptions. There are two basic features of human rights law for which comparisons might be sought in an earlier age. First, there is the substantive content of the corpus of rights as now understood, in the sense of the broad moral or legal assumptions which they represent. Second, and more fundamental from the lawyer’s point of view, there is the notion that some of those rights are (or ought to be) so fundamental that they are somehow entrenched against legislative interference. They represent some kind of higher law, antecedent morally—if not historically—to man-made law, and akin in this respect to the natural law of the Roman and Roman-Dutch jurists and the canonists. A precondition for both of these notions is the existence of a political constitution which embodies or recognises what is commonly labelled the Rule of Law<sup>14</sup>—meaning, in broad terms, that rulers are obliged to govern according to known principles of law and not in a despotic or arbitrary manner. There is a case for saying that none of these three phenomena were alien to English law in the Renaissance period.

### I. *The Rule of Law*

¶ 5 Let us begin with the rule of law, which has been a subject of debate among the constitutional historians of Tudor England.<sup>15</sup> No one questions that England, by the time of Henry VII, was a limited monarchy, which meant that government was conducted according to legal forms and procedures. The king could not change the law or break it.

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<sup>10</sup> *Millar v. Taylor*, 98 Eng. Rep. 201, 231 (K.B. 1769), *per* Yates J.; *Donaldson v. Beckett*, 1 Eng. Rep. 837, 840 (1774), *per* Thurlow (amended) (“An exclusive privilege to exercise a natural faculty, is an encroachment upon the rights of man.”). Copyright, of course, won.

<sup>11</sup> THOMAS PAINE, *THE RIGHTS OF MAN* (1791) was based on the declaration of the “droits de l’homme” by the revolutionary French National Assembly in 1789.

<sup>12</sup> *Ogden v. Follitt*, 3 Eng. Rep. 825, 829 (1790), *per* Lord Kenyon C.J. (amended).

<sup>13</sup> *Wombwell v. Belasyse*, 31 Eng. Rep. 966 (1825) (amended).

<sup>14</sup> The two are linked in the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) (“It is essential . . . that human rights should be protected by the rule of law.”).

<sup>15</sup> The principal contributions are: W. H. Dunham, *Regal Power and the Rule of Law*, 3 J. BRIT. STUD. 24-56 (1964); J. Hurstfield, *Was there a Tudor Despotism after all?* 17 TRANSACTIONS ROYAL HIST. SOC’Y 83-108 (1967); G. R. Elton, *The Rule of Law in Renaissance England*, in *TUDOR MEN AND INSTITUTIONS* 265-94 (A. J. Slavin ed., 1972), reprinted in 1 *STUDIES IN TUDOR AND STUART POLITICS AND GOVERNMENT* 260-84 (1974) (references below are to the latter). See *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 63-73.

Everyone, including the king, was subject to the law; and the law could only be changed by Parliament. As the judges advised Henry VIII in 1532, the king could not use his subjects contrary to the law, for instance by imprisoning them without trial.<sup>16</sup> Moreover, men trained in the common law permeated the machinery of government at every level, and their cast of mind influenced its mode of operation.<sup>17</sup> The historical debate concerns the reality behind the legal form. The use of Parliament is not inconsistent with arbitrariness of a kind, since—in any age—the prevailing party will have its way even when it is plainly wrong. The rule of law would be a mere figure of speech if a government could achieve any legislative change it wished or obtain any judicial decision which suited its purposes. What really matters, then, is not the mere existence of Parliament but its character, its representativeness and responsiveness to the world outside, and the willingness of governments to listen to argument and opposition. Likewise, the effectiveness of the common law, as a control on executive power, requires the judiciary to be truly independent of the government. The question is how far Tudor and Stuart governments were conducted in obedience to law, or how far the law gave way to the wishes of government

¶ 6 In seeking an answer to this question, attention has often been focused on Henry VIII's Statute of Proclamations (1539), which empowered the king to issue proclamations with the advice of his Council, and enacted that such proclamations should be "obeyed, observed, and kept, as though they were made by act of Parliament."<sup>18</sup> On the face of it, this might seem to give the government power to legislate without reference to Parliament, albeit a power which could be revoked or overridden by later statutes—as happened only eight years later when the act was repealed. It certainly raised fears at the time, and was long debated in Parliament. However, the primary intention of the act as amended seems to have been to give statutory confirmation to the long-standing practice of issuing proclamations in certain well-defined areas of government, chiefly to reinforce parliamentary enactments,<sup>19</sup> but also in exercising acknowledged prerogative powers,<sup>20</sup> and it is known that the statute was passed in response to a ruling by the judges expressing qualms about the validity of some recent proclamations which were not warranted by any parent legislation.<sup>21</sup> Resort to Parliament in this instance was intended to cure a legal doubt, in deference to the judges, and in that sense was consonant with rule by law. More significantly, the statute itself made clear that it did not authorise proclamations made to the prejudice of any person's life, liberty, or property, or in breach of any laws or customs

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<sup>16</sup> Serjeant Browne's Case, 93 SELDEN SOC'Y 183, 184 (1532) (misdated 1540) (J.H. Baker ed., 1977).

<sup>17</sup> S. J. GUNN, EARLY TUDOR GOVERNMENT 15, 206 (1995).

<sup>18</sup> 31 Hen. VIII, c. 8; G. R. ELTON, THE TUDOR CONSTITUTION 27-30 (2d ed., 1982) (repealed by 1 Edw. VI, c. 12). Maitland referred to it as "the English *Lex Regia*." F.W. MAITLAND, ENGLISH LAW AND THE RENAISSANCE 19 (1901).

<sup>19</sup> See S. B. CHRIMES, HENRY VII 175-177 (1972).

<sup>20</sup> For example see declarations of war and peace, alliances, provisions for defence of the realm, or alterations in the coinage. These remain to this day matters of royal prerogative to be dealt with by proclamation rather than statute. It was in this context that Fitzjames, C.J. and the judges advised Cromwell in 1531 that the export of bullion could be stopped by proclamation alone. See G. R. ELTON, REFORM AND RENEWAL 117-18 (1973); ELTON, TUDOR CONSTITUTION, *supra* note 18, at 26-27.

<sup>21</sup> LETTERS OF STEPHEN GARDINER 391 (J. A. Muller ed., 1933). Cf. LETTERS & PAPERS OF HENRY VIII 411.

currently in force, and practice after 1539 shows that proclamations continued to be used to support statutes rather than to replace them.<sup>22</sup> The repeal of the 1539 act (in 1547) probably made no difference to the judges' assertion in 1555 that "no proclamation by itself may make a law which was not law before, but may only confirm and ratify an old law, and not change it."<sup>23</sup> Staunford, J., a former queen's serjeant, even held that it was unlawful to debase the coinage by proclamation, since that would prejudice the queen's subjects. Alterations in the currency had always been made by proclamation, but Staunford, J. was referring to the drastic debasement of 1551, which—by decision of the Privy Council rather than Parliament—had halved the value of money.<sup>24</sup> It was clear to the judges throughout this period that no change in the law could be effected without parliamentary authority. This supposed piece of Henrician despotism was therefore no different in kind from the everyday modern statutes which empower ministers to introduce delegated legislation in the form of Orders in Council.

¶ 7 Attention has also been given to the dispensing power of the Crown, whereby the operation of a statute could in some circumstances be set aside by the government.<sup>25</sup> However, the power could only be used either to waive revenue due to the Crown or to dispense with a punishment, not to diminish the rights of another subject or to sanction a wrong which was *malum in se*.<sup>26</sup> Indeed, in about 1582 the judges went so far as to rule that the Crown could not dispense with any statute made for the public good.<sup>27</sup> Nor could the king alter the law by charter or letters patent,<sup>28</sup> and his power to grant temporary exemption from its operation by writs of protection was heavily circumscribed by the judges. According to one of Henry VIII's serjeants, "the king may not grant that justice shall not be done, for justice binds the king himself."<sup>29</sup> It was conceded that the king could grant exemption from jury service, or from being made a serjeant at law—even though every such exemption was to a slight extent against the common good—on the footing that

<sup>22</sup> E. R. Adair, *The Statute of Proclamations*, 32 *ENG. HIST. REV.* 34-46 (1917); G. R. Elton, *Henry VIII's Act of Proclamations*, 75 *ENG. HIST. REV.* 208-22 (1960); Elton, *supra* note 15, at 271-274; R. W. HEINZE, *THE PROCLAMATIONS OF THE TUDOR KINGS 153-199* (1976); M. L. Bush, *The Act of Proclamations: a Reinterpretation*, 27 *AM. J. LEGAL HIST.* 33-53 (1983); J. LOACH, *PARLIAMENT UNDER THE TUDORS 9-12* (1991). However, they sometimes went further. See HUGHES & LARKIN, *1 TUDOR ROYAL PROCLAMATIONS xxix-xxx* (P.L. Hughes & J.F. Larkin eds., 1964).

<sup>23</sup> British Library [BL] MS. Add. 24845, fo. 31 (translated). The reporter added, "Nevertheless various precedents were shown out of the Exchequer to the contrary, but the justices had no regard to them: *quod nota bene*." Some very extensive penal proclamations had been issued in the previous decade, including one which purported to introduce galley slavery for spreading seditious rumours. HUGHES & LARKIN, *supra* note 22, at 456. Plucknett suggested that this could have been justified under the statute of *scandalum magnatum* (12 Ric. II, c. 11), which left the punishment open. TASWELL-LANGMEAD'S *CONSTITUTIONAL HISTORY* 239 n. 60 (11th ed., 1960) (1875).

<sup>24</sup> BL MS. Add. 24845, fo. 31; HUGHES & LARKIN, *supra* note 22, at 518-519, 529-530 (shillings, introduced in 1549, reduced in value from 12d. to 9d., and groats from 4d. to 3d.; shillings further reduced to 6d., groats to 2d., pennies to ½d.). Later in the year new (debased) coins were introduced with the old values. *Id.* at 535.

<sup>25</sup> See Elton, *supra* note 15, at 274-277.

<sup>26</sup> 109 SELDEN SOC'Y li-liv (J.H. Baker ed., 1994).

<sup>27</sup> Anon. (c. 1582) BL MS. Harley 5030, fo. 37, printed in 109 SELDEN SOC'Y liv, n.62.

<sup>28</sup> For what follows see OXFORD HISTORY OF THE LAWS OF ENGLAND 65-66.

<sup>29</sup> *Marmyon v. Baldwyn*, 120 SELDEN SOC'Y 61, 62 (1527).

no individual was prejudiced by such a grant. Admittedly justice would be obstructed if such grants were made to everyone; but the answer was that the king would not do anything so generally prejudicial. The extent to which the king could grant licences of exemption from regulatory legislation, such as statutes governing exports and imports, raised occasional questions; but the proper answer depended on the interpretation of the statute in question.

¶ 8 These test-cases, then, were red herrings. Yet there were undoubtedly other cases in the Tudor period where the government acted despotically. Two important cases from the mid-1530's were unknown to the constitutional historians of the last generation. One was the case of *Lord Dacre of the South* (1534), when the judges were somehow persuaded to overturn the common learning on uses and to declare that uses of land could not be left by will.<sup>30</sup> This volte-face, for which the judges were promised the king's "good thanks" conveniently enabled Thomas Cromwell to drive the Statute of Uses through Parliament without opposition. The government, having been defeated in the House of Commons upon an earlier bill, had here proceeded to undermine the opposition by securing a dramatic change in the common law. By 1536, Parliament was only too willing to give the king all he asked, the *quid pro quo* being the preservation of existing titles notwithstanding the decision. Then, in the case of *Sir John Melton* (1535), Cromwell managed to effect a change in the law by act of Parliament while the suit was pending, so as to defeat Melton's bold claim to the Lucy inheritance—which the king wished to preserve for the Percy family.<sup>31</sup> In this second case, however, the judges were less inclined to assist the Crown, and that is why retrospective legislation was promoted to put the matter beyond dispute. Retrospective legislation, of which this was not the only instance,<sup>32</sup> affords one of the clearest examples of conflict between legal formality and the spirit of the rule of law.

¶ 9 We may never get to the bottom of what happened behind the scenes in either case. Both could be made to support an argument that Henry VIII's government under Cromwell was essentially despotic, in the sense that, although the outward forms of law were strictly observed, both judges and legislature were in practice amenable to the king's will. Nevertheless, assuming that they were unusual cases, they could also be taken as indicating a commitment to the law in quite a conservative sense. Henry could have achieved the revenue purposes of the Statute of Uses by replacing feudal revenue with some new kind of regular taxation. But that was too bold a step; regular parliamentary taxation to support the government in peacetime seems not yet to have been acceptable to political theory.<sup>33</sup> Rather than introduce a new tax regime, the solution was to legislate against tax avoidance. The king's policy, or Cromwell's, was in this case not to innovate but to restore the ancient feudal revenue of the Crown which had been severely reduced

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<sup>30</sup> See J. H. BAKER, 2 THE REPORTS OF SIR JOHN SPELMAN, in 94 SELDEN SOC'Y 195-203 (1978).

<sup>31</sup> See *Sir John Melton's Case (1535): Cockermouth Castle and the three Silver Lucas*, 55 CAMBRIDGE L. J. 249-64 (1996), reprinted in THE COMMON LAW TRADITION 363-380 (2000).

<sup>32</sup> OXFORD HISTORY OF THE LAWS OF ENGLAND 66, n.80.

<sup>33</sup> *Id.* at 67.

as a result of uses. It was a case of putting the clock back to an earlier period, and regaining the seignorial and prerogative rights which the common law itself gave to the Crown. That is a far cry from despotism as generally understood. In Melton's case the object of the government was to protect an ancient and important inheritance from passing to a remote relative for breach of a medieval heraldic stipulation in a clause which seems to have had no parallel—a result which would have seemed bizarre to most observers, then or since.

¶ 10 If we turn to even larger policy issues, it is possible to draw similar conclusions. In an imaginary world, Henry might have introduced through Parliament a modern divorce law. But that was unthinkable for a Defender of the Faith, and in any case, he had no grounds for dissolving his marriage *ex post facto*. He wanted a decree of nullity under existing Canon law, a divorce to which the better opinion of contemporary canonists held him entitled, and this required an ecclesiastical jurisdiction independent of the pope—who was known to side with Aragon. The result was revolutionary in respect to ecclesiastical polity, but it was achieved without secularising divorce, without altering the jurisdiction of the Church courts, without modifying the rules of Canon law (except in relation to the jurisdiction of the pope), and without separating the Church of England from the catholic and apostolic Church. The execution of Sir Thomas More for denying the lawfulness of the break with Rome certainly shocks the conscience, in so far as the statute under which he was convicted was harsh, the evidence against him probably perjured, and the jury probably hand-picked. Yet if More said what he was proved to have said, he had certainly broken the terms of the statute: he conceded as much himself. He had not meant to say it, and perhaps had not said it; but that was a question of fact on which the judges were powerless to override the jury.<sup>34</sup>

¶ 11 Strong kings could be cruel, and not only in England. But More's execution required a formal charge alleging an offence known to the law; evidence to prove it, given in public, on oath, and subject to challenge; a full opportunity for More to present his own case; the persuasion of twelve jurors, also under oath to speak the truth; and general approbation both of the charge and of the conduct of the trial by the judges. If the system was abused in More's case, it does not wholly detract from the nature of the system itself, which already possessed many of the procedural safeguards now treated as human rights. Indeed, the common law was much fairer to the accused than the Canon law system which More thought appropriate for dealing with heretics: give them a fair trial, wrote More, and the streets would be swarming with them.<sup>35</sup> I do not suggest that Henry VIII deserved canonisation any more than More did, but the secular law was at least moving in the direction of openness and procedural fairness. More was able to question the prosecution witnesses and present his case. Even the most dangerous traitors could not be done away

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<sup>34</sup> *Id.* at 417-418. For contemporary accounts of the trial (in 1535) see 93 SELDEN SOC'Y, *supra* note 16, at 58; J. Duncan & M. Derrett, *The Trial of Sir Thomas More*, 79 ENG. HIST. REV. 449-477 (1964), reprinted with revisions in ESSENTIAL ARTICLES FOR THE STUDY OF THOMAS MORE 49-78 (R. S. Sylvester & G. P. Marchadour eds., 1977).

<sup>35</sup> THOMAS MORE, THE DEBELLATION OF SALEM AND BIZANCE 104 (J. Guy ed., 1987).

with by royal decree; and there are several cases from the sixteenth century in which treason prosecutions were actually abandoned on advice from the judges that they were not legally well-founded. Nor did the judges always favour the Crown in the conduct of trials. In More's case itself, they apparently ruled that a failure to answer questions was not an overt act of treason; we see here a recognition of the nascent rule against self-incrimination.<sup>36</sup> In the case of *Lord Dacre of the North* (1534), they laid down the rule that the court may not communicate with jurors in the absence of the accused. Dyer's notebook shows that the judges took an equally independent line in the 1570's and 1580's, frustrating several prosecutions for treason on legal grounds.<sup>37</sup> For the Tudor judiciary to have done more would have required interference with the process of prosecution, and with the examination of witnesses, to an extent not yet contemplated as possible. If the judges threatened to be too difficult, they could in any case be bypassed by an act of attainder. Thomas Cromwell, who arranged some of Henry's state trials in the 1530's, was himself condemned by Parliament without trial.<sup>38</sup> That was lawful, in the sense that it was an act of legislative sovereignty, but it was undoubtedly contrary to the spirit of the rule of law. However, according to Coke, that was also the view of the judges at the time; and it was certainly Coke's own view a century later.<sup>39</sup>

¶ 12 The last point is important for my present purpose. Particular aberrations from higher standards do not disprove the prevalence and acceptance of a rule of law. Moreover, Henry's determination always to act within legal forms was itself of consequence in shaping attitudes. Since the rule of law is incapable of precise definition, the question of its prevalence in a particular age must be a matter of degree and opinion. Of the general attitude of the Tudor age there seems no room for doubt. Whatever lapses and failures may have occurred from time to time at moments of crisis, "Tudor thinking and practice on the law subordinated everybody, the king included, to the rule of law."<sup>40</sup>

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<sup>36</sup> However, in Lord Vaux's case (1581), they held that the privilege did not extend to misdemeanours. SELDEN SOC'Y, *supra* note 27, at lxvi-lxvii.

<sup>37</sup> See G. R. ELTON, POLICY AND POLICE 299-305 (1972); *The Reports of Sir John Spelman*, 94 SELDEN SOC'Y 138-140 (J.H. Baker ed., 1978); *The Notebook of Sir John Port*, 102 SELDEN SOC'Y xvii-xviii (J.H. Baker ed., 1986); SELDEN SOC'Y, *supra* note 27, at lxii-lxvii.

<sup>38</sup> For the growing use of acts of attainder to avoid difficulties associated with trials see Stanford E. Lehberg, *Parliamentary Attainder in the Reign of Henry VIII*, 18 HIST. J. 675-702 (1975); William Stacy, *Richard Roose and the Use of Parliamentary Attainder in the Reign of Henry VIII*, 29 HIST. J. 1-15 (1986) (referring to a case of 1531).

<sup>39</sup> SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 37-38 (1986). Coke says that he had learned from Sir Thomas Gawdy, "who lived at that time," that Henry VIII had commanded him to attend the chief justices for their opinions. It has been assumed, and seems most likely, that the reference is to Cromwell's case. KENNETH PICKTHORN, EARLY TUDOR GOVERNMENT 431-434 (1934); GOUGH, FUNDAMENTAL LAW 43; OXFORD HISTORY OF THE LAWS OF ENGLAND 68. Gawdy was a young member of the Inner Temple in 1540, but probably not yet a barrister.

<sup>40</sup> Elton, *supra* note 15, at 227.

## II. *The Body of Rights*

¶ 13 There is no universally agreed corpus of human rights. Even if there were, it would have to be set down in words, and words are susceptible of a wide variety of interpretations. We have had two or three major attempts at codification, notably the Constitution of the United States (1787) and the subsequent Bill of Rights (1791), the French Declaration of the Rights of Man (1789), the Universal Declaration of Human Rights (1948), and the European Convention on Human Rights (1950), which last has been engrafted onto United Kingdom law by virtue of the Human Rights Act 1998. These may be taken as a guide, though they are very different in content and understanding, even if we take the United States Constitution to mean what the Supreme Court now says it means rather than what it meant to the framers. To take but one example, the U.S. Constitution is currently interpreted as making it unlawful to proscribe abortion, on the footing that it would be an invasion of privacy, and a similar conclusion could be drawn from the guarantee of respect for private life in the European Convention.<sup>41</sup> However, another provision of the European Convention guaranteeing “human life”—which some construe to include potential or incipient life, or the condition of a thriving fetus—may come to be interpreted as having exactly the opposite effect.<sup>42</sup> The fact is that rights are necessarily contingent on the state of society, and its general assumptions, either at the time they are cast into words or whenever they subsequently come to be reinterpreted. In 1787 abortion was a crime at common law<sup>43</sup> and no one would have imagined that the Constitution was designed to alter that. When Thomas Jefferson proclaimed it a self-evident truth that all men are created equal, he did not reduce the stock of slaves in his basement at Montecello. Nor did anyone at that time suppose that his “inalienable right” to life made capital punishment illegal. Likewise in the sixteenth century, there would not have been widespread support for the abolition of capital punishment, though in fact the judges disliked an automatic death penalty and tolerated or encouraged many practical means of escape from it.<sup>44</sup> Freedom of religion would have been a notion impossible to comprehend in an age which held that there was only one true catholic Church, whether Roman or Protestant. Even in the religious context, however, the fluctuations of official religious policy in sixteenth-century England forced intelligent people to confront genuine differences of conscience, which for most of the time were tolerated far more in reality than the statute-books imply.<sup>45</sup> For instance, two of the busiest counsel practising in the Court of Queen’s Bench in the last quarter of the sixteenth century (Robert Atkinson and Richard Godfrey) were men who as Roman Catholics had been formally disbarred—and actually expelled from their inns of court—for recusancy.<sup>46</sup> Then again, the European prohibition

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<sup>41</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>42</sup> The point was raised but avoided in *Open Door Counselling v. Ireland*, App. Nos. 14234/88, 14235/88, 15 Eur.H.R. Rep. 244 (1993).

<sup>43</sup> The incorrect statements to the contrary in *Roe*, 410 U.S. at 113, were a result of failing to carry out historical research.

<sup>44</sup> Especially through the fictional extension of benefit of clergy, though this was gradually regulated by statute to prevent abuse in cases of serious crime.

<sup>45</sup> See *REPORTS FROM THE LOST NOTEBOOKS OF SIR JAMES DYER* lxvii-lxxv.

<sup>46</sup> J. H. BAKER, *READERS AND READINGS IN THE INNS OF COURT AND CHANCERY* 6, n.31 (2001). Complaint was made in Parliament in 1626 that popish lawyers living outside the inns of court were

on “degrading” punishment would have made no sense in an age which believed that the severest forms of punishment, to be an effective deterrent, ought to be as degrading as possible. Even so, a convicted prisoner was entitled to the protection of the law. Coke, citing *Bracton*, held that gaolers were forbidden “to inflict harm upon prisoners, as by keeping them in shackles . . . because a gaol ought to be for containment and not for punishment.”<sup>47</sup> Torture, though certainly used in treason investigations under warrants from the secretary of state or attorney-general,<sup>48</sup> was never acknowledged as lawful by the English courts.<sup>49</sup> Indeed, there was no common-law authority approving it, and the balance of explicit authority was against it,<sup>50</sup> whereas the Civil law treated it as a routine part of criminal procedure: judicial torture was used in Prussia until 1754, and in France until 1780.<sup>51</sup> Enlightened opinion has properly changed over the centuries. Yet it was recently reported in the press that, since the United States government had found terrorists unwilling to assist the police with their enquiries, they were thinking of introducing “harsher interrogation techniques” for defendants suspected of terrorism. I do not know what this means in practice, and perhaps we shall not be told; but the point is that such things are still thinkable when people are alarmed. The Roman Catholic terrorist Guy Fawkes was famously subject to “harsh interrogation” in the Tower to name his accomplices, the king himself instructing the examiners to begin with “gentler tortures” and then step them up by degrees.<sup>52</sup> This may strike us as barbaric, and it was certainly contrary to our current notions of human rights. But Fawkes would have been the al-Q’aida hero of his day if his plot to blow up the king in Parliament on 5 November 1605 had not been uncovered by intelligence in the nick of time; and even he was accorded a regular jury trial. The day of deliverance, 5 November, is still celebrated in England.<sup>53</sup>

¶ 14 Having made those reservations, we may turn to the other principal items in our modern lists of human rights—no slavery, the right to a fair trial, no punishment without law, and the protection of property or possessions. Here we might fairly say that such principles were part and parcel of the common law, and indeed the glory of the common law. Whoever actually penned the Universal Declaration of 1948 and the European

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continuing to practice. 3 PROCEEDINGS IN PARLIAMENT 1626 312 (W. B. Bidwell & M. Jansson eds., 1992).

<sup>47</sup> COKE, *supra* note 39, at 34.

<sup>48</sup> Including Coke. Its use seems to have been confined to treason cases, where it was thought justified for reasons of state.

<sup>49</sup> Excepting the barbarous *peine forte et dure*, which was the penalty for refusing to accept jury trial, no one could be tried by jury without his or her consent.

<sup>50</sup> Coke wrote in his old age: “there is no law to warrant tortures in this land, nor can they be justified by any prescription being so lately brought in.” COKE, *supra* note 39, at 35. For this proposition he vouched Fortescue, who wrote in the fifteenth century that torture was contrary to the common law. (Coke had nevertheless been professionally involved with several examinations on the rack.) *Id.*

<sup>51</sup> J. H. LANGBEIN, TORTURE AND THE LAW OF PROOF 62, 64 (1977).

<sup>52</sup> *Id.* at 85.

<sup>53</sup> Fawkes was put to the rack on 9 Nov., by virtue of a warrant in the king’s own hand dated 6 Nov., and named his fellow conspirators. He was subsequently indicted, tried by jury, convicted, and executed. Gunpowder Day is still an official day of thanksgiving in England (according to the 1662 Book of Common Prayer), but is nowadays celebrated with bonfires and fireworks rather than sermons and prayers.

Convention of 1950,<sup>54</sup> the definitions could well have been written by an English barrister in the Temple copying phrases from textbooks on the British constitution or from Blackstone. And much of it would have seemed perfectly straightforward to an English lawyer in the Renaissance period. By the time of Coke, and probably a century earlier,<sup>55</sup> lawyers regarded these broad principles as fundamental law enshrined in chapter 29 of Magna Carta:

No free man shall be taken, imprisoned, or disseised of his free hold, or liberties or free customs, or outlawed, exiled or in any way destroyed, nor will we proceed against him, save by the lawful judgment of his peers or by the law of the land. We shall not sell, deny or delay to any man right or justice.<sup>56</sup>

¶ 15 In fact they were wrong historically, but that made no difference. Magna Carta, though not a constitution, was morally entrenched; and chapter 29 was the chief legal weapon deployed against growing absolutism. It had been repeated and enlarged in a series of medieval statutes culminating in that of 1354 which introduced the phrase “due process of law.”<sup>57</sup> It was again repeated and enlarged in the Petition of Right 1628, to which King Charles I gave his full assent. No one could be taxed without the consent of Parliament. No one could be imprisoned, or deprived of his freehold property, or in any way “destroyed”, except by the “lawful judgment of his peers or by the law of the land.”

#### A. No Slavery

¶ 16 Although the common law did recognize a form of unfree status—villeinage—it did not acknowledge lawful slavery. Even villeinage found little favour with early-modern English lawyers. In the 1520’s, it was said at a moot in Gray’s Inn that villeinage was “an odious thing in law and not favoured, for it is absolutely contrary to liberty, and liberty is one of the things which the law most favours.”<sup>58</sup> In practice, villeinage was becoming obsolete in the sixteenth century and by the seventeenth was for all practical purposes extinct. This universal freedom was achieved not through legislation but by the operation of common-law procedures in which juries almost always pronounced (truthfully or

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<sup>54</sup> The complex story has now been unravelled in A. W. B. SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2001). A draft was prepared by Geoffrey Wilson of No. 1, Mitre Court, in the Temple, but it was not adopted.

<sup>55</sup> When the judges advised King Henry VIII that he could not imprison subjects without cause, or use his subjects contrary to the law, they cited Magna Carta, c. 29. *Serjeant Browne’s Case*, 93 SELDEN SOC’Y 184.

<sup>56</sup> Clause 39 of the original charter of 1215, but numbered c. 29 in the statutory form of 1225.

<sup>57</sup> 28 Edward III, c. 3 (“Item qe nul homme, de quel estate ou condition qil soit, ne soit osté de terre ne de tenement, ne pris, nemprisoné, ne disherité, ne mis a mort, saunz estre mesné en respons par due proces de lei,” which may be translated thus: “No man, of whatever estate or condition, shall be put out from land or tenement, taken or imprisoned, disinherited, or put to death, without being brought to answer by due process of law.”).

<sup>58</sup> Harvard Law School, MS. 47, fo. 59 (translated).

otherwise) in favour of liberty.<sup>59</sup> A century or so later, English legal doctrine was to prevail even against a growing commercial acceptance of negro slavery. As Chief Justice Holt ruled in about 1702, “as soon as a negro comes to England he is free; one may be a villein in England, but not a slave.”<sup>60</sup> The rest of that story is well known. Slavery was not in practice ended by declarations of rights.

#### B. No Punishment without Law

¶ 17 The medieval gaol delivery system ensured that, in routine cases, no one could be held in gaol for more than six months at the outside, that being the interval between assizes. Whether or not the prosecution was fully prepared, the defendant was entitled to be “discharged by proclamation” at the next gaol delivery if no evidence was offered against him. Bail was widely available, and guaranteed by medieval legislation, except in the most serious cases. Any form of imprisonment could be challenged by *habeas corpus*, a remedy which we now know to have been developed for this purpose during the sixteenth century.<sup>61</sup>

#### C. Fair Trial<sup>62</sup>

¶ 18 Since the fourteenth century the common law had forbidden anyone to be tried for a capital offence without a precise accusation, either by appeal of felony or indictment. Most criminal accusations in the Renaissance period were by indictment, that is, a specific written accusation approved by at least twelve sworn members of the public. The trial itself was by a jury of twelve neighbours, who had to be unanimous; and the defendant could challenge up to thirty-five of them before they were sworn in, without showing cause.<sup>63</sup> The rules of evidence were not yet developed, but it was the supposedly dreaded Star Chamber which proclaimed in 1607 that “it were better to acquit twenty that are guilty than condemn one innocent.”<sup>64</sup> Witnesses were generally brought face-to-face with the accused, and their testimony could be challenged.

¶ 19 Now, it would obviously invite an accusation of naivety to set out the positive case without acknowledging that the reality in Tudor and Stuart England often fell far short

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<sup>59</sup> For a summary of the full story, see J. H. Baker, *Personal Liberty under the Common Law of England, 1200-1600*, in *THE ORIGINS OF MODERN FREEDOM IN THE WEST* 178 (R.W. Davis ed., 1995).

<sup>60</sup> *Smith v. Brown*, 2 Salk. 666 (1702). Cf. *Shanley v. Harvey*, 2 Eden 126, 127 (1763), *per* Lord Hardwicke, L.C. (“As soon as a man sets foot on English ground he is free.”). For some qualifications, see J. H. BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY* 475-477 (4th ed., 2002).

<sup>61</sup> See 109 SELDON SOC’Y, *supra* note 26, at lxxvi-lxxxiii; OXFORD HISTORY OF THE LAWS OF ENGLAND 91-94.

<sup>62</sup> See generally J. H. Baker, *Criminal Courts and Procedure at Common Law*, in *THE LEGAL PROFESSION AND THE COMMON LAW* 259-301 (1986); *Pleas of the Crown: Criminal Procedure*, in *INTRODUCTION TO ENGLISH LEGAL HISTORY* 570-593 (3d ed., 1990).

<sup>63</sup> The number of peremptory challenges was reduced in 1530 to twenty. 22 Hen. VIII, c. 14.

<sup>64</sup> Literally, “it were better to aquite twenty that are gulytie than condempe one Innocente.” J. HAWARDE, *CASES IN CAMERA STELLATA* 320 (W. P. Baildon ed. 1894).

of the ideal. At courtroom level, ordinary trials—even on capital charges—were conducted with a haste and lack of circumspection which strikes us as shocking. (So they still were, let it be said, in the “age of reason”). The worst defect was that, in capital cases, the defendant was not allowed counsel except to argue a point of law.<sup>65</sup> But standards take centuries to evolve: as Coke himself was fond of saying, nothing is perfect at the same moment that it is invented.<sup>66</sup> It would indeed be astonishing if no changes had occurred in the legal system in the last four centuries. The suggestion is not that the legal system of Coke’s day would stand scrutiny in a court of human rights at the present day, but that it was moved and directed by the same basic principles as are found in the declarations of rights. The government—the Crown—was subject to the law. The judges, if occasionally subservient, often ruled against the Crown and set bounds on the prerogative.<sup>67</sup> The Crown could not interfere with private property rights by exercising the prerogative in new ways; and if any minister of the Crown purported to act unlawfully, his act was deemed invalid, for the Crown could do no wrong to a subject. In the criminal sphere, it is true that some prisoners who were considered dangerous to the very existence of the state—such as Guy Fawkes—were tortured before trial, to extract information, and were effectively beyond the reach of *habeas corpus*. But prisoners in general were protected against imprisonment without trial, all were allowed their say in court, and none could be put to death without the unanimous verdict of twelve citizens. Even those accused of high treason stood some chance of acquittal, or of having their prosecution dropped on the legal advice of the judges.

### III. *Fundamental Law and Judicial Review*

¶ 20 The most difficult aspect of our historical comparison is that of the hierarchy of rights. Human rights in the modern sense are by definition protected against contrary national laws, and therefore represent a form of higher law. Under current British doctrine, such a notion cannot readily be squared with the political fact that Parliament is sovereign and that the courts will not overturn an act of Parliament on the grounds that it contradicts some higher law. There are nevertheless two considerable qualifications to the sovereignty of Parliament: one is the political difficulty of flying in the face of accepted principles of natural justice, and the other is that statutes have to be interpreted before they can be applied in practice. The first qualification means that Parliament is only likely to infringe accepted human rights in borderline cases, where opinions differ on the point in question. If no one is quite sure where a right begins and ends, and that must often be the case, Parliament may be tempted to make its own judgment; and it is probably better placed to do so than the judges or the human rights lawyers. But if and when Parliament does make its own judgment, the result will always be subject to the second qualification. It did not require a Human Rights Act for the judges to bring into play presumptions in interpreting statutes, which belong to the same genre as the old maxim that the king can do no wrong.

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<sup>65</sup> It must be remembered that in most ordinary cases the Crown was not represented either. The inequality was most glaring in state trials, where the evidence was led by a law officer and the prisoner had to speak for himself.

<sup>66</sup> “Nihil insimul inventum est et perfectum.” SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTE OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON 230a, 377b (1812).

<sup>67</sup> For some Elizabethan examples, see 109 SELDON SOC’Y, *supra* note 26, at xii-ciii.

Parliament cannot be presumed to have intended something manifestly unjust unless the words it has used permit no other conclusion. Ministers who insist on introducing patently unjust legislation in the teeth of a court ruling will have to face their electorate. Thus, even if Parliament has the theoretical last word in any tussle with the courts, the presumption of righteous intentions may deprive the principle of most of its force.

¶ 21 These qualifications may lead us to an understanding of what sometimes appears to have been a greater willingness on the part of English judges in the Renaissance period to question legislation. There was, in theory, a further weapon in the judicial arsenal of that period in the form of natural law. Following the writers on Canon law, Fortescue in the fifteenth century,<sup>68</sup> St. German in the sixteenth,<sup>69</sup> and Coke in the seventeenth,<sup>70</sup> all held that a statute contrary to the law of nature would be void. Yet the concept of natural law in England bore little or no fruit in practice, except as an occasional (and rather outlandish) source of principle in common law and equity.<sup>71</sup> Modern English lawyers would say that natural law—as higher law—is incompatible with parliamentary sovereignty. But the root cause of its impotence was not that anyone in the medieval or early-modern period thought Parliament exempt from natural law. It was rather that no inferior court could adjudge the acts of the High Court of Parliament to be contrary to natural law. In other words, it was simply a jurisdictional principle developed before the importance of the separation of powers had been perceived.<sup>72</sup> That is the reason why there is no known instance, in any period, of an English statute ever being held void on the grounds that it conflicted with the law of nature. The concept of fundamental law sat more easily with the rhetoric of political argument, or the abstractions of philosophical speculation, than with the conventions of judicial decision-making.<sup>73</sup>

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<sup>68</sup> See *De Natura Legis Naturae*, discussed in N. DOE, *FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW* 75-78 (1990).

<sup>69</sup> DOCTOR AND STUDENT 12 (T.F.T. Plucknett & J.L. Barton eds., 1974) (a statute cannot prevail against natural law, because if it is brought in against natural law it is no statute but void).

<sup>70</sup> *E.g.*, Calvin's Case, (1608) 7 Co. Rep. 1, at ff. 13v ("the very law of nature itself never was nor could be altered or changed. And therefore it is certainly true that *jura naturalia sunt immutabilia*"); "the statute of 25 Ed. 3. cap. 22 . . . extends only to legal protection . . . for the parliament could not take away that protection which the law of nature gives him." *id.* at 14; "whatsoever is due by the law of nature cannot be altered . . . [*transl.* The laws of nature are completely perfected and immutable, whereas the law of man has a finite quality and there is nothing in it which can stand for ever: human laws are born, they live, and they die]." *id.* at 25.

<sup>71</sup> For the eighteenth century see D. J. Ibbetson, *Natural Law and Common Law*, 5 *EDINBURGH L. REV.* 4-20 (2001).

<sup>72</sup> See, e.g., Chedder v. Savage, (1406) Y.B. Mich. 8 Hen. IV, fo. 12, pl. 13, at fo. 13, *per* Tyrwhit ("est un judgement doné en parliament, que ne poyt estre reversé ou revoké en court plus base."); *Anon.* (1443) Y.B. Trin. 21 Hen. VI, fo. 56, pl. 13, *per* Paston, J. ("quant un estatute est fait, tout soit ceo encounter l'ey, et mischevous, uncore serra tenus pur ley tanque que il soit repel et adnul."); Pilkington's Case, (1455) Y.B. Pas. 33 Hen. VI, fo. 17, pl. 8, at fo. 18, *per* Fortescue, C.J. ("cest un acte de parlement et nous voillomus estre bien avisé devant que nous adnullamus ascun acte fait en le parlement.").

<sup>73</sup> For a full discussion see generally GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY*.

¶ 22 In practice the courts seem to have relied more on the notions of absurdity, repugnancy, and impossibility. Parliament cannot require two things that are mutually inconsistent, and so internal contradictions in legislation have to be resolved by the courts. Nor can it do the impossible; and our predecessors thought that impossibility could include legal impossibility. Thus, a fifteenth-century reader on chapter 9 of Magna Carta held that the confirmation of liberties to the city of London was void on the rather pedantic ground that a city—as a physical entity consisting of houses and streets—was dead and without legal capacity to accept a grant.<sup>74</sup> I think the technical point was that the confirmation should have been made to the mayor and commonalty of London; lawyers could not yet easily separate corporate personality from people. On a similar principle, other readers held void the grant of liberties to the Church of England (“*ecclesia anglicana*”) in chapter 1 of Magna Carta, since the Church was not a corporation. Unreasonableness could be dealt with by the presumption that Parliament cannot have intended something unreasonable. Coke wrote in the *Fourth Institute*:

When a law is worded generally, it is to be restrained in such a way that, when the reason for it ceases, it no longer applies; for since reason is the soul and strength of the law, the legislator is not deemed to have intended something which wants reason, even if the generality of the words at first glance suggests otherwise.<sup>75</sup>

The furthest reach of this principle is widely supposed to have been *Dr. Bonham’s Case* (1610), where Coke as Chief Justice of the Common Pleas stated 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 act to be void.”<sup>76</sup> Although we now know that Coke was the only member of the court who decided the case on this ground,<sup>77</sup> he himself set great store by it and copied out this passage twice in his own hand.<sup>78</sup> It was a controversial position at the time, and drew a condemnation from Lord Chancellor Ellesmere.<sup>79</sup> Yet it was not wholly new.<sup>80</sup> In a

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<sup>74</sup> JOHN SPELLMAN’S READING ON QUO WARRANTO, 113 SELDEN SOC’Y 4-5 (J.H. Baker ed. 1997). What he meant was that the confirmation should more correctly have been expressed as made to the mayor and commonalty of the city, since they were a corporation.

<sup>75</sup> COKE, *supra* note 39, at 330-331.

<sup>76</sup> *Dr. Bonham’s Case*, 8 Co. Rep. 114 (1610). There is a convenient summary of the various interpretations of this case in JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 111-12 (1999).

<sup>77</sup> C. M. Gray, *Bonham’s Case Revisited*, 116 PROC. AM. PHIL. SOC’Y 35-58 (1972).

<sup>78</sup> Once in his autograph report of the case (Cambridge Univ. Lib. MS. li.5.21(2), fo. 93v); and again in a manuscript note now at Yale University (Beinecke Library, Law School MS. G. R24.1, fo. 157v).

<sup>79</sup> BAKER, *supra* note 59, at 210-211.

<sup>80</sup> See SIR CHRISTOPHER HATTON, *A TREATISE CONCERNING STATUTES OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF* 19, fn.9 (1677) (“I should never think, that any Law positive, or constitution, should bind, but that which is rightly ordained.”). This treatise is attributed on the title-page to Sir Christopher Hatton (d. 1591), though the attribution has been questioned. There is an oblique reference on page nineteen to the earl of Leicester (d. 1588) as “lately deceased”, which suggests a date of composition around 1589-1590.

previously unnoticed moot in Gray's Inn, from the later 1520's, where the question arose whether Parliament could sanction the grant of land on condition that it could not escheat, several opinions were expressed that, although Parliament could make new law, it could not enact something repugnant, absurd, or contrary to law and reason.<sup>81</sup> This included, for at least some of the participants, a statute removing a piece of land from all human ownership (absurd), a statutory feoffment of land without the right to take the income (repugnant), or a statutory grant of land in fee on terms that it should not descend to heirs (against law and reason). In a real case of the same period, it was argued that Parliament could not alter immemorial local customs such as gavelkind.<sup>82</sup> But that was probably also a point of interpretation: a general statute would not be taken to derogate from a particular local custom without expressly mentioning it.<sup>83</sup> These are not human rights, nor even principles of natural law, though it is easy to see how the same principle of interpretation could be extended in the hands of a Coke—or a Holt<sup>84</sup>—to include provisions which conflicted with natural justice.

¶ 23 It is not my contention that the rule of law always prevailed in Renaissance England, or that human rights as now understood were always protected—any more than they are at the present day. But it is not so absurd to propose that the rule of law was an accepted constitutional principle in the Tudor and Stuart periods, and that many—though certainly not quite all—of the rights now classified as “human rights” would have been recognized without difficulty by English lawyers of that period. The principal difference, perhaps, is that in earlier periods the ideals were embodied within the common law itself and subject to development through precedent. Even in 1950, when the European Convention was settled with the active participation of the United Kingdom government, it was believed in Whitehall that the convention merely codified well-known common-law ideals and was not likely to challenge the operation of English law itself, except perhaps in

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<sup>81</sup> BL MS. Add. 35939, fo. 269. The date is fixed between 1526 and 1529 by the description of Richard Broke as chief baron of the Exchequer and Christopher Hales as solicitor-general. A translation from the law French text is appended to this paper.

<sup>82</sup> *Marmyon v. Baldwyn*, (1527) BL MS. Hargrave 388, fo. 236v, *per* More, J. (“This is a local custom . . . like various other customs within the realm which cannot now be changed and altered from their nature by the king or by Parliament: for instance, the custom of gavelkind.” (translated)).

<sup>83</sup> In the case in question, the city of London had claimed, through its recorder, that “they [the mayor and citizens] ought not by reason of any statute made contrary to the liberties and customs of the aforesaid city alter or infringe its liberties or free customs used from ancient time unless express mention is made thereof in the aforesaid statute.” King's Bench plea roll, KB 27/1062, m. 64 (translated). The city also relied on Magna Carta, c. 9, which confirmed to London its liberties and free customs; but they did not explicitly suggest that this operated as a kind of fundamental law.

<sup>84</sup> See *City of London v. Wood*, 12 Mod. 669, 687-688 (1702), in THOMAS LEACH, MODERN REPORTS: OR, SELECT CASES ADJUDGED IN THE COURTS OF KING'S BENCH, CHANCERY, COMMON PLEAS, AND EXCHEQUER 669, 687-688 (1796) (Holt, C.J. said that “if an Act of Parliament should ordain that the same person should be party and judge . . . it would be a void Act of Parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an Act of Parliament can do no wrong, though it may do several things that look pretty odd . . .”). Holt, C.J. here approved of Coke, C.J.'s dictum in *Dr. Bonham's Case*, and said it was “far from any extravagancy.” But he was probably the last judge to treat it as representing English law.

the colonies. Indeed, the affair was entrusted to the Foreign Office as a matter of international relations rather than of domestic jurisprudence. Fifty years later, as a result of activities in Strasbourg, the conception of human rights in the United Kingdom has undergone a transformation. They are no longer seen as a set of essentially British ideas, rooted in history, shared by other civilized nations, and framed into a code chiefly for the purpose of export to less favoured parts of the globe. They have become instead a source of ammunition for overturning domestic judicial precedent and legislation by recourse to vaguely defined concepts, sometimes interpreted in a mechanical way without reference to history, and an unlimited selection of loosely related ideas from around the world. The obvious danger of this newer movement is not merely uncertainty—which, paradoxically, is itself inconsistent with the rule of law—but the increasing politicisation of an unelected judiciary. Whether that is a fair price to pay for a formal check on Parliament will be one of the great issues for the United Kingdom in the present century.

APPENDIX I:

**A MOOT IN GRAY'S INN, c. 1526/29**

**BL MS. Add. 35939, fo. 269 (translated from law French).**

Lands are given by Parliament upon condition that they should not escheat to the lord from whom they are held. Is the condition good, or not?

*Walsingham.* It is all good, for everyone is privy to the Parliament and the Parliament may enact a thing which is contrary to the common law. Thus if a feoffment is made to an abbot, by Parliament, on condition that the lord shall not enter for mortmain, this is good; and yet a party may not make such a condition by his deed. Likewise if lands are given by Parliament to a man upon condition that, if he dies, his heir (under age) shall not be in ward, this is good; for the Parliament may do what a party may not. But if lands are given by Parliament upon condition that he cannot take the profits, this is void; for it is repugnant.

*Wroth* to the contrary. Parliament may not do something which is against law and reason, any more than a party may. Therefore if lands are given upon condition that they shall not descend, this is void; likewise by the party's deed. Here, then, is a similar situation (*tiel operation*), because the land is revertible to the lord paramount when the tenant dies without heir, in the same way as the land descends to the son when the father dies. Therefore etc.

*The reader* agreed with this opinion. But they said that the grant is good.<sup>85</sup>

*Hales, Sol.-Gen.* An [act of] Parliament shall be construed by common law and reason, and if the [act of] Parliament is so obscure that the intention thereof cannot be understood by law or reason it is void. But it seems to me that this is not a condition, for then it ought to abridge the estate or else augment the estate. For instance, if lands are given for life upon condition that if he does not pay so much money on such a day etc. the feoffor shall re-enter. Conversely, if lands are given upon condition that if the donee dies without heir of his body the land shall remain to a stranger in fee: this is not a condition but only a limitation of the remainder after the tail determines. Likewise here, the estate has its full perfection before the condition ought to take effect, and therefore it is no condition. As to the matter, it seems that it is good by [act of] Parliament, for the Parliament may make a law, so long as it stands with reason and is not absurd (*inconvenient*). However, if it is absurd, the [act of] Parliament is void: for instance, if it is enacted by Parliament that an acre of land called etc. shall be in no man, and shall not be held of any man. But here it is

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<sup>85</sup> Perhaps meaning that it was free of the condition.

a prejudice only to the lord paramount. Therefore etc.

*Petyt* agreed that the act was good in all respects, and said that it was a good condition—for here are words of condition, namely *sub conditione*, which make a condition—and that he who gave [the land] through the act of Parliament may re-enter. For, even if it is not expressly stated that he may re-enter, it is nevertheless implied. So it is where lands are given upon condition that the donee shall pay me £10 of money, without saying any more, this is good and it is implied as much as if he had said that if does not pay the feoffor shall re-enter. So it is if the condition is that he shall enfeoff John Style, without saying more.

BROKE, Chief Baron—as I heard, though I was not there—argued that he who gave [the land] through Parliament shall not have it, for he has barred himself from all his interest by the [act of] Parliament. But he said that the king shall have it; and the king was bound by the said [act of] Parliament.